THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 22

Case No. 12,806 — Case No. 13,389

APPENDIX

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SHOREY—STEVELIE

Case No. 12,806—Case No. 13,389

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FEDERAL CASES.

BOOK 22.

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

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

SHOREY (HARTSHORN v.). See Case No. 6,167.

Case No. 12,806.

SHOREY et al. v. RENNELL.

[1 Spr. 407.] [1]

District Court, D. Massachusetts. April, 1858.

SEAMEN—ILLEGAL PUNISHMENT—RIGHT TO PROTECTION—LISTENING TO COMPLAINTS.

1. Any officer of a vessel may use force, when necessary, to coerce the performance of duty by a seaman, when an exigency requires instant obedience.

2. But no one but the highest officer on board, can inflict punishment for a past offence, for the purpose of reformation or example.

3. Knocking a man down with a belaying pin, is an illegal mode of punishment.

4. The crew of a vessel have a right to the protection of the master against illegal violence from his officers. He ought to listen to their complaints, and prevent a repetition of their wrongs.

5. Where the crew, having been maltreated by the mate, without reason, and one of them knocked down with a belaying pin, and having good reason to apprehend future violence, appealed to the master in a respectful manner, stating their grievances, and requesting to see the consul, and declaring that they would do no more duty under the mate, the vessel then being safely in port: *Held*, that the master had no right to require their further services, without listening to their complaints, and taking measures, or giving assurance, that they should be protected from future wrong and outrage from the mate.

6. Where the master of a vessel causes any of his crew to be confined in a foreign jail, he ought to see that their condition and treatment there, is such as humanity requires.

7. Where seamen have been confined in jail on shore, the master ought not, on their return to the ship, to inflict punishment for threats supposed to have been uttered by them while in jail, without seeing the men and hearing their statements.

8. It does not necessarily follow, because a wrong is attempted upon a seaman, that he may use every kind and degree of resistance. If the wrong be such as will admit of complete indemnity, such resistance cannot be resorted to.

9. The master is civilly responsible for his ill treatment of the crew on board of his ship notwithstanding the advice or direction of the consul.

In admiralty.

C. G. Thomas, for libellants.

T. H. Prince, for respondent.

SPRAGUE, District Judge. These are five libels by seamen against the master of the ship Anna Kimball, for alleged personal wrongs and violence, while at the island of Mauritius. In August, 1856, the libellants shipped at Calcutta, for a voyage to Boston. When three days out from the Sand-heads, they had heavy weather, and the ship leaked badly. The crew in the forecastle consisted of seventeen men. Some of them went aft and requested the captain to put back, on account of the leak; he replied that the wind would be ahead, and that he would put into the first port for repairs; in this answer the crew acquiesced, and continued, without further objection, to do their duty, although the labor at the pumps and working the vessel was severe, until their arrival at Mauritius, one month and twenty days after leaving Calcutta. After arriving at Mauritius, the libellants and the rest of the crew moored the ship safely, secured the sails, and performed every duty, until the morning of the second day, when the libellants told the mate that they wished to see the captain; they then went aft, and told the captain that they wished to be discharged, because they were dissatisfied with the ship. They complained

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

of ill treatment of the crew by the mates, and of a want of provisions. Up to this time, it is conceded, the master personally had treated the crew well, nor does it appear that he had ever heard that they had complained, or had cause to complain of bad treatment by the officers. These seamen then specified their grievances, that one man had been frequently beaten by the mate, with a piece of ratline stuff; that another had been struck while at the wheel; and that a third, by the name of Shivelbein, had been knocked down and beaten by the second mate, with a belaying pin; and that the quantity of beef served out to the crew was insufficient. To these complaints the captain paid no attention, and although the second mate, who was present, declared that he had knocked down Shivelbein, as alleged, and would do so again, the captain took no notice of it, but at once ordered the men to their duty. The libellants then declared that they would do no more duty, until they had seen the American consul. In this interview the captain was in the wrong; and as this first error probably led to all the subsequent difficulties, it requires further examination. It appears by the evidence, that the complaints were not groundless. There is no doubt, that one man had been beaten several times by the mate, with a piece of ratline stuff, and that another was knocked down with a belaying pin, and there is reason to believe that a third had been struck at the wheel. As to the provisions, complaint was made to the mate by some of the crew, that the quantity of beef allowed was insufficient, and that for want of fresh water, the rice and beans could not be cooked. And I think that the weight of the evidence is, that the supply was not ample, especially considering the extra labor they were subjected to in pumping.

When the libellants went aft and asked for their discharge, the captain was bound to listen to and investigate their complaints, and he had no reason for refusing to perform this duty. The libellants had shown no symptoms of combination or insubordination, and the mates had severally inflicted violence upon the men, as above stated, to which no resistance was made, and none of the crew lifted a hand, or uttered a word, in their defence. All had performed their duty, until the ship had been safely moored in port. The captain had no reason to doubt their sincerity; they had shipped to go to Boston, without expecting to put into Mauritius; they had not been on shore, and had not been tempted to leave the ship by the seductions of the place, or the offer of higher wages; they were not indebted to the ship, on the contrary, all had at least twenty days wages due, which they offered to relinquish, in order to get a discharge. The case of Shivelbein imperiously demanded the interposition of the captain. Whether he had deserved any punishment is left in doubt by the evidence, but even if he had, the infliction of any punishment by the second mate was unlawful. Any officer may use force when necessary to coerce the performance of a duty, when an exigency requires instant obedience, but no one but the highest officer on board can inflict punishment for a past offence, for the purpose of reformation or example. The offence imputed to Shivelbein did not require immediate action; it could have awaited the decision of the master. But the punishment of knocking down with a belaying pin would have been illegal, if inflicted by the master himself. It is a great mistake to suppose that the master has performed his whole duty, when he abstains from personal wrongs to the men. They have a right to his protection against illegal violence from his officers, and he is bound to hear their complaints, and prevent a repetition of their wrongs, and yet he not only turned a deaf ear to their other grievances, but when the second mate avowed the outrage he had committed, and a determination to repeat it, he only ordered the libellants to their work. He thus tacitly sanctioned the past conduct of his officers, and encouraged a repetition of it in the future. Thus not only the men who had been illegally punished, but the rest of the libellants were left subject to outrage from the mates, without even an assurance of the protection or interposition of the master. I do not think that the master had any right to their further services upon such conditions; and he ought either to have granted them other terms, or to have discharged them; and as he refused any other terms, and the ship was then safely moored in port, the master and consul ought to have granted them a discharge. After the libellants had declared, as above stated, that they would do no more duty, the captain went ashore and obtained, under an order from the consul, a police force, with which he returned and took them before the consul, not as persons who had requested their discharge, or appealed to his authority, but as culprits, upon his complaint of having refused duty; and it was that charge which the consul proceeded to hear. Their defence, if gone into, must have involved an investigation of their grievances, but it was not gone into; the consul only inquired whether they had refused duty, and declined hearing anything in justification or excuse. In answer to his peremptory question, whether they refused duty, they answered that they did, as they could obtain no satisfaction: and thereupon, by order of the consul, they were all sent to jail, on shore, where the libellants remained thirty-three days. At the end of that time, the ship being about ready for sea, the consul employed a police force to carry them on board, and directed the officer to carry them in irons, which he refused to do. On coming alongside of the ship, the mate ordered the men to come on board singly; about half the men obeyed the order by going successively up the ladder, and over the rail, but

the rest, in violation of it, got in over the bulwarks at the same time. Shorey went up the ladder in obedience to the order of the mate, and was the first man on board; he was immediately told by the mate that he must go into irons; he replied that he would not, until he had seen the captain. The mate answered that he was on shore, and had given orders that the men should be so confined, and laid hold of Shorey's arm and attempted to put the irons around his wrists; Shorey pulled away his hand with the irons in it, and threw them overboard. The mate thereupon got his revolver and approached Shorey. Whether the revolver was wrested from his hand by Shorey, or by the police officer, or delivered up by the mate, is left in doubt; but it was not fired, and was finally put by the officer of the police into his own pocket. While this was going on, the second mate got into a conflict with some of the men; how it began does not satisfactorily appear. In this conflict the second mate suffered in his face, which bore marks of scratches and pieces of skin taken off. The policemen, six in number, were on deck, and refused to put the seamen into fetters, saying that they had no orders. The men went forward, and the mate sent a message to the captain on shore.

Let us here inquire, whether it was justifiable on the part of the master and mate, to put these men in irons, the moment they reached the deck, without allowing them to go to their chests, or to make any change of the clothes which they had worn day and night for thirty-three days in jail, or to cleanse them from the vermin. The only reason for it, in addition to the facts I have already detailed, was that they had uttered threats. But this is not proved. It is alleged they used threatening language, while in jail; but for this the captain and consul could have only rumor or hearsay. Not one of these seamen had, at any time, done or attempted any violence; and before the captain proceeded to inflict punishment by confinement on ship-board, for supposed threats in jail, I think he should have seen them, heard their statement, and learned, by a personal interview, their state of mind, and the effect of a month's imprisonment. Indeed, whenever a master of a ship thinks it necessary to cause any of his crew to be confined in a foreign jail, he ought to pay some regard to their condition and treatment there, and should, from personal examination, or at least through a reliable agent, see that they are such as humanity requires; and yet it does not appear, that either the captain, or the consul, ever visited the jail, or sent any one; except that the consul's clerk went twice a week to pay the jail fees. The attempt to put Shorey in irons was not justifiable. But it does not necessarily follow, because a wrong is attempted upon a seaman, that he may use every kind and degree of resistance. In cases where the wrong is such as will admit of complete indemnity, the policy of the law requires present submission, rather than a resort to violence; but Shorey neither inflicted, nor attempted to inflict any injury upon the mate; he merely withdrew his hand and threw the irons overboard.

About two hours after these occurrences, the captain came on board, accompanied by the consul, four ship-masters, and a passenger by the name of Rollins. They went into the cabin, and after remaining there a short time, came on deck, all seven with pistols in their hands; the captain and some others had revolvers. They took their station near the cabin gangway, with the police force on the left. The captain, or consul, then called upon the mate to state what had taken place upon the men's coming on board, and he thereupon gave his version of the affair. The six seamen at this time were all upon the top-gallant forecastle, unarmed and quiet. The captain directed the mate to order, or to bring, Shorey aft. The mate went forward and some of the police also, the mate gave the order to Shorey, who got down from the forecastle to proceed aft, when either the second mate, or some of the police, said to these men, "You are all wanted aft," and thereupon they all got off the forecastle, Lewis being the first, and following just behind Shorey; the mate then took hold of Lewis by the clothes on his breast, probably to prevent his going aft, and Lewis took hold of the mate in the same manner; some struggle ensued, but no blows, or attempt to injure each other. Upon seeing this, the captain, or the consul, cried out to his party, who had all remained near the cabin door. "Forward men, and fire;" and thereupon all the seven men rushed forward, pistol in hand, the captain and consul taking the lead, till they approached near the mate and Lewis, and then attempted to fire at the latter; the captain's pistol only exploded the cap, but the consul's went off, and his ball passed through the mate's hand into his wrist; it must have passed very near the body of Lewis, as the mate was holding him with that hand by the breast; the firing continued until there had been from six to twelve shots, but fortunately none but the first took effect. Shorey continued to go aft, till he reached where the carpenter stood with the irons, when he voluntarily put out his hands to have them put on; all the rest of the men, except Shivelbein and Batsford, also went aft during the firing, and quietly had manacles put on them by the carpenter. Shivelbein and Batsford retreated forward, and got again upon the top-gallant forecastle, the former on the starboard and the latter on the port side. The captain and others pressed forward with revolvers, and fired several shots. Shivelbein laid hold of capstan bars,

which were lying upon the forecastle, and threw them at the captain and his party, who were upon the main deck; one of them hit the captain in the forehead and inflicted a severe injury, but not such as to disable him, or prevent his continuing the business in hand. The most of the witnesses say that the captain fired at Shivelbein, before the latter threw a capstan bar; some that the captain was pointing at Shivelbein and the latter holding a bar, and that the firing and throwing were simultaneous; at last Shivelbein was knocked down by some one, and then very severely beaten; in the meantime Batsford, who was on the other side, was knocked down by the second mate with some weapon, very severely beaten by two persons, and thrown off the top-gallant forecastle on to the main deck. Shivelbein and Batsford, after being beaten as before stated, were carried aft, bleeding profusely, and both put into irons. Shivelbein, when taken aft, was wholly unconscious, and so remained for at least fifteen minutes, some say much longer. Finding that he remained wholly insensible, the fetters were taken off him. Batsford was also put into irons; he had lost his consciousness, but only for a short time. The captain and consul were unjustifiably rash and precipitate in calling out to their party, and rushing forward and firing as they did. I must presume that they really thought it necessary, in order to protect the mate and suppress a mutiny; but the evidence clearly shows that no such necessity existed. They doubtless had received from the mate, while on shore, and after they came on board, an inflamed statement of what had taken place in the morning, and their coming on board, as they did, with so many men armed with deadly weapons, can be accounted for only upon the supposition, that they expected to encounter a set of desperate mutineers. Being under the excitement of such apprehensions, when they saw the seamen get off the forecastle, and the occurrence between the mate and Lewis, they were impressed with the belief that the seamen were going to make a rush to protect Shorey. Now it is shown by the evidence, that this was an entire mistake. The seamen were quietly standing upon the top-gallant forecastle. When they got off, they were wholly unarmed, and were about to proceed aft, in the face of seven able-bodied men with pistols in their hands, and the police force. The men were proceeding quietly aft, in obedience to a supposed order, when the mate seized Lewis as above stated. But the mate did not call for any assistance, or make any explanation, or appear to a cool observer to be in any danger. I rely much for this part of the transaction, upon the testimony of Mr. Rollins, the passenger, a witness for the captain, who, although he was one of the captain's party, taken by him from the shore, armed like the rest, and testified that he was a friend of the captain, yet has given his testimony with intelligence and fairness. He says, among other things, that when the captain or consul cried out, "Forward men, and fire," and rushed forward, he immediately followed them, pistol in hand; that as he was advancing, Shorey pushed against him with some force, that he turned toward him, thinking he might intend some violence, but that Shorey only passed quickly aft, and held out his hands to the carpenter, and was put in irons. Now I cannot but think that if the captain and consul had been as cool and self-possessed as Mr. Rollins, this catastrophe would have been avoided; for when Shorey pushed forcibly against him, he had quite as much reason for shooting him, as there was for firing at the other men.

I have stated the facts, which, after careful examination, I think are established by the evidence. I have not overlooked the certificate of the consul, which was introduced by consent, in lieu of his testimony, and which, in many respects, makes a very different representation. A part of the certificate is mere hearsay, and inconsistent with the testimony. But other parts state what fell under the consul's own observation, particularly what took place on board of the ship, after his arrival with the armed party. I have carefully considered his representation of that scene, and given it all the weight due to the source from which it is derived. But it is so utterly inconsistent with the whole testimony in the cause, not only from the numerous witnesses for the libellants, but also from those for the respondent, that I cannot rely upon it as correct. Indeed, so irresistible is the counter-evidence, that the counsel for the respondent has not insisted upon the correctness of the certificate. After the tumult had ceased, and all the libellants had been fettered, water was thrown upon Batsford and Shivelbein, then lying on the deck, to wash off the blood, and all, excepting the latter, were immediately confined below. How long Shivelbein remained insensible, is left doubtful; when consciousness was restored he also was confined below. Batsford and Lewis were put between decks, with their hands in irons, over a chain above their heads, passing from stanchion to stanchion, between their arms; their feet also were fettered; the chain was so high, that Batsford could reach the deck only on tiptoe, and part of his weight was supported by his wrists; in about half an hour, however, the carpenter put a box under his feet, so that he could stand upon them. A part of the time, Batsford and Lewis were confined with their hands in irons, around both a chain and stanchion. Shivelbein and McDonald were put into the forward cabin, their hands and feet in irons, and their arms and legs around stanchions. Shorey was dealt with more severely; he was carried to the store-room, aft

of the after cabin, and there confined alone to a large square stanchion, by irons on his wrists and ankles, the stanchion between his legs and arms, and for a small part of the time, an iron bolt was put into his mouth. His fetters excoriated his wrists and ankles. That the confinement of all these men was for punishment, and not merely for security, is shown not only by the manner in which they were confined, but also by their treatment, as to food and drink. It was Saturday afternoon when they were put below; they had eaten nothing that day, except such breakfast as they got in the prison, and yet they were allowed nothing to eat or drink, until Sunday evening, when a pint of water and one biscuit were given to each; the same allowance was given them again on Monday evening. On Saturday evening, after the seamen had been confined, the master went ashore, on account of the wound he had received in the forehead, and did not return until Monday evening; in the meantime, a physician was sent on board, to examine the wounds of Shivelbein and Batsford, and the consul also came on board, and saw the situation of all the men, except perhaps Shorey. On Monday the captain sent an order to the mate to treat the men humanely; and on the evening of that day the captain came on board, and the prisoners were released, except Shorey, who was taken from the storeroom to the forward cabin, and there placed so that he could lie down, with one leg fastened to a stanchion. On Wednesday morning Shorey was released. They all turned to, except Shorey, who for several days was unable to do anything; and for three weeks was unable to stand at the wheel; it was much longer before he could go aloft. The wounds on the heads of Shivelbein and Batsford were not healed, for the greater part of the passage home. The irons on Shorey had not only taken the skin from his wrists and ankles, but produced sores which continued the greater part of the passage; and for one upon the ankle, he was under the care of a physician, for a month after his arrival. It is insisted, in behalf of the captain, that he is not responsible for any of the punishment inflicted upon the men, because it was done by the order, or approbation, of the consul. Upon the authority of the case of Jordan v. Williams [Case No. 7,528], the captain must be exonerated from liability for the imprisonment on shore, by the order and warrant of the consul. But I cannot extend the same immunity to what was done on board of the ship. There the captain was supreme, and must be responsible in damages for wrongs done to his men, by his authority, or acquiescence. The instructions of the consul might avail him much, in a criminal prosecution, in which malice is an essential ingredient, and a mistake, without evil intent, would be a good defence; but in a civil suit, the question is, whether a wrong has been done to the libellants, and if so, they are entitled to indemnity.

I am sorry to say, that the refusal of the captain to listen to the seamen, is not extraordinary; on the contrary, from the numerous cases which have come before me, I am induced to believe, that it is the course usually adopted by ship-masters. The maxim, that the master must support his officers, is carried to the extent of supporting them, whether right or wrong; or rather, without any inquiry whether they are right or wrong; and the man who makes a complaint, is frequently not only refused a hearing, but is marked as a troublesome fellow; and if several go aft together, the one selected as their spokesman, generally the most intelligent, is marked as a ringleader, and afterwards treated with severity. The consequence is, that the seamen do not complain to the master. When asked, as witnesses in court, why they did not go to him with their grievances, the answer generally is: "It would have done no good, and I should only have got myself into further difficulty." Masters, also, too often shirk the responsibility that belongs to them, respecting the discipline of the crew, and throw it upon the mates, who have no right by law to inflict punishment. When difficulties have arisen, and the mate properly invokes the authority of the master, he is too apt to say,—"Can't you govern the crew without troubling me?"—and the officers are thus required to exercise an authority which the law cannot sanction; and the men are turned over to the judgment or passions of the mates, however ill regulated they may be. The consequence is, that difficulties grow up between the officers and men, from want of supervision by the master; and violence and wrong are committed, until at last he is astonished by some outbreak, or demand, by the crew. Masters seem to think that it would encourage insubordination to listen to the men, and sometimes, even when they reprimand the mates in private, they carefully conceal their disapprobation from the injured seamen. This is a great mistake; a ship's company is a little community by itself. Its head, or governor, is invested with large powers, and is bound to extend his protection to all its members, and they ought not only to receive, but, as far as practicable, to be convinced that they will receive, equal justice at his hands, whatever their respective stations or duties. It is due to the consul, also, to say, that the examination at his office, as represented by the crew, is by no means unprecedented. When a controversy has arisen between a master and his seamen, the parties stand upon unequal grounds; the seamen are confined to the ship, the master goes on shore when he chooses, has the ear of the consul, enters a complaint against the men, makes his own statement of the case, and the men are then brought before the consul, with the bias of presumed guilt against them; and it too often happens, that no other investigation is thought necessary than merely to take the statement of the complainant. And it

thus happens, that the consul sometimes permits himself to be made use of, as an instrument of oppression, instead of extending to the seamen that protection which they had a right to demand from his official character.

I am of opinion that the libellants are severally entitled to recover against the respondent, for all the injuries suffered by his authority or acquiescence, on ship-board.

Decree in favor of Shorey, for $370; Shivelbein, $200; Batsford, $200; Lewis, $50; McDonald, $40.

Several indictments were pending against the captain for the same transaction.

[NOTE. A motion was subsequently made by the garnishee that he might be discharged, on the ground that he had no goods, effects, or credits of the principal in his hands, and prayed to be allowed to make disclosure under oath. Case No. 12,807.]

Case No. 12,807.

SHOREY v. RENNELL et al.

[1 Spr. 418.] [1]

District Court, D. Massachusetts. April, 1858.

GARNISHMENT—ADMIRALTY—EFFECT OF FAILURE TO ANSWER—EXECUTION.

1. It is the right and duty of a garnishee in admiralty, to put in an answer.

2. The libellant has not the right to contest the answer of the garnishee.

3. If a garnishee in admiralty make default, execution does not, in the first instance, go against him personally, or his property, but only against the debts, effects or credits of the principal in his hands.

4. Upon such default, the libellant may have compulsory process to obtain an answer.

5. If, however, he does not need a disclosure, but can satisfy the court by affidavits, that the garnishee has debts, effects, or credits in his hands, the libellant may have execution against them, without an answer having been put in.

6. After execution against debts, effects or credits, in the hands of the garnishee, and a refusal by him to pay, he has not the right to discharge himself by putting in an answer.

7. Semble. That after such refusal, the garnishee should be summoned in, that he may show other cause of discharge, if any there be.

8. After default by the garnishee, the court may, in its discretion, allow him to put in an answer upon terms.

[In admiralty. For a libel by certain seamen against the master of the ship Anna Kimball, for personal wrongs, see Case No. 12,806.]

C. G. Thomas, for libellant.

Henry A. Johnson, for garnishee.

SPRAGUE, District Judge. In this case the garnishee entered an appearance, but gave no stipulation, and put in no answer. After judgment against the principal, he was called and defaulted. The proctor for the libellant then filed an affidavit, that the garnishee had admitted, both before and after the suit was brought, that he owed the principal a certain amount, and moved for execution for that sum against the person and property of the garnishee. The court, supposing that there was no controversy, granted the motion without examination, and execution was issued accordingly. Subsequently the garnishee came into court, and upon his motion, the execution was superseded, and a stay ordered, until the parties could be heard. The libellant now moves the court that he may have an execution against the garnishee personally, and against his property generally, to the amount of the credits in his hands, as shown by the affidavit. On the other hand, the garnishee offers his affidavit that he has no goods, effects or credits of the principal in his hands, and prays to be allowed to make disclosure under oath, and to answer all interrogatories that may be propounded, and that thereupon he may be discharged. Some of the questions of practice that arise upon these motions seem not to have been settled. The process of foreign attachment in the admiralty is governed by its own rules and principles. It is not borrowed either from the custom of London, or the local legislation of the States, and little aid can be derived from the practice under those systems. So far, indeed, as we are called upon to extend or mould the practice of the admiralty, to adapt it to new cases, it may be wise to look into other systems, to see what experience has sanctioned, as just and useful in analogous cases. But for our guidance in admiralty practice, we must look primarily to the rules established by the supreme court, by authority of congress, as positive legislation. And where they do not apply, or are of doubtful construction, we resort for aid to the usual course of procedure and general principles. No. 2, of the rules by the supreme court, provides for the issuing of the process by foreign attachment. No. 37 is the only one which relates to the subsequent proceedings; it is in these words: "In cases of foreign attachments, the garnishee shall be required to answer on oath or solemn affirmation, as to the debts, credits or effects of the defendant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process in personam against him. If he admit any debts, credits or effects, the same shall be held in his hands liable to answer the exigency of the suit."

Under this rule several questions arise. It is contended by the counsel for the libellant, that the compulsory process in personam, which is to issue upon neglect to answer, is to be a process against the trustee, to compel him to pay to the creditor his debts, to the extent of the credits alleged by the libel to be in the hands of the trustee; but that is not correct. The rule first prescribes a

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

duty, viz., to answer, and then says, if he shall neglect that duty, compulsory process may issue against him; that is, process to compel him to perform the duty previously prescribed, and the neglect of which has occasioned the compulsion. But in the present case, the libellant does not move for such process, but insists that the garnishee having made default, it only remains for the court to coerce him to pay or deliver the debts, effects or credits in his hands. The prayer of the libel is, that execution may issue against the goods, effects or credits in the hands of the garnishee, and this is all the libellant can have, in the first instance: his motion, therefore, must be denied.

The motion of the garnishee involves several questions. 1st. Can the libellant have execution against the property in the hands of the garnishee, without an answer? 2d. If such execution issue, and the garnishee shall refuse to pay or deliver the property, must he be summoned to show cause why execution should not issue against him and his property; and if so summoned, will he then have the right to answer that he had not, when originally summoned, any debts, effects, or credits of the principal, and thus discharge himself from liability?

These questions it is necessary now to consider, for if the libellant cannot proceed further against the garnishee, without an answer, or if further proceedings against him will end only in his making the answer which he now asks permission to put in, his motion should be granted as of right, and without condition.

The 37th rule contemplates only a case of an answer, and gives the power of compelling it. But I think that if the garnishee chooses to waive his right, and prefers submitting to a default and the consequences thereof, to the expense and trouble of appearing in court, it is not imperative upon the libellant to coerce an answer before he can proceed further. It may be asked why does the rule give the right to compel an answer upon neglect, if a default thereon give to the libellant the right to proceed to execution?

The objection suggested by this question would be conclusive, if the neglect to answer and a default thereon would, in all cases, give to the libellant the benefit of a disclosure. But in cases of default, the court requires some evidence to sustain the claim; and as the question whether the garnishee has debts, effects, or credits of the principal in his hands, may depend upon transactions to which the libellant is no party, and may be known only to the trustee and his principal, a disclosure may be indispensable to give the libellant any evidence of the fact. But if the libellant, without disclosure, can upon default, show to the satisfaction of the court, that the garnishee holds debts, effects, or credits, I see no reason why he should not have execution against them.

As to the other question, whether, after such execution and a refusal by the garnishee to pay, he has the right upon summons, or otherwise, to make answer that he had not, when originally summoned, any debts, effects, or credits, and thereby discharge himself, I am of opinion that he has no such right. He had due notice of the libel alleging that he had funds in his hands, and was summoned to show cause why execution should not issue against those funds; he voluntarily neglected to appear, and subsequent proceedings were had by the court and the party, founded upon such neglect. Such default should subject the garnishee to some liability. To allow him, as a matter of right, to answer to the same matter which he was originally required to answer, would be a departure from the principles and the practice of judicial tribunals in other cases. Whether the garnishee should be summoned in, and allowed to show other cause why execution should not issue against him, as, for example, the discharge of the judgment against the principal by other means, or the destruction of the property in the hands of the garnishee, without his fault, before the execution was presented to him, need not now be decided. Such a course, however, seems to be eminently proper. The motion of the garnishee not being sustainable as matter of right, next appeals to the discretion of the court, in the exercise of which, the motion may be allowed in whole or in part, upon such terms and conditions as the judge sees fit to impose. The present case is attended with peculiar circumstances. Affidavits have been filed, stating that the garnishee, knowing that the suit was impending, admitted that he had funds in his hands to a certain amount, which might be held by attachment, and that the suit was thereupon proceeded with, and other means of security omitted. Counter affidavits have been filed, denying such admissions, and stating that the proctor for the libellant had agreed that the garnishee need not make answer in court, but that if judgment should be rendered against the principal, the answer might be sent to the proctor; and that the default was obtained without due notice. Under these circumstances, I shall take off the default, and allow the garnishee to answer as to the debts, effects, or credits of the principal in his hands, and such interrogatories touching the same as may be propounded by the libellant, upon condition that his answer may be contested by the libellant, and that the garnishee shall enter into stipulation with surety, to pay whatever sum shall be decreed against him.

I make it a condition, that the answer may be contested by the libellant, because I apprehend that he would not otherwise have that right. It is true that Mr. Benedict, in his Admiralty Practice (section 459) says, that "if the garnishee deny having debts, credits, or effects in his hands, the libellant may reply to his answer, and the question

will be tried by the court, like any other issue." The only authority cited is Hall, Adm. 70-78, which does not sustain the position. The rule indicates no such right, and the general admiralty law makes the sworn answer conclusive. Clerke's Praxis, tit. 34. The libellant, by the former practice, might, before answer under oath, take upon himself the burden of proving assets to be in the hands of the garnishee, and that issue was tried without any answer. Id. But of this option the libellant is deprived by the 37th rule, which makes it the absolute right and imperative duty of the garnishee to answer.

Motion of the garnishee granted, upon the condition above specified.

See Smith v. Miln [Case No. 13,081].

SHOREY (UNITED STATES v.). See Cases Nos. 16,280-16,282.

Case No. 12,808.

SHORNER'S CASE.

[1 Car. Law Repos. 55.]

District Court, D. Pennsylvania. Oct., 1812.

ENLISTMENT OF MINORS IN THE ARMY — CONSENT OF PARENTS—WIDOWS.

[The word "parent," as used in the proviso to the 11th section of the act of January 11, 1812 (2 Stat. 672), which forbids the enlistment of any minor without the consent of his "parent, guardian, or master," includes the mother where the father is dead and there is no guardian or master; and in such case an enlistment without her consent is void.]

In the case of Shorner it was agreed that the following case should be submitted to the district judge for decision as upon a writ of habeas corpus:

J. Shorner is a minor, between nineteen and twenty years of age. He had been bound apprentice to two successive masters, but both indentures had been cancelled, and he has since worked as a journeyman, on his own account, always applying his wages to his own use, without rendering any account of them to his mother, who was still living, though his father was dead. He has no guardian. He enlisted as a soldier in the army of the United States, without the knowledge of his mother.

The question submitted for the decision of the judge was whether the enlistment is valid, under the 11th section of the act of congress passed the 11th of January, 1812. The section is in these words: "That the commissioned officers who shall be employed in the recruiting service shall be entitled to receive, for every effective able man, who shall be duly enlisted by him, for the term of five years, and mustered (and between the ages of eighteen and forty-five years) the sum of two dollars: provided nevertheless, that this regulation, so far as respects the age of the recruits, shall not extend to musicians or to other soldiers who may re-enlist into the service: and provided also, that no person under the age of twenty-one years, shall be enlisted by any officer, without the consent in writing of his parent, guardian, or master, first had and obtained, if any he have," &c.

Mr. Dallas, as district attorney, promised that, having been requested by a respectable officer to give an opinion upon the present question, he had thought better to submit it to the judge, in order to fix the rule, whatever way it was established, upon the basis of judicial authority. He admitted that in common speech and in the English dictionaries the word "parent" embraced both father and mother; but that it had required a more limited meaning in legal contemplation, and was (as Jacob, in his Law Dictionary, states) "generally applied to the father." It was, therefore, important to ascertain the sense in which congress had used the words; and for argument, by way of illustration, Mr. Dallas considered the legal relation of father and mother to the child, independent of natural ties, at the common law and upon positive statute; concluding that the act of congress deemed the age of eighteen a competent age for entering into the contract of enlistment, the minor must establish upon plain reason the exception which authorises him to annul it.

Mr. Chauncey, on the other hand, contended that the word "parent" was used by congress in the admitted popular sense; that the distinctions between the mother and father at common law were founded upon feudal principles, which could not apply there; and that every inducement to subject a minor to the advice, countenance, and control of a father, would apply, upon his death, with additional force, to the case of the surviving "parent" or mother.

PETERS, District Judge. I have resolved in my mind the arguments of the counsel on both sides of the question submitted to my decision, as stated in the foregoing case. It does not seem to me to be necessary to discuss the common law points adduced to show that the mother is not in such degree of consanguinity or relationship to, or vested by the common law with the control over the son in his nonage and after the period of nurture, as to render her consent necessary to the binding force of engagements, or to exercise authority over his actions. Those points are grounded very much on the principles of feudal institutions, which, favoring and protecting the claims of primogeniture, distinguish between the rights and duties even of a father in regard to his eldest son and apparent heir, and of that son towards him; and these as they respect the younger children. The greatest part of those principles are inapplicable in this country, though it is our habit to regard them; and are, in many instances, opposed to the principles both of reason and nature, as the latter are felt and practiced upon here. Women, in ages in this

regard barbarous, were treated as mere breeders and nurses, held in slavish subjection, and denied the proper and necessary authority over their offspring.

In the act of congress relative to naval enlistments the words are dissimilar on that subject from those in the act relative to similar engagements in the land service. The words which have been the subject of discussion, are: "Provided always, that no person under the age of twenty-one years shall be enlisted by any officer or held in the service of the United States, without the consent in writing of his parent, guardian or master, first had and obtained, if any he have." Now, whatever rights or disabilities an infant may or may not have or be subjected to, or whatever may be the relationship or power of a mother at common or civil law, I cannot conceive that she is not described in this act of congress so distinctly by the term "parent" that it would be a violation of all rational construction to say that she must be excluded from this statutory regulation. If the inconvenience to the service is found so important as it had been stated to be by the counsel who advocates the legality of the enlistment, let congress model the regulations in future so as to exclude the mother by declaring that by the term "parent," only the father is meant to have authority in any case, where there is not either guardian or master; and of course it will then follow that when a youth has neither father, guardian, or master, that he may, as in this case, have a "parent" remaining,—that is, his mother,—and yet he must be left to his own will, without control over any of his actions, without a friendly monitress to check his indiscretions, or cherish and invite his return to prudence and safety.

Whether the enlistment in this case be or not discreet and proper, I will not undertake to determine. But it appears to me that the only remaining "parent" of this young man, who has neither "guardian" nor "master," has a right, by the feelings and affections of a mother, to pass an opinion and to use a discretion on the subject. Whether she will or will not exercise this right wisely must be left to herself, and those who will advise her for the best. General principles cannot be warped to suit a particular case. It is a cold and cheerless submission to and unnecessary extension of the rude and rigorous principles of black letter jurisprudence to say that because the mother is not entitled to, and cannot sue for amends for loss of service of the son (yet by the law of Pennsylvania he is obliged to assist in her support), she may not interfere in what regards his welfare and happiness. If we take Lord Coke's advice, and place ourselves in the situation of the legislators when they passed the proviso in question, I think we may safely conclude that few of them knew and none of them thought of the learned lore which the books contain on the subject of paternal guardianship and power over the son and his affairs, or maternal disabilities and exclusions from such concerns. No doubt, if the father were living, the mother would not be the "parent," whose "consent in writing" would be required. But in this case, when he is dead, a "parent" is still left to satisfy the words of the law, "if any he have."

In the light in which I view the law and case, I cannot but consider the enlistment as invalid.

Case No. 12,809.

SHORT v. SKIPWITH.

[1 Brock. 103.] [1]

Circuit Court, D. Virginia. Nov. Term, 1806.

PRINCIPAL AND AGENT—DISOBEDIENCE TO INSTRUCTIONS—DAMAGES — MEASURE—USURY—COMMISSIONS.

1. Where an agent voluntarily disobeys the instructions of his principal, and converts to his own use a sum of money belonging to his principal, to which a definite and a specific destination is given by the principal, and the article into which the agent is directed to convert the money subsequently acquires great additional value, the agent is not merely responsible for the money, so misapplied, with legal interest, but is accountable for the article into which it ought to have been converted.

2. Although it is a rule, that the condition of him who seeks to avoid a loss, is viewed with more favour than that of a person who seeks a gain; yet, between contending parties, the wrong-doer is the person who ought to suffer, and he shall not be allowed the benefit of the rule.

3. A, the principal, residing in Europe, directs his agent B, in Virginia, by letter bearing date December 20th, 1787, to convert the funds in his hands belonging to the principal, into certificates, which B fails to do. In the spring of 1789, B determines to relinquish his agency, and places A's funds in the hands of C, except £51 16s. 10d., which are not accounted for. C invests the funds of A in certificates, according to his previous directions: *Held*, that B is chargeable with certificates which he ought to have purchased, with the balance remaining in his hands, at the same rate that other certificates were purchased by C, in 1789. But B is accountable for the certificates with their legal interest, only, and not with the certificates into which the interest might annually have been converted.

[Cited in brief in Enders v. Board of Public Works, 1 Grat. 386.]

4. The general policy of the law forbids that a debtor should be subjected to all the loss consequent on his failure to fulfil a promise to pay the debt. Such breaches are so often the result of events which could neither have been prevented or foreseen by the debtor, that interest is generally considered as compensation, which must content the creditor.

[Cited in Polsley v. Anderson, 7 W. Va. 212; Baker v. Rinehard, 11 W. Va. 245.]

5. A contract of loan for six per centum interest, when the law allowed only five, is clearly usurious; but where the person who betrays the lender into such a contract is his agent, it would be against good conscience that the borrower should derive any advantage to him-

[1] [Reported by John W. Brockenbrough, Esq.]

self, prejudicial to the lender from this circumstance, and the lender is entitled to legal interest.

6. An agent, who, in his character of agent, collects a debt due to his principal, and retains it by contract of loan with his principal as debtor, entered into before the debt is collected, is not entitled to commissions on the amount so collected.

The complainant, William Short, a citizen of the state of New York, filed his bill in this court, in 1803, against the defendant, setting forth that Skipwith, as agent of the plaintiff, had abused the confidence reposed in him by his principal, had failed to account for several sums of money received by him in his character of agent, and had neglected to apply other funds of Short, which had come to his hands, according to the positive instructions of Short; whereby he had sustained heavy losses, and praying an account, &c. By the letters of Short to Skipwith, which are filed in the cause, it appears that Short, in January, 1786 (then residing in France), constituted the defendant his agent in Virginia, and directed him to withdraw certain military certificates belonging to Short, from the hands of Benjamin Harrison, Jr., his former agent in Virginia; and to remit the interest which had accrued or should thereafter accrue thereon to the said Short, in Paris. The plaintiff, however, on the 4th of May, 1787, informed his agent that he was no longer in need of the interest arising from the certificates, and desired him to convert it into principal, that he preferred to have it converted into certificates, but gave his agent no positive instructions to that effect. On the 4th of August of the same year, Skipwith acknowledged the receipt of Short's letter of the 4th of May preceding, in which he strongly dissuaded Short from making any further investment in certificates, stating, that "he had already ventured far enough on the faith of a Virginia assembly." He urged Short, however, to give him positive instructions, promising that they should be obeyed. These positive instructions were given by the plaintiff in his letters of the 20th and 31st of December, 1787, of the 1st of February, 1788, and of the 20th of March, 1788. These letters are couched in very strong terms, and urge Skipwith, in the most earnest manner, to convert all of Short's funds which should come to his hands from any source, into certificates. These instructions were not complied with, and in the spring of 1789, the defendant relinquished his agency, and placed the certificates belonging to Short, with the interest which had accrued on them, except £51. 16s. 10d., in the hands of James Brown, a merchant residing in Richmond, Virginia, who proceeded to convert the interest, viz., £290. 10s. 7d., into certificates. It was not invested, however, as advantageously as it might have been at the corresponding period of the previous year, when the instructions from Short to Skipwith were received, they having risen in value considerably. The plaintiff asserts a claim to the difference, and contends that the deficiency of £50. 16s. 10d. should be considered as certificates according to their value in 1788. As to the other questions in the cause, the circumstances out of which they arose are sufficiently stated in the following opinion of the court.

MARSHALL, Circuit Justice. In arguing this cause, the counsel, both for the plaintiff and the defendant, rely upon the situation of the parties as furnishing strong reasons in favour of that result for which they severally contend. The plaintiff, in a distant country, commits his most important interests to his friend in Virginia; places in the hands of that friend large sums of money, which are to be employed for the advantage of the owner, manifests a strong preference for their being invested in the public funds, and, after some time, expressly orders that investment. The agency is entered into with alacrity; but the agent was a private gentleman, not in habits of dealing in public paper, and residing at some distance from the great market to which the commodity was most usually brought. It certainly was not to be expected, that a person under the circumstances of the defendant, could execute the orders of the plaintiff with the celerity and adroitness of a professed dealer in certificates; but it was to be expected, that the orders of the plaintiff would not be disobeyed, and his remote situation increased the obligation not altogether to neglect any part of his business. In its origin, the duty of the agent, except as it regarded the collection of a few debts, which will form an object of particular consideration, was limited to the safe custody of the certificates of his principal, and a remittance of the interest. The circumstances of the plaintiff, probably, changing so as no longer to require remittances from Virginia, he formed the resolution of converting the profits of his estate into additional capital, which resolution was communicated to the defendant in a letter of the 4th of May, 1787. This letter manifests a preference for certificates over other property, but unquestionably submits it to the discretion of the agent who was on the spot, to act according to the opinion he should form on circumstances which were often changing. Nothing can be more obvious than that the judgment of the agent was in direct opposition to that of his principal, and that he was radically opposed to those hazardous investments to which his principal was strongly inclined. Under these impressions, he earnestly dissuades the plaintiff from the measure to which he seemed most inclined, but accompanies his request for positive orders, with explicit assurances that those orders, whatever they might be, should be obeyed. This request produced the letter of the 20th of December, which could not be well misunderstood. Only strong circumstances, unknown to the plaintiff when that letter was written, and rendering it al-

most certain that the public debt would not be placed on solid funds, could have justified a departure from the instructions contained in the postscript of that letter. Seldom is less latitude given to an intelligent, an upright, and a distant agent. The letters of the 31st of the same month, and of the 1st of February, 1788, are still more positive. The suspicion, that any state of things could exist which might render the observance of these orders imprudent, seems to have passed away, and they are absolute. The defendant could not misunderstand them. In the spring of 1789, the defendant became disposed to relinquish the active part of his agency; and, thereupon, he placed the fund in the hands of Mr. James Brown. The whole interest which had accrued on the certificates was not at this time accounted for. It appears from the report, that £51. 16s. 10d. were neither invested in certificates, nor placed in the hands of Mr. Brown, nor accounted for in any manner. The court knows not what disposition was made of this money, and must consider it as having been appropriated by the defendant to his own use. If any other application was made of it, it is incumbent on the defendant to show such application. Whether this residuum was in specie, or in warrants, is not expressly stated; but a view of the report would induce the opinion, that it was a balance of interest money accruing before the 1st of January, 1789; and, consequently, must be considered as specie. If the fact be otherwise, the defendant ought to show it. Had this money been placed in the hands of Mr. Brown, it might have been, and would have been, so far as any facts can authorise such a conclusion, converted into certificates. The question, then, arising upon this part of the case is, whether an agent who voluntarily disobeys the orders of his principal, and converts to his own use a sum of money belonging to his principal, and distinctly appropriated to a definite object, shall be accountable for the money and interest, or for the article into which it ought to have been converted?

The situation of the defendant has no bearing on this case, because, if he found a difficulty in making personally the necessary investment of money in certificates, he could have found no difficulty in delivering the money, with the certificates and interest-warrants, to Mr. Brown. The case appears to be stripped of every circumstance which can give to it any other character than that of a diversion of funds by a trustee from their proper object to his own use. That the principal has been essentially injured in the events which have happened by this breach of trust, that the restoration of his money with interest will be no compensation for this injury, is too obvious to be controverted; that the agent will sustain great real loss if decreed to compensate the principal, is, perhaps, equally true.

On the part of the defendant, it is urged with great force, that the condition of him who seeks to avoid a loss, is viewed with more favour than that of a person who seeks a gain. The influence of this argument will always be felt by those, whose duty it becomes to decide questions of this description; and if other considerations be nearly balanced, its influence must be decisive. But there may exist considerations which ought to overcome the mild policy of the rule which has been stated. It is also a maxim, which, on every principle of morals, is entitled to great regard, that between contending parties, the wrong doer is the person who ought to suffer. In the present controversy, no blame can attach to the plaintiff. His instructions are distinct, the means of observing them are placed in the hands of Mr. Skipwith, and it cannot be alleged that the failure to observe them is, in the most remote degree, to be ascribed to Mr. Short. That the balance, whatever it may be, rests with Mr. Skipwith, seems incontestable. If, because the loss of Mr. Short is merely the loss of gain, his compensation should be restricted to the restoration of his money with interest, the encouragement which such a decision would give to dangerous and corrupt practices in the intercourse between a principal and his agent, must be apparent. It would hold forth an inducement, in every instance where extraordinary profit might be made, to divert trust funds into other channels than those for which they were designed, to the great injury of a large portion of society. It is said, and truly said, that extravagant calculations of conjectural profits are not to be indulged, and will never be regarded in courts of justice, as the standard by which damages are to be ascertained. The example given is, that the plaintiff might have subscribed his stock to the bank, might have sold out at a high price, and employed the produce of the sales advantageously. Certainly, such possibilities are to be totally disregarded. But, undoubtedly, where a single investment of money is ordered on a specific article, which article of itself, without any new operation depending on the judgment, acquires great additional value, this additional value cannot fairly be denominated the result of an extravagant calculation of imaginary profits. Suppose a contract for the purchase of an increasing property of any description, which contract depended on the payment of money on a given day. If the agent in whose hands the purchase money was placed, should, instead of executing his trust, convert a part of the money to his own use, and thereby defeat the contract, it would seem unjust that the remedy of his principal should be limited to the money and interest. That this would not necessarily be the measure of damages, is to be inferred from the circumstance, that the injured person is not confined to an action for money had and received to his use, but may maintain a special action on the case for the damages actually sustained. Be-

tween the case supposed, and that at bar, there seems to exist no solid distinction. The difference between a contract actually made, and one which the agent had engaged to make, and possessed the absolute power of making, seems not sufficient to warrant a different decision in the case of a misappropriation of the fund.

Reasoning by analogy, there are many principles settled by decisions, which justify the position, that in general cases, the agent who voluntarily commits a breach of trust, by applying the trust money to his own use, must account for the loss which his principal has sustained. But by each party an authority has been cited, which is considered as applying directly to the case before the court. On the part of the defendant, the case of Groves v. Graves, 1 Wash. [Va.] 1, has been relied on, as a direct authority, for limiting the recovery of the plaintiff in this case, to his principal and interest. In the case of Groves v. Graves [supra] the principle that the value of the article, when the contract ought to be performed, is the proper standard of damages, was not laid down as a general rule to govern in ordinary cases, but is stated to be the proper rule under the peculiar circumstances of that case. What those peculiar circumstances were, must be searched for in the record, as the opinion of the court makes no allusion to them. That there were circumstances to which the court allowed weight, ought to be inferred, from their resting their decision, not on general principles, but on those peculiar circumstances. If we examine the case, as reported in 1 Wash. 1, we find no other testimony than the contract, and a deed of trust as a collateral security for the performance of that contract. The decree of the chancellor is founded on the contract being designed to secure an unconscionable advantage, or on its being obtained from a person whom Groves had reason to believe a needy man. But the opinion of the court of appeals disclaims this ground, as the lowest price of certificates mentioned in the contract was merely a penalty, and as the price actually agreed on was only the lowest market price. The contract, therefore, did not exhibit those peculiar circumstances on which the opinion of the court was founded, and certainly, the collateral security could not change the nature of the rights which the contract gave. In fact, that case has since been generally considered, notwithstanding the terms in which the opinion of the court was delivered, as settling a general principle, which should apply to all contracts made in public paper. Yet there are in the case, some particular circumstances, which, whether sufficient to be the motives for the decree or not, were most probably of some weight. Although the lowest price mentioned in the contract is, in construction of law, a penalty, yet it was intended by Mr. Groves, to avail himself of that penalty, he obtained a judgment at law for it, and his answer claimed the whole advantage of that judgment. Even the actual price agreed upon was the lowest market price. Graves, against whom the judgment was obtained, was not himself the wrong doer, did not himself receive the money, but was the security of Stockdell. It is not impossible that these circumstances might have some weight in producing the opinion which was given. None of them exist in the case now under consideration.

The plaintiffs have cited a case from 2 East, 211 (Shepherd v. Johnson), in which it was decided in the court of king's bench, that in a contract for replacing stock, the price on the day was not the true measure of damages, but the subsequent rise ought to be taken into consideration. The only peculiarity attending that case is, that it appears to be a loan of stock, and not a contract for its purchase. Between a loan and a contract to purchase at a fair price, where the money is actually advanced by the purchaser, and no casualty prevents the seller from procuring the article, the court cannot distinctly perceive a difference. An agent misapplying the fund to his own use, does not appear in a more favourable point of view than a borrower. The case in 2 East, 211, therefore, appears to be directly in point, and in this case, the court is of opinion, that the defendant is accountable in certificates for the money remaining in his hands. Perhaps, in strictness, that money ought to be converted into certificates, at the price taken by the commissioner.[2] But the disposition to diminish so excessive a loss, as the defendant would sustain by this rigid application of the rule, will induce the court to lay hold of any principle or fact, which the case affords, to effect this diminution. If the money in the hands of Mr. Skipwith had been placed in the hands of Mr. Brown, in the spring of 1789, although this would have been a tardy execution of the trust, it would have satisfied the court. Had the money been placed in Mr. Brown's hands, it is not clear that it would have been invested in paper to more advantage, than the money which was placed in his hands. Upon this part of the case, then, it is the opinion of the court, that the money remain-

[2] The commissioner in his report, estimates the certificates at the price which they bore in the spring of 1788. In 1789, they had risen very much in value. The opinion here intimated by the chief justice, that the money in the hands of the agent should be considered in strictness, as certificates, at the price they bore in 1788, would seem, by analogy, to be the correct one. As between the vendor and vendee of property deliverable on a certain day, in futuro, it is well settled by a series of decisions, that in a suit by the vendee for damages for the failure to deliver, the measure of damages is the value of the article at the time of the breach. The contract price on the one hand, and the rise subsequent to the breach, are both to be disregarded. See note 1 to Letcher v. Woodson [Case No. 8,280], where the cases on this subject are collected. In would seem, that the principle of those cases would apply equally to the relation between principal and agent.

ing in Mr. Skipwith's hands, ought to be converted into certificates, at the same rate that other monies were converted into paper in the year 1789, it is presumed, by Mr. Brown. The same train of reasoning which rejects the admission of compound interest, will induce the court to direct, that these certificates shall be accounted for, with only their legal interest, and to set aside so much of the report, as charges the defendant with the certificates into which the interest might annually have been converted.

The next point to be considered, is the money placed in the hands of Col. Kennon, and invested by him in certificates. As this was a transaction of the defendant himself, it was his duty, either to have collected this debt, or to have transferred this claim to Mr. Brown, and have put it in his power to collect it. To have omitted to do either, is such excessive negligence as in a case, of the character of that before the court, cannot be tolerated. By holding up this claim, after the agency had passed into other hands, Mr. Skipwith must be considered as taking upon himself the responsibility for its amount, to Mr. Short. But, pursuing the principle which was observed in regard to the money applied to his own use, the court will consider him as accountable only for the certificates and interest.

The third exception to the report, respects the debt which was due from Col. Harvie. The transaction relative to Harvie's bond is, in some important particulars, distinguishable from those parts of the case which have been already noticed. This money does not appear to have been used by Skipwith, in virtue of the general agency, but in consequence of a loan. Previous to the letters of January and February, 1786, a communication concerning the lending and borrowing of that debt had taken place between William Short and the defendant. Although the nature of this communication does not appear to be accurately recollected by either of the parties, it is sufficiently apparent, that the defendant wished to borrow the money, and that the plaintiff was willing that he should receive it on loan. Although the letter of July 3d, 1786, shows, that Skipwith had relinquished any right to the money, which might be given by the conversation with Short, yet the proposition made to the plaintiff in that letter, has relation to the original contract, and seeks to renew it. It is true, that at the time of receiving the bond from Edmunds, the defendant did not take it upon himself. He seems at that time to have been equally apprehensive of paper money, and of the abolition of certificates, and not to have chosen to expose his friend to the one casualty, or himself to the other. It was only after the debt was collected, that he was willing to consider it as his own. His letter of March, 1787, announces his collection of the debt, and his determination to hold it at six per cent. The plaintiff's letter of the 20th of December, 1787, manifests his satisfaction with this employment of the fund.

From a review of all the circumstances which preceded the completion of this transaction, it results, that the money was collected by the defendant, in his character as agent, and applied to his own use, in consequence of a contract to that effect, which was made before his agency commenced, which contract was sanctioned by the plaintiff in the letter of appointment, and which application was afterwards approved by him. Where, in different parts of the same transaction, the same person acts in different capacities, it is often difficult to assign to each part its distinct character. Indeed, it will often happen, that the two characters are so intermingled, that each will impart something of itself to the other. The question made in this case is, whether Skipwith held the money collected from Col. Harvie, as a common debtor, or as the agent of Mr. Short? So far as respects an ability to avail himself of any penalty, to which Mr. Short might be exposed, there can be no doubt, but that he ought to be subjected to all the restraints of an agent, or trustee. But in other respects, his character seems to be rather that of an ordinary debtor. He appropriated the money to his own use, not merely in virtue of his authority as agent, but with the previous and subsequent approbation of the plaintiff, and he paid interest on the money so appropriated. It is true, that an express promise was made to hold the money, subject to the orders of the plaintiff, but the loan does not appear to have been made on this condition; and, in point of fact, every sum payable on demand is held on the same terms. Yet it is a question of some intricacy, whether this money is not to be considered as being in Mr. Skipwith's hands, as agent, and not as a debtor, in consequence of the letter of the plaintiff, directing its investment in certificates, and the promise of the defendant to comply with that direction, and whether Mr. Skipwith is not liable to the extent of his promise. With some hesitation, the court has decided this question in the negative. The original appropriation of this money to his own use, having been an act which was perfectly rightful, Mr. Skipwith has been already stated to have been so far an ordinary debtor, and it would be going a great way to subject a debtor, who promises to pay a debt, to all the loss consequent on his failure to fulfill his promise. The general policy of the law does not admit of such strictness; and although, in morals, a man may justly charge himself, as the cause of any loss, occasioned by the breach of his engagements, yet in the course of human affairs, such breaches are so often occasioned by events which were unforeseen, and could not easily be prevented, that interest is gen-

erally considered as compensation, which must content the injured. Mr. Skipwith, therefore, will be decreed to account for Harvie's debt in specie, and not in certificates.

There is another part of this claim, which the court touches with real reluctance. The contract of loan being for six per centum interest, when the legal interest was only five, was evidently usurious. The court cannot decree a larger interest than the law allows, whatever may be the contract of the parties. But the person who drew the plaintiff into this contract, having been himself the agent, it would be against conscience, that he should derive any advantage to the prejudice of the plaintiff from this circumstance. The court, therefore, allows the legal interest of five per centum. Had the court approved the conversion of this debt into certificates, the commission upon its collection, and upon its investment, would undoubtedly be approved also. But the change of this essential principle, produces corresponding changes in minor parts, which are connected with it. The defendant, having collected this money for himself, is not entitled to a commission on the collection; and as he is not chargeable with certificates, he can have no claim to commissions on such investment. Another slight change to be made in the account is, in the allowance of expenses, as well as commissions, on the business actually transacted. That reasonable expenses ought to be allowed, if commissions are withheld, is unquestionable, but when commissions are allowed, it is supposed to be usual to admit no other charge on the business.

The court has felt some difficulty, respecting Griffin's note. It is unquestionable, that the orders of Mr. Short did not authorise such a purchase, and that it was an indiscreet exercise of his powers as agent, to purchase the bond of any person for certificates, instead of the certificates themselves. This indiscretion is enhanced by taking an assignment, without recourse on the assignor. It is answered by the defendant, that Mr. Short was well satisfied with a similar contract, made with Mr. Giles. But upon examining the letter of Col. Skipwith, which announces this purchase, he states the acquisition to have been of certificates themselves, nor does he allude to the real state of the fact, until his letter of June 16th, 1788. In that letter, he gives some account of his investments, and states himself, to have paid Mr. Giles £30 for £200, in military notes. There are several reasons for not considering the non-appearance of a disapprobation of this proceeding, as an implied permission to deal in private bonds, instead of public securities. The expressions used are ambiguous, and might be misunderstood by Mr. Short. After a positive statement given by Skipwith, that he had actually purchased public securities, the term military notes might well have been understood, by a person in Mr. Short's situation, as a species of public paper, not as a private note for public paper. The same letter, too, promises a detailed statement of the situation of the plaintiff's affairs, which was not given till 1791, long after this contract with Mr. Short was made. The letters of Mr. Short, subsequent to June, 1788, press continually for this statement, and urge an investment of all his funds, according to his explicit instructions, which were given in his letters of December, 1787, and February, 1788. Those letters certainly contain nothing which can mend the defendant's case. The circumstances of the contract, also, deserve consideration. It is remarkable, that Col. Skipwith purchased this note partly on credit. In March, 1788, when the note was purchased, he paid £29. 15s. 4d., and in the December following, £120. 4s. 8d. The argument, that he purchased a bond, instead of certificates themselves, for the sake of the credit, is scarcely to be resisted. He ought not to have required credit. He would then have been in funds from the interest-warrants of the plaintiff, had he retained that fund for the object to which it was appropriated. What the opinion of the court, on this point, might have been, had this bond been purchased for ready money, need not be stated. It would certainly have presented the question, under an aspect less unfavorable to the defendant's cause; but, circumstanced as the case is, the court cannot admit this item to the defendant's credit. This opinion is not formed on the situation of the obligor. The testimony of the case, induces the opinion, that his ability to pay the debt might have been confided in. But the defendant ought not to have purchased any bond, and the probability that this improper measure was occasioned by having made use of the funds of the plaintiff, in his hands, seems decisive of his liability for this sum. But, as he has actually paid for the bond, and has not, in this respect, retained in his hands the money of the plaintiff, but has sought to invest it in certificates, there is a distinction between this part of the case, and that in which the court held the defendant responsible for the amount of the money retained, in certificates themselves. For this sum, therefore, the defendant will be chargeable only in specie.

For the reasons given in the report, the defendant is not chargeable with Randolph's bond. For the mare, the defendant is accountable, but the commissioner possessed no testimony, which would enable him to introduce that item into the account. Unless it can be arranged by the parties, it must be settled by a jury, and for that purpose, an issue will be directed.

Decree. This cause came on to be heard

at the last term on the bill, answer, depositions, exhibits, the report of the commissioner, the exceptions to that report. and the arguments of counsel, all which being fully considered, the court is of opinion, that the instructions given by the plaintiff to the defendant, in his letters of December, 1787, and February, 1788, to convert the money in his hands, into public securities of some description, were positive, and ought not to have been disregarded; and that, therefore, the defendant is accountable in certificates, at the rate at which they appear in the receipt of James Brown, which is one of the exhibits, to have been purchased in 1789; for so much money arising from the interest on the plaintiff's certificates, as was retained by the defendant, and applied to his own use; but that he is accountable only for simple interest on those certificates, at the rate of six per centum per annum. The court is also of opinion, that the defendant, having not only neglected to furnish the plaintiff, or the agent who succeeded to the management of his affairs, with any document which could enable him to recover the debt due from Richard Kennon, must be considered as having collected that debt, or as having made himself responsible for it, and is, therefore, chargeable with the sum in certificates, which the said Kennon stated himself to have purchased. The court is further of opinion, that the debt due from J. Harvie, in the proceedings mentioned, was placed in the hands of the defendant on loan, and is to be accounted for in specie, with interest, at the rate of five per centum per annum, that being the interest which, when the debt was contracted, it was lawful to receive; but the defendant is not entitled to the commissions, with which he is credited in the report for collecting this debt, he having received it on loan. The court is further of opinion, that the defendant was instructed to purchase public securities, and not empowered to buy private bonds for public securities, and, therefore, that he is not entitled to a credit in account for Griffin's bond, the more especially, as that bond was purchased on a credit at a time when the money of the plaintiff was in his hands. But as the sum given for this bond, appears to have been laid out, with the intention to benefit the plaintiff, and not for his own advantage, the defendant is only to be charged with the sum in specie, with interest thereon, at the rate of five per centum per annum. The court is further of opinion, that the credits given to the defendant, on account of expenses, ought to be disallowed, the commission on his transactions as agent being a sufficient compensation for those transactions.

SHORT (WEBSTER LOOM CO. v.). See Case No. 17,343.

Case No. 12,810.

SHORT v. WILKINSON.

[2 Cranch, C. C. 22.] [1]

Circuit Court, District of Columbia. June Term, 1811.

PLEADING AT LAW—DEBT ON FOREIGN JUDGMENT—PLEA.

Nil debet is not a good plea to an action of debt, in the District of Columbia, brought upon a judgment of a state court in Kentucky; but the defendant may, with the leave of the court, withdraw it, and plead nul tiel record, on payment of the costs of the term, and a continuance of the cause until the next term, if the plaintiff should desire it.

Debt on a judgment obtained in a state court in Kentucky. The defendant pleaded nil debet, and payment. When the cause was called for trial, Mr. Jones and Mr. Law, for defendant, moved to be allowed to strike out the plea of nil debet, and to substitute the plea of nul tiel record.

Mr. Key, for plaintiff, objected that it was now too late, and that nul tiel record is an improper plea. If the plaintiff will consent to take his judgment on the plea of nil debet, it is not for the defendant to object that it is an immaterial plea.

Mr. Jones, in reply. The defendant is as much interested in seeing that the pleadings are regular, as the plaintiff; because a judgment in his favor upon an immaterial issue, will not protect him against a subsequent suit on the same cause of action.

BY THE COURT (CRANCH, Chief Judge, absent). The amendment is allowed on paying the costs of the term, and on the plaintiff's being allowed a continuance if he wishes it.

They said it had been decided. on demurrer, during this term, that a judgment of a state court is a domestic judgment, and that nil debet is an improper plea to an action of debt upon such a judgment. So, in Skyren v. Lindo [Case No. 12,931], in Alexandria, where the plaintiff brought an action upon the case on a judgment obtained in Virginia, and the defendant was held to bail on affidavit, the court suffered him to appear without special bail; and decided, on demurrer. that the action should have been debt, and not case. By the constitution of the United States, "full faith and credit shall be given by each state to the public acts, records, and judicial proceedings of every other state" (article 4, § 1), and by the act of congress of 26th May, 1790 [1 Stat. 122], those acts, when authenticated in the manner therein prescribed, shall have the same faith and credit as they would have had in the court whence the record is taken. The exemplification of the record on which this suit is founded, will have the same effect as if this suit had been in a county in Kentucky, and no other authentication will be required here than there. If, then, nil debet

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

would be an improper plea there, it will be equally so here; and from a parity of reasoning, if nul tiel record would not only be an admissible plea, but the best adapted to try the question, on a suit in Kentucky, it will be so here.

Case No. 12,811.

In re SHORTER.

[Mobile (Ala.) Reg. & Advertiser, Dec. 17, 1865.]

District Court, D. Alabama. Dec. 16, 1865.

CONSTITUTIONAL LAW—TEST OATH FOR ATTORNEYS IN FEDERAL COURTS— EX POST FACTO LEGISLATION.

[The act of January 24, 1865 (13 Stat. 424), forbidding any attorneys to practice in the federal courts except upon taking the test oath prescribed by the act of July 2, 1862 (12 Stat. 502), whereby the affiant is made to swear that he has never borne arms against the United States, or furnished aid or encouragement to their enemies, is unconstitutional, because the matter of regulating the admission of attorneys to practice is left by the constitution to the courts themselves, to be exercised according to the provisions of the common law, and is not delegated to the legislative power; because it deprives attorneys previously admitted to practice of substantial rights, in the nature of property, without due process of law, and compels them to be witnesses against themselves; and because it operates as an ex post facto law.]

[Cited in Ex parte Law, Case No. 8,126.]

[This was an application by John Gill Shorter and others, attorneys, for leave to practice in the federal courts without taking the test oath prescribed by the act of January 24, 1865, entitled "An act supplementary to an act to prescribe an oath of office and for other purposes."]

BUSTEED, District Judge. One of the most difficult and certainly one of the most delicate duties that a court of justice can be called upon to discharge is to pronounce upon the constitutionality of legislation. There is that in the very nature of this act calculated to inspire the utmost circumspection, not perhaps unaccompanied by something resembling fear. It is no light matter to attack the binding force of congressional enactments. Every presumption is in favor of their validity. The legislature of a people is a nation in concrete; representing its wisdom and its will. The motives which influence the conduct of its members are beyond the pale of legal investigation and may be inquired of only in foro conscientiæ; and in this tribunal each legislator both prosecutes and defends, and is witness, juror and judge. One of the fathers of American jurisprudence said that it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. This is the standard by which the propriety of judicial interference with the operation of a statute should be determined, and I accept the rule with the profoundest reverence for the learning and wisdom of its author. It is under the direct influence of such sentiments that I approach the consideration of the question presented for adjudication; and when I take into account the deference that is due to legislative and executive departments of the government, the real magnitude of the matter itself, the interests involved, and the paucity of my own powers, I cannot repress the wish that I had been spared this ordeal. To do one's whole duty in whatever sphere of life; to do it truly as it respects conscience and intelligence,—is, however, all that may be required of any. To do this is to keep the oath I took, to "administer justice without respect of persons; to do equal right to the poor and rich; and faithfully and impartially to discharge and perform all the duties incumbent upon me as a judge, according to the best of my ability and understanding, agreeably to the constitution and laws of the United States."

The whole structure of American, and indeed of republican, government, rests upon the distribution of power among the several bodies of its magistracy. It has passed into an axiom that the legislative, executive, and judicial departments ought to be separate and independent each of the other. Mr. Madison denominates this separation and independence the "essential precaution in favor of liberty," and declares that the accumulation of these powers in the same hands "may justly be pronounced the very definition of tyranny." It is not to be denied either that legislative bodies, elected by and from among the people, are more or less actuated by the passions and prejudices which, for the hour, rule and govern their constituencies. To imagine popular representatives free from such influences, is to suppose them more than men; and to presume that their conduct will not be in some degree controlled by considerations of what is agreeable to those upon whose suffrages they depend, is to fly in the face of all nature and experience. It was to correct this tendency and to save to the whole people their constitutional rights, that the system of checks and balances was adopted, which distinguishes the American government from all others. "It may be a reflection on human nature, that such devices should be necessary to control the abuses of government, but what is government itself, but the greatest of all reflections on human nature? If men were angels no government would be necessary." To each of the departments of the government of the United States the constitution says, "Thus far shalt thou go, and no farther." To each is assigned limits which it may not lawfully pass. Each is a guardian of the public against the aggression of the other. Each, within its sphere, an honored agent of the general harmony and safety, and each an usurper eo instanti it steps beyond its circumscribed boundaries,—each obliged, upon pain of being derelict and foresworn, to adopt as its motto,

"Justice is the end of government." The legislature is to make the laws. The executive is to approve them and see that they are carried into effect. The judiciary is to expound them and administer them, and, when questions are raised upon them, to decide whether they are consonant or repugnant to the constitution. The legislature that should refuse to pass all needful laws for the regulation of the body politic would palpably violate its duty; the executive who should neglect to approve and execute constitutionally enacted laws would be undeserving his high office; and the judiciary that does not interpret, pronounce, and apply the laws so made and approved is culpable beyond comparison.

On the 2d day of July, 1862, the congress of the United States passed an act entitled, "An act to prescribe an oath of office, and for other purposes." By its terms every person who, after its passage, should be elected or appointed to any civil, military, or naval office under the government, before entering upon its duties, and before being entitled to its remunerations, is obliged to take and subscribe to the following oath, or affirmation: "I do solemnly swear, or affirm, that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel or encouragement to persons engaged in armed hostility thereto; that I have neither sought, nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power or constitution within the United States hostile or inimical thereto." It is important to observe here that this qualifying oath has reference only to persons who aspire to positions of honor or profit under the government. It has no application to the community at large, or to any particular class of citizens. It is directed against office-holders as such. One of the penalties provided in the statute for falsely affirming under it, is that "the person shall be deprived of his office and rendered incapable forever after of holding any office or place under the United States." The intention of congress, if we may derive it from the political circumstances of the times, was that no person who aided in the attempt to destroy American nationality should again be trusted with the authority or honored with the offices of the republic. It was notorious that men who had been educated in the military and naval schools of the nation, at the expense of the public, had joined in and often led the revolt against the national sovereignty, and that others, connected with the administration of civil affairs, left their places in congress, and in the cabinet, and on the bench, and formally renounced their allegiance to the United States. To secure the country from a recurrence of such a state of facts, so far as the legislative imposition of qualification for office could accomplish this, was, beyond question, the intention of the lawmakers, and there is nothing in such a law repugnant to reason, religion, or natural rights. It is plainly within the power of congress to say to a candidate for the benefactions of the offices of the republic, "You must, as a condition precedent to enjoying these, furnish a guarantee of an oath that you have not done, and will not do, any act inconsistent with the honor of the government, or that will endanger its perpetuity." No man has an inchoate or vested right in these, and places of honor and emolument should be the rewards of capacity, patriotism, and fealty.

On the 24th day of January, 1865, congress passed an act in these words: "Be it enacted," &c., "that no person, after the date of this act, shall be admitted to the bar of the supreme court of the United States, or at any time after the 4th of March next, shall be admitted to the bar of the circuit and district court of the United States, or of the court of claims, as an attorney or counselor of such court or shall be allowed to appear and be heard in any such court, by virtue of any previous admission, or any special power of attorney, unless he shall first have taken and subscribed the oath prescribed in an act to prescribe an oath of office, and for other purposes, approved July 2d, 1862, according to the forms and in the manner in said act provided; which said oath so taken and subscribed shall be preserved among the files of such court, and any person who shall falsely take the said oath, shall be guilty of perjury, and on conviction shall be liable to the pains and penalties of perjury, and the additional pains and penalties in the said act provided." It is claimed that this act contravenes several provisions of the fundamental law, and the power of the courts is now invoked to prevent its going into operation. Its unconstitutionality is asserted upon several grounds, and if these objections, or any of them, are well taken, the act must be declared of no effect and void. Without repeating the argument of counsel, all of whom, both at Montgomery and Mobile, have exhibited great learning and close study of and familiarity with the civil, common, and statute law, the objections urged against this enactment may be thus stated.

It is claimed to be unconstitutional, because: First, it virtually takes from the courts, and gives to the legislature, the power to license attorneys and counselors. Secondly, because it requires a new qualification in attorneys and counselors, which has no aptness in itself, and which is not necessary to the faithful and skillful discharge of a lawyer's vocation. Thirdly, because congress has no right to prescribe such an oath for an attorney, any more than it has a right to prescribe it for a farmer or a mechanic.

Fourthly, because it deprives a man of his property without due process of law, and holds him to answer for an infamous crime without presentment or indictment of a grand jury, compels him to be a witness against himself, and deprives him of the right to a trial by an impartial jury of the state and district wherein the alleged crime was committed. Fifthly, because it trenches upon the pardoning power of the executive, rendering amnesty or pardon of no effect to restore the subjects of these benefits to their original status. Sixthly, because it deprives the citizen of his right "to have assistance of counsel for his defense" in the national courts. Seventhly, because it is in the nature of a bill of attainder, and an ex post facto law. And, lastly, because it is against the common right.

All of these objections to the law of January 24, 1865, have been urged with a zeal and earnestness which could only spring from a deep belief in their justice on the part of counsel. History, experience, and precedent have been arrayed in support of the veiws so ably presented by the distinguished lawyers selected to discuss the question; and, however I may differ from some of the propositions advanced, I gratefully acknowledge the assistance afforded me by the arguments of my brethren of the bar.

Does the law of congress of January 24, 1865, conflict with any of the provisions of the constitution of the United States? If it does, and this appears, the law is void, and the courts must so adjudge it. It certainly has some marked and unusual characteristics. It inaugurates in American history a new kind of legislation, at war with previously conceived and very generally entertained ideas. It is of the species known as "class legislation"; that is to say, its provisions are not of general application to the whole community. It lacks the "universality" and "uniformity" which Blackstone declares are of the essence of a law, and its requirements and prohibitions are confined to a limited number of persons, and a particular calling in life. Such an enactment, to be binding, must strictly observe and keep within constitutional limitations. If enacted at all, it shall not exceed, in the least, the authority for its creation.

The law is retroactive as well as retrospective. It deals in rights and privileges which were vested before its passage. In the case of a citizen by birth, it embraces the entire period of his existence, and holds inquisition upon it. A French writer of distinction says that such laws "are illegal in principle and disastrous in results." Another publicist, of equal fame, says, "The retroaction of laws is the greatest crime in legislation." The constitution of the state of New Hampshire declares that "retrospective laws are highly injurious, oppressive and unjust." Chancellor Kent, in Dash v. Van Kleeck (N. Y.) 7 Johns. 477, uses this language: "As often as the question has been brought before the courts of justice in this country, they have uniformly said that the objection to retrospective laws applies as well to those which affect civil rights as to those which relate to crime." The law of 1862, as we have seen, relates to persons seeking office or place under the United States. The law of 1865 does not relate to persons holding or seeking office or place in any department of the public service. Lawyers, eo nomine, cannot be said to be officers of state. They are, to all intents and purposes, as much private citizens as the members of any other avocation, trade, or pursuit.

Lastly, in enumerating its distinctive features, the law may be said to be highly penal in its general scope and effect.

Now, it cannot be all this, and yet allowed to stand. Being all this, it must stand, unless it violates some principle of the constitution. We have seen that the courts have nothing to do with the motives or the policy that instigate legislation. The first of these may be corrupt, and the last ill advised, but the judiciary cannot look at either of them. The intention of the lawgiver must be gained from the words he uses, not from the impulses that govern him.

We recur, then, to the question, is this law unconstitutional in all or any of the respects claimed by those who oppose it? And, first, has congress the right to prescribe qualifications to persons who desire admission to the bar of the national courts, as attorneys or counselors? The thirty-fifth section of the act of September 24, 1789 [1 Stat. 92], provides that, in all the courts of the United States, the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as by the rules of said courts respectively shall be permitted to manage and conduct causes therein." This act, it will be remembered, was passed shortly after the adoption of the national constitution, and when the principles upon which it was founded were familiar to the mind of every statesman and politician. It was intended by the legislature to carry into effect that provision of the organic law which provides that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as congress may from time to time establish." The thirty-fifth section of this act is a clear concession to the courts of exclusive jurisdiction over the subject of the admission of attorneys and counselors to practice, and may, I think, be taken as an acknowledgment by congress that this is a matter within the "judicial power of the United States." It is certain that the courts have uniformly acted upon this understanding, and until the passage of the law of January 24, 1865,—nearly eighty years,—congress has not attempted to exercise any control over the subject.

In the case of Ex parte Secombe, reported in 19 How. [60 U. S. 9], which was an appli-

cation for a writ of mandamus to the judges of the supreme court of the territory of Minnesota, commanding them to vacate an order made for the removal of the relator from the roll of attorneys, Chief Justice Taney says that, in a court of the United States, the relations between the court and the attorneys and counselors who practice in it, and their respective rights and duties, are regulated by the common law. And he adds, "It has been well settled by the rules and practice of common-law courts that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counselor, and for what cause he ought to be removed." The power, the chief justice declares, is not an arbitrary one, but must be exercised and regulated "by a sound and just judicial discretion, whereby the rights of the bar may be scrupulously guarded and maintained by the court as the rights and dignity of the court itself." It is plain that any other doctrine would lead to interminable disorder in the courts. If congress may, ex mero motu, enact that a man who has aided in the Rebellion shall thereafter be absolutely disqualified from practicing law in the national courts, notwithstanding that he has been previously admitted under their rules, why may not congress enact that a man shall be allowed to practice in those courts without any other qualification than having fought under the banners of the republic? If the former may be decreed as a penalty, why not the latter as a reward? Where shall the power of the courts over the conduct and qualifications of attorneys end, and where the power of congress begin? How shall the conflict of jurisdiction that might arise be settled? It must not be forgotten that congress does not originate either the national courts themselves, or the office, privilege, or franchise of an attorney and counselor in those courts. If it did, I am not prepared to say that it could not annex such conditions to the enjoyment of the privilege as it might consider wise and just.

Let us now look at the objections made to the law on the more substantial grounds urged against it. Does it deprive a man of any advantage which he had legally acquired, and how shall this be tested? It is the indisputable right of the citizen accused of an offense to be tried by an impartial jury of the state and district wherein the crime shall have been committed, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and in no criminal case to be compelled to be a witness against himself. These are among the most solemn of all the guaranties of the constitution. They are not concessions to liberty, as is sometimes supposed; they are restraints upon government, and bulwarks against oppression. Does this law prescribe a crime, and affix a penalty to its commission? What is crime? Is it not some act for which a person may be punished? What is punishment? Is it not the absolute or partial deprivation or curtailment of some right or enjoyment previously possessed? Punishment, to be such, need not be corporeal. The first murderer did not expiate his offense with his life, or by imprisonment. The sentence pronounced against him was, "A fugitive and a vagabond shalt thou be on the earth;" and in his agony the criminal cried out, "My punishment is greater than I can bear." That this statute does prescribe a crime is too plain to need argument and that it affixes a penalty to its commission is equally clear. Does it not also take from the person against whom its provisions are leveled the benefit of presumptive innocence, when it requires a man to take an expurgatory oath as a condition to exercising a privilege which, if he were not guilty as specified in the act, he would be allowed? Is not this in fact to oblige a man to be a witness against himself? The maxim of the law is, "Accusare nemo debet se, nisi coram Deo." The demand of this statute is that by the offer of affirmative proof of innocence the applicant for admission to practice shall create, as against himself, a presumption of guilt.

It is unworthy of the great question to say that a man is not obliged to put himself in the supposed dilemma; that all he has to do is not to attempt the practice of his profession in the national courts, and he will not run the risk of testifying to his own guilt. This is the merest and the shallowest sophistry. If he keep silence, he is thereby deprived of a constitutional right; if he speak, he becomes "a witness against himself." Judgment of condemnation instantly follows the coerced acknowledgment of guilt, and an act of the legislature is thus made to take the place and exercise the functions of the judicial office. Now, if congress can bring about such a result to a man, is it not doing by indirection what it is expressly prohibited from doing directly?

It has been strongly urged upon the argument that this law of January 24, 1865, is in the nature of a bill of attainder, and if it be liable to this charge it cannot stand. Congress is expressly prohibited from passing such a law. It is well settled that bills of attainder, as they are technically called, include what are known as bills of pains and penalties. [Fletcher v. Peck] 6 Cranch [10 U. S.] 138; 1 Kent, Comm. p. 382, § 19; and Story, Comm. Is not the law of January 24, 1865, such a bill? Does it not in fact disfranchise the class of men known as lawyers, under the pain of their not taking the oath it prescribes? Is not this the logical and necessary consequence of their refusal? Does it not disfranchise them when it requires them to take the prescribed oath before they can exercise their vocation? Is it not an assumption by the legislature of judicial magistracy? Is it not "pronouncing upon the guilt of the party without any of the common forms and guards of trial?"

I will now consider the objection that this statute is in the nature of an ex post facto law. Congress is restrained, in express terms, from passing a law of this character, and history is full of warning against the impolicy and wickedness of declaring an act to be criminal which, at the time of its commission neither involved moral turpitude, nor transgressed the written code. If a statute does this, and affixes a penalty to the act, it is ex post facto; or if, by a statute passed subsequently to the commission of a crime, the punishment for that crime is increased, or "different or less evidence is required to convict an offender than was required when the act was committed," the law is ex post facto. One of the clauses in the act of congress of the 2d of July, 1862, and which is embraced in the oath required by the act of January 24, 1865, is as follows: "That I have neither sought nor accepted nor attempted to exercise the functions of any office whatever under any authority, or pretended authority, in hostility to the United States." This abjuration is not confined to any period. It covers the lifetime of the affirmant. Before the 24th of January, 1865, a British subject could be admitted to all the rights of citizenship in the United States by taking the oaths of naturalization. Without being naturalized, he might be admitted to the bar of this court, upon complying with the rules of the court. But if, during the period of war between the United States and Great Britain, a half century ago, he had held office in the kingdom of which he was native, and was then a subject, he could not comply with the requisitions of this statute, and could no longer exercise his privilege as a member of the bar of this court. The right acquired by his naturalization and by the rules and orders of the court would be annulled by a law ex post facto, and for an act innocent, and even praiseworthy, when it was done. Other illustrations, by way of example, occur to the mind, but it is not necessary further to pursue this line of thought; nor do I consider it requisite to the adjudication of the question before me to enter into the examination of any other of the grounds of objection to the act taken by counsel on the argument. As to all these, I do not express either dissent or agreement.

I am of opinion that the act of the 24th of January, 1865, supplementary to the act of July 2, 1862, violates several of the provisions of the constitution, and it is the right of those whose interests are to be affected that I should declare the conclusions which I have reached. If these conclusions are not founded in reason and law, the supreme court of the United States, now in session, can correct the error, and I will gladly reform my judgment by the standard of its excellence.

SHORTER (UNITED STATES v.). See Cases Nos. 16,283 and 16,284.

Case No. 12,812.

SHORTRIDGE et al. v. MACON.

[Chase, 136;[1] 1 Abb. U. S. 58; 2 Am. Law Rev. 95; Phil. N. C. 392; 5 Int. Rev. Rec. 206; 1 Am. Law T. Rep. U. S. Cts. 35.]

Circuit Court, D. North Carolina. June, 1867.

PAYMENT—SEQUESTRATION—CONFEDERATE STATES GOVERNMENT—RELATION OF STATES TO GENERAL GOVERNMENT DURING WAR.

1. Compulsory payment of a debt to a receiver under the sequestration acts of the Confederate government is no defense to a suit brought upon such debt by the creditor.

[Cited in Head v. Starke, Case No. 6,293.]

2. The suspension of intercourse consequent upon the recent war, did not prevent interest from accruing between citizens adhering to the respective parties thereto.

[Cited in Keppell v. Petersburg R. Co., Case No. 7,722; Brown v. Hiatt, Id. 2,011.]

[Cited in Billgerry v. Branch, 19 Grat. 412.]

3. War levied against the United States by citizens of the republic, under the pretended authority of the new state government of North Carolina, or of the so-called Confederate government, was treason against the United States.

[Cited in U. S. v. Stark, Case No. 16,378; Stevens v. Griffith, 111 U. S. 53, 4 Sup. Ct. 285.]

4. It is the practice of modern governments when attacked by formidable rebellion, to exercise and concede belligerent rights. These are concessions made by the legislative and executive departments in the exercise of political discretion. They establish no rights except during the war.

[Cited in U. S. v. Stark, Case No. 16,378; Cuyler v. Ferrill, Id. 3,523; Bailey v. Milner, Id. 740.]

5. Courts have no policy and can exercise no political powers. They can only declare the law.

6. Legal rights could neither be created nor defeated, by the action of the government of the Confederate States.

7. The state of North Carolina by the acts of her convention in May, 1861, by the previous acts of her governor, by the subsequent acts of all departments of the state government, and by the acts of the people at the elections in May, 1861, set aside her state government and constitution, connected under the national constitution with the government of the United States, and established a new constitution and government connected with another so-called central government, set up in hostility to the United States, and entered upon a course of active warfare against the national government. By these acts the practical relations of North Carolina to the Union were suspended, but they did not for a moment effect a separation of North Carolina from the Union.

[Cited in Cuyler v. Ferrill, Case No. 3,523; Bailey v. Milner, Id. 740.]

Assumpsit, in which the plaintiffs declared upon a note executed by the defendant in 1860. The plaintiffs were citizens of Pennsylvania at the time the note was given, and continued to be such until the bringing of the suit; and during that time the defendant continued to be a citizen of North Carolina. Among other pleas, the defendant re-

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[1] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission.]

lied upon the fact that during the existence of the late government of the Confederate States, and by virtue of certain acts of congress under that government, this debt had been confiscated, and he was compelled by process to pay it into its public treasury. It was also insisted that the state of things consequent upon the recent war between the United States and the Confederate States, was such as to excuse the defendant from payment of interest accruing during that period.

Mr. Bragg, for plaintiffs.
Rogers & Batchelor, for defendant.

CHASE, Circuit Justice. This is an action for the recovery of the amount of a promissory note, with interest. There is no question of the liability of the defendant to the demand of the plaintiffs, unless he is excused by coerced payment of the note sued upon, under an act of the self-styled Confederate Congress, passed August 30, 1861, entitled "An act for the sequestration of the estates of alien enemies," and an amendatory act passed February 15, 1862. It is admitted that the plaintiffs were citizens of Pennsylvania; that the defendant was a citizen of North Carolina; that the note sued upon was made by the defendant to the plaintiffs; and that the defendant was compelled, by proceedings instituted in the courts of the so-called Confederate States, to pay the amount due upon it to the receiver appointed under the sequestration acts. Upon these facts it is insisted that the defendant is discharged from his liability to the plaintiffs. It is claimed that, while it existed, the Confederate government was a de facto government, that the citizens of the states which did not recognize its authority were aliens, and in time of war, alien enemies; that, consequently, the acts of sequestration were valid acts; and, therefore, that payment to a Confederate agent of debts due to such citizens, if compelled by proceedings under those acts, relieved the debtor from all obligation to the original creditors.

To maintain these propositions, the counsel for the defendant rely upon the decisions of the supreme court of the United States, to the effect that the late rebellion was a civil war, in the prosecution of which belligerent rights were exercised by the national government, and accorded to the armed forces of the rebel Confederacy; and upon the decisions of the state courts, during and after the close of the American war for independence, which affirmed the validity of confiscations and sequestrations decreed against the property of non-resident British subjects and the inhabitants of colonies or states hostile to the United Colonies or United States. But these decisions do not in our judgment sustain the propositions in support of which they are cited. There is no doubt that the state of North Carolina, by the acts of the convention of May, 1861, by the previous acts of the governor of the state, by subsequent acts of all the departments of the state government, and by the acts of the people at the elections held after May, 1861, set aside her state government and constitution connected under the national constitution with the government of the United States, and established a new constitution and government connected with another so-called central government, set up in hostility to the United States, and entered upon a course of active warfare against the national government. Nor is there any doubt that by these acts the practical relations of North Carolina to the Union were suspended, and very serious liabilities incurred by those who were engaged in them. But these acts did not effect, even for a moment, the separation of North Carolina from the Union, any more than the acts of an individual who commits grave offenses against the state by resisting its officers and defying its authority, separate him from the state. Such acts may subject the offender even to outlawry, but can discharge him from no duty and can relieve him from no responsibility.

The national constitution declares that "treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." The word "only" was used to exclude from the criminal jurisprudence of the new republic the odious doctrines of constructive treason. Its use, however, while limiting the definition to plain overt acts, brings these acts into conspicuous relief as being always and in essence treasonable. War, therefore, levied against the United States by citizens of the republic, under the pretended authority of the new state government of North Carolina, or of the so-called Confederate government which assumed the title of the "Confederate States," was treason against the United States. It has been supposed, and by some strenuously maintained, that the North Carolina ordinance of 1861, which purported to repeal the North Carolina ordinance of 1789, by which the constitution of the United States was ratified, and to repeal also all subsequent acts by which the assent of North Carolina was given to amendments of the constitution,—did in fact repeal that ordinance and those acts, and thereby absolved the people of the state from all obligations as citizens of the United States, and made it impossible to commit treason by levying war against the national government. No elaborate discussion of the theoretical question thus presented seems now to be necessary. The question as a practical one is at rest, and is not likely to be revived. It is enough to say here that, in our judgment, the answer which it has received from events is that which the soundest construction of the constitution warrants and requires. Nor can we agree with some persons, distinguished by abilities and vir-

ties, who insist that when rebellion attains the proportions and assumes the character of civil war, it is purged of its treasonable character, and can only be punished by the defeat of its armies, the disappointment of its hopes, and the calamities incident to unsuccessful war.

Courts have no policy and can exercise no political powers. They can only declare the law. On what sound principle, then, can we say judicially that the levying of war ceases to be treason when the war becomes formidable? that war, levied by ten men or ten hundred, is certainly treason, but is no longer such when levied by ten thousand or ten hundred thousand? that the armed attempts of a few, attended by no serious danger to the Union, and suppressed by slight exertions of the public force, come, unquestionably, within the constitutional definition, but attempts by a vast combination, controlling several states, putting great armies in the field, menacing with imminent peril the life of the republic, and demanding immense efforts and immense expenditures of treasure and blood for their defeat and suppression, swell beyond the boundaries of the definition and become innocent in proportion to their enormity. But it is said that this is the doctrine of the supreme court. We think otherwise. In modern times it is the usual practice of civilized governments attacked by organized and formidable rebellion, to exercise and to concede belligerent rights. Under such circumstances, instead of punishing rebels when made prisoners in war as criminals, they agree in cartels for exchange, and make other mutually beneficial arrangements; and, instead of insisting upon offensive terms and designations, in intercourse with the civil or military chiefs, treat them, as far as possible without surrender of essential principles, like foreign foes engaged in regular warfare.

But these are concessions made by the legislative and executive departments of government in the exercise of political discretion and in the interest of humanity, to mitigate vindictive passions inflamed by civil conflicts, and prevent the frightful evils of mutual reprisals and retaliations. They established no rights except during war. It is also true, that when war ceased, and the authority of the regular government is fully re-established, the penalties of violated law are seldom inflicted upon many. Wise governments never forget that the criminality of individuals is not always or often equal that of the acts committed by the organization with which they are connected. Many are carried into rebellion by sincere though mistaken convictions; or hurried along by excitements due to social and state sympathies, and even by the compulsion of a public opinion not their own. When the strife of arms is over, and such governments, therefore, exercising still their political discretion, address themselves mainly to the work of conciliation and restoration, and exert the prerogative of mercy, rather than that of justice, complete remission is usually extended to large classes by amnesty or other exercise of legislative or executive authority, and individuals not included in these classes, with some exceptions of the greatest offenders, are absolved by pardon either absolutely or upon conditions prescribed by the government. These principles, common to all civilized nations, are those which regulated the action of the government of the United States during the war of the rebellion, and have regulated its actions since rebellion laid down its arms. In some respects the forbearance and liberality of the nation exceed all example. While hostilities were yet flagrant, one act of congress practically abolished the death penalty for treason subsequently committed, and another provided a mode in which citizens of rebel states, maintaining a loyal adhesion to the Union, could recover after war the value of their captured or abandoned property.

The national government has steadily sought to facilitate restoration with adequate guaranties of union, order, and equal rights. On no occasion, however, and by no act, have the United States ever renounced their constitutional jurisdiction over the whole territory or over all the citizens of the republic, or conceded to citizens in arms against their country the character of alien enemies, or admitted the existence of any government de facto, hostile to itself within the boundaries of the Union. In the Prize Cases the supreme court simply assented the right of the United States to treat the insurgents as belligerents, and to claim from foreign nations the performance of neutral duties under the penalties known to international law. These decisions recognized, also, the fact of the exercise and concession of belligerent rights, and affirmed, as a necessary consequence, the proposition that during the war all the inhabitants of the country controlled by the rebellion, and all the inhabitants of the country loyal to the Union, were enemies reciprocally each of the other. But there is nothing in that opinion which gives countenance to the doctrine which counsel endeavor to deduce from it, that the insurgent states, by the act of rebellion, and by levying war against the nation, became foreign states, and their inhabitants alien enemies. This proposition being denied, it must result that in compelling debtors to pay to receivers, for the support of the rebellion, debts due to any citizen of the United States, the insurgent authorities committed an illegal violence, by which no obligation of debtors to creditors could be cancelled or in any respect affected.

Nor can the defense in this case derive more support from the decisions affirming the validity of confiscations during the war for American independence. That war began, doubtless, like the recent civil war—in rebellion. Had it terminated unsuccessfully, and had English tribunals subsequently affirmed the validity of colonial confiscation and se-

questration of British property and of debts due to British subjects, those decisions would be in point. No student of international law or of history needs to be informed how impossible it is that such decisions could have been. Had the recent rebellion proved successful, and had the validity of the confiscations and sequestrations actually enforced by the insurgent authorities, been afterwards questioned in Confederate courts, it is not improbable that the decision of the state courts made during and after the revolutionary war, might have been cited with approval. But it hardly needs remark that those decisions were made under circumstances widely differing from those which now exist. They were made by the courts of states which had succeeded in their attempt to sever their colonial connection with Great Britain, and sanctioned acts which depended for their validity wholly upon success; and can have no application to acts of a rebel self-styled government, seeking the severance of constitutional relations of states to the Union, but defeated in the attempt, and itself broken up and destroyed.

Those who engage in rebellion must consider the consequences. If they succeed, rebellion becomes revolution, and the new government will justify its founders. If they fail, all their acts hostile to the rightful government are violations of law, and originate no rights which can be recognized by the courts of the nation whose authority and existence have been alike assailed. We hold, therefore, that compulsory payment under the sequestration acts to the rebel receiver of the debt due to the plaintiffs from the defendant, was no discharge. It is claimed, however, that whatever may be the right of the plaintiffs to recover the principal debt from the defendant, they can not recover interest for the time during which war prevented all communication between the states in which they respectively resided. We can not think so. Interest is the lawful fruit of principal. There are, indeed, some authorities to the point that interest which has accrued during war between independent nations can not be afterwards recovered, though the debt, with other interest, may be. But that rule, in our judgment, is applicable only to such wars. We perceive nothing in the act of July 13, 1861, which suspended for a time all pacific intercourse between the loyal and insurgent portions of the country, that requires or justifies the application of that rule to the case before us. Legal rights could neither be originated nor defeated by the action of the central authorities of the late rebellion.

The plaintiff must have judgment for the principal and interest of his debt, without deduction.

[NOTE. In the case of Bigler v. Waller [Case No. 1,404], decided at the May term, 1870, of the circuit court of the United States for the district of Virginia, the chief justice held that, under the special circumstances of that case, interest was suspended during the civil war; and intimated a doubt as to the correctness of the above ruling.] [3]

SHORTRIDGE v. MASON. See Case No. 12,812.

SHORTSLEEVES (STEAM STONE CUTTER CO. v.). See Case No. 13,334.

Case No. 12,813.

The SHORT STAPLE.

[1 Gall. 104.] [1]

Circuit Court, D. Massachusetts. May Term, 1812.[2]

NON-INTERCOURSE—SPECIAL DEFENCE—BURDEN OF PROOF—STATUTES—RETURN CARGO—EVIDENCE.

1. Where the claimants set up a special defence against a forfeiture, the onus probandi lies on them; and if such defence be not satisfactorily made out, condemnation will go. A registered vessel is within the prohibitions of the 3d section of the act of 9 January, 1808, c. 8 [2 Stat. 453]. That section was not repealed by the 19th section of the act of 1st March, 1809, c. 91 [9 Laws (Weightman's Ed.) 255; 2 Stat. 533], or 2d section of the act of 28th June, 1809, c. 9 [10 Laws (Weightman's Ed.) 14; 2 Stat. 550].

[Cited in The Ocean Bride, Case No. 10,404; U. S. v. 129 Packages, Id. 15,941; Boxes of Opium v. U. S., 23 Fed. 392.]

2. Under the 3d section of the act of 9th January, 1808, c. 8, the return cargo is not affected with forfeiture.

3. Strong presumptive circumstances of fraud will outweigh positive testimony against it.

[Cited in The Ocean Bride, Case No. 10,404.]

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

In admiralty.

G. Blake, for the United States.

Wm. Prescott and R. G. Amory, for claimants.

STORY, Circuit Justice. The libel in this case contains several counts; but two only are relied on, viz. 1. That the brig departed from the port of Baltimore, and proceeded to a foreign port, viz. Cape Nicholas Mole, in the island of St. Domingo, contrary to the 3d section of the act of 9th January, 1808, c. 8. 2. That the brig at the port of Cape Nicholas Mole aforesaid, traded with divers goods and merchandizes, constituting her original outward cargo, and received on board and traded with a return cargo of salt, contrary to the same section. The facts stated in these counts are admitted to be proved, and the ground assumed in the claim and defence is, that the brig was compelled to proceed to the Mole, in consequence of a hostile capture by a British armed cutter, and there disposed of her

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[3] [From Abb. U. S. 58.]

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

[2] [Reversed in 9 Cranch (13 U. S.) 55.]

outward cargo, and being there released, was permitted to go to Turks Island, where a cargo of salt was taken in, with which she returned to the United States.

The facts appear to be these: In the month of August, 1808, a British armed cutter called the Ino, arrived in Boston, and remained there until about the 25th of the ensuing October, when she cleared out for the Cape of Good Hope, with a crew of twelve men on board, including the passengers, and with provisions for such a voyage. The cutter was armed with about ten guns, and appears to have been regularly commissioned. The owner was on board, but she was commanded by another person. On the 4th of October, the brig Short Staple (which is a registered vessel) cleared out from Boston for Baltimore, and on the 11th of the same month, the brig William King cleared out from Boston for the same port, and both brigs safely arrived, and after taking on board full cargoes of flour, and receiving a clearance, went down to Hampton Roads for the ostensible purpose of proceeding to Boston about the 1st of the following November. The brigs were here detained about seven days, as is alleged, by head winds. While the brigs were lying in Hampton Roads, and about five or six days before their sailing therefrom, the Ino arrived in the Roads, for the ostensible purpose of refitting her boom, which was said to be carried away by a gale of wind. While lying there, the owner of the Ino and the masters of the two brigs appear to have been, at times, on shore at Norfolk; but there is no evidence that they were seen together. On the morning of the 8th of November, the brigs sailed from the Roads, and the Ino also; and in the afternoon of the same day, about ten leagues from the shore, the Ino brought them to by firing guns, and sent a prize master and one or two hands on board, and took possession of them, and directed their course first for Jamaica, and afterwards for Cape Nicholas Mole, in St. Domingo. During the voyage the Ino and the brigs kept company together, until they were overhauled by a British ship of war, and the Ino then took the prize masters and others of her crew out of the brigs, and stood away to the windward, in order, as it is said, to avoid the impressment of her crew. The brigs were searched by the ship of war and suffered to proceed; and on the next day, or the day after, arrived safe at the Mole, where they found the Ino, which had not been in company with them after the parting at the time of their being searched by the ship of war. The Short Staple here landed her cargo, which was sold for a high price, viz. $35 per barrel of flour, to the black government, and was abandoned altogether by the Ino, which sailed immediately afterwards in company with the William King for Jamaica. When off Kingston, the owner of the Ino went on board the William King, and proceeded with her into port, and there abandoned the prize without instituting any proceedings in the admiralty. After discharging her cargo, and leaving her mate at the Mole for the purpose of receiving the proceeds of the sales, the Short Staple proceeded from thence to Turks Island, took on board a cargo of salt, and returned therewith to the United States.

Such are the facts found stated in the depositions in the case, which have indeed been not a little clouded by evidence of the confessions of several of the witnesses. But it is not necessary nicely to sift the evidence, because my decree will be founded on other views.

The story here told is indeed a very extraordinary one, and yet is supported by positive direct testimony. It is certainly the duty of the court not lightly to suspect the truth of statements, clothed with the solemn sanctions of an oath, and supported by numerous concurring witnesses. But testimony, however positive, must in its nature be liable to control by strong presumptive circumstances, and must be weighed with care, when it comes loaded with the temptations of private interest, and the impressions of personal penalties. It is a melancholy consideration for the court, that in the discharge of public duty, it finds itself often obliged to resist the influence of human declarations, and to rely upon the concurrence of probable circumstances.

In the present case the claimant [Elisha Hathaway] admits, that the brig proceeded to a foreign port and there disposed of her cargo. It therefore becomes incumbent on him to make out a justification in point of fact, as well as law. The onus probandi rests on him, and a forfeiture must be pronounced, unless he brings the defence clear of any reasonable doubt. See Ten Hogsheads of Rum [Case No. 13,830]. Now there are many circumstances in this case, which have a tendency to excite strong suspicions and doubts.

1. The privateer had but a small complement of men; she had been in Boston, while the brigs lay there, about two months; and she followed rapidly on their course, when they departed. She professed a destination for the Cape of Good Hope, which, though attempted to be explained, when connected with her subsequent conduct, is not quite satisfactory.

2. The pretence alleged for capture was utterly vain and illusive. It was that French property was on board, or that the brigs were bound to French West India Islands. The cargo was flour, notoriously of our own production. The papers were all regular, and indeed do not seem to have been examined at all. The capture, on account of alleged destination to French West India Islands, was wholly frivolous, for such a trade was

not, as to foreign nations, illegal. The capture was made in or near our own waters. No effort was made to confine or govern the crews: two men were taken out of each brig, and no more: the masters remained on board, and the whole crew of the privateer does not seem to have equalled that of the brigs.

3. When the British ship of war was met, the prize masters seem to have been removed, to avoid impressment. No persons were left on board to control the course or conduct of the vessels. The masters were at full liberty to proceed to any port they pleased, for the prizes, as such, were completely abandoned: yet they proceeded to the Cape.

4. If the capture were really hostile, it is inconceivable that the brigs should not have been carried directly to some British port, for search and condemnation. This is the usual, nay, I had almost said, the invariable course. But here one brig is abandoned at the Mole, without further examination or process, and the other is abandoned at Jamaica with as little ceremony. The cargoes of the vessels were very valuable. It is almost a settled usage to decree costs in the admiralty courts to the captors, upon the slightest pretence; and there was therefore the strongest reasons to tempt the captors to a trial. No legal advice of the king's attorney appears to have been taken. Yet notwithstanding all these circumstances, showing that the capture, if real, was a most flagrant wrong, the captain and owner are found as witnesses in the cause, and volunteers to prove their own unworthy conduct; nay more, the privateer, when this testimony is given, is herself within our own ports enjoying the protection of government.

These are some of the circumstances which carry to my mind strong impressions against the reality of the capture; I must therefore consider it an amicable arrangement, in which a good market, and not a good prize, was the primary intent of the parties. But it is said, that if, on the facts, the court are of opinion, that the defence is not made out, yet condemnation ought not to go, because no forfeiture is incurred under the 3d section of the act of the 9th of January, 1808, c. 8, unless a vessel proceed to a foreign port or place contrary to that act, or the act to which that act is a supplement. And it is argued, that such proceeding to a foreign port by a registered vessel is not contrary to either of these acts. The original act lays an embargo on all ships and vessels within the ports of the United States bound to any foreign port, and prohibits registered vessels from departing with cargoes from one port to another of the United States, unless bonds be given to reland the cargo in the United States. But this act contained no provisions applicable to licensed vessels, and therefore, by the 1st and 2d sections of the supplementary act, the legislature prohibited coasting and fishing vessels, from departing from one port to another of the United States, unless bonds were given "not to proceed to any foreign port," but to reland their cargo in the United States. Then comes the 3d section, which in effect declares, that if any ship or vessel shall, contrary to the provisions of either of these acts, proceed to a foreign port or place, such ship or vessel shall be forfeited. It is certainly true, that the provisions of the other sections of the supplementary act are not applicable to registered vessels. It is however admitted by the counsel for the claimants, that licensed vessels, proceeding to a foreign port, would be liable to forfeiture by the 3d section, because the condition of their bond is, not to proceed to a foreign port. But it is argued, that no such provision is found in the bond to be given by a registered vessel, the condition of which simply requires a relanding of the cargo in the United States. But even as to licensed vessels, there is certainly no direct prohibition in the act against their proceeding to a foreign port. It is a mere inference from the apparent intent of the legislature. If therefore we are to imply such a prohibition, as to licensed vessels, we must certainly imply the same as to registered vessels, when they have proceeded to a foreign port, and have not relanded their cargo in the United States. For in such case (which happens to be the present), it is proceeding to a foreign port, contrary to the condition of the bond. In illustration of the argument of the counsel of the claimant, it has been said, that if a registered vessel proceed to a foreign port, and afterwards reland her cargo in the United States, it is no forfeiture of the condition of the bond. Now admitting this to be true, it does not follow that no offence is committed. It would be unlawful for such vessel to depart without a clearance, but such departure would certainly not amount to a forfeiture of the bond, if any were given.

But it strikes me very clearly, that the 1st section of the embargo act, with few exceptions, prohibits all voyages to foreign ports. It places a restraining interdict on all ships, and prohibits the granting of any clearance for such ports. How then can we say, that it is not contrary to that act, to proceed to a foreign port? The departure of registered vessels is not allowed generally, but only from port to port of the United States. If therefore they departed under color of a coasting voyage really bound for a foreign port, it must be as much a violation of the embargo, as though they departed for such foreign port, without giving bonds.

The supreme court of the United States condemned the Eliza (7 Cranch [11 U. S.] 113) for the same offence, although I am well satisfied, that she was a registered vessel. The Paulina (7 Cranch [11 U. S.] 52) was a registered vessel, and the whole reasoning of the court in that case evidently proceeds on this ground. It is true, in neither case

was the point brought before the court. But these causes were very ably argued and well considered, and if there had been any solidity in the objection, I feel some confidence, that it would not have escaped the attention both of the bar and the court.

It has also been slightly argued, that the section on which this prosecution is founded, is to all intents and purposes repealed, and if so, no condemnation can pass against the property. On examining the 19th section of the act of 1st March, 1809, c. 91, [9 Laws (Weightman's Ed.) 255; 2 Stat. 533], and section 2 of the act of 28th June, 1809, c. 9, [10 Laws (Weightman's Ed.) 14; 2 Stat. 550], I am satisfied, that nothing can be taken by this objection. The Short Staple must therefore be condemned. But the attorney for the United States contends, that under the last count in the libel, viz. the trading at Turks Island, the cargo of salt is also forfeited by the 3d section of the act of 9th January, 1808, c. 8. Now the trading alleged in that section must be contrary to that act, or the act to which that is a supplement. But I know of no provisions in either of those acts, which make it illegal to trade with a foreign cargo which had not been previously carried from the United States. The mere traffic in foreign commodities is not an offence; it must be such traffic carried on by an illegal exportation from the United States. In my judgment, therefore, the cargo is not subject to forfeiture.

On the whole I affirm the decree of the district court with costs.

[NOTE. This cause was carried by writ of error to the supreme court, where the sentence of this court condemning the Short Staple was reversed and annulled, and the cause remanded, with directions to decree a restoration of the vessel to the claimants, and to dismiss the bill. 9 Cranch (13 U. S.) 55.]

Case No. 12,814.

SHOUP et al. v. HENRICI et al.

[2 Ban. & A. 249; 11 Phila. 514; 22 Int. Rev. Rec. 114; 9 O. G. 1162; 23 Pittsb. Leg. J. 123; Merw. Pat. Inv. 673; 33 Leg. Int. 120.] [1]

Circuit Court, W. D. Pennsylvania. March 11, 1876.

PATENTS—PUMP-TUBE—ANTICIPATION.

1. The complainants' patent was for a combination of a pump-tube, an outer or larger tube or casing, and a seed-bag outside of the latter. It was designed for use in oil-wells, for the purpose of avoiding the effect of the gas upon the pump-valves, by supplying an avenue of escape for the gas between the pump-tube and the casing. The defendants proved that one Donnelly had, long before complainants' invention, used, in a well sunk to obtain salt water, a device consisting of an outer tube or casing with a seed-bag outside of it next to the wall of the well, and a pump-tube inside of the casing, with a space between them. The object was to provide an outlet for the gas evolved in the well, without passing through the pump-valves. The use of the Donnelly device was, after a brief period of use, abandoned, because it was found so to contract the calibre of the well as to greatly diminish the supply of salt water: *Held*, that the Donnelly device was an anticipation of complainants' patent, and could not be regarded as an abandoned experiment.

2. A device, consisting of a combination of the same elements, arranged and operated in substantially the same way and for the same purpose as the patented device, and which has been used, prior to the invention of the patented device, sufficiently to illustrate and test its complete efficiency for that purpose, is an anticipation of the patented invention, and is not to be regarded merely as an abandoned experiment, although its use may have been quickly discontinued.

3. If the use of such anticipating device be altogether discontinued, it would leave it open to the public to use it. No subsequent invention could take it up and appropriate it exclusively. Gayler v. Wilder, 10 How. [51 U. S.] 477, cited.

[This was a bill in equity by William Shoup and others against Jacob Henrici and others to enjoin the infringement of letters patent No. 45,647, granted to Shoup December 27, 1864.]

Weir & Gibson and George Harding, for complainants.

N. P. Fetterman, Henry Baldwin, and C. S. Fetterman, for defendants.

McKENNAN, Circuit Judge. The complainants' patent is for a combination of a pump-tube, an outer or larger tube or casing, and a seed-bag outside of the latter. It is designed for use in oil-wells, which are usually of great depth and small calibre, and its object and operation are to allow the escape of gas from the bottom of the well through the space between the pump-tube and the outer tube or casing, so that it will not necessarily pass through the valves of the pump-chamber and obstruct the operation of the pump.

The defendants admit that they have used the combination described in the patent, and justify such use upon the ground that the patentee was not the first and original inventor of the combination claimed by him, but that it was known to and used by others before the date of his alleged invention.

I am satisfied that this defence has been maintained, but I do not propose to state at length the reasons upon which this conclusion is founded, or to advert in detail to all or any of the proofs in the cause which have induced it.

It will suffice to refer to one instance of its public and notorious use before the date of the alleged invention of it by the patentee. This occurred at what is designated as the

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. Merw. Pat. Inv. 673, contains only a partial report.]

Donnelly well, and years before the patentee ever conceived the idea of his invention. It was a well of small calibre, and sunk to considerable depth to obtain salt water. The device used in it for that purpose consisted of an outer tube or casing, with a seed-bag outside of it next to the wall of the well, and a pump-tube inside of the casing, with a space between them. A large volume of gas was evolved in the well, and it escaped freely in the interval between the casing and the pump-tube, without passing through the pump-valves. It is hardly disputable that these devices and the patentee's invention were substantially identical in their construction and arrangement, and that they operated alike in furnishing a vent for the gas.

But in the Donnelly well the double casing was found so to contract the calibre as to greatly diminish the supply of salt water, and for that reason it was abandoned after a brief period of use, and the single tubing was restored. It is, therefore, claimed to have been an unsuccessful and abandoned experiment.

It was said before that the combination in both cases consisted of the same elements, and that they were arranged and operated in substantially the same way. But was the purpose for which the patentee's invention is intended to be used effectuated by the devices employed in the Donnelly well? There is no doubt about this. The useful result contemplated by the invention in question is the avoidance of the effect of the gas upon the pump-valves by supplying an avenue of escape for it between the pump-tube and the casing. The Donnelly devices furnish the same means for the escape of the gas and the relief of the pump-valves, anad they were used sufficiently to illustrate and test their complete efficiency in that direction. What more was required to demonstrate the completeness of the device as a means of accomplishing the result contemplated by the patentee? No change in mechanism was needed, and it was successful in operation. This is all that is required to take it out of the category of abandoned experiments. Its use might be altogether discontinued, but this would only leave it open to the public to use it. Certainly no subsequent inventor could take it up and appropriate it exclusively. What was said by the chief-justice in Gayler v. Wilder, 10 How. [51 U. S.] 477, is decisive on this point: "We do not understand the circuit court to have said that the omission of Conner to try the value of his safe by proper tests would deprive it of its priority; nor his omission to bring it into public use. He might have omitted both, and also abandoned its use, and been ignorant of its value; yet, if it was the same with Fitzgerald's, the latter would not upon such ground be entitled to a patent, provided Conner's safe and its mode of construction were still in the memory of Conner before they were recalled by Fitzgerald's patent."

The bill must be dismissed with costs.

Case No. 12,815.

Ex parte SHOUSE.

[Crabbe, 482; [1] 1 Pa. Law J. 227.]

District Court, E. D. Pennsylvania. July 29, 1842.

BANKRUPTCY — THE PETITION — SUFFICIENCY OF STATEMENT OF DEBT—ACT OF BANKRUPTCY—PREFERENCE—PARTNERSHIP—EVIDENCE.

1. Where petitioning creditors state in their petition simply that there is owing to them, from the alleged bankrupts, the sum of five hundred dollars and upwards, it is a sufficient statement of their debt to enable them to institute proceedings.

2. A note of the alleged bankrupts, passed by them to the party in whose favor it was drawn after it was due, and after the alleged acts of bankruptcy, and subsequently purchased by the petitioning creditor in order to enable him to petition, is a sufficient debt for that purpose.

3. A dissolution of partnership, and consequent transfer from the retiring to the remaining partner of all the assets and liabilities of the firm, is not necessarily an act of bankruptcy in the partnership, but may be so if it is intended thereby to give a preference to a separate creditor over the creditors of the partnership, or to bring him in on an equality with them, which could not have been if the partnership had continued, or, generally, if it is in any other way a cover to actual or legal fraud.

[Cited in Darby v. Boatman's Sav. Inst., Case No. 3,571; Re Waite, Id. 17,044; Re Johnson, Id. 7,369; Tiffany v. Boatman's Sav. Inst., 18 Wall. (85 U. S.) 389.]

4. Where a partnership in involved circumstances called a meeting of their creditors, and on the same day transferred to a particular creditor the note of a third party, as security for an antecedent debt, it was a fraudulent preference and an act of bankruptcy.

5. Otherwise, if the collateral security is transferred when the debt is incurred.

6. Evidence of acts of bankruptcy must be confined to those alleged in the petition.

This was a petition by certain creditors of the firm of J. A. and H. W. Shouse to have that firm declared bankrupt. It appeared that the respondents were partners in the dry goods and hosiery trade in Philadelphia. On the 1st April, 1842, Henry W. Shouse retired from the firm and assigned his whole share therein to the other partner, Jacob A. Shouse, who also assumed the debts of the partnership, the arrangement being altogether verbal; Henry W. Shouse, however, subsequently remained about the store and acted as one having an interest in the business. Prior to the formation of the firm, Jacob A. Shouse was indebted to his father William Shouse in $6000, exclusive of interest, secured by bond and warrant of attorney, and also to Dickinson and Brother in $4000, being his proportion of the debts of an extinct firm of which he had been a member, and for which sum they held his note. After the dissolution Jacob A. Shouse carried on the business and paid some of the debts of the firm, though just before the dissolution he had confessed their inability to pay a very small bill which was then presented. On the 2d

[1] [Reported by William H. Crabbe, Esq.]

May, 1842, a meeting of the creditors was called, at which Henry W. Shouse acted as if still a partner, and for which, indeed, he had written the call. At this meeting it was ascertained that the firm was insolvent, exclusive of the individual debts of the partners, but no arrangement was effected with the creditors, and thereupon these proceedings were commenced, the petition being filed on the 5th of May.

[2][On the 5th May, 1842, Carr & Hall, and Meckie, Plate & Co. filed a petition for a decree of bankruptcy against Jacob A. Shouse and Henry W. Shouse, brothers, and then lately partners in trade. The petition was in the form prescribed by the rules of court, and set forth that the Shouses were owing to the petitioners, "the sum of $500 and upwards," and that they had become bankrupt, by—(1) Having on the first of April preceding, fraudulently dissolved the firm, and by Henry's having transferred all his interest in the firm, then being insolvent, to Jacob, to enable one William Shouse (the father of the said Henry and Jacob) to enforce against the said assets, a separate debt (which was specified—a judgment in D. S. B., ripe for execution) of $6000, due by Jacob to his father; and also to enable Jacob to pay "a certain other separate creditor of him the said Jacob to a large amount, in whole or in part out of the said assets, to the injury of (your) petitioners, and all creditors of the said firm." (2) By the said Henry and Jacob, or the said Jacob, "with the knowledge and consent of the said Henry" having "made fraudulent transfers of evidence of debt, to prefer divers of the creditors of said firm, to wit, one Hulse, to secure a debt of $149 96, and one Jacob Shouse (a third brother), to secure a debt of $100." (3) That the said firm had become, and was now insolvent.

[The answer denied the facts as charged, and that any act of bankruptcy had been committed, but did not except to the petition for want of precision or form.

[When the case came on to be heard, it appeared, that Carr & Hall held a note of the respondents for $488 46, which, on the 2d May, 1842 (three days before the petition filed), had been given to one Grundy, for an antecedent debt, and which Carr & Hall had on the same 2d May purchased of Grundy at a discount of 25 per cent. for the purpose of making the present petition. It appeared also, that Carr & Hall held in their own right, a note of the respondents, originally for $250, dated the 23d March, 1842, and payable on demand. This note was, however, secured by an assignment of a note of one Healy for $276 67, which would not be due till the 8th–11th June, 1842, and for which note C. & H. had given a receipt, thus, "Received, &c. &c. Healy's note, six months from December 8th, as collateral security;" and besides this, the original note had been reduced by two payments on account, one of $24, on the 1st of April, and another, of $50 on the 7th of April. Its amount, when the petition was filed, was accordingly $176. Meckie, Plate & Co. held two notes, one for $373 47 which was over due at the time the petition was filed, (this note fell due April 26th;) and another for $270 50, which would not be due until more than a month afterwards. Jacob, at the time he entered into the partnership with his brother, owed their father $6000, (the debt alleged in the petition;) and also $4000 to an old partnership, of which he had been formerly a member. Henry owed nothing except the partnership debts. Neither had property except what was invested in the partnership.

[As to the first allegation of the petition, (viz. the fraudulent dissolution and transfer) it appeared by evidence whose competence was not objected to, that the respondents dissolved their partnership connexion on the 1st April, 1842, Henry retiring from the business, but not executing any transfer; the arrangements (which did not appear to be very definite) resting in parol. Henry, however, remained, usually about the store, and appeared to take part in attending to its management. Jacob took the assets, and carried on the business, and between the 1st of April, when the partnership was dissolved, and the 2d of May, when (as is hereafter stated,) the creditors were convened, sold some of the goods, and paid some of the debts, but these debts were less in amount than the proceeds of the goods sold. The concern, was, however, considerably embarrassed, and on the 2d of May, a meeting of the creditors was requested, and held on that evening. An invitation, which was produced, to this meeting was in the handwriting of Henry. On the following evening a committee, which had been appointed the night before, to examine the affairs of the partnership, reported to the creditors that the liabilities were $17,450 90 and the assets $16,692 28, leaving a deficit of $758 68. In consequence of the mode of book-keeping which had been used by the respondents, the state of the firm on the 1st of April, when it was dissolved, did not satisfactorily appear. A book-keeper employed by the petitioners, to investigate the books, testified that the firm was more insolvent on that day than on the 2d of May when they called their creditors together. But the respondents produced another book-keeper, who, on different data, made a different statement. It appeared, however, from M'Henry's evidence, (which as is hereafter stated, was objected to, as incompetent,) that towards the end of March,—a few days before the partnership was dissolved, he, M'Henry, called on the firm for payment of a small bill, which the firm could not, or did not pay. From other evidence, (the note book of the respondents, which was not however filed with the deposi-

[2] [From 1 Pa. Law J. 227, and here published in place of the more condensed statement of facts and briefs of counsel contained in Crabbe, 482.]

tions in the case. After the hearing, it was mislaid by the counsel of one party or the other; and the reporter has, in vain, endeavored to procure it. He cannot, accordingly, give its contents with any nearer precision than he has done;) it appeared that on the 8th of April, a note for $500 fell due, of which but $150 was paid; that on the 20th several other notes matured, on which likewise, but partial payments were made. On the 26th, Meckie, Plate & Co.'s note on which this petition was in part founded, became payable. On the 29th Jacob wrote to his brother John, (as is hereafter stated,) asking him to make a loan of money; and on the 30th was greatly pressed to raise the sum of $100, to replace money of a friend, which a few days before he had misappropriated. The best proposition made at the meeting, was to deduct from the partnership assets the $6000, due the father, and to bring in the $4000 due the old firm into the common stock with the partnership creditors, and then to give the creditors all round 40 p. c. in endorsed notes, having 4, 6, 8, 10, 12, 14, 16, and 18, months to run, with 5 p. c. in the firm's own notes at 20 months. The other evidence of insolvency and fraud, rested on admissions said to have been made by Jacob A. Shouse, at the two meetings of the creditors already mentioned. Henry attended these meetings, and heard all that was said, and made no objection or correction, but did not himself take an active part.

[Cavender, a witness of the petitioners, testified that Jacob was asked by one of the creditors, "Did you now know that you were insolvent at the time of the dissolution?" and that he answered "Yes;" but whether Jacob answered "I did," or "We did," the witness could not say. This witness did not remember hearing any cause assigned for the dissolution of the firm. Greiss, a witness of the respondents, swore that the answer was, "I knew I was." John Shouse, (a third brother, whose testimony was not objected to,) to the same point; and, that in immediate connexion, Jacob proceeded to speak of the debt due to his father, and the old firm. These last two witnesses, and M'Carraher, (a witness of the petitioners) heard no other cause assigned for the dissolution of the firm, than that Henry was not in good health, and wished to retire from the city. But M'Carraher stated, that Jacob, at one of the meetings, had said that Henry was well aware of the condition of the firm, and, notwithstanding his retirement, that he knew he would be liable for the debts of the firm. This witness stated also, that at one of these meetings, when Jacob was urging a compromise by which the $10,000 due to him individually should be satisfied, as before stated, out of the partnership assets, and the subject of conversation leading to it, John Shouse (a lawyer of Easton, and who represented his father) produced his father's bond, and said that he could take out of the partnership stock the entire amount of the bond. With regard to this bond, it appeared that on the 29th April, 1842, John Shouse, having received a letter from Jacob, asking the advance of money, came to Philadelphia, and, in behalf of his father, who likewise resided at Easton, entered judgment on the bond, in this city. But all this part of the case was made much stronger for the petitioners, by the evidence of Freytag and of M'Henry; but their competency was objected to, before the commissioner, and on the hearing, upon the following grounds: Freytag, was a member of a certain firm who at the time of filing the petition, and still, were creditors of the respondents. To give himself competency, he produced an assignment by himself to another member of his firm, just before the testimony was taken, (June 3d,) and a release by the assignee, "from all, and all manner of liability or responsibility on account of the transfer." Freytag in his evidence stated that his firm was solvent. M'Henry, like Freytag, belonged to a firm which, up to the day the testimony was taken, had been a creditor of the respondents; but on that day the firm, (itself composed of two brothers) had assigned the claim (to their father,) at 25 p. c., in a note of this father, payable on demand. (M'Henry and Freytag, with another creditor, one of the petitioners, were the committee which had been appointed, as before stated, on the 2d May; and they had, accordingly, in a good measure, taken the lead, and been deferred to.) Both these persons, then, stated, that the answer of Jacob Shouse, to the question already mentioned, was, "We were aware." Freytag, however, stated, that he heard no cause assigned for the dissolution of the firm, but Henry's being tired of business, and desiring to remove into the country. But M'Henry stated, that in answer to a question put, or a statement taxed upon Jacob, Jacob had answered that he had dissolved with his brother, for the purpose of enabling his father's judgment to hold good against the stock; that himself suggested, and in fact positively asked Henry to have a receiver appointed, which Henry declined to do, in consequence of his desire to save his father the $6000; and finally that John Shouse said, that if the creditors did not come into an arrangement, the father would proceed to sell under his judgment. (But John Shouse swore positively, that "nothing of the kind," stated by M'Henry as having been admitted to be the cause of the dissolution, was said at the meeting referred to.)

[As to the second allegation,—the preferences. 1st, Hulse's. On the 2d May, (the day on which the creditors were convoked,) a note of one Lee, for $130 had been assigned to Hulse, to secure a debt of $149 96, money borrowed on the preceding 27th April. By which of the brothers the money had been borrowed, did not appear, but a note addressed to Hulse, May 2d, 1842, (the day, as

has been stated, on which the creditors were convened.) requesting him to hold Lee's note "as collateral," was written by Jacob, and signed in the firm's name; and the collateral itself was indorsed by Jacob in the same name, and both Freytag and M'Henry stated, that at the meeting of the creditors, Jacob, in Henry's presence and hearing, and unreproved by him, acknowledged the transfer of the collaterals for the debts due to Hulse, and to John Shouse, which, Jacob proceeded to state, the firm wanted to prefer, to pay in full; and M'Henry added, that Jacob said "they didn't wish any one to lose borrowed money, and the bankrupt law prevented them making preferences." 2d. John Shouse's. On the 30th April, Jacob applied to his brother John, for a loan of $100, which he was "extremely anxious" to have, for the purpose of paying a debt of a friend who had sent him $100 to pay it; which money, he, Jacob, being very much in want of, had used, with the expectation of making it good in a few days. John agreed to give him the money, if Jacob would make him secure, which Jacob did, by giving a note of a third person, for $147, as collateral; John giving "a written promise to return him the difference when the note was paid." (John Shouse's testimony.)

[The case was argued at great length, and with much contention as to the credibility of the witnesses.

[Mr. Gerhard for the petitioning creditors. This is an issue, in an equity cause, between the petitioning creditors, as complainants, and the two Shouses, as respondents. There are no other parties to the proceedings. Under the rules of court, the petition and answer elicit one or more issues. In the present case the joint trading of the respondents, and their being debtors to the requisite amounts are not put in issue. The case is narrowed to the discussion of the issues. By evidence not disputed, it appears that the transfer to Jacob was voluntary, without consideration, without any declaration of trust, and was made by one member of an insolvent firm, to his copartner yet more insolvent. The property which before belonged to the partnership, became the individual property of Jacob; it became subject to the father's judgment which had just been made ready for execution; and the whole transaction was out of the ordinary course of business. These facts speak loudly as to the object of Henry's retirement. The purpose of the dissolution appears yet more plainly, in what was said by Jacob, at the meeting of the creditors. It may be objected, that the testimony of M'Henry is not the same with that of the other witnesses. His testimony, however, is positive, and therefore better, than that of the other witnesses. It is a general law of evidence, that positive testimony is to prevail over that which is but negative. One witness may have been attending when others were not, may have heard what another did not, may remember what another has forgotten. In this case, the evidence can be reconciled. M'Henry, moreover, was one of the committee, more acquainted with the whole subject than the other creditors were, more interested in what passed, and therefore more to be relied on, when he speaks so unequivocally. M'Henry, Freytag, and McCarraher, all speak as to John Shouse's production of the father's bond. They must be taken to be as intelligent as the witnesses who do not support them, and being more numerous, their testimony, according to a settled rule of evidence, must prevail. M'Henry and Freytag are uncontradicted on all other points. But no mttter what may have been the intent of the dissolution. It was a general assignment by Henry of his property, for he had no general property. Now, a general assignment, it is well settled, is an act of bankruptcy. Compton v. Bedford, 1 W. Bl. 362: because, says Mansfield, it "creates an insolvency"; Law v. Skinner, 2 W. Bl. 996: for, says, De Gray, the trader "can carry on no business"; Alderson v. Temple, 4 Burrows, 2235: because, says Lord Mansfield again, "it would be rescinding the whole system of the bankrupt laws," and having the debtor, instead of the great seal, appoint the trustees. S. p., Ex parte Foord, decided by Lord Hardwicke, cited in 1 Burrows, 477; Thornton v. Hargreaves, 7 East, 544. And see, particularly, Stewart v. Moody, 5 Tyrw. 493, 1 Cromp. M. & R. 777, and Siebert v. Spooner, Tyrw. & G. 1075, 1 Mees. & W. 714, —modern cases, where the subject is regarded as fully settled. This point has been similarly decided, and on similar grounds, by Judge Conkling of the Northern district of New York. Barton v. Tower [Case No. 1,085]. And he remarks that the provision of our act has been copied nearly verbatim from the act of 5 Geo. IV.

[2d. As to the preferences. First. Hulse's. This preference was unsolicited by Hulse. It was given at the same time that he received notice to attend the meeting of creditors, and was therefore in contemplation of bankruptcy. It is an act of bankruptcy. Harman v. Fishar, Cowp. 117; Ogden v. Jackson, 1 Johns. 370. Pulling v. Tucker, 4 Barn. & Ald. 382. Second. John Shouse's. This money was borrowed for the purpose of enabling the bankrupts to make a preference; and this purpose was known to John Shouse. John Shouse cannot thus enable his brother to do that indirectly, which if done directly, would be a fraud on the law. Nor is it material that the transfer was contemporaneous with the advance. In Linton v. Bartlet, 3 Wils. 47, "a trader, in consideration of a loan of $201 * * * being in insolvent circumstances, assigns one third part of all his effects to the lender, who is his brother." Per Cur.: "Although this may be a hard case upon the brother, who is a bona fide creditor, yet the giving him a preference is

a fraud upon all the laws concerning bankrupts, &c. There is no case wherever such a preference as this was allowed. The same spirit of equality ought to warn the courts of justice which warned the legislature when they made the bankrupt laws, &c. It is a bill of sale made by a trader, when he was insolvent, and plainly had an act of bankruptcy in contemplation, &c. The deed is void." This case is in point.

[3d. The insolvency of the firm; which, as I contend, is made an independent and specific act of bankruptcy under the 14th section of the act. That section declares "that where two or more persons, who are partners in trade become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners." Under the recent English statutes, insolvency is almost synonymous with bankruptcy. It would seem that congress did not wish to extend our bankrupt system so far, but confined insolvency, as an independent act of bankruptcy, to partnerships. In fact, in such cases it is almost essential for the protection of the respective rights of the individual and firm creditors. because the minute provisions contained in the 14th section, secure the proper distribution of the individual and firm assets. The meaning of the words is plain; and if read without attempt at refined criticism, they present no difficulties. On the other hand, any effort to escape from the obvious meaning of the words produces contradictions and absurdities. Either insolvency is, in the case of partnerships, a substantive act of bankruptcy, or it is a superadded requisite to the declaration of partners as bankrupts—a reductio ad absurdum. In addition, it must follow that without the 14th section, partners could not be declared bankrupts—a construction which would be in direct conflict with the whole current of English decisions and those of this country, on the former bankrupt law.

[Mr. J. M. Porter, Mr. Mallery, and Mr. Charles Gilpin, for the respondents, said that the case was defective in its outset. The debt of $500, said to be due to the petitioners, was stated in too general a way. It did not appear to whom the debt was due,—whether to C. & H., or to M. P. & Co., nor did the character of the debt appear. It was impossible for an averment so defective in precision, to be answered. Besides, $500 are not due in the sense required by congress; for, first, C. & H. bought one of their debts, (Grundy's,) for the purpose of instituting this proceeding. They ask to make a law, designed to aid honest creditors, subserve the animosities of malignant ones. The court will not assist in experiments of cruelty. Every act of bankruptcy is supposed in law, to be a fraud upon the petitioning creditors; but how can this be when that person had no debt existing at the time? He is no party grieved. In Ex parte Lee, 1 P. Wms. 782, the chancellor says, "Had the endorsement, &c. been made after the bankruptcy, it might be a question, whether such indorsee would be entitled to a commission—he not being a creditor, &c., or capable of taking out a commission at the time of the party becoming a bankrupt." Second. The other claim of Carr & Hall, is not enforcible at this time. It is secured by Healy's note, not yet due. It can't be doubted, that it was understood that the note for $250 should not be enforced till it was seen whether Healy's note would be paid. Except forbearance, there was no consideration for the transfer of Healy's note. Payments have been made on account; and every thing shews that it was understood there should be no process. At any event, the note of Healy, should be surrendered. Third. The debt of $270 50, to M. P. & Co., is not yet due. In point of law it is no debt. In the construction of the act of congress, technical words must be construed technically. To "owe" debts not due, is a legal absurdity. Could an action of debt, or assumpsit, or any action be brought on such a debt? Could the plaintiff declare that the defendant, "to him owed, and from him unjustly detained" such a debt. The answer would be "Nil debet." Therefore, the only debt on which the petition can rest is one of $373 47, due Meckie, Plate & Co.; and this debt is insufficient in amount.

[But as to the merits. Freytag and M'Henry are the two principal witnesses of the petitioners. Both are incompetent. Though Freytag assigned his interest in the note, to his co-partner, it is still the property of the firm; so much so at least, as that it is applicable in the first instance, to the payment of partnership debts. His interest in the note, and also in the firm, is that which remains after payment of these debts; and he is interested in obtaining a decree, by which the note will be certainly provided for. Then, as to M'Henry. Can it be believed, that the note given by M'Henry, the father, to the firm, and payable on demand, will be enforced in case nothing is realized from Shouse's note. M'Henry having given his note, is a legal consideration for the transfer, even if never paid. The firm is obviously interested that their father should receive the amount of Shouse's note. The evidence of both Freytag & M'Henry, must, then, be eliminated; and the case then falls down. The dissolution appears to have been fair, and for the purpose of enabling Henry to withdraw from business. Neither William Shouse nor John Shouse, nor any other of Jacob's separate creditors, were informed of the dissolution. There is no evidence, in either case, that any property of the firm was ever offered to these creditors, or ever agreed to be given to them. On the contrary, Henry, notwithstanding ill health, and a desire to withdraw to the country, still remained

supervising the affairs he had left, and seeing that the firm's affairs were properly conducted. Besides, is it credible that Henry, who it appears, well knew of his liability for the firm's debts, should love his brother's creditors so much better than those who were at once both his own and his brother's, as to assign his property to pay that brother's creditors?—this, too, when by so doing, he would not relieve his brother from debt, but only substitute one class of creditors for another. Admitting that John Shouse said, at the meeting, what Freytag and M'Henry say, that he did. What of it? It was said only pending a negotiation of compromise; and to induce it. Did he ever do what he said he could do? or rather, did Jacob and Henry ever assist him in doing it? for until you so connect the acts or designs of the father or his agent, with those of Henry and Jacob, as to make the acts or designs of the former, the acts and designs of the latter likewise, it is of no importance what John or his father threatened to do, or even what they did. It appears that John Shouse came to town, to enter judgment against the firm, when they, so far from assisting to protect the father, were asking of John, his agent, additional advances. It was an act induced by John's alarm for his father; and so far as adverse relations existed, of an adverse nature of the interests of the firm. It was in invitum. But it is said, that the transfer was an act of bankruptcy, no matter what may have been its object. We admit that according to the English decisions, a general assignment is an act of bankruptcy. But an assignment is a transfer under seal. 2 Bl. Comm. 310. This transaction had none of the qualities, and none of the effects of a general assignment. The right of levy, and every other right of the partnership creditors remained undisturbed by this transaction. It was a mere retirement of Henry from the firm. But besides the English doctrine has not been followed by this court. It is a doctrine which has not proved satisfactory even at home. Eden speaks of it, as a doctrine "difficult to understand" (Eden, Bankr. Law, 28); as one whose reasons "are by no means satisfactory" (Id.). Lord Eldon has more than once expressed his disapprobation of the doctrine. 16 Ves. 148; 17 Ves. 198. It got foot from a N. P. decision of Lord Mansfield (Coke, Bankr. Law, p. 100), whose great name controlled subsequent judges against their own judgment. On principle, it is not easy to understand the doctrine. Such an assignment is good at common law; by the statutes of Elizabeth; and it is not declared by the bankrupt act to be void. Nor is such an assignment against the policy of the act. The policy of the act is, that creditors shall be paid alike; and the act has no further policy. Now a general assignment, without preferences, does exactly this thing. It may not do it in the manner and through the same forms as the bankrupt law would do it; but the machinery of the act is no part of its policy. The court has no right to extend the policy of the bankrupt act, beyond the point that the bankrupt act has, itself, defined. So inconvenient has the doctrine been found in England, that according to Eden (Bankr. Law, 31), the legislature (Geo. IV. c. 16), has been obliged to ingraft a limitation on the principle.

[Now, as to the preferences. "Fraudulent." as used in the first section of the bankrupt law, means fraudulent, in ordinary signification. It is used without any reference to qualification, by future parts of the act. The assignment must be shown to be fraudulent in fact, or by some principles of law, independently of the bankrupt act. Now neither preference was of this character; for it is lawful for a debtor to prefer a bona fide creditor. Then does the preference come within the 2d section, and become void as being a fraud upon the bankrupt act? To be void on that ground, it must have been made "in contemplation of bankruptcy." We observe, first, that there is not evidence even of insolvency, and this is in answer, likewise to the 3d allegation of the petition. The two book-keepers are in conflict. The committee found the firm. a month after the dissolution, nearly solvent. As to the proposition to pay 45 per cent, it was a proposition, made during a treaty, and under an attempt to make an advantageous compromise. But it was made on an estimate which brought Jacob's separate debts as a charge on the firm's property. It was a proposition which failed, and failed because the partnership creditors refused to agree to it. It was dependent, and to be dependent on their assent. If an execution had issued on the father's bond, the process would have been set aside. If there had been danger of misapplication of the partnership effects, equity would have appointed a receiver. Those effects were fettered by a trust, which nothing could dislodge. The firm was solvent; or. at all events, there was no contemplation of bankruptcy, which is always a question of fact. (The counsel then pursued the same course of argument as Mr. Sergeant did in Potts and Garwood [Case No. 11,344], and as Mr. Mallery did, in Breneman's Case [Id. 1,830]). But the petition makes no allegation of "a contemplation of bankruptcy." According to its own showing the preference may have been valid. The petition should possess the essential qualities of a declaration; and this court has already decided in Potts and Garwood [supra] that it will not hear proof of any thing not alleged in the petition, nor put in issue. This is conclusive as to the preferences. But suppose the petition to be sufficient. Are the preferences acts of bankruptcy? First, the transfer to John Shouse. It was contemporaneous with the money advanced. It was clearly bona fide; and if such a transfer was invalid, so would an ordinary sale have been; for where a party can sell, be can pledge or mortgage likewise. For

aught that appears, the case cited from 3 Wils. 47, was for an antecedent debt. But in addition to this, the whole transaction was with Jacob alone. Second. Hulse's preference. Striking out the evidence of Freytag and M'Henry, there was nothing to shew that Henry was cognizant at any time, of the transfer. The note inclosing the transfer, was written by Jacob alone. It was written after the dissolution of the firm, and when, according to the averment in the petition, the object of Henry was to give Jacob entire control.

[As to the 3d allegation—the insolvency of the firm,—which it is alleged, is ground for a decree under the 14th section of the act. The language of the section is peculiar. "Where," &c., "partners in trade, become insolvent, an order may be made in the manner provided in this act" to secure partnership effects to partnership creditors, and individual property to individual creditors. Now the word "order," though used in both sections 10 and 11, is not used in the sense of a decree of bankruptcy. It is a direction of the court made subsequently to such decree. A decree must precede it. "Insolvency," can mean, therefore, nothing but insolvency as ascertained by a decree of bankruptcy. Any other construction would render the bankrupt act, both impracticable and dangerous;—impracticable, because insolvency is an issue which it would be scarce possible, in many cases, to ascertain: For example, in the case of a firm whose affairs were on a large scale, the court would be involved in investigations as to the condition of debtors on all parts of the earth; and in speculations upon the course of commerce, of politics, and of many other things which in their nature could afford no data for conclusion. The construction would be dangerous, because it would enable a discontented partner, or a malignant enemy, to destroy the most stable commercial house, if largely engaged in trade. If the petitioner can't prove insolvency, he can, at least, produce it. The firm is advertised as among bankrupts. Its creditors make a rush. Its credit is destroyed. Its resources exhausted; and itself is ruined. Yet the way is irremediable. This is the nature of commercial credit. So obvious are these considerations, that of two improbabilities, it is more easy to believe that the word "insolvent," has been inadvertently used for "bankrupt," than that congress should not have perceived the disastrous results which judicial action upon the strict sense of the term "insolvent," would produce. The object of the provision, it may be fairly contended, was nothing more than to regulate in an equitable manner, the distribution of partnership, and individual effects.

[The counsel ended by saying, that the power given to an individual to proceed against merchants who might prove entirely solvent, was one, which, if not strictly regulated, would prove pernicious. Nor was the mischief remediable by discharging the petition. The court ought early to announce its determination to encourage no proceeding of this sort, unless the petitioner was ready to sustain his allegations,—sustain them—not by questionable evidence, by conjectures, or by inferences, but by clear, direct, and connected testimony. The petitioner came into court, swearing that he was ready to prove his allegations. If the court acted on this principle, it was impossible to award a decree against Henry W. Shouse; and failing in part, the petition would be dismissed.

[It was replied. The respondents do not rely on any merits of their own; their effort is, to invalidate the case of the petitioners. Have they succeeded in this effort? To their first objection,—that the debt of $500 is defectively stated, it is a complete answer, to say, that this court has set forth a form of petition (Rules & Forms Bankr. p. 41), and that the form prescribed is literally adhered to, in this petition. The English form may be more precise, but that is a matter regulated by a rule of the English court of chancery. This court has adopted a different rule. It is contended next, that the respondents do not "owe debts amounting in the whole to not less than $500," to the petitioners. This is a point not raised by the issues. The existence of the debt is averred by the petition, and is not denied by the answer. The court should, therefore, not allow the question to be discussed, for the case of Potts & Garwood [supra] has decided that parties will be confined to the discussion of the issues.

[But let us examine the objection. 1st. As to Grundy's debt, (for $488.46), in regard to which, it is objected that it was bought by the petitioners after the act of bankruptcy was committed, and so not owing. Whatever dicta or decisions may have been formerly made, on this point, the modern law is that the indorsee comes in on the ground of the original debt; and if the petitioner be a creditor when the petition is filed, that is enough. This point was settled in the K. B. in Glaister v. Hewer, 7 Term R. 498. See, also, Bingley v. Mallison, 3 Doug. 333; Anon., 2 Wils. 135, and Key v. Cook, 2 Moore & P. 720.

[2d. As to the debt of $176, secured by Healy's note. It is argued, that for the purpose of this application, the original debt is extinguished by this security: This, however, cannot be, unless there was some contract to forbear; and there is no evidence from which such a contract can, fairly, be inferred. Undoubtedly Carr & Hall could have sued the respondents at law—there being no stronger evidence of contract to forbear. In Hill v. Harris, 1 Moody & M. 448, a stronger case than this, Lord Tenterden held, that where money was lent on a mortgage payable after six months' notice, such notice not to expire before the 30th January, 1830, a commission was properly sued out on the debt, in March, 1829. See also, Culver v. Calender [Case No. 3,467].

[3d. As to the debt of $270.50 to Meckie,

Plate & Co., to which it is objected that it is not yet due. The answer is, that the act don't require that the debt should be due. The act requires only, that the respondents should owe debts; and as is remarked by Judge Conklin (Barton v. Tower [Case No. 1,085]), the phraseology of the act in relation to the debt of not less than $500 to the petitioning creditors, is the same in this respect as that used in relation to the aggregate amount of debts which the debtor must owe, of not less than $2,000, and it will not be pretended that these debts must be actually due.

[The object of the provisions in regard to each requirement as to the amount of the debt was to prevent insignificant creditors, from occupying the time of the national courts with their petty litigations. The "debitum in præsenti solvendum in futuro," is well known to the law; and the case of Hill v. Harris, 1 Moody & M. 448, already cited, shows that the petitioning creditors' debt need not be due.

[Respecting the competency of M'Henry and Freytag. If incompetent in the first instance, their assignments and the release have divested them of all legal interest in the matter. Willings v. Consequa [Case No. 17,767]; Sinclair v. Stevenson, 1 Car. & P. 582. "Curia advisari vult."] [3]

RANDALL, District Judge. Several exceptions have been taken, by the counsel for the respondents, to the regularity of the proceedings in this case, which it may be well to consider before entering into any examination of the merits of the application, for, if well founded, they must put a stop to the present proceedings. It is said the petition is informal, inasmuch as it does not state the nature and character of the petitioning creditors' debt. This, however, I apprehend to be wholly unnecessary. It sets forth that the respondents owe them five hundred dollars and upwards; this is all which is required either by the act of congress or the rules of court; indeed, the form of petition prescribed by the court, has been literally followed by the petitioners, and is sufficient to institute the proceedings, although it may not be sufficient to entitle them to a dividend of the assets. The same general allegation of indebtedness was made under the bankrupt law of 1800 [2 Stat. 19] (Coop. Bankr. Law, Append. vii.), and in England no other particulars are required. Ex parte Ward, 1 Atk. 153.

It is next said that the debts of the petitioning creditors were not due at the time of presenting their petition, and therefore it cannot be prosecuted. Without deciding whether it is or is not necessary that the debt should be due at the time of presenting the petition (which I strongly incline to doubt), it is sufficient to say that in this case the question does not arise. It is admitted that there was due to Meckie, Plate & Company, one firm of the petitioners, $373 47, being the amount of a promissory note drawn by the respondents, and which fell due on the 26th April, 1842; and that Carr & Hall were the owners of a note drawn by the respondents in favor of Edmund Grundy, dated the 5th October, 1841, at six months, for $488 46. But this last note, it is said, was not given by the respondents until the 2d or 3d of May, 1842, and was then purchased by Carr & Hall from Grundy; that this being after the acts of bankruptcy complained of, the amount cannot be computed in Carr & Hall's claim; and that a creditor will not be permitted to purchase claims against a debtor, and thus enable himself to obtain a commission of bankruptcy. To this I cannot agree. The act of congress declares that the application shall be "upon the petition of one or more of their (the bankrupt's) creditors, to whom they owe debts amounting in the whole to not less than five hundred dollars." The object of this was, no doubt, to prevent frivolous and vexatious applications by creditors holding trifling demands, and when perhaps the expense of the proceeding might equal the debt to the creditor. All, however, that is required by the act is, that the petitioners should be creditors to the amount of five hundred dollars at the time of presenting their petition. Now it is admitted that the debt was justly due and owing to Grundy, and it is proved that the note was given to him to enable him to sell it to Carr & Hall; by the purchase they became the creditors in place of Grundy, and were as much entitled to join in this application, as he would have been before the sale of the note. Glaister v. Hewer, 7 Term R. 498; Ex parte Lee, 1 P. Wms. 782. There was also a debt of $176 due to Carr & Hall for money loaned by them to the respondents, and as collateral security therefor they held a note drawn by one Healy, not yet due. The respondents, however, had also given their own note for the amount, payable on demand, and suit could have been maintained thereon at once; for though Healy's note was not yet due, it had not been received as a payment, but as a pledge or security, to be surrendered when payment was made. Thus the amount due and owing to the petitioning creditors, on the 5th May, when the petition was filed, amounted to upwards of $1000, and the debts actually due by the respondents to more than $2500.

The exceptions to form being thus disposed of, let us examine what are the acts of bankruptcy complained of, and how they are supported by the evidence. The petition charges that the respondents became bankrupt on or about the 1st of April last: By a fraudulent dissolution of their partnership and transfer of all the interest of Henry Shouse in the assets of the firm, they being insolvent, for the purpose of enabling one William Shouse to enforce against the assets a separate debt of Jacob A. Shouse to the said William Shouse to the amount of $6000, bearing interest, under a judgment bond executed the

[3] [From 1 Pa. Law J. 227.]

15th January, 1833, before the formation of the partnership; and also to enable him, the said Jacob A. Shouse, to pay a certain other separate debt of his, the said Jacob's, to a large amount, in whole or part out of the assets of the said partnership, to the injury of the petitioners and the other creditors of the firm; and by the said Jacob and Henry, or Jacob with the knowledge and consent of Henry, having made fraudulent transfers of evidences of debt to prefer divers creditors of the firm; to wit: to Charles Hulse, to secure a debt of $149 96, and to John Shouse, to secure a debt of $100. The answer of the respondents distinctly and unequivocally denies each of the allegations in the petition, and that any act of bankruptcy has been committed. From the evidence reported by the commissioner, it appears that the respondents entered into copartnership, in the dry goods and hosiery business, about the 1st August, 1840, and continued until the 1st April, 1842, when the partnership was dissolved by a verbal agreement, Henry W. Shouse retiring from the business, which was continued by Jacob, who took the assets and assumed the debts of the firm; he continued in business until the 2d May, 1842, and during that time, sold goods to the amount of $2473 19, and paid debts of the firm amounting to about $1800; he also purchased goods on his individual account to the amount of $506 67. Prior to entering into copartnership with his brother, Jacob was indebted to his father, William Shouse, who resided in Easton, Pennsylvania, in the sum of $6000, for money borrowed in 1833, for which his father held his bond and warrant of attorney to confess judgment, and was also indebted to the firm of Shouse, Dickinson, and Company, of which he had been a member, in the sum of $4000, for which they held his notes. On the 2d of May, 1842, the respondents called a meeting of the creditors of the firm, and stated their inability to pay their debts. A committee of creditors was appointed to examine into their affairs, and on the 3d, reported that the liabilities of the firm amounted to $17,450 96, and their assets to $16,692 28, showing a deficiency of $758 68. They also reported that Jacob A. Shouse was indebted to Dickinson and Brother in $4000, for his proportion of the debt of Shouse, Dickinson & Company, and to his father in $6000, on the bond before mentioned, but they did not consider it just or proper that either of these debts should be paid out of the assets of the firm. The respondents, however, insisted that the debt to their father should be first paid in full, and Dickinson and Brother be allowed to come in, pro rata, with the other creditors; or they proposed to pay forty per cent. on the amount of the claims in eight equal instalments at four, six, eight, ten, twelve, fourteen, sixteen, and eighteen months, in notes to be endorsed by William Shouse, and the further sum of five per cent. in their own notes, without endorsers, at twenty months. The committee recommended that this proposition be declined. At both of the meetings William Shouse was represented by his son John, who had the bond in his possession, and, on the 3d May, entered judgment thereon in the district court for the city and county of Philadelphia. The creditors declined acceding to the proposition of the respondents, and this petition was filed on the 5th of May.

It has been insisted by the counsel for the petitioning creditors that the dissolution of copartnership, and assignment by Henry to Jacob of all the property of the former in the firm, was, in itself, an act of bankruptcy, as it assigned all his property, he having no separate estate. To recognise this doctrine would be most disastrous to the business community. A member of a commercial firm could not retire from it, no matter with what motive, without making himself liable to a commission of bankruptcy, and his copartners subject to the contingency of having their business broken up and destroyed when they were in a flourishing condition. Such a dissolution cannot be considered as necessarily, in itself, an act of bankruptcy in any of the copartners; there is no intrinsic evidence of fraud on the face of it, and unless accompanied by fraudulent acts or intentions it is perfectly legitimate. But if the dissolution is a mere cover to conceal either actual or legal fraud, or with intent to give a preference to a separate creditor over those of the partnership, or to bring him in on an equality with them in the distribution of the assets of the firm, which could not have been if the partnership had continued, then there is such a fraud on the partnership creditors as will make it an act of bankruptcy; for it matters not what may be the mode of conveyance, if the intent is fraudulent courts will guard against any evasion of the law. The intent then with which the dissolution was agreed upon being the material point for consideration in this first charge, it is necessary to examine more minutely the details of the evidence as to the acts and doings of the parties, at and about the time it took place, and, as this is more a question of fact than of law, I would be glad if I could at once refer it to a jury for determination, but as the act of congress has imposed on me the duty of deciding it in the first instance, I will do so according to the view I have taken of the evidence.

Much has been said as to the credibility of witnesses as well as in regard to their competency. I conceive it to be the duty of a judge, as of a jury, where there is a conflict of testimony to give such a construction to it as will, if practicable, reconcile the whole, or, if that cannot be done, to give more weight to direct and positive than to negative testimony, but if the evidence be uncontradicted, and not improbable in itself, that full faith should be given

to it by the court. With this view I have carefully examined the testimony exhibited to me, and am of opinion that the weight of it is in favor of the petitioning creditors. In coming to this conclusion I have less difficulty, as it is not obligatory on the respondents, who have the right of appealing to a jury to determine the correctness of my decision, while a contrary course would be binding upon the petitioners. As the case will, without doubt, go to a jury, I will not enter into any detailed argument on the facts, but briefly state the principal grounds on which my conclusion is formed. The business of J. A. and H. W. Shouse does not appear to have been very prosperous. A short time before the dissolution of the copartnership Mr. M'Henry called on them for the payment of a small bill: Jacob said they were unable to pay it; that he was sick of the business and had made up his mind to quit it; that he then owed $10,000 in his individual capacity and had no property but his interest in the partnership concern. There is no evidence that Henry in his individual capacity owed a dollar. Six thousand dollars of Jacob's individual debt was owing to their father, who could have no claim on the property of the firm till the partnership debts were paid. Under these circumstances they dissolved partnership on the 1st April, and the property of the firm was assigned to Jacob. It is true some payments were made by him on account of the debts of the firm, but not equal to the amount of sales. As early as the 8th April a note for $500 became due, of which only $150 was paid, and on several other notes which fell due before the 20th of that month only partial payments were made; on the 26th, the note for $373 47, held by Meckie, Plate & Company, fell due, and no part of it was paid.

It is evident that the firm was in difficulties at the time of the dissolution, but it is said that this step had been contemplated for some time, and that Henry, in consequence of ill health, wished to remove to the country. The evidence is, however, that, notwithstanding the dissolution, Henry remained in town, continued about the store, and actually wrote the notices for the meeting of creditors on the 2d of May; at that meeting he took an active part, and when requested by one of the creditors to agree to the appointment of a receiver, acknowledged his authority to do so, but declined, and expressed his desire that the bond to his father should be paid. It is unnecessary at this time to enter into the various declarations made by the parties at the meeting of creditors, and about which contradictory testimony has been given; or to decide how far the acts and declarations of one partner may be given in evidence against the other. I consider the act of dissolution and transferring the joint property to Jacob as the act of both partners, and altogether different from the case of an individual transferring his property to a third person, which, of course, could not be considered an act of bankruptcy in the grantee. The preference of Hulse I also consider as the act of both parties, being given by Jacob and approved by Henry. The money was borrowed on the 27th of April, and on the 2d May, the very day on which the first meeting of creditors was held, the preference was given, and, for aught that appears, was unsolicited. That they then contemplated bankruptcy can scarcely be denied. It is true this preference was for money borrowed, and was not of very large amount; but, it matters not how meritorious the creditor or hard the case, the law considers all creditors as on an equal footing, and prohibits favor to any. The alleged preference to John Shouse strikes me differently. The security or preference was given at the same time the money was borrowed; it was not for a bygone or prior contracted debt; and it was surely competent for them to give the security on receiving the money. Nor is it any answer to say that the money was borrowed for the purpose of paying another creditor who was thereby preferred; the allegation in the petition is that the preference was given to John Shouse, and that is the only charge the respondents are called upon to answer.

Believing, however, that the petitioners have sustained their first and second charges, the decree prayed for is granted.

Case No. 12,816.

In re SHOWER.

[6 N. B. R. 586; [1] 4 Chi. Leg. News, 299.]

District Court, D. Kentucky. June, 1872.

BANKRUPTCY—DISCHARGE—BANKRUPT ACTS—PROPORTION OF ASSETS.

In proceedings in bankruptcy commenced after January first, eighteen hundred and sixty-nine, where it does not appear either that the bankrupt's assets are equal to fifty per cent. of the claims proved against him on which he is liable as principal debtor, or that the requisite number of his creditors have assented to his discharge, a discharge from debts contracted prior to January first, eighteen hundred and sixty-nine, only, will be granted although the bankrupt shows that his assets equal fifty per cent. of the claims proved against his estate that were contracted subsequent to January first, eighteen hundred and sixty-nine.

[Cited in Re Hershman, Case No. 6,430; Re Pierson, Id. 11,154.]

In bankruptcy.

BALLARD, District Judge. On the twelfth day of October, eighteen hundred and seventy, John L. Shower filed his petition to be adjudged a bankrupt. He now applies to be discharged from all debts, from those which

[1] [Reprinted from 6 N. B. R. 586, by permission.]

were contracted on or after January first, eighteen hundred and sixty-nine, as well as from those contracted prior to that date. In support of this application he shows assets equal to fifty per centum of such claims proved against his estate as were contracted on or after the first of January, eighteen hundred and sixty-nine, but fails to show that his assets are equal to fifty per centum of all the claims proved against his estate on which he is liable as principal debtor. It is indisputable that the application must be granted so far as it seeks a discharge from the debts contracted prior to January first, eighteen hundred and sixty-nine, but I do not agree with the register that upon the facts shown, any discharge can be granted from the debts contracted on or after that date. The only provisions of the statute which relate to the subject are to be found in the second clause of the thirty-third section of the act of March second, eighteen hundred and sixty-seven (14 Stat. 532), in the amendment of July twenty-seventh, eighteen hundred and sixty-eight (15 Stat. 227), and in the further amendment of July fourteenth, eighteen hundred and seventy (16 Stat. 276).

Let us now bring the provisions of these several statutes together, and after learning the meaning of the original act, as amended by the act of July, eighteen hundred and sixty-eight, endeavor to ascertain how this meaning is modified by the act of July, eighteen hundred and seventy. The second clause of the thirty-third section of the act of March second, eighteen hundred and sixty-seven, provides, "And in all proceedings in bankruptcy commenced after one year from the time this act shall go into operation, no discharge shall be granted to a debtor whose assets do not pay more than fifty per centum of the claims against his estate, unless the assent in writing of a majority in number and value of his creditors who have proved their claims is filed in the case at or before the time of application for a discharge." I believe it has been universally held, that this provision of the act went into operation on the first day of June, eighteen hundred and sixty-seven. The act of July twenty-seventh, eighteen hundred and sixty-eight, provides that said clause be so amended as to read as follows: "In all proceedings of bankruptcy commenced after the first of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims, proved against his estate, upon which he shall be liable as principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, be filed in the case, at or before the time of the hearing of the application for a discharge."

This amendment effected several changes: First. Under the original act, the bankrupt could not obtain a discharge upon showing simply that he had conformed to his duty, unless the proceedings by or against him were commenced on or before the first day of June, eighteen hundred and sixty-eight. By the amendment he may obtain his discharge upon showing such conformity, if the proceedings were commenced on or before the first of January, eighteen hundred and sixty-nine. Second. Under the old law, in proceedings commenced after the first of June, eighteen hundred and sixty-eight, the bankrupt could obtain no discharge, unless his assets paid fifty per centum of all claims against his estate, whether owing by him as principal debtor or otherwise; by the amendment, in proceedings commenced after the first of January, eighteen hundred and sixty-nine, he is entitled to his discharge, if his assets are equal to fifty per centum of the claims proved, upon which he is liable as principal debtor. Third. By the original act, if the bankrupt, in asking for a discharge, relied upon the assent of his creditors, he was obliged to file such assent in the case at or before the application for discharge; by the amendment, the assent may be filed at or before the time of the hearing of the application.

Under the original act of March second, eighteen hundred and sixty-seven, and the amendment of July twenty-eighth, eighteen hundred and sixty-eight, the bankrupt was entitled to a discharge from his debts, no matter when the debts were contracted, but he was not entitled to such discharge unless proceedings were commenced within a given time. His right to a discharge did not depend upon the date of his debts, but upon the date of the proceedings. If the proceedings were commenced before the given date, he was either entitled to a discharge from all his debts (except those expressly excepted), or he was not entitled to a discharge from any. If the proceedings were commenced by or against him after the first of January, eighteen hundred and sixty-nine, he could be discharged from no debts, no matter when contracted, unless his assets were equal to fifty per centum of the claims proved against him, upon which he was liable as principal debtor, or unless the assent in writing of a majority in number and value of his creditors, to whom he was liable as principal, and who had proved their claims, was filed in the case at or before the hearing of the application.

We come now to consider the amendment of the fourteenth of July, eighteen hundred and seventy (16 Stat. 276). That amendment provides, "That the provisions of the second clause of the thirty-third section, as amended by the first section of an act in amendment thereof, approved July twenty-seventh, eighteen hundred and sixty-eight, shall not apply to those debts from which the bankrupt seeks a discharge, which were contracted prior to January first, eighteen

hundred and sixty-nine." We have just seen that under the provisions of the second clause of the thirty-third section, as amended by the act of July twenty-seventh, eighteen hundred and sixty-eight, the bankrupt could not, in proceedings commenced after January first, eighteen hundred and sixty-nine, if he did not rely on the assent of creditors, obtain a discharge from any of his debts, unless his assets were equal to fifty per centum of the claims proved against him, upon which he was liable as principal. This amendment declares that the provisions of said second clause shall not apply to debts from which the bankrupt seeks a discharge, which were contracted prior to January first, eighteen hundred and sixty-nine, but it leaves those provisions to apply in full force to debts from which he seeks a discharge, which were contracted after that time. The effect, then, of this last amendment is, that in proceedings commenced after January first, eighteen hundred and sixty-nine, the bankrupt will, upon showing only general conformity, be discharged from all debts contracted prior to January first, eighteen hundred and sixty-nine, but will not be discharged from any contracted on or after that time, without showing either that his assets are equal to fifty per centum of the claims proved against his estate, upon which he shall be liable as principal, or that his creditors have assented.

The demand that the assets shall equal fifty per centum of the claims proved makes no reference to the time when the claims were contracted. There is nothing whatever in the language of the demand to distinguish between claims contracted before and claims contracted after the first of January, eighteen hundred and sixty-nine. One class is as provable against the estate of the bankrupt as the other, and therefore when the statute says that the bankrupt shall not be discharged from his debts contracted on or after the first of January, eighteen hundred and sixty-nine, unless his assets shall be equal to fifty per centum of the claims proved against his estate, it is impossible to reject in the computation the claims proved which were contracted before the first of January, eighteen hundred and sixty-nine.

The assent must be equal to fifty per centum of all the claims proved on which the bankrupt is liable as principal, including as well those contracted prior to January, eighteen hundred and sixty-nine as those contracted afterwards. Under the act of eighteen hundred and sixty-eight, the bankrupt in proceedings commenced after January first, eighteen hundred and sixty-nine, could not be discharged from any of his debts, no matter when contracted, unless his assets bore a given relation to the claims proved, upon which he was liable as principal, or unless he exhibited the assent of his creditors. Under the act of eighteen hundred and seventy, he will be discharged from all debts contracted before the first of January, eighteen hundred and sixty-nine, though he has no assets, and though he obtain no assent of creditors, but he cannot be discharged from any debt contracted since, unless he comply with the demands of the act of eighteen hundred and sixty-eight—that is, he must, I repeat, either show that his assets are equal to fifty per centum of all claims proved on which he is liable as principal, or he must exhibit the assent of creditors. Let me, if possible, make this matter still plainer. The universal rule of construction is to read every statute which has been amended, as if the amendments were incorporated with the original act. Now if we incorporate into the second clause of the thirty-third section of the bankruptcy act of March second, eighteen hundred and sixty-seven, the provisions contained in the amendatory act of July twenty-seventh, eighteen hundred and sixty-eight, and of July fourteenth, eighteen hundred and seventy, it will read as follows: "In all proceedings in bankruptcy commenced after the first of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor from debts contracted on or after the first of January, eighteen hundred and sixty-nine, whose assets shall not equal fifty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, unless the assent in writing of a majority in number and value of his creditors, to whom he shall have become liable as principal debtor, and who have proved their claims, be filed in the case, at or before the time of hearing of the application for discharge." If this be the reading of the statute, and that it is seems to me to be undeniable, there seems to be no ground for the claim of the bankrupt. It seems to be as plain as language can be that he cannot be discharged from debts contracted since, though he is entitled to be discharged from the debts contracted prior to January first, eighteen hundred and sixty-nine, because his proceedings were commenced after that time and his assets are not equal to fifty per centum of claims proved against his estate on which he is liable as principal debtor, and there is no pretense that any of his creditors have assented to his discharge. Whether or not a bankrupt will be discharged from debts contracted after January first, eighteen hundred and sixty-nine, upon filing the assent of creditors whose debts were contracted before that time and which have been proved, if they constitute all of the debts proven or a majority in number and value, is a question not directly presented in this case. The conclusion at which I have arrived on the question before me seems to furnish a ready answer; but it is not proper that it should be either answered or discussed until it arises.

I have heretofore prescribed four forms of discharge: one applicable to cases in which the proceedings were commenced prior to January first, eighteen hundred and sixty-nine; a second, to cases commenced after that date, in which cases it does not appear either that the assets are equal to fifty per centum of the claims proved, &c., or that the creditors have

assented; a third, to cases commenced after that date in which it does appear that the assets equal fifty per centum, &c., and a fourth, to cases commenced after that date in which the assent of creditors is filed. In this case, as the proceedings were commenced after the first of January, eighteen hundred and sixty-nine, and as it does not appear either that his assets are equal to fifty per centum of the claims proved against his estate on which he is liable as principal debtor, or that any of his creditors have assented to his discharge, a discharge of the second class will be granted. Accordingly, it is considered that, whereas John L. Shower has been duly adjudicated a bankrupt, under the act of congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf,

It is therefore ordered by the court, that said John L. Shower be forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the twelfth day of October, eighteen hundred and seventy, on which day the petition for adjudication was filed by him, excepting such debts as were contracted on or after the first day of January, eighteen hundred and sixty-nine, and such, if any, as are excepted from the operation of a discharge in bankruptcy.

SHREVE (BUTTS v.). See Case No. 2,258.

Case No. 12,817.

SHREVE v. DULANY.

[1 Cranch, C. C. 499.][1]

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

PRACTICE AT LAW—PRODUCTION OF BOOKS—NOTICE — HUSBAND AND WIFE — LIABILITY FOR WIFE'S DEBTS AFTER SEPARATION.

1. Notice to produce a book of accounts given on the preceding evening, is sufficient when the counting-house of the party is very near the court-house.

2. The defendant is not liable for goods delivered to his wife upon her credit after a separate maintenance allowed by him; but from the defendant's express promise to pay, the jury may infer that the goods were delivered to his wife by his order, unless such inference is rebutted by proof that the original credit was given to her.

Assumpsit [by Thomas Shreve against Benjamin Dulany] for goods sold and delivered to the defendant's wife.

The defendant, after the jury was sworn, gave a written notice to the plaintiff to produce his book of original entries, in which the items of the account were charged; and the next day moved the court to compel the production of it.

E. J. Lee, for plaintiff, objected that the notice was too short.

But THE COURT thought it was reasonable notice; the plaintiff's counting-house being within a very short distance from the court-house.

Upon the trial, the plaintiff offered evidence to prove that the goods were furnished and delivered to the defendant's wife at her request; and that the defendant afterwards verbally promised to pay for them. That when the goods were furnished to the defendant's wife, the plaintiff had an account opened in his books against her; and she stated that a considerable part of the goods were for the use of the defendant's sons, who were under age, (except William,) and were applied to their use and were made into clothes for them, for the making of which the defendant had paid.

Whereupon the defendant offered evidence that his wife left his house in the year 1804, and had lived separate and apart from him ever since; that this was known to the plaintiff at the time he delivered to her the goods, and that in 1805 the defendant, by deed, allowed his wife a separate maintenance.

Whereupon the defendant, by his counsel, Mr. C. Simms, prayed the court to instruct the jury, that if they should be satisfied by the evidence that the defendant's wife left his house, and lived separate and apart from him, and that this was known to the plaintiff at the time he furnished her with goods, and that the defendant had made a competent separate maintenance for his wife before the goods were so furnished, then they ought to find for the defendant. In support of this prayer he cited the following authorities: 1 Esp. N. P. 122, 125; 1 Pow. Cont. 78; Bull. N. P. 135.

E. J. Lee, contra, cited Stedman v. Gooch, 1 Esp. 6; Esp. N. P. 124, 126.

THE COURT refused to give the instruction as prayed, but instructed the jury that, if the goods mentioned in the declaration were delivered to the defendant's wife, on her credit, after the separation between them, and after the settlement of a separate maintenance by the defendant on his said wife, then the defendant is not liable for the same. But if the jury should find that the defendant expressly assumed to pay the amount of the account after the goods were delivered to his said wife, that then his express promise to pay, (if uncontradicted by proof of the credit being originally given to his said wife,) is evidence, from which the jury have a right to infer that they were delivered by his order, in which case he would be liable to the present action.

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

SHREVEPORT (LEWIS v.). See Case No. 8,331.

Case No. 12,818.

SHREW et al. v. JONES.

[2 McLean, 78.] [1]

Circuit Court, D. Indiana. May Term, 1840.

JUDGMENT—LIEN ON LANDS—INDIANA STATUTE—CIRCUIT COURT.

1. At common law a judgment created no lien on the real estate of the defendant. But as his land was made liable to satisfy the judgment, under the elegit, this created a lien.

[Cited in Morsell v. First Nat. Bank, 91 U. S. 360; Re Boyd, Case No. 1,746; Cooke v. Avery, 147 U. S. 389, 13 Sup. Ct. 346.]

2. There was a judgment lien on the lands of the defendant, in Indiana, before there was any express statutory provision on the subject. This was *held* to be the effect of several statutes, which subjected lands to execution and sale under a judgment.

3. By the act of 1818 a lien was given from the rendition of the judgment. And this lien extended throughout the state.

4. The act of 1824 limits the liens of the judgments of the circuit courts of Indiana, to the counties in which the judgments were entered.

[Cited in Lombard v. Bayard, Case No. 8,469.]

[Cited in Harrison v. McHenry, 9 Ga. 164.]

5. This statute imposed no restrictions on the liens of the judgments entered in the supreme court of the state.

6. The act of 1831 limits, also, the judgments of the supreme court to the counties in which they shall be entered. But this law being passed subsequently to the act of congress of 1828 [4 Stat. 278], which adopts the execution laws of the states, &c., can have no effect on the judgments of the federal courts.

7. The jurisdiction of the circuit court of the United States is coextensive with the limits of the state of Indiana, and, consequently, the liens of its judgments extend throughout the state.

[Cited in Cropsey v. Crandall, Case No. 3.418; Lombard v. Bayard, Id. 8,469; Ludlow v. Clinton, Id. 8.600; Dartmouth Sav. Bank v. Bates, 44 Fed. 548.]

[Cited in Lawrence v. Belger, 31 Ohio St. 178; Sellers v. Corwin, 5 Ohio, 407.]

8. Prior to the act of 1831, the lien of the judgments of the supreme court of Indiana was coextensive with its jurisdiction, which extended to the limits of the state.

9. The land of a defendant in a judgment of this court, may be sold on execution, notwithstanding a judgment may be subsequently obtained in the state court, under which a levy was first made on the land.

[This was an action of ejectment by Shrew and Winston against I. D. Jones to recover possession of a certain lot.]

Fletcher & Butler, for plaintiffs.

Wright & Patterson and Chase & Lockwood, for defendant.

OPINION OF THE COURT. The title to the lot for which this action of ejectment was brought is under a judgment of this court, obtained the 5th December, 1837, by Shrew and Winston against David Miller and others. The fee of the lot was vested in Candler, one of the defendants. The first of January, 1838, an execution was duly issued upon said judgment and delivered to the marshal to be executed. This writ was returned, replevied, with a replevy bond duly executed. Afterwards, the 17th December, 1838, another execution was duly issued, which was levied by the marshal upon lot one hundred and forty two, in the town of Logansport, as the property of Candler. This lot was sold by the marshal on due notice being given, to the lessor of the plaintiff, for the sum of five hundred and fifty dollars, which was paid, and a deed was duly executed by the marshal. No copy of this judgment was ever filed in the clerk's office, under the statute of Indiana. The defendants' title was derived under a judgment against Candler and Sludge, the 26th February, 1838. Execution was issued on this judgment the 19th April, following, which was returned no property found. An alias fi. fa. was issued the 24th September ensuing, and levied on the lot in controversy, which was sold by execution the 10th May, 1839, to Jones, the defendant, who received the sheriff's deed.

The above facts are admitted by the parties, and that the proceedings in both cases were regular. The judgment of this court, under which the lessor of the plaintiff claims, having been first obtained, it is insisted that his right is paramount to that of the defendant. On the part of the defendant it is contended that the judgments of this court create no lien on the real estate of the defendant, beyond the limits of the county in which judgment is entered; and that the judgment before the state court in Cass county, where the lot is situated, being obtained before the levy under the first judgment, it has the prior lien. And this is the only question in the case. As land was not liable to be sold on execution, or extended at common law, it is clear that at common law the judgment created no lien on the land of the defendant. But the argument is not sustainable that a judgment can not operate as a lien on real estate, unless this effect be specially given to it by statutory provision.

The statute of 2 Westm. 13 Edw. I., gave the elegit which subjected real estate to the payment of debts, and this, as a consequence, it has always been held, gave a lien on the lands of the judgment debtor. 3 Salk. 212; 1 Wils. 39; 2 Leigh, 268; 6 Rand. [Va.] 618; [U. S. v. Morrison] 4 Pet. [29 U. S.] 124; Bank of U. S. v. Winston [Case No. 944]; 3 Bl. Comm. 418; 2 Bac. Abr. 731; [Tayloe v. Thomson] 5 Pet. [30 U. S.] 367. The same doctrine was held by the supreme court of this state, in a learned and able opinion, in the case of Ridge v. Prather, 1 Black [66 U. S.] 401. The court say: "We have always had a statute at least as strong as that of Westm. 2, by virtue of which judgments are liens upon real estate." But until the act of 1818, there was no statute declaring that judgments should be a lien on real

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

estate. In the view of the court such lien arose from the various acts subjecting lands to execution.

The thirteenth section of the act of 1818, entitled "An act to prevent frauds and perjuries," gives a lien on the real estate of the defendant from the time of signing the judgment. This statute, it would seem, was introductive of no new principle, but gave effect, from a specified time, to a judgment lien. It is unnecessary to inquire whether, prior to this time, the lien took effect from the commencement of the term, or not; it is enough to know that it existed. The lien, under this statute, as well as that which existed before the statute, being general, must have extended throughout the state. The circuit courts had power to issue executions to any county in the state. And as their jurisdiction, thus to enforce their judgments, extended throughout the state, the lien must have been coextensive with their jurisdiction. This act was modified by an act subjecting real and personal estates to execution, approved 30th January, 1824. The thirteenth section of this act provides, that judgments in the circuit courts are hereby made liens on the real estate of the defendant, or defendants, from the day of the rendition thereof, in the county where such judgments may be rendered. And, on recording a copy of the record of such judgments in the clerk's office of any other county, the same operates as a lien within such county. This act is restrictive of the lien of a judgment of the circuit court, but it could have had no such effect on a judgment entered by the supreme court of the state. This point is not known to have been decided by the supreme court of the state, but it is one which would seem to admit of little or no doubt. If, before the passage of this act, the liens of the judgments of the supreme and circuit courts extended throughout the state, which, it is presumed, no one will controvert, it is clear that the restriction of the lien on the judgments of the circuit court, could impose no restriction on the judgments of the supreme court. If any thing were wanted to make this view conclusive, it is found in the act of 1831. The twenty second section of this act, which was enacted to prevent frauds and perjuries, &c., provides that judgments in the circuit and supreme courts of this state, shall have the operation of, and be, liens &c., in the county within which such judgments may be rendered. This act has never received a construction by the supreme court of the state, nor is it important now to inquire whether the effect of it must be to limit the lien of the judgments of the supreme court to the county of Marion, in which, only, its sessions are held. It is enough to know that the object of the act was, in some degree, to restrict the liens of the judgments of that court; and that such restriction was not imposed by the act of 1824. It is true that in the act of 1831 the circuit court is named with the supreme court, but this was necessary, as the latter act changed somewhat the duty of the clerk who records the transcript. The ground may then be assumed, that, up to the year 1831, the original judgments of the supreme court created a lien throughout the state.

By the act of congress of the 19th May, 1828, it is provided, "that writs of execution, and other final process issued on judgments and decrees, rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same, except their style, in each state, respectively, as are now, and in the courts of such state." This act places the states that have been admitted into the Union since the judiciary act of 1789 [1 Stat. 73], was passed, in regard to the proceedings of the courts of the United States, in all respects, with the exception of Louisiana, on the same footing. As this fact has often been stated by the supreme court, it is unnecessary to examine it. The act of 1828 adopts the laws of Indiana which existed at the time of its passage, and not those which have been subsequently enacted on the same subject. Congress have not adopted the laws of any state, in regard to the practice of the courts of the United States, prospectively. The law of Indiana, in 1828, in regard to judgments and executions in the supreme court, is the law by which the present question must be decided.

In the case of Taylor v. Thompson. 5 Pet. [30 U. S.] 367, the court say: "The first point made by the plaintiff in error is, that, by the law of Maryland, which, it is admitted, is the rule by which this point is to be determined, a judgment is no lien on real estate before execution was issued and levied." And in the case of Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 453, the court say, the judgments in the federal courts, within the district of New York, are liens upon real property in like manner as judgments of the state courts, and to the extent of the local jurisdiction of the court. And, so in every other state, the judgments of the federal courts have the same lien, to the extent of its jurisdiction, as the judgments of the highest court of the state. The act of 1828 declares that the rules of proceeding, &c., shall be the same in the circuit courts of the United States as in the highest court of original and general jurisdiction of the state. The supreme court of Indiana is the highest court of the state, and its jurisdiction is coextensive with the state. Prior to the act of 1831, a judgment of that court constituted a lien throughout the state, and as the jurisdiction of the circuit court of the United States is also coextensive with the limits of the state, its judgments must create a lien to the same extent.

If, as contended, the liens of the judgments of this court be limited to the county

in which they are rendered, as in the inferior courts of the state, the judgments of this court have, in effect, no lien. The law of the state, which extends the lien of a judgment of the circuit court of the state to any county within which the record of such judgment shall be recorded, can have no application to this court. We have no right, under it, to require our judgments to be recorded by any clerk of the state court.

The law of Indiana, regulating judgments and executions, as it stood in 1828, is the law of congress, by adoption. Effect must be given to the provisions of this law, so far, at least, as they are adapted to the organization and powers of this court. If the rules of proceeding by the circuit courts of the state be followed by this court, effect is given to them without reference to the limited jurisdiction of these courts. The limits of the state, in the exercise of the jurisdiction of this court, is as the limits of a county to the local court. The modes of judicial proceedings and rules of property are different in the different states; and, in adopting those rules, congress designed, as far as practicable, to give the same effect to them in the courts of the Union as in the courts of the state. No other course of legislation could have been so well calculated to produce a harmonious action in the judicial departments of both governments. But if a state law, being framed in reference to the limited jurisdiction of the state courts, for this reason can not constitute a rule for the federal courts, the legislation of congress, on the subject, has been in vain. Such has not been the view taken by the courts of the United States. The law of the state regulates the proceedings of a sheriff on execution. He is to advertise the property, real or personal, &c., but his duties are all limited to the county. The same rule governs the marshal, and operates throughout the state. The principles of the state law are adopted, but the instruments which give effect to those principles are necessarily different, and they are made to operate throughout a more extended jurisdiction.

But as it regards the main, and, indeed, the only question in this case, we have no need to resort to this course of induction. As has been stated, the judgment of the supreme court of this state, in 1828, operated as a lien on the real estate of the judgment debtor throughout the state, and this is conclusive of the question. The same effect is given to the judgments of this court. In the case of Lessee of Sellers v. Corwin, 5 Ohio, 398, the supreme court, in a very elaborately considered case, decided that, under a law of that state giving judgment liens an effect the same as in this state, the judgment of the circuit court of the United States constituted a lien to the extent of its jurisdiction. No supposed inconvenience which arises under the laws of 1828, in regard to judgment liens, and which have been remedied by the act of 1831, can operate against this construction. In most of the states, it is believed, the judgments of the circuit court of the United States operate as a lien to the extent of its jurisdiction. If it shall be deemed important to have the records of the judgments of this court recorded in the county where the lands of the defendant are situated, it may be required by act of congress, or by a rule of this court, if the law of the state shall require the clerks to make such record.

Case No. 12,819.

SHREWSBURY v. The TWO FRIENDS.

[Bee, 433.] [1]

Admiralty Court, South Carolina. Jan., 1786.

MARITIME LIENS—REPAIRS—POSSESSION.

A shipcarpenter has no lien for repairs, after the vessel is out of his possession, if the contract was made on land, and the owners reside in the place. See Clinton v. The Hannah [Case No. 2,898].

[Followed in Pritchard v. The Lady Horatio, Case No. 11,438. Cited in Levering v. Bank of Columbia, Id. 8,287. Approved in Ramsay v. Allegre, 12 Wheat. (25 U. S.) 619. Cited in Bains v. The James & Catherine, Case No. 756; The Draco, Id. 4,057; The Stephen Allen, Id. 13,361. Cited in dissenting opinion in Jackson v. The Magnolia, 20 How. (61 U. S.) 333; Cunningham v. Hall, Case No. 3,481.]

[Cited in Re The Josephine, 39 N. Y. 26.]

In admiralty.

In this cause of Shrewsbury v. The Sloop Two Friends, the following appears to be a short state of the case: That the vessel, with an American register, is owned partly by a foreign merchant, but now resident here; and partly by a citizen of the state of Georgia, who resides there. That soon after her arrival in this port, the foreign part owner attached in the court of common pleas, the remaining property of the other in her, for a debt due to him by the said other part owner. That a claim was set up against the moiety attached by a third person, who asserted that a sale thereof had previously been made to him; which contest is still pending in the court of common pleas. That after the attachment, and while the vessel continued in the custody of the sheriff, (but by his permission remaining in the possession of the plaintiff in attachment,) Shrewsbury, a shipwright, was employed to repair her. (And here there was a variety and contradiction in the evidence produced, whether Shrewsbury was employed by the master, or the foreign part owner; there being positive swearing to each.) That the vessel being removed out of Shrewsbury's dock, he applied to this court, for a warrant to arrest her, for the repairs; which warrant issued, and was ex-

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

ecuted by the marshal, during the absence of the sheriff.

On the return of the warrant, a motion was made in behalf of the foreign part owner, that it be quashed; and the motion was supported on the following grounds: 1st. That the vessel being in custody of the sheriff, was not within the jurisdiction of this court. 2d. That the repairs being made on the vessel in port, and not while on a voyage, but by owner's order, and she being hypothecated neither by the master, nor owner, the vessel was not liable, but recourse must be had to the owner.

This motion was opposed in behalf of the actor, 1st, on the general principle, that for all repairs made and necessaries supplied to a vessel, she is liable; that an hypothecation is always implied whether executed in form or not: and that properly, only one moiety could be said to be in the custody of the sheriff; 2d, but that however the rule might be with regard to repairs and necessaries supplied at home, and in the port to which the vessel belongs; there is a difference when she is in a foreign port; that this is settled by the resolutions of all the judges in Charles I. time, as reported in Cro. Car. 216, and that Charleston is to all intents and purposes, a foreign port, both to the vessel and owners; that it would be hard, if it was otherwise; for as the owner was a foreigner, and perhaps had no other property in this state, the shipwright might lose his debt, or not obtain any security for it, if the vessel was not liable.

To this last argument, it was replied, that the owner had offered any security to the shipwright, if he would wait the determination of the suit in the common pleas, concerning the attached moiety; and that he had indeed reconducted the vessel into the shipwright's own dock, where she now lay.

DRAYTON, District Judge. This being a short state of the case, and of the arguments offered on both sides, the court is now to pronounce an opinion and decree upon the whole. The principal points to be considered and determined, I think, are the following: 1st. Whether a vessel is liable for all repairs and necessaries in general, at any time and in any circumstances. Or, 2d. Whether a distinction is to be taken, and a difference made; and that she may be liable in particular cases, and not in others; and lastly, whether her being a foreign vessel, and owned by a foreign merchant, will make any difference in the general rule on such occasions.

And with regard to the first and second points, I conceive the law to be clear and settled. The jurisdiction of this court extending only to maritime causes, it cannot take cognizance of any transactions or contracts which arise on land. And herein I distinguish thus: Where a vessel is lying in port, and the owner is there present, all matters and contracts, relative to her, must be supposed to be entered into by him on shore; and consequently to be infra corpus comitatus; and redress and satisfaction, in case of any dispute on the occasion, must be sought in the courts of common law. But where a vessel is on a voyage, and by stress of weather, or other accident, puts into a port, the occasion happening at sea, and on her arrival in port no owner being present, to whose personal credit recourse may be had for necessaries, the master, ex necessitate rei, has a right to procure them on the security of the vessel; and to obtain payment on that security, this is the proper and only court to apply to. This distinction is plainly laid down and taken notice of in all the cases, where this matter has been agitated.

I will examine the several authorities which have been cited in the present case, for and against this opinion; and from them shew the reasons upon which I ground mine. Much stress has been laid by Mr. Read, on the resolutions of the judges as reported in Cro. Car. 216, in support of his argument. I shall make some observations on those resolutions. In the first place, it does not appear, that they were an adjudication on any particular case before the court. They seem merely gratis dicta; and this interpretation so favourable to the extent of the admiralty jurisdiction, was made but a few years after the remarkable contest between the judges of that court and of the common law courts, which is mentioned in the 4th Institutes. The court of admiralty at that time, claiming almost every thing; perhaps the other at first, thought it necessary to concede something more than they had a legal right to. At least it proves that some doubts prevailed on the subject; and that the jurisdiction was either not well understood, or settled on one side. It is remarkable too, that these resolutions, which are inserted in the first editions of Croke, do not appear in the later. I observed the edition Mr. Read quoted from is of 1657. Upon referring to mine, which is of 1669, I find them omitted. See Clinton v. The Hannah [Case No. 2,898]. From whence there is a seeming implication, that upon better consideration, they were held not to be of authority; and were therefore omitted. This is confirmed by an adjudication in the same reign contradicting them. It is in Bridgeman's Case, Hob. 11. There, says the chief justice, "The admiralty court hath no power over any cause at land; for both by the nature of the court, and by the statute, it is to meddle with things arising upon the seas. But (he goes on) I was of opinion clearly, that the admiral law is reasonable, that if a ship be at sea, and take leak, or otherwise want victual or other necessaries, whereby either herself be in danger, or the voyage defeated, that in such a case of necessity, the master may impawn for money, or other things to relieve such extremities, by employing the money so; for he is the person trusted with the ship and voyage, and

therefore reasonably, may be thought to have that power, rather than see the whole lost. But in this case, the faults were, that neither the contract, nor the impawning were said to be for any such cause, nor was the impawning said to be at sea." And lastly, the authority contended for under those resolutions is denied by all the subsequent, and late determinations on the subject. The first (Moll. de J. Mar. 333), though short, is express to the point. In Justin's Case, 1 Salk. 34 (but better reported 2 Ld. Raym. 805), it is expressly laid down, "that as it did not appear the ship was on her voyage, when she was in distress, and the contract made for the cable and anchor, the case was out of the admiralty jurisdiction." I shall have further occasion to refer to this case hereafter.

The next in point of time is Watkinson v. Bernardiston, 2 P. Wms. 367. There it was likewise determined, "If a ship is in the Thames, and money is laid out for repairs, &c. it is no charge on the ship; but the person employed must resort to the owner. But if at sea, (i. e. if on a voyage) and no contract can be made with the owner, the master, ex necessitate rei, may hypothecate the ship for repairs." Here the distinction is fully expressed; the circumstances fixed, and the reason explained: "On a voyage;" and because the "owner is not present." Of course the inference is, that if she is not on a voyage, and if the owner is present, there is no such claim on the ship, nor any such power in the master. The master's power arises only in the absence of the owner, as his substitute and representative; and even in the owner's absence, he is not empowered on all occasions to make the ship or owner liable. "For if he takes up money to mend or victual the ship, when there is no occasion, he only is liable. And it is but reasonable, that the person advancing the money should take care, that he lends it upon such an occasion, as that the master's act shall bind the owner." These are Molloy's words, as cited in Coop. 638, which was quoted by Mr. Read. It shews that the supplier of necessaries, or carpenter who repairs, runs some risque; that he ought to act cautiously, and particularly when the owner is present. For in the last case, I conceive the master cannot hypothecate the vessel; and if he did, that such hypothecation would be void, and not binding on the vessel. But neither does that case, nor the other in Doug. 97, quoted by Mr. Read, contradict this opinion. In the first Lord Mansfield says, "Whosoever supplies a ship, has a treble security; the master, the ship, and the owner." True he has so: he has the security of the ship in all cases, by lien, while she continues in his possession; and in particular cases, where she is properly hypothecated, whether in his possession or not. He has besides, the personal security of the master, or owner, in either case. I deny neither position. In the second (Doug. 97) his lordship says positively and expressly, "Work done in England on a ship, is on the personal credit of the employer; but in foreign ports, the master may hypothecate." That is, he may hypothecate under the circumstances, and for the reason mentioned in 2 P. Wms. 367.: "Because the ship is on a voyage, and the owner is not present." This distinction is continued through all the cases. And with regard even to a lien, Lord Mansfield speaks only hypothetically; if there was any lien, it was in the carpenter. And the general practice of shipwrights, as mentioned in the same case, seems to shew, that they looked more to the employer, than to the ship for security. However, it is, I confess, my opinion, that the shipwright has a lien on the vessel, so long as she is in his possession. But the lien extends no farther than as a security; and does not give him power to sell, nor this court to order it. And herein consists the difference between a lien and hypothecation.

I come now to the last point, whether this being a foreign vessel and owned by foreign merchants, makes any difference in the general rule laid down? I cannot allow, that this question is applicable to the present case. How is either this vessel or this port foreign, when the vessel is registered as American, when she is owned partly by a citizen of the United States, and partly by a merchant who, though not a citizen, is engaged in a commercial connexion here; and is at present settled here? This is now his home; and Charleston harbour in the present case is quasi the river Thames, in those reported in the English books. But admitting the objection in its fullest force, I do not find that the law has made any difference on the occasion. On the contrary, there is a case directly in point, which settles it. It is that of Justin's Case, before quoted. There the ship belonged to Norway; her owners were foreigners, and London to both was a foreign port. There likewise were urged the same reasons, as at present, to make the vessel liable. "The defendant would be without a remedy, if a prohibition should be granted. Because, the master of the ship with whom he contracted, was dead, and the part owners were foreigners." But the court said there, as I do here, "Because it does not appear that the ship was on her voyage, when she wanted the anchor and contracted for it, it is a contract made with the master on land; and is the common case."

It appears that the sloop Two Friends was not on a voyage; that she was lying here in port under the care and direction of her owner; that that owner was on the spot, and settled in business here. The contract therefore was made on the land infra corpus comitatus, and is not within the jurisdiction of this court. And the hardship in the present case is much less than in the other; for the owner is not only willing but able to give security; and has indeed restored the vessel to

the possession of the shipwright. The chief and only hardship is his being saddled with costs; which it is said, he has been led to incur, from the former practice, and past decrees of this court in similar cases. I should be sorry, if there were any just ground of complaint against courts of justice. But I apprehend the cause of this complaint is not to be imputed to the court. A different decree may have been pronounced here; but then I suppose it must have been, when the objection has not been taken; and the court can have no other than the judicial knowledge of any case before them. In the only case where this exception has been taken since I sat on this bench, I gave the same decision as I shall now.

On the whole, after maturely considering and weighing all the circumstances of the fact, and the authorities of law in this case, I do adjudge, pronounce and decree, that the warrant issued by this court, against the sloop Two Friends, be quashed; that the vessel be discharged from the custody of the marshal, and that the actor do pay the costs of suit.

SHRIEVE (OSBORNE v.). See Case No. 10,598.

SHRIVER (SMITH v.). See Case No. 13,108.

Case No. 12,820.

SHRYOCK et al. v. BASHORE.

[By the court of common pleas of Franklin county, Pennsylvania, Rowe, P. J.]

SHUCK (UNITED STATES v.). See Case No. 16,285.

Case No. 12,821.

In re SHUEY.

[9 N. B. R. 526;[1] 6 Chi. Leg. News, 248.]

District Court, D. Minnesota. April, 1874.

BANKRUPTCY—PROPERTY IN HANDS OF SHERIFF—ASSIGNEE.

The United States district court has no authority to order property to be taken out of the hands of the sheriff who holds the same by virtue of an execution issued upon a judgment obtained in a state court, and the lien under the execution is prima facie valid. Therefore, until the writ is set aside on account of fraud, or for the reason that it is in violation of the bankrupt law, the assignee has no right to immediate possession of any of the property seized before the judgment is satisfied.

A creditor of the bankrupt obtained a judgment against him in the state district court before bankruptcy proceedings were commenced, and the sheriff has made a levy, by virtue of an execution, upon sufficient property to satisfy it. A temporary injunction was granted by the court, enjoining the sheriff from selling under the execution, upon the petition of an unsecured creditor, who asks that the sheriff be ordered to deliver the property in his possession to the assignee in bankruptcy when chosen. A motion is now made by [W. H. Shuey] the judgment creditor to dissolve the injunction, and upon a full argument and due consideration the following is the opinion of the court.

E. C. Palmer, for motion.

Geo. L. Otis and Harvey Officer, contra.

NELSON, District Judge. I have no authority to order the property to be taken out of the hands of the sheriff. The lien under the execution is primá facie valid. The writ was rightfully issued, and until set aside on account of fraud, or for the reason that it is in violation of the bankrupt law [of 1867 (14 Stat. 517)], the assignee in bankruptcy has no right to immediate possession of any of the property seized, before the judgment is satisfied. The creditor upon whose petition the injunction was granted, charges that the judgment, upon which the execution issued, was obtained through the procurement of the bankrupt, who desired to prefer the judgment creditor. If, when properly presented, such allegation should be sustained by the court, the lien would be declared null and void; until that occurs, however, I can not destroy it. The creditors, at their first meeting, this day, have authorized the assignee to contest the validity of the judgment lien, and for that purpose to file a bill in equity immediately. I shall therefore continue the injunction for the present, unless the judgment creditor will consent that, on the sale of the property, the proceeds may be deposited in this court by the sheriff, less the amount of his fees, to remain subject to the lien of the judgment creditor, and to be paid over to him if in the suit to be commenced by the assignee the court shall determine the claim or lien valid and legal. Should he consent to such an arrangement or disposition of the proceeds of the property seized, the clerk, on filing such a stipulation, will enter an order modifying the injunction so as to permit the sheriff to sell at the time advertised. If the litigation is protracted, an order will be entered that the fund be invested for the benefit of the successful party or parties.

Case No. 12,822.

SHUFFLETON v. NELSON.

[2 Sawy. 540.][1]

Circuit Court, D. Oregon. Feb. 10, 1874.

ADVERSE POSSESSION—BURDEN OF PROOF—COLOR OF TITLE—TACKING—OREGON DONATION ACT.

1. Twenty years continuous adverse possession of real property is a bar to an action by the

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

owner to recover the possession; but the burden of proof is upon the party alleging such a possession.

2. Whether an adverse possession is proven in a particular case is a question of fact for the jury, under the instructions of the court, as to what constitutes adverse possession.

3. The possession of the occupant of a lot in Coffin's addition to Portland was not adverse to the title of Coffin prior to the passage of the donation act, because the legal title of the latter did not accrue until that time.

4. The purchaser of a lot in the addition aforesaid from Coffin and Lownsdale, by a quit-claim deed of June 25, 1850, with a covenant to convey the legal title to said purchaser when the same should be acquired from the United States, did not hold the same in subordination to said Coffin's title under the donation act after the passage of the same, but the conditions of said sale being performed, so far as said purchaser was concerned, thereafter his possession might become adverse to said Coffin's, and in the absence of proof to the contrary, should be presumed to be so.

5. An adverse possession to be a bar to an action to recover the possession by the owner of the legal title must be continuous for twenty years: and several successive but unconnected disseizins or adverse possessions, though amounting in the aggregate to twenty years, cannot be tacked together to make such a continuous possession.

6. Where there are several successive adverse occupants of real property, the last one may tack the possession of his predecessors to his, so as to make a continuous adverse possession for twenty years, provided there is a privity of possession between such occupants; and in case of an actual adverse possession, such privity arises from a parol bargain and sale of the possession of the premises, followed by delivery thereof, as well as by a formal conveyance from one occupant to the other.

[Cited in Sherin v. Brackett, 36 Minn. 154, 30 N. W. 552; Vance v. Wood (Or.) 29 Pac. 75.]

7. Color of title or entry under a formal deed is only a necessary element of adverse possession, where such possession as to part of the premises claimed is merely constructive and not actual.

This action was commenced October 27, 1871, to recover the possession of lot one, in block one hundred and eighteen, in the city of Portland, and was tried before a jury, upon the defense that neither the plaintiff [H. A. Shuffleton], his ancestor, predecessor or grantor was seised or possessed of the premises in question, within twenty years before the commencement of this action. Code Or. 141. The plaintiff duly deraigned title from Stephen Coffin, the donee of a tract including the premises, under the donation act of September 27, 1850, by virtue of a settlement commenced before that date. The defendant [Robert Nelson] gave evidence tending to prove that Chapman purchased the premises of Coffin and Lownsdale on June 25, 1850; that in 1851 Chapman sold to Caruthers, who occupied until 1853, when the latter sold to Kellogg; that Kellogg fenced and occupied until 1862, when he sold to the defendant, who improved and occupied the same down to the commencement of the action. To prove these successive sales and transfers of the possession of the lot, the defendant gave in evidence certain writings purporting to be the deeds of the several vendors to their vendees, which were not executed so as to entitle them to the force and effect of deeds. The defendant also gave oral evidence tending to prove the sale from Chapman to Caruthers, and from the latter to Kellogg; and also the sale from Kellogg to the defendant in 1862; and that at each of such alleged sales the purchaser obtained the possession of the lot from the prior occupant for a valuable consideration, with the intent to thereby acquire whatever right such occupant had in or to the premises, and so occupied it. Coffin, the donee, testified that he was in the possession of the donation claim of two hundred and forty acres, which includes this lot from August, 1850, to the date of the patent to him in 1861, but was not in the actual possession of this lot from the time of the sale to Chapman—June 25, 1850.

John W. Whalley, for plaintiff.

Walter W. Thayer, for defendant.

DEADY, District Judge (charging jury). Gentlemen of the Jury: It is admitted that the legal title to the premises in controversy is in the plaintiff. Stephen Coffin, the donee of the United States, was seized in fee of his donation claim, inclusive of this lot, under the donation act of September 27, 1850, from the date thereof—his settlement having been in fact commenced before that date—and the plaintiff shows a good paper title under him.

The defense is, that, notwithstanding the plaintiff and those under whom he claims have had the legal title since September 27, 1850, yet the plaintiff is barred of his right of entry, and therefore cannot maintain this action, because neither he nor they have been seized or possessed of the premises within the twenty years next before the commencement of this action—October 27, 1871. In other words, the defendant maintains that he and those in priority with him have been in the adverse possession of the premises for a period of twenty years prior to the commencement of this action.

The possession of the defendant and those in privity with him to constitute a bar to the plaintiff's right of entry must have been actual, exclusive, notorious and adverse, or hostile to the title of Coffin, or, in other words, it must have been continuously held during the period of twenty years with a manifest intent to claim the land occupied as against Coffin, and those claiming under him. 2 Washb. Real Prop. p. 489.

The burden of proof to show the possession to be adverse is upon the party who alleges it—the defendant. Whether or not the proof shows an adverse possession in this case is a question for you to determine, under the instructions of the court as to what constitutes such a possession. 2 Washb. Real Prop. p. 490.

The possession of Chapman prior to Sep-

tember 27, 1850, was not adverse to the plaintiff's title, because the legal title of his grantor, Coffin, did not accrue until that time. The statute of limitations did not commence to run against Coffin until the legal title had passed to him from the United States, by virtue of his settlement under the donation act. Doswell v. De La Lanza, 20 How. [61 U. S.] 32; Gibson v. Choteau, 13 Wall. [80 U. S.] 99. Neither did Chapman hold the possession of the lot in subordination to any right or title in Coffin prior or subsequent to the passage of the donation act, by reason of his entering under the deed to him from Coffin and Lownsdale, of June 25, 1850. Under that deed Chapman took the possession of the lot with a covenant upon the part of Coffin and Lownsdale to convey to him the legal title when they or either of them obtained it from the United States. The conditions of the sale were performed so far as Chapman was concerned, and from September 27, 1850, he was entitled in equity to a conveyance of the legal title from Coffin. Thereafter his possession might become adverse to that of Coffin's, and in the absence of any proof to the contrary, should be presumed to be so. Stark v. Starr [Case No. 13,307].

It is not seriously questioned, upon this view of the law, but that the defendant has been in the adverse possession of the premises since the date of his entry in 1862, and that Kellogg, Caruthers and Chapman were also in such possession during the several periods of their occupancy, since September 27, 1850; but the plaintiff insists that there is no privity of possession shown between the defendant and these parties, so as to make twenty years of continuous adverse possession in favor of the defendant.

Upon this point the law is, that the adverse possession of the defendant, to constitute a bar to the plaintiff's right, must be continuous. Several successive but unconnected disseizins or adverse possessions, though amounting in the aggregate to twenty years, cannot be tacked together to make a continuous possession for that period in favor of the last occupant. For instance, if A. enters upon the land of another and holds it adversely to him for ten years, and then abandons or disposes of his possession in some way, and thereupon B. enters upon the same premises and holds them adversely to the owner for another period of ten years, but without any privity of contract or estate with A., and as a stranger to him, he cannot tack A.'s possession to his, and thereby make a continuous adverse possession in himself for twenty years. In such case B. does not enter under A., or obtain his possession; and as soon as A. quits the possession, the true owner, in virtue of his legal title, is again instantly seized or possessed of the premises by operation of law, and thereby the continuity of the possession between the adverse claimants is broken, or rather is prevented.

To establish this privity of possession, it is admitted on all hands that the later occupant must enter under the prior one—must obtain his possession either by purchase or descent. Ang. Lim. § 413; 2 Washb. Real Prop. 489, 493, and cases there cited.

In this case the defendant claims that the proof shows that the possession has passed by bargain and sale and delivery, regularly from Coffin and Lownsdale to Chapman, from Chapman to Caruthers, from Caruthers to Kellogg, and from Kellogg to the defendant.

As a matter of law this proposition is denied by the plaintiff, because, as he maintains, this possession could only have passed from one of these parties to the other by the force and operation of duly executed deeds, valid upon their face, which, if the several grantors therein had had the legal title to the premises, would have been sufficient to pass such title to their grantees; it being admitted that no such deeds are shown.

In the books, it is often said, that to enable an occupant to tack the possession of a prior occupant to his, for the purpose of making out the statutory period of limitation, such occupants must have held under color of title, and there must be a privity in deed between them.

I think these expressions refer to and grow out of the doctrine of what is called constructive adverse possession; as where one enters under a deed, valid upon its face, for a tract of one hundred acres, but only actually occupies five acres of such tract, his claim of possession is referred for extent to the limits in his deed, and he is held to be constructively in the adverse possession of the whole tract. Simpson v. Downing, 23 Wend. 320; Humbert v. Trinity Church, 24 Wend. 611.

But here the premises in controversy are a town lot only fifty by one hundred feet in size. Under the circumstances there is no room for the doctrine of constructive possession. The occupants since the sale to Chapman have been in the actual possession of the whole lot, or no part of it.

Where the possession is actual it may commence in parol without deed or any writing, and I am of the opinion, both upon reason and authority, that it may be transferred or pass from one occupant to another by a parol bargain and sale, accompanied by delivery. All the law requires is continuity of possession, where it is actual. Brandt v. Ogden, 1 Johns. 158; Doe v. Campbell, 10 Johns. 477; 2 Hil. Real Prop. 172; Ang. Lim. § 413, note 2; Moore v. Moore, 8 Shep. [21 Me.] 350.

If, then, you are satisfied from the evidence that the defendant entered into possession of the premises under Kellogg, by virtue of a sale and delivery of the possession to him by Kellogg or his authorized agent, by deed, writing or parol, and that Kellogg entered under Caruthers and Caruthers under Chapman in like manner; and also that the defendant and said Kellogg, Caruthers and Chapman, or the defendant and said Kellogg and Caruth-

ers, have, taken together, held the actual possession of the premises, according to the situation of the property and the purpose for which the same was intended and could be conveniently used, adverse to Coffin's title, for a period of twenty years prior to October 27, 1871, your verdict should be for defendant; otherwise, for the plaintiff.

The jury found that the plaintiff was not entitled to the possession of the premises.

Case No. 12,823.

SHUFORD v. CAIN et al.

[1 Abb. U. S. 302;[1] 16 Pittsb. Leg. J. 194; 2 Am. Law T. Rep. U. S. Cts. 187; 3 West. Jur. 294; 1 Leg. Gaz. 154.]

District Court, N. D. Georgia. Sept. 14, 1869.

COURTS—PROCEEDINGS IN LAW AND EQUITY—JURISDICTION—VACATING JUDGMENT.

1. The commingling of law and equity in the same proceeding, which is allowed in the state courts of Georgia, is unknown in the national courts held within that state. These sit distinctly as courts of law, or as courts of equity.

2. In modern practice the courts incline to allow a question of regularity in the proceedings in a cause to be raised and determined upon a motion in the cause, instead of requiring the party aggrieved to sue out a writ.

3. A circuit or district court has no jurisdiction to entertain an action brought by an indorsee of a promissory note where both the maker and the payee and indorser are citizens of the same state. As the payee could not have sued the maker, his assignee or indorsee cannot do so, under section 11 of the judiciary act of September 24, 1789 [1 Stat. 78]. So *held*, notwithstanding the note was not negotiable in terms.

[Cited in Re College Street, 11 R. I. 475.]

4. A judgment and subsequent proceedings, had in a circuit or district court, which are void for want of jurisdiction, may be vacated upon motion in the same court, notwithstanding the expiration of the term at which the judgment was rendered.

[Cited in Woffenden v. Woffenden (Ariz.) 25 Pac. 668. Cited in brief in Jackson v. Hulse, 6 Mackey, 553.]

Motion to vacate a judgment and subsequent proceedings.

Mr. Hopkins, for the motion, cited [Gibson v. Chew] 16 Pet. [41 U. S.] 315; [Dromgoole v. Farmers' & Merchants' Bank of Mississippi] 2 How. [43 U. S.] 241; [Phillips v Preston] 5 How. [46 U. S.] 290, 291; [Connolly v. Taylor] 2 Pet. [27 U. S.] 556; 3 Bac. Abr. tit. "Error"; 12 Johns. 434; 14 Johns. 425; [Harris v. Hardeman] 14 How. [55 U. S.] 342; [Shriver v. Lynn] 2 How. [43 U. S.] 58; [Carter v. Bennett] 15 How. [56 U. S.] 356; [Harris v. Hardeman] 14 How. [55 U. S.] 345, 346; [Ex parte Crenshaw] 15 Pet. [40 U. S.] 119.

Mr. Weil, and Lochrane & Clark, in opposition, cited Popino v. McAllister [Case No. 11,277]; [Young v. Bryan] 6 Wheat. [19 U. S.] 146; [Evans v. Gee] 11 Pet. [36 U. S.] 80; Chit. Bills.

ERSKINE, District Judge. Elkanah Shuford, a citizen of the state of Alabama, brought assumpsit in this court against William C. Cain, as maker of a non-negotiable promissory note, and Joseph L. Grisham, as indorser of the same. The following is a copy of the note: "On or before the first day of January, 1863, I promise to pay J. L. Grisham the sum of seven hundred dollars, for value received of him, with interest from twelve months, this 12th October, 1860. W. C. Cain." The note was indorsed in blank by the payee, J. L. Grisham.

The writ was returnable at the March term, 1868. Service was acknowledged by defendants, but neither appeared. At the same term, judgment by default was taken, a verdict rendered and judgment final entered, upon which execution issued and was levied by one Dickson, a deputy marshal, on land as the property of Grisham.

Thus the matter stood until after the September term, 1868, when Grisham filed a bill, on the chancery side of this court, against Shuford and Dickson, to set aside the judgment, &c.; because, as alleged, the court had no jurisdiction of the subject matter of the action, both maker and indorser being citizens of Georgia when the note was made, and at the commencement of the action; that Grisham indorsed the note to one Galt, in part payment for a family of slaves purchased by him of Galt; and that he, Grisham, when the suit was brought, had, and still has, a good defense to the note, but, being sick during the term, he was unable to make the defense. On these grounds,—and on others unnecessary to mention here,—he prayed that the sale of the land be enjoined. A hearing on the bill alone was had at chambers. The injunction was denied; but the sale of the property was postponed, and time granted to defendants to demur, plead, or answer by the first day of the ensuing term, when the cause could be fully argued. Whereupon, counsel for Grisham asked for, and (no objection being interposed by defendants) obtained leave to file a motion on the common law side of the court—as ancillary to the bill, or in lieu of it. The motion was filed. It prayed, like the bill, that the judgment be annulled, and the fieri facias set aside, for reasons similar to those contained in the bill. Defendants filed no defense to either bill or motion. But (complainant making no objection) they were allowed to contend against the bill and motion, to the same extent as would have been proper had a demurrer been filed. In argument, they insisted that the former contained no equity, and the latter no law; at least, neither equity nor law which could avail the complainant at that late day—he being barred of any supposed rights by his own laches; and further, that the court had no power to enjoin the judg-

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

ment, or to annul it, after the end of the term at which it was obtained. It was contended that the bill and motion are one proceeding; or, if distinct and separate proceedings, both must be rejected as inapplicable remedies, or, if not so, as coming too late.

I am relieved from passing upon some of the propositions advanced and discussed, as Mr. Hopkins, counsel for Grisham, elected to submit his case on the common law motion alone. Had he relied on both bill and motion, some embarrassment might have arisen, for the question would have presented itself, whether a party, in asking an adjudication in a United States court, could blend a proceeding which is properly cognizable in a court of equity with one properly cognizable in a court of law.

The United States courts are courts of law and equity. And it is the duty of the judge to see that the course of the court,—whether it be the court of chancery, of admiralty, or of common law,—is not invaded or altered. He must take care to preserve it. Const. art. 3, § 2; Bennett v. Butterworth, 11 How. [52 U. S.] 669.

In the courts of many of the states,—Georgia, for example,—law and equity are, in a greater or less degree, blended. This commingling is unknown in the national courts. These, as courts of law, entertain suits in which legal rights are to be ascertained and determined in contradistinction to equitable rights. As courts of equity, they entertain suits in which relief is sought according to the principles, and, in general, the practice of the equity jurisdiction as established in English jurisprudence. Parsons v. Bedford, 3 Pet. [28 U. S.] 447; Robinson v. Campbell, 3 Wheat. [16 U. S.] 212; U. S. v. Howland, 4 Wheat. [17 U. S.] 108; Pennsylvania v. Wheeling Bridge Co., 13 How. [54 U. S.] 519.

It was insisted, on the part of Shuford, that no relief could be given, in this particular case, upon a mere motion. But counsel did not name what he deemed a proper remedy, though he seemed to indicate that a suit of audita querela or scire facias, or a writ of error coram vobis, might possibly answer. The court will, however, leave the matter as it stands, and assume that a proceeding by motion is a suitable and also a not unusual remedy. This mode of investigating questions which are in their general features like these now under consideration, has, in modern days, been countenanced and adopted by the courts, by reason of being less expensive, and more simple and expeditious than those cumbrous and technically toilsome remedies just named. Staniford v. Barry, 1 Aiken, 321; Smock v. Dade, 5 Rand. [Va.] 639; Gordon v. Frasier, 2 Wash. (Va.) 130; [Langworth v. Screeven, 2 Hill (S. C.) 298];[2] Johnson v. Harvey, 4 Mass. 483; Baker v. Judges of Ulster, 4 Johns. 191; Crawford v. Williams, 1 Swan, 341, and cases there cited; Ledgerwood v. Pickett [Case No. 8,175]; s. c., 7 Pet. [32 U. S.] 144; Wood v. Luse [Case No. 17,950]; Harris v. Hardeman, 14 How. [55 U. S.] 334.

A rule is, that the same court which pronounced and entered up a final judgment cannot, at a subsequent term, vacate it for errors in law; this is the doctrine of the common law, and also of the supreme court of the United States. Some of the exceptions to the rule are, where the judgment was irregular, or where no notice had been served upon the defendant, or for fraud, or misprision of the clerk. But none of these faults are relied on by Grisham, in the proceedings instituted by him to set aside and annul this judgment. He asks for relief because, as he avers, this court had no jurisdiction of the subject matter of the cause; indeed, that cognizance of it was positively inhibited by section 11 of the judiciary act of September 24, 1789. This objection is, I apprehend, the main, if not really the only, question for determination.

It is admitted by the pleadings, and was not disputed in the argument, that the note was made in Georgia; that Cain, the maker, and Grisham, the payee and indorser, were then citizens of Georgia, and so continued to be, and were citizens of, and residing in this state, at the commencement of the action. Also, that Grisham, when the interlocutory and final judgments were obtained, had, and still has, a good defense against the note; but, by reason of his sickness, he could not make his defense. Upon what matters of law or fact these additional objections to the validity of the judgment were based, was not brought to the notice of the court. Nor, indeed, was it necessary to present them.

It was argued by the learned counsel for Shuford that this being a non-negotiable note, it was not within the prohibition contained in section 11 of the judiciary act. This position is, I think, untenable. The section does not confine the jurisdiction to negotiable paper.

If Grisham, the payee of this note, had indorsed it to A., a citizen of another state, A. could bring an action against Grisham to recover its contents; for the indorsement of a non-negotiable note by the payee, ordinarily creates, as between him and the immediate indorsee, the same liabilities and obligations as are incurred by the indorsement of a negotiable note. But no action at law could be sustained by A. against Cain, the maker, without using the name of the payee, unless there was an express promise by the maker to pay A. Story, Prom. Notes, § 128, and note 4; Burmester v. Hogarth, 11 Mees. & W. 97; Matlack v. Hendrickson, 1 Green [13 N. J. Law] 263; Gibson v. Cooke, 20 Pick. 15; see 2 Pars. Notes & B. 44.

In Young v. Bryan, 6 Wheat. [19 U. S.] 146, it was held by the supreme court of the United States that a circuit court has jurisdiction of a suit brought by the indorsee of a

[2] [From 3 West. Jur. 294.

promissory note, who was a citizen of one state, against the indorser, who was a citizen of a different state, whether a suit could be brought in that court by the indorsee against the maker or not. See, also, Evans v. Gee, 11 Pet. [36 U. S.] 80.

Now, if Shuford be the immediate indorsee of Grisham, the payee (and of this presently), he could, as just remarked, have instituted a suit in this court against the payee, but not against the maker. And even if the cause of action were a promissory note payable to order, the indorsee could not bring a suit here against Grisham and Cain, payee and maker, because his assignor, Grisham, could never have sustained an action in this court against Cain,—Cain and Grisham being citizens of Georgia. Montalet v. Murray, 4 Cranch [8 U. S.] 46; Coffee v. Planters' Bank of Tennessee, 13 How. [54 U. S.] 183.

It was stated in the proceedings of file, that Grisham indorsed the note thus: "J. L. Grisham,"—to one Galt, and delivered it to him. If this be so, and the allegation was not denied or questioned,—the note being payable to a particular person only,—there has never been any privity in law between the subsequent holder, Shuford, and Grisham, the payee and indorser, or between the former and Cain, the maker. Consequently, Shuford could not bring a suit at law in his own name against Grisham and Cain, or against either of them. Story, Prom. Notes, §§ 128, 129.

Section 2732 of the Code of Georgia (1st Ed.) provides that the maker and indorser of a note may be sued in the same action. This mode of proceeding was adopted in the case at bar. The declaration contains one count. Independently of this provision in the Code, no such joint action is maintainable under the well established rules of pleading; because the liabilities of the maker of a promissory note and an indorser are distinct and independent—the one being primary and immediate, the other secondary and collateral—and they cannot in a national court be sued jointly, but must be proceeded against in separate actions.

In Keary v. Farmers' & Merchants' Bank of Memphis, 16 Pet. [41 U. S.] 89, 94, Mr. Justice Story, in giving the opinion of the court, said that it is not "competent for any state legislature to regulate the forms of suits or modes of proceeding or pleadings in the courts of the United States; but the sole authority for this purpose belongs to the congress of the United States."

The circuit and district courts of the United States are courts of limited, but not inferior jurisdiction, and they cannot exercise any jurisdiction which is not expressly, or by necessary implication conferred. But where they do possess jurisdiction they have a right to decide every question which occurs in the cause; and whether their decisions be correct or otherwise, their judgments are conclusive between parties and privies until reversed on error. If, however, they are without authority, their judgments are absolutely null, and form no bar to a recovery which may be sought, even prior to a reversal in opposition to them. This is the distinction between judgments which are voidable and those which are void. Shriver v. Lynn, 2 How. [43 U. S.] 43; Harris v. Hardeman, 14 How. [55 U. S.] 334; Carter v. Bennett, 15 How. [56 U. S.] 354; Atkinson v. Purdy [Case No. 616].

As has been already observed, Cain, the maker of the note, and Grisham, the payee, both being citizens of Georgia, the latter could not bring a suit in this court to recover the contents of the note against the former; for, by a provision in section 11 of the judiciary act, the jurisdiction is confined to cases in which "the suit is between a citizen of the state where the suit is brought, and a citizen of another state." Nor could any assignee or indorsee of Grisham sustain a suit here against the maker, in the face of the following prohibition in section 11: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made."

Thus it will be seen that the present case falls directly within both of these clauses of the section. And with these facts before me, I cannot come to any other conclusion than that the rendition of the judgment was coram non judice, and therefore utterly void.

Counsel for Shuford contend that if the court should be of opinion that the judgment, so far as it affects Cain, is void, it must nevertheless stand good as against Grisham.

On inspection of the record, the judgment is found to be against both defendants—"that the said plaintiff do recover against the said defendants his damages aforesaid," &c. This judgment, being an entirety, if void in part, is void in all; if annulled as to one of the parties, it must be annulled as to both. 2 Saund. 101; Hemmenway v. Hickes, 4 Pick. 497. But if the judgment could have been several, instead of joint, I cannot perceive how Shuford would be thus benefited.

As to the position that if Grisham ever had any rights, he came too late to assert them—the reply is: if the judgment is a nullity, he is in time. Wood v. Luse [Case No. 17,950].

Ordered, that the judgment by default, the verdict and the final judgment be, and they are hereby declared null and void, and that the writ of fieri facias be quashed. But the writ and declaration may remain before the court until 10 a. m., on the last day of the present term; and, in the mean time, the plaintiff, Shuford, may move for leave to amend, if he should be of opinion that the court has power to grant any amendment in the proceedings.

SHULMAN, In re. See Case No. 739.

Case No. 12,824.

SHULTS v. MOORE.

[1 McLean, 520.] [1]

Circuit Court, D. Ohio. July Term, 1839.

DEEDS—ACKNOWLEDGMENT—WHO MAY TAKE—CERTIFICATE—RECORDING—NOTICE.

1. Under a late decision of the supreme court of Ohio, a deed acknowledged before the mayor of Cincinnati, is good.

2. Independently of this decision, the court incline against the power of the mayor to take the acknowledgment.

3. He is given the same powers as a justice of the peace, "in civil and criminal cases," that is, judicial powers.

4. The taking of an acknowledgment is not the exercise of a judicial power—it would seem therefore that the mayor, under the former law, could not take acknowledgments.

5. Recording a deed, duly acknowledged, is constructive notice.

6. If the acknowledgment be substantially defective, though the deed be recorded, it is not notice.

[Cited in Bishop v. Schneider, 46 Mo. 473. Cited in brief in Owen v. Baker, 101 Mo. 410, 14 S. W. 175. Cited in Reed v. Kemp, 16 Ill. 451. Distinguished in Shove v. Larsen, 22 Wis. 146. Cited in Stevens v. Hampton, 46 Mo. 408.]

7. By the decision of the supreme court of the United States, parol proof that a justice acted as such, is admissible, when not stated in certificate.

[Cited in Hudson v. Fishel, 17 R. I. 70, 20 Atl. 100.]

8. Notice in fact may be proved, of a prior deed.

[This was an action in ejectment by Conrad Shults against Lewis Moore. For a motion for a prior continuance of this cause, see Case No. 12,825.]

Mr. Fox, for plaintiff.

Wright & Wood, for defendant.

OPINION OF THE COURT. This action of ejectment was brought to this court, under the act of congress, from the state court in which it was commenced. Both parties claim the land in controversy under James Drake. The lessor of the plaintiff first introduced a deed from Drake to Dehant, dated the 26th September, 1817, and a mortgage, dated 12th August, 1818, by Dehant to the lessor of the plaintiff. The mortgage was acknowledged before the mayor of Cincinnati on the day it bears date. The defendant introduced a deed for the same premises from James Drake to the defendant Moore, dated 9th September, 1826; and which was recorded 17th November, 1826. Also a mortgage from Dehant to Drake, dated 26th September, 1817, and a record of a proceeding on this mortgage, by scire facias in which a judgment was entered, and the premises were sold on execution, by the sheriff, to Drake. The sheriff's deed read in evidence is dated 31st May, 1833. And the defendant introduced a deposition conducing to prove that at the time, and before the mortgage to the lessor of the plaintiff was executed, he had notice of the prior mortgage executed by Dehant to Drake, and here the evidence closed. It was agreed that the objections to the deeds on both sides should be considered in the main argument to the jury, and that in their instructions the court should decide the legal questions that arise in this case.

The first objection is, that which is made to the acknowledgment of the mortgage deed given in evidence by the lessor of the plaintiff. This deed was acknowledged before the mayor of the city of Cincinnati; and his right to take the acknowledgment is questioned. By the act of Ohio of 30th January, 1818, a deed for the conveyance of land is required to be acknowledged before a judge of the court of common pleas or justice of the peace. The tenth section of the act giving jurisdiction to the mayor (13 Ohio Laws, 60), declares that in all civil and criminal cases he shall have the same jurisdiction as a justice of the peace. Subsequently to the taking of this acknowledgment, an act was passed giving power to the mayor to take acknowledgments of deeds, and confirming those which he had taken, excepting acknowledgments to be used in suits then pending. And at the time of the passage of this law, a suit was pending in Butler county between the same parties, involving the subject now in dispute. The validity of the acknowledgment under consideration, must be decided under the general law on the subject, and in reference to the adjudications made on the same point by the supreme court of the state. And first, as to the power of the mayor under the general law.

In all civil and criminal cases, he has the same jurisdiction as a justice of the peace. And this is the extent of the jurisdiction conferred on him. He can exercise no jurisdiction but what is specially given. His powers are all regulated by the statute, under which they are derived. What is meant by a jurisdiction, "in all civil and criminal cases?" It can have no other application than to the exercise of judicial power. A criminal case as well as a civil one, requires parties; a plaintiff and defendant, and a subject matter of controversy, in the decision of which, the judgment of the mayor must be exercised. There can be no case, technically speaking, without parties. The word "case" is well defined at common law, and in legal parlance; and when such a term is used in a statute it is always presumed to be used, unless the contrary very clearly appear, in reference to its known signification. The power conferred on the mayor, was not generally the powers of a justice of the peace, but the same powers as a justice of

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

the peace, "in civil and criminal cases." In other words, the same judicial powers. A justice by the statute is authorized to do many acts which are not judicial, such as solemnizing matrimony, taking depositions, and taking acknowledgments of deeds. In 5 Ohio, 331, the supreme court decided that the mayor was not authorized to take depositions. And in 1 Ohio, 15, that in taking an acknowledgment of a deed, a justice does not act in a judicial capacity. Both these points were quite clear before these decisions were given; but as they have been adjudged, they are not now to be contested. It appears, then, that the powers given to the mayor by the above act, were strictly and technically judicial; and did not extend to any act or power not judicial. And it follows that under the above law, the mayor had no power to take the acknowledgment of a deed. This is the view of the court uninfluenced by any construction of the statute, by the supreme court; and it has been given because the construction does not seem to have been well settled by that court.

On the part of the defendant it is contended that the construction has been settled, in this very case, when formerly before the supreme court, against the power of the mayor to take acknowledgments.

An action of ejectment was commenced in the common pleas, by the plaintiff against the defendant, for the recovery of the property now in dispute; and on the trial an objection was made to the deed of mortgage, to Shults, on the ground that the mayor had not power to take the acknowledgment; and on this ground the court rejected the evidence. And on a motion to set aside the verdict the judges were divided in opinion, so that the case was brought before the judges in bank, and there the four judges were divided, and the motion to set aside the verdict against the plaintiff failed. And this is claimed as a decision of the identical point, now under examination; and it is contended that it should be considered by this court, as conclusive.

The decision of the question between the same parties, respecting the same subject matter of controversy, would be no more conclusive of the present case, than if the same point had been decided between other parties. The former action of ejectment constitutes no bar to the present action. But in the case referred to, the construction of the statute was not settled. Had the decision of the motion for a new trial been acquiesced in, there would have been some color for the argument that the point had been adjudicated, as the two judges must have concurred in rejecting the deed on the trial. But the two judges on the circuit were divided on the motion for a new trial, and so were the four judges in bank. The construction of the statute therefore was not settled in that case. But, it appears from a manuscript record, that the same point, as to the power of the mayor to take acknowledgments, came up very recently, before two of the judges on the circuit, at Cincinnati, and it was decided in favor of the power. In this decision, both the judges must have concurred. It is not known that this decision has been adjourned to the court in bank; and so long as it shall stand unreversed, it will constitute a rule of decision for this court. We do not inquire whether the construction of a statute by the supreme court of the state, is right or wrong according to our views, but we receive it as the law of the state. Under this decision the deed, with the acknowledgment before the mayor, will be considered as having its full legal effect by the jury.

The objection that to the acknowledgment the mayor affixed and certified the seal of the corporation, and not his private seal, is easily answered. The mayor is the keeper of the corporation seal, and uses it to authenticate his official acts. And it may be a matter of doubt whether, if he may as mayor, take the acknowledgment of a deed, the seal may not be used to authenticate the act. In any view, the mayor has a right to adopt a scrawl, a wafer, or any other impression as his private seal, and if he so designates it, there can be no objection. The seal is used to authenticate the act of the acknowledgment, and if it give greater solemnity to the authentication than is required, still it must be held good, as a seal used by the mayor, for the special purpose, to authenticate the act. The impression was made by the mayor; it was then his seal, and if necessary it may be considered as the seal of the corporation; but if not necessary, and the seal is not used properly, as a corporation seal, it at least is the seal of the mayor which he has adopted and used as his own. Every thing said in the certificate or which appears from the impression of the seal, which was not required for the due authentication of the acknowledgment, may be rejected as surplusage, if enough appear to authenticate the act. And we think enough appears, both as to the certificate and the seal, in substance and in form, to verify the acknowledgment.

On this deed the lessor of the plaintiff relies for a recovery. The deed of mortgage from Dehant to Drake is of prior date to the mortgage from Dehant to Shults, but the magistrate before whom it was acknowledged, did not state, either in the body of the certificate or with his signature that he was a justice of the peace; and it is contended that the deed, therefore, has not been legally acknowledged. Under ° an agreement it is read in evidence, with leave to except to the acknowledgment. The objection is well founded in fact. The official character of the justice does not appear in his certificate, nor are the initials J. P. an-

nexed to his signature, nor any thing else to show in what character he acted in taking the acknowledgment. The certificate of the clerk and seal of the court of common pleas are annexed to the acknowledgment, showing that James Heaton, Esq., before whom the acknowledgment was taken, was, at the time, a justice of the peace. And the question here arises whether this omission of the justice can be supplied by proof that he was a justice of the peace. If such evidence be admissible, there can be no doubt that the certificate of the clerk, under the seal of the court, is the best evidence of which the case is susceptible. The clerk has official knowledge of the appointment and qualification of the justice, and is authorised to certify the facts.

In the case of Vanness v. Bank of U. S., 13 Pet. [38 U. S.] 21, the same question came before the court under the statute of Maryland, which requires a deed to be acknowledged before two justices of the peace. The court in that case say "upon the second exception, the plaintiff in error contends, that the acknowledgment of the deed from Walter Smith to Benjamin Stoddart is defective, and the deed inoperative, because it does not appear in the certificate of acknowledgment endorsed upon the deed that the persons before whom it was made were at that time justices of the peace for Washington county; and he insists that this omission cannot be supplied by parol." "This question depends upon the construction of the acts of assembly of Maryland which prescribe the mode in which deeds shall be acknowledged, for the conveyance of real property. We perceive nothing in the Maryland acts of assembly which requires justices of the peace or other officers to describe, in their certificates, their official characters. It is no doubt usual and proper to do so, because the statement in the certificate is prima facie evidence of the fact, where the instrument has been received and recorded by the proper authority. But such a statement is not made necessary by the Maryland statutes. And whenever it is established by proof that the acknowledgment was made before persons authorized to take it, it must be presumed to have been taken by them in their official capacity; and when their official characters are sufficiently shown by parol evidence, or by the admissions of the parties, we see no reason for requiring more, where the acts of the legislature have not prescribed it. On the contrary, the soundest principles of justice and policy would seem to demand that every reasonable intendment should be made to support the titles of the bona fide purchasers of real property; and this court is not disposed to impair their safety, by insisting upon matters or form, unless they were evidently required by the legislative authority." Unless there be something peculiar in the Maryland statutes, this decision is conclusive of the point now under consideration. For it lays down the position that proof of the official character of the officer may be made by parol, where it does not appear on the face of the certificate of acknowledgment. The statute of Ohio no more prescribes the mode of the certificate than the statute of Maryland. The requirement is that the deed shall be acknowledged before a justice of the peace; and of course the evidence of the acknowledgment must appear on the deed.

I did not accord with the above decision, though I expressed in the reports no dissent. It appeared to me that the acknowledgment upon its face must contain all the requisites to its validity, to have the effect of notice under the registration laws. And as we have not before us the statute of Maryland, and the defendant relies on proof of notice in fact, the court will reserve the question as to proof of the official character of the justice, and instruct the jury that for the purposes of this trial the acknowledgment will be considered defective and inoperative. And this being the case, the recording of the deed would not be constructive notice, under the statute. If a deed not under seal, or with one subscribing witness only, were recorded, it would not be notice. And it would seem to follow that if the deed were defective in any substantial part, there could be no notice under its registration. Without an acknowledgment, the recording of the deed could have no effect as to notice, for the statute requires the deed to be executed and acknowledged, and then recorded, to operate as constructive notice. The acknowledgment must be made before a justice of the peace, and the evidence of this must be on the deed, or connected with it. And if this acknowledgment be defective in not showing that the person who took the acknowledgment had a right to take it, the act does not appear to be official, and is not a compliance with the statute. And where a purchaser is to be charged with constructive notice from the mere registration of a deed, all the substantial requisites of the law should be complied with. As well might it be contended that a recorded deed without an acknowledgment would be notice, as that it would be notice with a defective acknowledgment.

Some reliance is placed in the argument on the sheriff's deed for the premises under a sale on the judgment obtained on the scire facias. But it is clear that this deed can only have relation back to the judgment; and if the defendant insists on a lien under the mortgage, prior to the judgment, it can only be established by proof of notice in fact of the mortgage. As it regards the notice in fact, the jury are to judge from the evidence. They are the exclusive judges of the credibility of witnesses, and if they believe the witness whose deposition has been read, the fact of notice is proved. He swears, that

before the first mortgage to Shults was given, he conversed with the witness respecting the first mortgage, and observed that the property was worth considerably more than the first mortgage called for, and that his mortgage would secure the property, excepting the amount of the prior mortgage. An attempt has been made to impeach the credibility of this witness, by proving that he was intemperate; but this evidence, not going to the general reputation of the witness, was overruled, and there are no circumstances going to impeach him, unless they are found, as contended by the plaintiff's counsel, in the manner of his stating the facts.

The jury found a verdict of not guilty, and a motion for a new trial being overruled, a judgment was entered on the verdict.

SHULTZ (JOSSE v.). See Case No. 7,551.

Case No. 12,825.

SHULTZ v. MOORE.

[1 McLean, 334.] [1]

Circuit Court, D. Ohio. Dec. Term, 1838.

CONTINUANCE—SICKNESS OF COUNSEL.

A motion was made for a continuance of this cause, founded on the affidavit of one of the defendant's counsel, who was sick and unable to attend the court. The affidavit stated that the affiant was the first counsel engaged by the defendant, had appeared as his counsel in the same case in the state court, and was intimately acquainted with the grounds of defence. That he had possession of the papers, &c., and that he did not believe justice could be done in the cause, under present circumstances, in his absence.

[Cited in Markson v. Ide, 29 Kan. 703; Myers v. Trice, 11 Haus. (86 Va.) 841.]

[This was an action of ejectment by the lessee of Conrad Shultz against Lewis Moore. Heard on motion for a continuance.]

OPINION OF THE COURT. Where the leading counsel in a case is prevented from attending the court by sickness, and the counsel in attendance is not prepared to go on with the trial, it is a sufficient ground for a continuance. The cause stands continued at the costs of the defendant.

[See Case No. 12,824.]

SHULTZ (UNITED STATES v.). See Case No. 16,286.

Case No. 12,826.

SHUMAN v. FLECKENSTEIN.

[4 Sawy. 174; [2] 15 N. B. R. 224; 9 Chi. Leg. News, 174.]

District Court, D. Oregon. Jan. 30, 1877.

BANKRUPTCY—ILLEGAL TRANSFER OF PROPERTY—ACTION BY ASSIGNEE TO RECOVER—DAMAGES.

1. A transfer of property by an insolvent debtor, contrary to section 5128 of the Revised Statutes, is contingently valid, and the receipt of the same by the creditor is not tortious, and does not of itself amount to a conversion of the property.

[Cited in brief in Crampton v. Valido Marble Co., 60 Vt. 297, 15 Atl. 153.]

2. An action by an assignee in bankruptcy to recover the value of goods transferred by the bankrupt contrary to section 5128 of the Revised Statutes, is in substance and effect an action of trover, and the complaint must either allege an actual conversion of the property to the use of the defendant, or a demand and refusal to deliver the same to the assignee.

[Cited in Crampton v. Valido Marble Co., 60 Vt. 302, 15 Atl. 153.]

3. In such action the assignee may recover damages for the detention of the property, including profits made out of it, or injuries received by it while in the possession of the creditor.

Action [by A. Shuman, assignee, against Henry Fleckenstein] for money had and recovered to the use of the plaintiff under section 35 of the bankrupt act. [14 Stat. 534;] Rev. St. § 5128.

M. W. Fechheimer, for plaintiff.
Cyrus Dolph, for defendant.

DEADY, District Judge. This action is brought by the assignee of V. Schmidt, a bankrupt, under section 35 of the bankrupt act (section 5128, Rev. St.), to recover from the defendant the sum of $311, the alleged value of certain property transferred by said bankrupt to the defendant within two months prior to the filing of the petition against him in bankruptcy, contrary to the provisions of said section.

The defendant demurs, and for cause of demurrer assigns that the complaint does not allege a demand and refusal of the property, or any fact showing its conversion by the defendant. The only allegation in the complaint upon the subject of demand is, that the plaintiff, before the commencement of this action, "demanded the said sum of $311, the value of said property, from the defendant herein;" and that the defendant has "neglected and refused to pay the same or any part thereof to said plaintiff."

This, of course, is not a demand for the property and a refusal to deliver the same, but merely a demand and refusal to pay an arbitrary sum of money, which the plaintiff assumes is the value of the property.

In Brooke v. McCraken [Case No. 1,932], it was suggested by this court that a transfer of property contrary to section 35 of the bankrupt act, was not void as against the bankrupt, and that therefore the receipt of the property by the party taking the transfer was not tortious, and unless the subsequent detention became wrongful for some other reason, there must be a demand and refusal to make it so.

In Hyde v. Sime [unreported], Mr. Justice Hoffman held that a transfer by an insolvent debtor contrary to section 5128, supra, has "a contingent validity," because it can only be avoided by the commencement of pro-

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

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

ceedings in bankruptcy within a certain time thereafter, and therefore in case such transfer is made void by an adjudication in bankruptcy "the creditor who has received the goods cannot be considered a tort feasor until a demand has been made upon him by the assignee."

The right given to the assignee to "recover the property, or the value of it," is in effect a right to maintain replevin for the possession of the specific property or trover for the conversion of the same. When the property has been sold by the creditor for a certain sum of money, the assignee may doubtless adopt the sale, and sue for the amount realized therefrom, as for money had and received to his use.

The present action is substantially one of trover—in the nature of an action of trover—for the value of the property and proceeds, upon the theory that the defendant has wrongfully converted the same to his own use. "A conversion, in the sense of the law of trover, consists either in the appropriation of the thing to the party's own use and beneficial enjoyment, or its destruction, or in exercising dominion over it, in exclusion or defiance of the plaintiff's right, or in withholding the possession from the plaintiff under a claim of title inconsistent with his own." 2 Greenl. Ev. § 624.

Speaking of the action of trover, Chitty says (Chit. Pl. 170): "A demand and refusal are necessary in all cases when the defendant became, in the first instance, lawfully possessed of the goods, and the plaintiff is not prepared to prove some distinct, actual conversion;" and gives the following illustration, which seems to be exactly in point: "As when a trader, on the eve of his bankruptcy, made a collusive sale of his goods to the defendant, it was decided that the assignees could not maintain trover without proving a demand and refusal; for the parties contracting were competent at the time; and if the assignees disaffirm the contract, they should give notice by a demand,"—citing 2 H. Bl. 135, and other cases.

The original taking in this case being with the consent of the then owner, the bankrupt, and contingently valid, it was not tortious, and, therefore, does not amount to a conversion, and no subsequent distinct and actual conversion being shown, the plaintiff must allege and prove a demand and refusal before he can recover. Triscony v. Orr, 49 Cal. 617.

The demand and refusal alleged in the complaint is not of the goods, but their assumed value. Because the defendant refused to pay this sum, which may be twice what he believes the actual value of the goods to be, it does not follow that he refuses to deliver the same, or is not ready and willing to deliver them whenever duly demanded.

Counsel for the plaintiff, practically admitting that the assignee might have had the goods in question by demanding them, objects to this view of the law, that it will enable a creditor of an insolvent to receive goods from his debtor contrary to section 5128, supra, and to use them so as to make material gain out of them, or seriously depreciate their value, and then relieve himself from all liability by simply returning the depreciated or comparatively worthless articles to the assignee upon demand.

But I apprehend such a consequence will not follow. The assignee is as much entitled to recover damages for an injury to, or detention of, the goods as to recover the possession of them, and under the Code, as well as at common law, such damages may be recovered in the action to recover possession. 1 Chit. 186, 189; 2 Greenl. Ev. § 560; Civ. Code Or. § 91.

It is also objected by counsel for plaintiff that this is not an action of trover, but an action under the Code. An action under the Code is, in effect, an action upon the case; that is, the facts and circumstances of the transaction in question; and the action of trover and conversion was also originally nothing but an action on the case, the case being that the defendant had found goods, and refused to deliver them to the owner on demand. 1 Chit. 167.

While, then, this is not an action of trover eo nomine, it is such in substance and effect, and the cause of action attempted to be stated in the complaint is, in fact, identical with that upon which trover would lie at common law. A necessary element in the proof of this cause of action, where there was no actual conversion, was a demand and refusal of the property. According to the rule and theory of the Code, I think this necessary fact should be alleged in the complaint. See Brooke v. McCraken, supra, and authorities there cited. Section 5128, supra, does not give the assignee any additional or peculiar remedy in the premises. It provides, in effect, that a transfer of property contrary thereto shall be void, if the debtor is adjudged a bankrupt within a limited time thereafter. So far, the act annuls and confers rights which would not otherwise be affected or exist. But the additional clause, which declares that in that event "the assignee may recover the property or the value of it from the person so receiving it," is a mere legal conclusion from the premises, and does not restrict or enlarge the remedy of the assignee. Recover the property or its value, how? According to the procedure known to the forum in which the assignee elects to proceed.

Although the bankrupt act declares that the assignee may recover the property or its value, it is to be construed as giving a right to recover the latter, only as a substitute for the former in cases where the property has been destroyed or passed beyond the control of the creditor, or been constructively converted to his own use by a refusal to deliver the same upon the due demand of the assignee. In the latter case the assignee has the option to sue for the property or the value. But an

action to recover the value of property can only be maintained when the property itself has been actually or constructively converted to the use of the defendant, and the complainant must therefore allege a conversion in terms or its legal equivalent—a demand and refusal.

The demurrer is sustained.

SHUMATE v. HAWTHORNE. See Case No. 5,654.

SHUMAWAY (HOWE v.). See Case No. 6,774.

SHUMWAY (WRIGHT v.). See Case No. 18,093.

Case No. 12,827.

SHURLDS v. TILSON et al.

[2 McLean, 458.] [1]

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

PARTNERSHIP — DISSOLUTION — NOTICE — PUBLICATION IN NEWSPAPER.

1. There are two modes of giving notice of the dissolution of a copartnership, which will discharge an outgoing partner. One is express notice, by circular or otherwise, to those with whom the firm has had dealings. The other by publication in some newspaper of general circulation.

2. This latter notice is conclusive on those who had not had dealings with the firm. And as to those who have had dealings with the firm, such a publication would be received as evidence to the jury, who must determine, from all the circumstances of the case, whether the party had notice.

3. A person who deals with an individual, and exercises a power to bind another, should make some inquiry into his right to do so.

At law.

Davis & Forman, for plaintiff.
Baker & ——, for defendants.

OPINION OF THE COURT. This action is brought by the plaintiff, as assignee of certain bills or promissory notes, which purported to be signed by the defendants, and dated the 8th of May, 1839, and the 23d of July following. The defendants [Tilson and Pitkin] were partners in merchandizing, at Quincy, in this state, until the 19th April, 1839, when their partnership was dissolved; of which notice was given at the above date, in a newspaper published at Quincy. Both the defendants resided at that place. The plaintiff is a citizen of St. Louis, in Missouri. From the indorsements on the bill it would seem that this suit is brought for the benefit of the Bank of St. Louis. It is not pretended that either the bank or the plaintiff had any dealings with the defendants during their partnership. And the only question is, whether such notice of the dissolution of the partnership has been given to exonerate Tilson from liability on the bills. They were drawn by his late partner, Pitkin, and signed in the name of the partnership.

There are two modes of giving notice of the dissolution of a partnership, which shall put it out of the power of either partner to bind the other. The first is a special notice, by a circular or otherwise, of the dissolution, to those persons with whom the partnership had had dealings. This is the safer and more advisable course. And until this notice be given, either expressly or constructively, the partnership may be still bound after the dissolution. And the partners are bound, where the act purports to be a partnership act, without notice, whether it be done with a customer or a stranger. The second mode of giving notice is by a publication in a gazette. This publication of the dissolution is admissible as evidence, but Mr. Gaw, in his treatise on Partnership, page 280, says—that it is of little avail, unless it be shown that the party entitled to notice was in the habit of reading the Gazette. Godfrey v. Turnbull, 1 Esp. 371; Leeson v. Holt, 1 Starkie, 186. He says, indeed, that an advertisement in a common newspaper is not even admissible, without proof that the party took in the paper. In the case above cited, from 1 Starkie, Lord Ellenborough said—that he would receive evidence of the advertisement in the Gazette, but that, unless it were proved that the party was in the habit of reading the Gazette, the evidence would be of little avail. And his lordship was of opinion, that the advertisement in the Times, was not admissible at all without proof that it was taken in by the party. From these remarks it would seem that the Gazette was the paper in which such notices usually appeared, or were required to be published, and, therefore, a notice published in that was admissible in evidence, on a different principle from a notice in the Times. In the case of Jenkins v. Blizard, 1 Starkie, 418, the notice in the Gazette being read, the defendants proved that a similar advertisement had been inserted once in the Morning Cronicle, and, also, that the plaintiffs took in the latter paper. Lord Ellenborough was of opinion that it was admissible, and referred to a case where a party was sought to be affected with notice of an advertisement contained in a weekly provincial paper; in that case the paper was not only delivered at the house, but the party was seen to read it. Upon the whole his lordship submitted the evidence to the jury, and informed them that it was for them to say whether, under all the circumstances, the plaintiffs had notice. He, at the same time, remarked—it would be a more prudent course to send circulars to all with whom the parties had dealings. The court of king's bench, however, have recently decided, in the case of Wright v. Pulham, 2 Chit. 121, that notice in the Gazette, is notice to all the world of the dissolution of a partnership. In that case it did not appear that the party had had actual notice of the dissolution. This decision conflicts with some of the nisi prius decisions above cited, and of course overrules them. And from this decision the law seems to be now settled in England, although the report of the case is very

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

short and unsatisfactory, that a publication in the Gazette is sufficient notice of the dissolution of a partnership. And that the question there now is, not whether notice was, in fact, given to the party, but whether it was published in the Gazette. It is known that newspapers are sold in London by the carriers, and not delivered to subscribers as in this country. This, however, can make no difference as to the publication of the notice.

In the case of Lansing v. Gaine, 2 Johns. 300, it was held that a notice of the dissolution in the public papers is conclusive upon all persons who have had no previous dealings with a copartnership. But as to such persons as have had dealings with a copartnership, it is not so to be considered, unless, under the circumstances, it appears satisfactory to the jury that it operated as a notice. Bristal v. Sprague, 8 Wend. 423; Graves v. Merry, 6 Cow. 701; 6 Johns. 147, 148; Mowatt v. Howland, 3 Day, 353; Martin v. Walton, 1 McCord, 16.

Prudence requires, when an individual by his act assumes the right to bind another, that some inquiry should be made into his power to do so. And even to a stranger, and especially a bank, to whom the bill was negotiated, it would seem not to impose an unreasonable diligence to inquire whether a partnership, which formerly existed, be still subsisting. The court instructed the jury that if they shall find there was, in good faith, a dissolution of the copartnership between the defendants, and that notice was published of the same, on the 19th of April, in a newspaper of general circulation, at Quincy, it was sufficient to discharge Tilson from liability in this action.

The jury assessed damages against the other defendant on default, and found in favor of Tilson.

SHUSTER (UNITED STATES v.). See Case No. 16,287.

Case No. 12,828.

SHUTE v. DAVIS.

[1 Pet. C. C. 431.] 1

Circuit Court, D. Pennsylvania. April Term, 1817.

COURTS—FEDERAL JURISDICTION—CITIZENSHIP.

1. The circuit court has no jurisdiction, when neither of the parties in the suit, are citizens of the state in which the action is instituted.

[Cited in Donaldson v. Hazen, Case No. 3,-984; Dundas v. Bowler, Id. 4,140; Allen v. Blunt, Id. 215.]

2. Where the plaintiff was a citizen of Kentucky, and one of the defendants was a citizen of Pennsylvania, and the other defendant a citizen of New Orleans, but no process had been served on the latter, the jurisdiction of the court, in the case was maintained.

[Cited in Picquet v. Swan, Case No. 11,134; Nesmith v. Calvert, Id. 10,123; Heriot v. Davis, Id. 6,404.]

[Cited in Wills v. Home Ins. Co., 28 Iowa, 546.]

[3. Cited in Smith v. Allen, 1 Blackf. 24, note 1, to the point that in ejectment the legal title must prevail.]

Motion on arrest of judgment, upon the ground of want of jurisdiction. The declaration stated the plaintiff to be a citizen of the state of New York, and the defendant to be a citizen of New Jersey.

WASHINGTON, Circuit Justice. This point was settled in the case of Craig v. Cummins [Case No. 3,331], decided in this court, in January, 1811. The judgment must therefore be arrested.

1 [Reported by Richard Peters, Jr., Esq.]

SHUTE v. GOSLEE. See Case No. 8,958.

SIBLEY (BALDWIN v.). See Case No. 805.

SIBLEY (DIBBLE v.). See Case No. 3,883.

Case No. 12,829.

SIBLEY v. MOBILE.

[3 Woods, 535; 1 4 Am. Law T. Rep. (N. S.) 226.]

Circuit Court, S. D. Alabama. Dec. Term, 1876.

RAILROAD COMPANIES—MUNICIPAL AID—LEVY OF TAX—CONSTITUTIONAL LIMIT—EXHAUSTING POWER.

1. Where an act of the legislature authorized a city to issue its bonds in aid of a railroad company, and ratified a contract by which the city, having issued its said bonds, agreed to appropriate sufficient moneys from its treasury to pay the accruing interest thereon, the city was thereby authorized to levy a tax to pay said interest, and such authority carried with it the duty to make the levy.

2. But when, at the time of the issue of the bonds, the constitution of the state limited the taxing power of the city to a certain per centum upon its taxable property, the city could not exceed that limit; but having first levied a tax sufficient to pay its current expenses, it was bound by its contract to exhaust, if necessary, the residue of its taxing power in order to pay the interest on said bonds.

3. Where such a constitutional limit to the taxing power existed, it was not competent for the legislature, by an act passed after the issue of said bonds, to direct that the entire taxing power of the city should be exhausted for the payment of the holders of bonds of another issue who had no specific claim upon the fund raised by taxation, or any part thereof.

4. Where the taxing power of the city was limited by the constitution, all the holders of the bonds issued by the city were entitled to share pro rata in the general fund raised by taxation, which remained after the payment of the current expenses of the city.

5. A city with a limited power of taxation which, by neglect to levy and collect taxes, has permitted the interest on certain of its bonds to fall in arrears, cannot defend against an application for the writ of mandamus to compel the levy of a tax to pay a judgment recovered for interest due on bonds of a later issue, by alleging that a levy to pay the interest in arrears on the older issue would exhaust its taxing power, when at the same time it expresses no purpose to levy a tax for that object.

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

Heard on motion for peremptory mandamus. The case was as follows:

On February 23, 1876, the plaintiff recovered in this court against the city of Mobile a judgment for $23,560. The judgment was based on five hundred semi-annual interest coupons for $40 each, which had been originally attached to one hundred bonds for $1,000 each, issued by the city of Mobile in aid of the Mobile & Alabama Grand Trunk Railway Company. The authority to issue these bonds was based on an ordinance of the city dated June 25, 1869, and afterwards, and before the issue of the bonds, confirmed by an act of the legislature of Alabama, dated January 17, 1870. The ordinance, after setting out the terms of a contract between the city of Mobile and the railroad company, by which the city agreed to loan its bonds to the latter, authorized the issue of bonds, and declared that "the city shall be bound to appropriate sufficient moneys from its treasury to pay the interest provided to be paid by the city," to be raised at the option of the city by general or special tax. The act of the legislature, after first approving the ordinance and a contract for the issue of the bonds made by the city with the railroad company in pursuance of the ordinance, and declaring said contract "legal and binding on the city," enacted as follows: "The corporate authorities of said city of Mobile shall have and they are hereby invested with power and authority to adopt such ordinances, by-laws, and resolutions, and to provide such ways and means as shall be necessary or proper for the full execution and performance of said contract so made with said railroad company." The bonds having been issued in pursuance of the authority conferred by the ordinance and the act of the legislature, were put in circulation, and the city having five times made default in the payment of the semi-annual interest, suit was brought upon the dishonored coupons, and the judgment above mentioned recovered. Execution was issued on the judgment and returned unsatisfied, whereupon a demand was made upon the city authorities that they should levy a tax to pay the judgment, which they refused to do. Thereupon, according to the practice in the state courts of Alabama, a petition was filed against the city of Mobile, asking for a rule nisi upon the city, calling upon it to show cause why the peremptory writ of mandamus requiring it to levy tax should not issue. The rule was allowed, and the city filed its answer thereto.

The answer denied that it was the legal duty of the city to levy the tax, and in support of this averment stated, that by the constitution of the state of Alabama, in force when said ordinance and act of the legislature were passed, and said bonds issued, the city of Mobile was restrained from collecting a greater tax than two per centum upon the assessed value of its taxable property, and by the constitution now in force, the same limitation of the power of the city to tax still existed, with this additional provision, that for the payment of its existing indebtedness the city could levy not more than one per cent upon its taxable property, and for its current expenses not more than one per cent. The answer further alleged that over and above the sum necessary for the expenses of the city government, there could be collected for the year 1877, under the limitations of the constitution of Alabama, not more than $145,000, applicable to the payment of the city debt; that there remained due and unpaid of the principal of a series of bonds issued by the city, by authority of an act of the legislature passed in 1843, the sum of $3,100, and four years' accrued interest, amounting to $3,600, and that for the payment of the said principal and interest, the taxes upon the real estate of the city were pledged and appropriated. That there was also outstanding and unpaid of the principal of a series of bonds issued by the city, by authority of an act of the legislature passed in 1858, the sum of $137,000, besides four years' arrearages of interest, amounting to $43,840, making a total of $180,840, to provide for which, and the annually accruing coupons, the city was bound, under its contract, and by virtue of the act of the legislature aforesaid, to provide, by an annual tax, a sum at least proportional to the original amount; that is to say about the sum of $17,000. The answer further stated, that on January 1, 1876, the bonded debt of the city, principal and interest, amounted to $3,332,901, of which $880,094 were for bonds and interest thereon, issued to the Mobile & Alabama Grand Trunk Railroad Company, and of which the debt claimed by the relator formed a part; that it was impossible for the city, with the means at its command, to pay this debt, the annual interest on which amounted to $200,000, while the maximum of taxation allowed for all purposes on the taxable property of the city, would only produce a sum not exceeding $340,000. The answer further alleged that a compromise of the debt was all that was practicable; accordingly, the legislature of the state, by an act approved March 9, 1875, had provided for the reduction and funding of the debt of the city. The act authorized the city to issue $2,000,000 of coupon bonds, for the purpose of settling and funding its debts, and created a contract lien "on the yearly revenues of the city, to be raised by taxation each year, to the extent necessary to pay the interest on said bonds due and falling due each year, and to raise a sinking fund of $50,000 each year for the payment of the principal of said bonds." And the said act restricted the power of the city to levy taxes to the raising of such amounts as might be necessary to discharge the interest on the bonds therein provided for, and for the said $50,000 for the sinking fund, and for such sum as might be necessary to pay the current expenses of the city government. The answer further alleged that $1,185,500 of bonds had been issued under the

said act of March 9, 1875, and that the city was compelled to raise for the current year, under said act, the sum of $121,130, which was declared to be a lien on the revenues of the city raised by taxation; that the funding and adjusting of the city debt was still in progress, and other bonds were being issued, so that the amount to be raised for interest was being continually increased.

The city, therefore, affirmed that all its powers to levy taxes to pay debts would be entirely exhausted in the effort to provide for those classes of its bonded debt for which special provision had been made under authority of the legislature, and that no margin would be left out of which to pay debts not thus provided for, and relator's coupons belonged to a class of debts for which no special provision was made. The city, therefore, insisted that it had not the power or authority to levy the taxes which the relator prayed the court to require it to levy. When the acts of 1843 and 1858, above referred to, were passed, there was no constitutional limit on the taxing power of the city.

To this answer of the city the relator demurred, and upon this demurrer the case was argued and heard.

Geo. N. Stewart and Harry Pillans, for relators.

Stevens Croom, City Atty., and Peter Hamilton and J. A. Hamilton, for the city of Mobile.

WOODS, Circuit Judge. The act of the legislature of January 17, 1870, conferred ample authority upon the city of Mobile to issue the bonds from which the coupons of relators were detached, and even without express authority to that effect, implied an authority to levy a tax for their payment. Loan Ass'n v. Topeka, 20 Wall. [87 U. S.] 655; Gibbons v. Mobile & G. N. R. Co., 36 Ala. 439; Ex parte Selma & G. R. Co., 45 Ala. 696; Ohio v. Commissioners, etc., of Clinton Co., 6 Ohio St. 280; U. S. v. New Orleans [Case No. 15,871]. Besides the implied power there is an express agreement, on the part of the city, set out in the ordinance of June 25, 1869, and approved and ratified by the legislature, by the act of January 17, 1870, by which the city bound itself to appropriate sufficient moneys from its treasury to pay the interest, and reserved to itself the right to raise the same by special tax, which reservation was also approved by the same act of the legislature. The city acted upon this authority, and, as its answer shows, for several years levied a special tax to pay the interest on the bonds issued to the Mobile & Alabama Grand Trunk Railway Company. The authority to levy the tax for the payment of the interest on these bonds carries with it the duty to make the levy. The power to levy the tax is in the nature of a trust for the benefit of the holder of the bonds. The rights of the creditor and the ends of justice demand that it should be exercised in favor of affirmative action, and the law requires it. City of Galena v. Amy, 5 Wall. [72 U. S.] 705; High, Extr. Rem. § 397; Supervisors v. U. S., 4 Wall. [71 U. S.] 435. When the bonds which relator holds were issued, the law authorized, and, in effect, required, the levy of a tax to pay the interest thereon as it accrued. This law formed a part of the contract as much as if it had been written on the face of the bonds. Gelpcke v. Dubuque, 1 Wall. [68 U. S.] 175; Von Hoffman v. Quincy, 4 Wall. [71 U. S.] 535; Gunn v. Barry, 15 Wall. [82 U. S.] 610; Commissioners' Court of Limestone Co. v. Rather, 48 Ala. 446; Milner v. Pensacola [Case No. 9,619]. The city of Mobile, by its ordinance, confirmed by act of the legislature, has agreed to pay the interest on those bonds semi-annually, either out of its general revenue or by special tax. This contract is, of course, subject to the constitutional limit upon the taxing powers of the city restricting it to a levy not to exceed two per cent per annum.

The question is, therefore, presented by the demurrer to the answer, whether it was competent for the legislature, by an act passed subsequent to the issue of these bonds, to exhaust all the taxing power of the city, and direct the application of the proceeds of such taxation to other subjects, to the exclusion of the issue of bonds of which the relator holds a part. After authorizing the city to issue these bonds, and after approving the contract of the city to pay the interest semi-annually, either by a general or special tax, can the legislature authorize and direct that all the taxing power of the city shall be exercised for the benefit of the holders of other bonds who have no specific claim upon the funds raised by taxation, or any part thereof, to the exclusion of these? In my judgment, such an act would be a violation of the rights of the holders of the bonds thus excluded, and an impairment of their contract with the city of Mobile. These bondholders are entitled to have all the taxing power of the city within the constitutional limit exercised, if necessary, to secure the performance of the contract made by the city with them. When that power is exercised, the current expenses of the city must be paid out of the fund so raised, and, as to the residue, the relators are entitled to share pro rata with the other creditors of the city who have no specific lien or claim to any portion of the taxes; and neither the city nor the legislature has the power to appropriate the taxing power of the city for the exclusive benefit of a class having no superior rights, while these relators have a contract in effect declaring that a part of the taxing power of the city shall be exercised for their benefit.

It appears, from the answer of respondent, that certain sums are due the holders of bonds issued under the acts of 1843 and 1858, for unpaid interest, and the answer avers that if these sums are paid, and also the sum

required by the act of 1875, the taxing power of the city for the current year will be exhausted. But there is no averment that it is the purpose of the city to levy any tax to pay the past due interest referred to; and, excluding taxation for such purpose, it appears that the city will not exceed its power to tax, if it should levy a sufficient sum to satisfy the judgment of the relators. Moreover, the bonds issued by authority of the acts of 1843 and 1858, cannot be affected by the limit imposed on the taxing power of the city by a constitution adopted after the issue of the bonds. These relators are here pressing their right to be paid by taxation. The city cannot protect itself from its obligation founded on its own contract to levy the tax, by showing that it has failed in former years to do its duty by its creditors, and allowed interest to accumulate, while at the same time it expresses no purpose to levy a tax to pay such interest due and unpaid.

In my judgment, the facts set up in the answer of the city of Mobile constitute no reason why the writ of mandamus asked for by the relators should not issue. The demurrer to the answer is, therefore, sustained.

Case No. 12,830.

SIBLEY v. ST. PAUL FIRE & MARINE INS. CO.

[9 Biss. 31; 7 Reporter, 169; 8 Ins. Law J. 461; 11 Chi. Leg. News, 115; 8 Reporter, 808.] [1]

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

INSURANCE—FRAUDULENT PROOF OF LOSS—ACCURACY IN PROOF—ARSON—OVER-VALUATION—PREPONDERANCE OF EVIDENCE.

1. If an insured party who has suffered a loss, knowingly and with the intention to defraud the insurance company, which had insured his stock of goods, makes up in his proof of loss a false and exaggerated statement of the amount and value of the stock of goods in store at the time of the fire and destroyed or damaged thereby, he thereby forfeits all claim against the insurance company.

2. The insured is not obliged to state his loss in dollars and cents with arithmetical accuracy, but he must disclose the whole truth, and nothing but the truth, as nearly as he can arrive at it by a reasonable and honest effort on his part.

3. The fact that the insured had been tried and acquitted on a criminal charge of arson in connection with the burning of his store, is entitled to no weight in a civil suit on the policy, in which arson is alleged as a defense.

4. Where an insurance company, in defense of an action on an insurance policy, alleges arson or a fraudulent over-valuation of the property destroyed, it sustains the burden of proof and must make out its defense by a satisfactory preponderance of evidence.

5. Mere number of witnesses does not constitute preponderance of evidence, and the jurors may believe one in opposition to several, if satisfied that the truth is with him.

Action on a policy of insurance [by Charles W. Sibley against St. Paul Fire & Marine Insurance Company].

J. M. Flower and Ira W. Buell, for plaintiff.

E. A. Otis and A. N. Waterman, for defendant.

BLODGETT, District Judge (charging jury). This is a suit upon a policy of insurance issued by the defendant company, whereby the defendant insured the firm of Sibley & Chester to the extent of $1,000, against loss by fire on a stock of goods in the store occupied by Sibley & Chester, in the Davis Block on Second street, in the city of Clinton, Iowa. [All the questions in regard to title are disposed of by the amendment which has been made, so that I will omit so much of my charge as I have prepared in reference to that subject.] [2]

The plaintiff claims, and it is conceded, that a fire occurred in the plaintiff's store on the morning of the 19th of January, 1876, whereby the stock of goods insured was destroyed or substantially destroyed; and the conditions precedent of the policy have been practically complied with. The policy requires that proofs as to the nature and extent of the loss shall be furnished to the defendant within a reasonable time after the fire. This is a condition precedent, for the purpose of giving the insurance companies an opportunity to investigate the claim, before being obliged to make payment. It is admitted that proofs were furnished on the 22d of June succeeding the fire, which were supplemented or amended by other proofs furnished at the request of the insurance company on the 12th day of July, and it does not seem to be insisted that, under the circumstances, this was not apt time. The delay which took place, under some circumstances, might have been such as to have entitled the company to resist the loss; but under the circumstances under which this delay occurred, I think no question is made but what the plaintiff did furnish the proofs of loss which were required in apt time; so that you will not be troubled with that question, as no question is made before the court or jury on that point.

Defense on the merits, then, is made on two grounds: First—That the fire in question, was caused by the criminal and willful act of the plaintiff, with the intent to defraud the insurance companies who had issued policies on this stock of goods. Second—That the plaintiff has been guilty of fraud in the exhibition of his proofs of loss by presenting an intentionally exaggerated statement as to the extent of his loss. As to both these defenses, the defendant has the laboring oar; that is, the defendant has the affirmative on these points, and must make out one or both of them by a satisfactory preponderance of evidence; but the sustaining of either of these

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 7 Reporter, 169, and 8 Reporter, 808, contain only partial reports.]

[2] [From 11 Chi. Leg. News, 115.]

propositions or grounds of defense would be sufficient to defeat the plaintiff's claim. The effect of sustaining either of these defenses would be to brand the plaintiff as a deliberate swindler or moral criminal; therefore the proof on these points should be fully satisfactory to your minds.

I had occasion in the trial of an insurance case a few years since, to consider and give to the jury the rule in regard to the kind of proof which was required to sustain this kind of defense, which for convenience I will read to you:

"If the plaintiffs knowingly, and with intent to defraud the defendant and other insurance companies, who had insured their stock of goods, made up a false and exaggerated statement of the amount and value of their stock of goods in store at the time of the fire, and destroyed or damaged thereby, they thereby forfeit all claim against the insurance company.

"In cases of this kind, the plaintiff must come into court with clean hands. The insured is presumed to know better than any one else the value of his property and the amount of his loss, and is bound to make his statement of loss honestly, without any attempt to obtain more than his actual damage; and this rule of law, that thus defeats all claims, unless honestly made, is intended to protect insurance companies from frauds which might otherwise be perpetrated on them. It is a rule which can do an honest man no harm.

"I do not mean, by this, that a person who has sustained loss for which the insurance company is liable, is obliged to state his loss in dollars and cents with arithmetical accuracy, for that, from a variety of circumstances, is frequently impracticable; but he must disclose the whole truth, and nothing but the truth, as nearly as he can come at it at the time by a reasonable and honest effort on his part." Huchberger v. Home Ins. Co. [Case No. 6,821].

The defendant's evidence tends to show by circumstances, that the plaintiff's store was set on fire by the plaintiff, or through his connivance or procurement; and it appears, and is conceded, as one of the elements in this case, that the plaintiff was indicted in Clinton county, Iowa, where this loss occurred, and tried for the incendiary burning of this store, and on that trial, he was acquitted. This acquittal, however, is not to be considered by you as in any light bearing upon the question of the guilt of the plaintiff upon this branch of the case. It is not conclusive, and can cut no figure, and has no weight for the purposes of this trial. There may not have been testimony enough to justify the jury in their estimation in finding the plaintiff guilty of incendiarism, as charged in that indictment. We have not the record before us, and we do not know what the specific charges were; and therefore that trial and acquittal do not weigh as testimony in this case at all, but you must decide this issue upon the evidence which has been given in this case. The defendant has the right to set up this defense, notwithstanding the fact that the plaintiff was not convicted on that indictment.

The circumstantial evidence centers mainly about the tub alleged to have been found in the store, with cotton batting and kerosene in it, on the morning after the fire. The defendant's evidence tends to show that such a tub was found in the store immediately after the fire; and from this fact the defendant insists that the fair presumption is raised that this combination of combustibles was placed there for incendiary purposes, and that the plaintiff must necessarily have been privy to its being there for such purposes. I need not recapitulate in detail the testimony of the defendant in regard to the time when and place where this tub and its contents were found, nor the alleged particulars in regard to the marks it left upon the floor, as this must all be fresh in your recollection.

In answer to this branch of the case, the plaintiff has offered proof tending to show that the tub in question was not seen in the building for some days after the fire—that it was in a restaurant up stairs over the adjoining store at the time of the fire and either fell, or was thrown into the yard, and was either placed in the store by design or accident after the fire, and without the knowledge of the plaintiff, and in furtherance of some design against him.

The first question to be considered by you on this branch of the case is whether, if this tub and contents were found in the store on the morning after the fire, upon the first ingress into the store after the fire was sufficiently extinguished, it furnishes a necessary inference that the plaintiff placed it or caused it to be placed there for incendiary purposes. Second, does the proof offered by the plaintiff overcome or answer this theory? You have listened to the explanation which has been offered by the plaintiff in reference to the question of the finding of this tub, as to whether the tub was actually there, as to whether it could have been there during the fire, as to whether its contents, cotton batting saturated with kerosene, perhaps as inflammable a substance as is known, unless it may be gunpowder, could have remained unconsumed during such a fire. These are questions for you to weigh. The law makes you judges of the weight to be given to all this testimony, not only as to the credibility of the witnesses, but as to the conclusions to be drawn from the circumstances to which they testify. It is for you to say whether this charge of incendiarism has been so far made out, and sustained by the proof as to clearly satisfy your minds of its truth by a satisfactory preponderance of evidence. The testimony on this, as on the other points of the case, is conflicting and contradictory; and it is for you to reconcile it if you can, or if irreconcilable, to say which and how much

of it you will believe. If, from all the proof in the case, you come to the conclusion that the plaintiff did set fire to his store, or caused it to be set on fire, then the plaintiff has no right of action on this policy, and you should find the issue for the defendant, without considering the other elements of the defense.

As to the second ground of defense, the policy in this case contained the following clause:

"All fraud or attempt at fraud, by false swearing or otherwise, shall cause the forfeiture of all claim on this company under this policy."

It hardly needs a judicial interpretation of this clause of the contract to see that if the plaintiff has intentionally made a claim for a loss under this policy of a sum greater than his actual loss, for the purpose of defrauding the defendant thereby, he by such acts forfeits all right to a recovery under the policy. The uncontradicted evidence in the case shows that the plaintiff's books of account, and original bills of purchase, and invoices, were burned in the fire in question. The plaintiff was therefore obliged to resort to secondary evidence to show the amount of his loss; and his testimony tends to show that the method adopted by the plaintiff to arrive at, or ascertain approximately the amount of his loss, was to take the gross amount of his purchases ascertained from his bank account, the amount of cash deposited, as he claims to have sold only for cash, and to add to the cash deposited in bank what he believed or estimated to be a fair statement of his expenses, to take from this sum his average profits, and then deduct the balance from his total purchases, on the assumption that all goods except those which had been sold in the due course of trade, were in the store at the time of the fire, and that the result of these figures would be a very close approximation to the actual loss.

I do not understand that the plaintiff's attorneys claim that this method would give an exact statement of the stock on hand; that perhaps would be impossible. In this statement is a large item for a bill of goods which the plaintiff claims to have bought in November or October, 1875, of one Rockwell, amounting, as is shown, to between six and seven thousand dollars in actual value, but for which the plaintiff claims to have paid $5,000; $1,500 of which was in cash and the balance in mining stock; and the whole controversy on this branch of the case centers around the question whether the plaintiff did, in fact, buy from Rockwell, and place in his store at Clinton, any such bill of goods as is claimed. I say the whole controversy centers about this fact, because there seems to be no dispute as to the amount of goods which the plaintiff bought of other merchants, and of which invoices have been furnished, which when added to the Rockwell bill make up the total of the plaintiff's purchases. Upon this pivotal question the plaintiff has testified to the purchase from Rockwell of six or seven thousand dollars worth of goods in the fall of 1875, which he says he placed in his store, and which formed part of his stock, and he is the only witness who has testified to the direct fact of such purchase. There are some witnesses who testify to facts which it is claimed corroborate and sustain Mr. Sibley on this point, but they seem only to have partially corroborated him. For instance, Mr. Munson states that he knew of four trunks of goods being shipped or sent by rail from Chicago to Clinton by the plaintiff; but Mr. Munson does not know where these goods came from, and there is, therefore, this link out, which you are obliged to fill by the plaintiff's own testimony. He says these goods came from the Rockwell purchase. Mr. Sibley also testifies that his partner, Mr. Chester, was with him at the time of the purchase, and inspected the goods. He tells you that Chester is now in New York, and yet his testimony, as to the amount of this stock purchased, is not offered. The fact that, in a closely controverted question as to the value of this stock of goods, the testimony of a witness is not offered who would seem to have been in a position to throw light upon the transaction, is a circumstance which the jury have a right to consider, and it is for you to say whether it does or does not satisfy your minds that the testimony of this witness, if produced, would not tell against the plaintiff's case, as it is your province to weigh all the circumstances in the case, as well as the direct evidence, and the lack of testimony is frequently as significant a fact as its presence.

To meet this testimony of the plaintiff as to the goods sold by Rockwell, he (Rockwell) has been called as a witness, and he testifies in substance and positively, that he only sold the plaintiff about $70 worth of goods; and his testimony is corroborated to some extent by Skidmore, Boynton and Mrs. Wood, and perhaps others whom I have omitted to mention, who claim to have seen the goods in question, and who testify that Rockwell had only a small remnant of millinery goods, whose value, at the time, could not at the utmost exceed from $100 to $125. There is also testimony from the witness Johnson, who was a clerk for the plaintiff, tending to show that there was a depletion of this stock going on; that goods went irregularly out of the store, and not in the ordinary course of trade. His estimate, also, as to the value of the goods, at the time of the fire, differs widely from the estimate of the plaintiff, and also from the estimate given by the plaintiff's witness, Lewis, who was also a clerk in the store. I may here say that the plaintiff and Lewis estimate the goods variously from $9,000 to $11,000, as in the store at the time of the fire, while Johnson places it only at the outside as between three and four thousand dollars. There has also been a large amount of

testimony introduced tending to impeach the witnesses, Sibley, Rockwell, Johnson and Rowley. The most of this testimony consists of proof tending to show that these witnesses have made on other times and occasions different statements as to the fact than those they have given under oath before you on this trial. The law makes you the judges of the credibility of the witnesses, and the weight to be given to their testimony; and it is for you to say whether any of these witnesses, called by either party, have been so far impeached—their credibility as witnesses so far attacked and broken down—as to justify you in disbelieving their testimony. Upon this point, I read from the instruction given by Mr. Justice Davis to a jury, in the trial of a case somewhat similar to this, a few years since, from the bench of this court: "The credibility of witnesses is for the jury. The court cannot instruct you whom to believe and whom to disbelieve. There is no artificial rule of belief to control the minds of a jury. Some witnesses, by their appearance on the stand, impress the jury that they are impartial between the parties and tell the truth. Other witnesses who testify show such bias and tell their story in such a way that the mind hesitates to place implicit reliance on what they say. To such witnesses you should apply the best of your common sense. How did they bear themselves on the stand? Was the evidence favorable? Was it consistent with ordinary human conduct? Did they stand the test of cross-examination? Have they been successfully contradicted or impeached? Have they shown malice? These are matters proper to be considered in examining the value of testimony on which the case turns." Huchberger v. Merchants' Fire Ins. Co. [Case No. 6,822.]

If you are satisfied from a consideration of all the proofs, that any witness has sworn falsely in regard to any material fact in this case, then you are at liberty to reject his entire evidence, but you are not obliged to do so, because he may have sworn falsely upon some point, and yet have told the truth upon others; so that you are, after all, to judge as to how much of each witness's testimony you will believe.

So, too, in regard to the question of preponderance of testimony. Mere numbers do not, as a rule, create such preponderance. That is, the jury are at liberty to believe one witness in opposition to several, if there is such coherence and such an air of veracity surrounding his testimony as to satisfy you that he has told you the truth, and that the others have not done so. The very position in which the law places you as judges of the weight of the testimony and the credibility of the witnesses, leaves it for you to say whom and what you will believe, and how much you will believe.

The question, after the consideration of all this mass of contradictory and impeaching testimony, (and it is only for the solution of this question that the proof is admitted) is, did Mr. Sibley purchase from Rockwell this large bill of goods to which he has testified? If you find that he did purchase this six or seven thousand dollars worth of goods, and place them in his store, then I think I do not overstep the province of the court in saying that you should find for the plaintiff on this branch of the case. But if, on the contrary, you are satisfied that Rockwell has told you the truth as to the nature and extent of his dealings with Mr. Sibley, then you must find for the defendant on this issue, because there can be no dispute that Sibley, in his estimates of his loss which he rendered to the insurance company, includes this alleged purchase of six or seven thousand dollars worth of goods from Rockwell, and if he knew that he had made no such purchase, then he must have known that his claim was false and fraudulent, and by such fraud he forfeited his rights under the policy, and your finding should be for the defendant.

As the testimony is voluminous, allow me to suggest that you may abridge your labor by considering these two questions of fact separately; that is, first, was the fire caused by the incendiary act of the plaintiff with intent to defraud? Does the testimony, when all weighed and considered, satisfy your minds by a satisfactory preponderance of proof that the plaintiff caused his store to be set on fire? If you solve that question in favor of the defendant, that will be an end of the case. If, however, you should conclude that the charge of incendiarism is not made out to your satisfaction, then you can take up the last and other branch of the defense; I merely suggest this as you may be able more methodically to marshal the evidence on these two issues by considering them separately.

In performing your duty as jurors, in the settlement of the issues in this case, you should purge your minds of all prejudice against either party, and consider this case fairly as between man and man.

Insurance companies have become a necessity to the business of a civilized community, and the transactions of this country could not be carried on without their agency. They are but an aggregation of the capital of individuals, and the individual stockholders whose money is invested in them, have rights as sacred and as much in your keeping and in the keeping of the court as that of any of the policy holders. The right in any case can harm no man. The business of insurance is peculiar. Insurance companies, from the very nature of their business, are exposed to a variety of frauds and impositions. The character of the business, therefore, justifies the insurance companies in hedging, as I may say, their liability with many precautions and conditions unknown to any other kinds of business. These conditions, however, as interpreted by the courts, do not stand in the way of the recovery of an honest loss The

zeal and suspicion of agents and adjusters may, when there are suspicious circumstances surrounding the loss, give annoyance and produce delay, even in the case of a bona fide loss, which ought to be paid; but this overzeal of agents and employés in other cases (for I do not know that there is any allegation of that kind in this case) ought not to prejudice your minds against the defendant, or against insurance companies in general, so as to prevent your considering their defense when made, with the same fairness as if the defense came from an individual.

If you come to the conclusion that the defense has not been established by the evidence, then it will become your duty to fix the measure of the plaintiff's damages. It is conceded, or has been, during the trial, that the loss in this case was practically a total one; that is, that there were no remnants saved from the contents of the store that were of any appreciable value, or from which the plaintiff derived any benefit. It is also conceded that there were ten policies of insurance upon this stock of goods, making a total of insurance of $10,000. The proofs of loss submitted by the plaintiff, and as finally amended by him, amount to a total of $9,578.76, for which the defendant is liable for one-tenth, with interest at the rate of six per cent. per annum from 60 days after the final proofs of loss were rendered, which was on the 12th day of July, 1876.

[If you find for the defendant it will not be necessary for you to make any computation as to that. The form of your verdict will be: "We, the jury, find the issue for the plaintiff, and fix the damages at" so much which will be the amount arrived at by the rule I have given you. If, on the contrary, you find that the defense has been established, or either of the defenses, then the form of your verdict will be: "We, the jury, find the issues for the defendant."] [3]

Verdict for plaintiff, for $567.50.

The verdict in this case was subsequently set aside and a new trial granted; and the suit was afterwards dismissed by plaintiff.

NOTE. The fraud and false swearing, in order to defeat a recovery, must have been intentional, with respect to a material matter and with the purpose to defraud and deceive the insurer. Marion v. Great Republic Ins. Co., 35 Mo. 148; Moadinger v. Mechanics' Fire Ins. Co., 2 Hall (N. Y. Super. Ct.) 490; Commercial Ins. Co. v. Huckberger, 52 Ill. 464; McMaster v. President, etc., of Insurance Co. of North America, 55 N. Y. 222; Maher v. Hibernia Ins. Co., 67 N. Y. 283; Franklin Fire Ins. Co. v. Updegraff, 43 Pa. St. 350; Insurance Companies v. Weides, 14 Wall. [81 U. S.] 375; Dogge v. Northwestern Nat. Ins. Co., 49 Wis. 501, 5 N. W. 889.

A discrepancy between the value of the goods destroyed by the fire as sworn to by the insured, and the value as proven on the trial in a suit against the company, is not necessarily evidence of fraud. Beck v. Germania Ins. Co., 23 La. Ann. 510; Clark v. Phœnix Ins. Co., 36 Cal. 168; Franklin Ins. Co. v. Culver, 6 Ind. 137; Moore v. Protection Ins. Co., 29 Me. 97; Rockford Ins. Co. v. Nelson, 75 Ill. 548.

If payment of the loss be obtained by means of fraudulent proofs, the money may be recovered back. Hartford Live Stock Ins. Co. v. Matthews, 102 Mass. 221; Northwestern Life Ins. Co. v. Elliott [5 Fed. 225]; McConnel v. Delaware Mut. Safety Ins. Co., 18 Ill. 228.

[3] [From 11 Chi. Leg. News, 115.]

SIBLEY MACH. CO. (ROSE v.). See Case No. 12,051.

SIBLINE v. HERCULES MUT. LIFE ASSUR. SOC. See Case No. 6,402.

Case No. 12,831.

SICARD v. BUFFALO, N. Y. & P. RY. CO.

[15 Blatchf. 525; 8 Reporter, 550.] [1]

Circuit Court, N. D. New York. Jan. 31, 1879.

APPEAL — FINDINGS OF FACT — CARRIERS — LIEN FOR FREIGHT — BANKRUPTCY — TITLE OF ASSIGNEE.

1. On a writ of error to the district court, where the judgment of that court is based on the report of a referee, the findings of fact made by the referee are conclusive, in this court, and only his conclusions of law can be questioned, and that only so far as they are challenged by exceptions filed in the district court.

[Cited in Lyons v. Lyons Nat. Bank, 8 Fed. 374.]

2. The terms of a contract by a railroad company for the carriage of coal, *held* to amount to a waiver of a lien on the coal for freight, so that the company, giving credit to the owners of the coal, and taking their note for such freight, had no right to rescind the contract and assert such lien, until the note was dishonored, before which time the title of an assignee in bankruptcy of said owners to said coal intervened.

3. The title of an assignee in bankruptcy, under section 5,044 of the Revised Statutes of the United States, relates back to the time the petition in bankruptcy is filed, so that no person can, by any subsequent act in respect to property which was the property of the bankrupt at that time, defeat such title, or place a lien on such property.

4. Where a defendant put his refusal to deliver property to its owner, on the ground of a lien on it for freight and also for storage, he cannot, in a suit against him to recover possession of the property, claim judgment on the ground that he had a lien for storage, it being *held* that he had no lien for freight.

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

[This was an action by George J. Sicard, assignee in bankruptcy of Clarence D. Simpson and Joseph W. Dennis, against the Buffalo, New York & Philadelphia Railway Company, to recover damages for the detention of coal.]

George Gorham, for plaintiff.

Sherman S. Rogers and Franklin D. Locke, for defendant.

BLATCHFORD, Circuit Judge. This is a writ of error to the district court. After the cause was at issue in that court, it was re-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 8 Reporter, 550, contains only a partial report.]

ferred by the court, the counsel for the respective parties having stipulated to such effect in open court, to a referee, to hear, try and determine the same, the order of reference providing, that, on filing the report of the referee, judgment might be entered thereon, on application to the court, at any time. The referee reported in favor of the plaintiff. The defendant filed exceptions to the findings and decisions of the referee. The report and exceptions were brought before the court, on notice, and it made an order overruling the exceptions and confirming the report, and ordering that judgment be entered for the plaintiff in accordance with the report, with costs. Accordingly, a judgment was entered, that the plaintiff recover of the defendant 67.49 tons of egg coal, 12 tons of pea coal, 119.14 tons of chestnut coal, and 362.35 tons of stove coal, or, in case a delivery of said property cannot be had, the sum of $2,200.55, the value thereof; and, also, that the plaintiff recover of the defendant $165.43 damages for the detention of said property, and $90.69, costs. The only question, on the record, is, whether the report of the referee ought to be sustained, as against the exceptions filed. The findings of fact made by the referee are conclusive. Only his conclusions of law can be questioned, and that only so far as they are challenged by the exceptions filed in the court below.

The facts found by the referee are substantially these: From May 1st, 1875, to February 7th, 1877, the bankrupts were dealers in coal at Buffalo, and the defendant was a railroad corporation, operating a railroad between Emporium, in Pennsylvania, and Buffalo, and was a common carrier of merchandise, for hire. In May, 1876, it was agreed verbally between the bankrupts, as copartners, and the defendant, that, from that time forward, the defendant should transport for them, via Emporium, and over its railroad, to Buffalo, all hard coal sold by them; and that they should pay for all coal shipped from September 1st, 1876, to December 1st, 1876, 90¾ cents per gross ton, freight, and for all shipped between December 1st, 1876, and May 1st, 1877, $1 per gross ton. Such payment was to be made as follows, viz.: The freight earned during the preceding month was to be determined and settled for on the 10th day of each calendar month, when the firm was to make and deliver to the defendant its promissory note, payable 60 days after such 10th day, for the amount of such monthly freight. The parties did not provide, by the contract, for the carriage of any specific amount of coal during said term, but it was contemplated, by both parties, that the firm would furnish to the defendant, for carriage under said contract, a large amount of coal each calendar month during such term. Under this agreement the firm commenced the shipment of coal, and thereafter shipped all its coal over the defendant's road, and made monthly settlements up to and including January, 1877, and the defendant delivered to the firm all coal carried except that specified in said judgment. No settlement was made in February for the January shipments, and the defendant did not, in February, 1877, render any statement of the coal carried in January. On February 7th, 1877, the bankrupts failed and made a voluntary assignment of all their joint and several property to one Moulton, for the benefit of their creditors, under the statute of New York. At the time such assignment was made, and at the commencement of the suit, the defendant had in its possession the coal specified in said judgment, all of which coal was transported by it from Emporium to Buffalo. The transportation charges on the coal carried in January for the firm, by the defendant, were $2,821.47, and on that carried in February, $651.25. The freight on the coal in the custody of the defendant at the time of the assignment was reasonably worth $561. The total amount owing to the defendant by the firm, at the time of such assignment, was $8,977.09, all of which was for carrying coal. Of this sum, all but that earned in January and February, 1877, was represented by notes given upon the monthly settlements made in November and December, 1876, and January, 1877, which notes had been endorsed by the defendant and discounted at its bank. One of the notes given by the firm to the defendant matured and was dishonored, and the defendant was charged as an endorser upon it, February 21st, 1877. The defendant thereupon refused, to deliver any more coal to the firm or to Moulton, the assignee, until the charges were paid, and, payment not being made, it caused such coal as it had in its possession to be stored. It has never been tendered its charges, or any part thereof, by the firm, or by Moulton, or by the plaintiff. On the 14th of February, 1877, a petition in bankruptcy was filed by creditors, upon which the members of the firm were adjudged bankrupts, and the plaintiff was appointed their assignee, and received an assignment from the register May 12th, 1877, with title as of February 14th, 1877. Moulton assigned all his interest in the coal in question to the plaintiff. After qualifying as assignee, the plaintiff, on the 15th of May, 1877, demanded from the defendant the coal in its possession. The defendant claimed a lien upon the coal for the entire indebtedness, or, at any rate, for the reasonable worth of the transportation charged on the coal in its hands, and for its expenses in storing and caring for the coal subsequently to its delivery in Buffalo, and refused to surrender possession of it until these charges were paid. The prices charged by the defendant were the reasonable worth of carrying coal from Emporium to Buffalo, those being the points between which the coal in question was transported. The reasonable cost of the storage of the coal in its possession, up to the time of the plaintiff's demand, was $150. The reasonable worth of the coal in the defendant's possession at the time of the demand by the plaintiff was $3.75 per ton for egg coal, $4.00 for stove coal, and $2.90 for pea coal. The defendant has been compelled, as endorser, to

take up all the notes of the firm which it held at the date of the voluntary assignment. The referee found, as matters of law: (1) That the plaintiff is the owner, and is entitled to the immediate possession, of 67.49 tons of egg coal, 12 tons of pea coal, 119.14 tons of chestnut coal, and 362.35 tons of stove coal, in the possession of the defendant at the date of the plaintiff's demand thereof, and that the defendant has no lien thereon; (2) that the defendant wrongfully detains and withholds said coal from the plaintiff; (3) that the value of the coal so detained by the defendant is the sum of $2,200.55; (4) that the plaintiff is entitled to a judgment in his favor, awarding him the possession of the said coal, together with $165.43 damages for the detention thereof, or, if the delivery of the said coal cannot be had, then that he have judgment against the defendant for the value of the said coal, viz.: $2,200.55, with damages for the detention thereof, viz., $165.43, amounting, in all, to $2,365.98, with costs. The exceptions filed are (1) to the finding and decision that the defendant wrongfully detains and withholds said coal from the plaintiff; (2) to the finding and decision that, at the time of the plaintiff's demand, the defendant had no lien upon such coal; (3) to the finding and decision that the plaintiff is entitled to a judgment in his favor, awarding him the possession of said coal; (4) to the finding and decision that the plaintiff is entitled to have of the defendant $165.43 damages for the detention of said coal.

The defendant contends that Moulton and the plaintiff can have no other rights than the bankrupts possessed; and that, after the dishonor of the bankrupts' note on the 21st of February, 1877, the bankrupts could not have obtained possession of the coal from the defendant, because the default in the payment of the note authorized the defendant to rescind the contract, and assert its right to a lien on the coal, and to assume the same position as if there had not from the beginning been any special contract in respect to the coal found in the possession of the defendant when such note was dishonored. For the plaintiff, it is contended, that, by the terms of the original contract of carriage, as to giving credit, the defendant waived its lien for freight; that the dishonor of the note, and the insolvency of the firm, gave no right to the defendant to rescind the contract and assert a lien; and that the bankruptcy intervened before the note was dishonored, and the title of the plaintiff to the coal, under the bankruptcy, relates to a time before the note was dishonored.

The view urged on the part of the defendant is, that, by the original agreement, the defendant merely agreed to claim no lien if payment should be made at a specified time, that is, it agreed to claim no lien until default in payment should be made, but reserved its right to assert a lien when such default should occur. But, if this view were sound in law, as applied to the claim to a lien for freight, the defendant cannot assert such lien as against the plaintiff. It may be admitted that the plaintiff took his title to the coal subject to all the equities and liens of the defendant, as respected the coal, as the property of the bankrupts, on the 14th of February, 1877. Yeatman v. Savings Institution, 95 U. S. 764, 766. At the very least, however, the lien was suspended, and in abeyance, and incapable of assertion, until the 21st of February, 1877, even as against the bankrupts. Before that date the title of the plaintiff intervened, either through Moulton, or directly under the bankruptcy proceedings, or both. But the bankruptcy title must be regarded as the paramount one, and the voluntary assignee must be regarded as having assigned to the plaintiff all his interest in the coal in question, because the plaintiff had the paramount right to it, under the bankruptcy statute. The bankruptcy assignment to the plaintiff related back to February 14th, 1877, and, by operation of law, vested the title to the coal in the plaintiff, as of that date. Section 5044. Although the bankruptcy assignment was not made until May 12th, 1877, it carried to the assignee the property owned by the bankrupt on February 14th, 1877, and carried it in the condition in which it stood on that day, so that no person could, by any subsequent act in respect to such property, defeat such title. The defendant could not, by an act of rescission on the 21st of February, 1877, place a lien on the property, as against the title of the plaintiff. If such lien did not exist on the 14th of February, it could not arise afterwards, unless by the act of the assignee in bankruptcy. This doctrine is well settled in numerous cases. It is illustrated by the decision of this court in Howard v. Crompton [Case No. 6,758]. In that case, a person who was a debtor to a bankrupt at the time the proceedings in bankruptcy were commenced, thereafter and before the adjudication of bankruptcy paid the debt to the bankrupt, without any actual notice or knowledge of the bankruptcy proceedings, and in the usual course of business, but the money thus paid did not come to the hands of the assignee in bankruptcy. It was held that the assignee could recover the debt from the person who so paid it to the bankrupt. The principle is the same as in the present case.

It is contended by the defendant, that, if there was no lien for the freight, there was a lien for the storage, as against the plaintiff; that, if the defendant had any lien upon the coal for any amount whatever, the judgment below is erroneous; and that it can assert any lien it had, whether its refusal to deliver the coal was placed upon the proper ground or not. The argument is, that, whatever rights the plaintiff has, attached as of the 14th of February, 1877; that any delivery after that time to the bankrupts, or to Moulton, would not have

barred the plaintiff's right of action; that the plaintiff made no demand until May 15th; that the defendant stored the coal about February 21st; that the reasonable cost of such storage from that time until May 15th was $150; and that for that amount the defendant had a lien. The answer to this view is, that the referee finds, that, when the plaintiff made his demand on the defendant, the defendant put its refusal to deliver, not on the ground of a lien for storage merely, but on the ground of a lien for the freight on the coal, and also for storage, and that it refused to surrender possession of the coal until both the transportation charges and the storage expenses were paid. If a lien for the storage alone had been asserted, non constat the plaintiff would have paid the $150.

The foregoing views dispose of the first three exceptions to the referee's report. The fourth exception is to the finding and decision that the plaintiff is entitled to have of the defendant $165.43 damages for the detention of said coal. The ground of the exception is not stated. The exception admits that there is a finding by the referee that the plaintiff sustained $165.43 damages by such detention. What the damages were, or how their amount was arrived at, does not appear. The complaint alleges that such damages are $1,000, and claims judgment for them. If damages to the amount found were sustained, the plaintiff is entitled to recover them, and the finding that the damages were $165.43 is conclusive, on this writ of error.

The judgment below is affirmed, with costs.

SICKEL (CLARKE v.). See Case No. 2,862.

Case No. 12,832.

SICKELS v. BORDEN.

[3 Blatchf. 535.] [1]

Circuit Court, S. D. New York. Nov. 6, 1856.

PATENTS — NEW IDEA — ADAPTATION — INFRINGEMENT—MEASURE OF DAMAGES—PATENT FEE—PROFITS—STEAM CUT-OFF.

1. The principle of the invention covered by Sickels' patent of September 19th, 1845, for a "method of tripping the drop cut-off valves of steam-engines, and regulating and adjusting the same," explained.

2. The mere discovery of a new idea is not the subject of a patent. It must, in order to be patentable, be embodied in working machinery, and adapted to practical use.

[Cited in White v. Allen, Case No. 17,535; Reeves v. Keystone Bridge Co., Id. 11,660.]
[Cited in Burke v. Partridge, 58 N. H. 352.]

3. Rules for determining the infringement of a patent, stated.

4. The mere form of the defendant's machinery must be disregarded, and the substance of its arrangement, and its method of working, must be looked into, for the purpose of seeing whether the plaintiff's ideas are incorporated in it.

5. If the plaintiff's invention be a machine, it is infringed by a machine which incorporates, in its structure and operation, the substance of the invention, that is, an arrangement which performs the same service, or produces the same effect, in the same way, or substantially the same way.

[Cited in Whitney v. Mowry, Case No. 17,592; Werner v. King, 96 U. S. 218.]

6. The doctrines of the cases of Walton v. Potter, Webst. Pat. Cas. 586, and Bovill v. Moore, Dav. Pat. Cas. 361, 405, on the subject of infringement, approved.

7. If a patentee has an established patent fee, that sum, with the interest, constitutes the measure of damages for an infringement. If not, then the profits which the infringer has made by the use of the invention, may be taken as the measure.

[Cited in Spaulding v. Page, Case No. 13,219; Emerson v. Simm, Id. 4,443; Washington A. & G. Steam Packet Co. v. Sickles, 19 Wall. (86 U. S.) 617; Goodyear Dental Vulcanite Co. v. Van Antwerp, Case No. 5,600; Stutz v. Armstrong, 25 Fed. 147.]
[Cited in Dean v. Charlton. 23 Wis. 612; Porter v. Standard Measuring Mach. Co., 142 Mass. 195, 7 N. E. 928.]

8. Where, for the purpose of introducing his invention to public notice, a patentee has accepted small patent fees in particular cases, that consideration should be taken into account by a jury, in fixing a patent fee as a measure of damages.

9. The adoption, by a jury, of the patent fee as the measure of damages for infringement by the use of a machine, operates to vest in the defendant the right to use the machine during the term of the patent.

[Cited in Spaulding v. Page, Case No. 13,219; Stutz v. Armstrong, 25 Fed. 148.]

This was an action on the case [by William B. Sickels against William Borden,] tried before Mr. Justice Nelson, for the infringement of letters patent [No. 4,199] granted to Frederick E. Sickels, September 19th, 1845, for a "method of tripping the drop cut-off valves of steam-engines, and regulating and adjusting the same." The material parts of the specification, and the claims, were as follows:

"By the method now practised of operating the drop cut-off valve, the motion is derived from the lifter, which approaches its state of rest as the piston of the engine approaches the middle of its stroke, or its maximum velocity, and the valve is tripped by the same motion which lifts it; so that there must be very great nicety in the adjustment to regulate the extent of the cut-off at about the half stroke. The object of my invention is to remedy this, and its principle or character consists in tripping the valve by a motion independent of the lifting-rod or rods; and also in combining the various parts in such manner as to regulate the cut-off with accuracy, during the action

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

of the engine, by connecting the two shafts that trip the two cut-off valves, end to end, by means of adjustable spring arms that take into and are, when set, held in the teeth of a sector, which vibrates on the axis of motion of the shafts, and receives its vibratory motion from the eccentric; which spring arms may be shifted in the teeth of the sector, brought nearer to, or farther from each other, and thus cut off at a less or greater portion of the stroke. * * * It will be evident, from the foregoing, that any motion, derived from any part of the engine, may be substituted for the vibration of the arms or wipers, provided the character above described be maintained; as, for instance, instead of the horizontal vibratory motion of the arm or wiper, the spring may be disengaged from the stem of the valve by a vertical descending motion as the lifter rises, and this may be derived from any moving part of the engine, other than the lifters or their rocking-shaft, such as the piston-rod, the beam, the crank-shaft, &c. What I claim as my invention, and desire to secure by letters patent, is, tripping the drop valve of the cut-off by a motion independent of the lifters, substantially in the manner and for the purposes herein described. I also claim combining the wiper that drops the valve of the cut-off, whether working horizontally or vertically, with any of the moving parts of the engine other than the lifters or their rocking-shaft, by means of the sector and arm or arms, by means of which the extent of the cut-off can be regulated at pleasure, during the action of the engine, from the full to the least portion of the stroke, as herein described."

The infringement alleged was in the use of the patented invention on the engine of the steamboat Metropolis, running between New York and Fall River.

Charles M. Keller and Edward N. Dickerson, for plaintiff.

Francis B. Cutting and Edwin W. Stoughton, for defendant.

NELSON, Circuit Justice (charging jury). The first question to which your attention should be directed, is the construction of the patent. This is essential, in order to enable you, in the first place, to ascertain the extent of the plaintiff's right; and, in the second, to determine whether or not the arrangement of the defendant violates that right. To aid you in this investigation, it will be advisable, in the first instance, to look at the principle of the new set of ideas involved in the patentee's discovery, and which, it is claimed, have been embodied into a working machine, and adapted to practical use.

It is stated by the patentee, both in his patent and in his testimony on the trial, (and there seems to be no controversy among the experts respecting it), that previous to September, 1845, (the date of the patent), the valve-stem, which was used for the purpose of disengaging and dropping the valve, and thereby cutting off the steam from the cylinder, was disengaged by the motion of the lifter of the valve; and that, as a consequence of this, there was a difficulty in cutting off the steam beyond the half stroke, and, as stated by the patentee, a nice and difficult adjustment was required, in order to effect the separation at that point. To remedy this difficulty is the purpose of his improvement. He gives up the lifting motion, which had before been used for tripping the valve, and substitutes in its place a motion from the engine independent of the lifting motion. In the particular arrangement described by him, he takes the motion from the eccentric strap, at right angles to the usual valve motion, and detaches the valve by that motion, through the instrumentality of the proper machinery, by means of a vibrating sector operating upon an arm or wiper. This arrangement presents to the mind a new set of ideas, as constituting the subject matter of this invention. It is new, according to all the experts. Previously to this, the motion to trip had been taken from the lifter; and, therefore, it required a new development and application of power, to avoid the difficulty arising out of the use of the motion of the lifting-rod. The power of the eccentric had not before been applied for the purpose. The novelty of the invention consists in the new set of ideas by which the patentee saw the possibility of dispensing with the lifting motion as a means of detaching the valve and allowing it to drop, and in deriving power from some other part of the engine. He took it from the eccentric strap, and adapted it to his purposes by an arrangement of machinery independent of, and uncontrolled by, the lifting motion. The improvement, however, does not limit the patentee to the motion or power derived from the eccentric strap, for he says that it may be taken from any other moving part of the engine, always excluding the lifting-rod.

I agree with the counsel for the defendant, that the mere discovery of the idea of deriving power for the tripping of the valve from the eccentric strap, or from any other moving part of the engine not controlled by the lifting-rod, would not constitute the subject of a patent, although the idea were new. That idea is, however, the foundation upon which the improvement rests, and without which it would not have been discovered. The new set of ideas which of themselves are not the subject of a patent, must, in order to become patentable, be embodied in working machinery, and adapted to practical use. It is the embodiment of machinery for practical purposes which furnishes beneficial results to the public, and renders the discovery patentable. This has been effected by the patentee, by the arrange-

ment of machinery whereby the eccentric strap, by means of intervening arms and levers, which control the arm or wiper, operates to detach the valve. This combination of machinery embodied the new ideas of the patentee, and adapted them to practical use, and thus rendered them the proper subject of a patent.

Many parts of the machinery necessary for working a steam-engine, and which have been brought out in the progress of this trial, have no necessary bearing upon this controversy. The patent is simply for an arrangement of machinery to control the tripping of the valve. Of course, for the practical working of the machinery, it is necessary that some contrivance should be interposed to take care of the valve in its descent to its seat, to prevent its breaking in pieces. But the easing of the valve to its seat, so as to prevent slamming or damage to the valve, although essential, has nothing to do with the contrivance for effecting the detachment. Different persons may prefer different modes of easing the valve to its seat after it is detached. One of the several contrivances possible you have seen in the machine of the defendant. In this machine the valve is eased down by the arm of the sector. Another contrivance (which is the favorite one of the patentee, and one to which he refers in his patent) is the water-dash-pot—a close vessel containing water, which checks the valve in its rapid descent to its seat. By the contrivance of Mr. Corliss, (which has been before this court), the valve is eased to its seat by compressed air. There may be many other contrivances for the same purpose. Suffice it to say, that these contrivances have nothing whatever to do with this controversy. Hence it is not important for you to inquire which of the several arrangements is the best one.

The patentee having discovered that he could trip the valve by a motion independent of the lifting motion, and, therefore, not controlled by that motion, it is very obvious that such independent motion may be used to trip it at any desirable point of the stroke of the piston, because it is an independent motion, and (as was very well said by one of the experts) a positive motion used for tripping. Therefore, it may be used, at the discretion of the engineer, or of the person constructing the machinery, to detach the valve at any point of the stroke of the piston that may be the most useful. This led to the second claim in the patent. By the interposition of the sector and arms, the engineer is enabled to detach the valve at will at any point of the stroke of the piston, during the operation of the engine.

It was suggested, and to some extent urged by the counsel for the defence, in the progress of the trial, that there was no novelty in the patentee's arrangement. This is a question of fact for the jury to determine, upon a view of all the evidence in the case. I will not review the evidence, because all the experts called on both sides conceded that the idea of taking the power to detach the valve from some part of the engine other than the lifter, was new, and all of them admitted that it was valuable. After these unqualified concessions by the witnesses for the defendant, it is unnecessary to enter into an examination of this question. Whether Mr. Bennett had this idea is immaterial; since, according to his own testimony, whatever improvements he devised and put into operation on the Despatch, were abandoned, and his machinery was sold for old iron, after a partial trial. After this, it would be a waste of time to follow out any inquiry respecting the organization of his machine.

The next inquiry is, whether or not the new set of ideas lying at the foundation of the patentee's invention, and embodied and adapted to practical purposes by him, is found in the tripping apparatus of the Metropolis. If the ideas of the patentee have not been embodied in that apparatus, there is no infringement, and the plaintiff is not entitled to recover. If they have been, then there has been an appropriation of his property, and he is entitled to your verdict.

It was urged by the counsel for the defendant, upon the basis of the testimony of the experts, especially that of Mr. Allen, that the defendant's arrangement is essential to the working of his machinery, and that, therefore, it is not to be separated into parts, in determining whether or not it is an infringement of the plaintiff's rights. This view may be taken as correct, but with this qualification—that if, on an examination of the defendant's combination, the peculiar arrangement of the patentee is found to be embodied and working there, as in the patentee's arrangement, however it may be combined with other machinery, the patentee's discovery is appropriated, the same as if it were used alone and separate from those connections; and it will be the duty of the jury to determine whether there is, in the combination and arrangement of the defendant, any such incorporation of the new set of ideas lying at the foundation of the patentee's invention.

The new form of the machinery embodying the new ideas, is not a material part of the patentee's invention, for the reason that the embodiment of his ideas into working machinery is rather the work of the skilful mechanic than that of the inventor. Many inventors of improvements in machinery, not being mechanics themselves, are obliged to obtain the aid of skilful mechanics in embodying their ideas in practical working machinery. Different mechanics would perhaps embody them by different arrangements of machinery—all conforming, however, to the principles and ideas of the inventor. Hence, the mere form of the defendant's machinery must be disregarded, and the jury must look into the substance of

its arrangement, and its method of working, for the purpose of seeing whether the ideas of the inventor are incorporated in it. If they are, the patent is infringed.

One of the defendant's experts, an apparently intelligent engineer, inferred that the defendant's arrangement was substantially different from that of the patentee, because, by following out the specification of the patentee, which minutely describes the construction of his apparatus, he could not make the arrangement used by the defendant. This proposition is also embodied in one of the prayers of the counsel for the defendant, but its unsoundness is obvious, upon an established principle of the patent law, which declares that formal changes of machinery do not evade a patent. However different, apparently, the arrangements and combinations of a machine may be from the machine of the patentee, it may in reality embody his invention, and be as much an infringement as if it were a servile copy of his machine. According to the patent law, if the machine complained of involves substantial identity with the one patented, it is an infringement. If the invention of a patentee be a machine, it is infringed by a machine which incorporates, in its structure and operation, the substance of the invention; that is, an arrangement which performs the same service, or produces the same effect, in the same way, or substantially the same way.

In a case before the king's bench in England (Walton v. Potter, Webst. Pat. Cas. 586), Chief Justice Tindall made the following observations, with every word of which I agree: "Where a party has obtained a patent for a new invention, or a discovery he has made by his own ingenuity, it is not in the power of any other person, simply by varying in form or in immaterial circumstances the nature or subject matter of that discovery, to obtain either a patent for it himself, or to use it without the leave of the patentee; because that would be, in effect and in substance, an invasion of the right." The chief justice, therefore, said to the jury: "What you have to look at, upon the present occasion, is not simply whether, in form or in circumstances that may be more or less immaterial, that which has been done by the defendants varies from the specification of the plaintiff's patent; but you are to see whether, in reality, in substance, and in effect, the defendants have availed themselves of the plaintiff's invention, in order to make that fabric which they have sold in the way of their trade." One machine is the same in substance as another, if the principle be the same in both, although the forms may be different. In Bovill v. Moore, Dav. Pat. Cas. 361, 405, Lord Chief-Justice Gibbs says: "I remember that was the expedient used by a man in Cornwall, who endeavored to pirate the steam-engine. He produced an engine which, on the first view of it, had not the least resemblance to Boulton and Watt's," (who were the patentees). "Where you looked for the head you found the feet, and where you looked for the feet you found the head; but it turned out that he had taken the principle of Boulton and Watt. It acted as well one way as the other; but, if you set it upright, it was exactly Boulton and Watt's engine. So, here, I make the observation because I observe it is stated that one acts upwards and the other downwards. One commences from the bottom, and produces the lace by an upward operation. The other acts from above, and produces it by an operation downwards. But, if the principle be the same, it must be considered as the same in point of invention."

These are the principles by which the jury must be guided, in an examination of the contrivance of the defendant which is claimed to be an infringement, and to embody the new ideas, the principle, the method of working, which is found in the arrangement of the patentee. As I have already said, after a principle has been discovered, after a new set of ideas have been struck out by genius and thought, as in this case, their embodiment in machinery, their adaptation to the working out of the practical results contemplated by the inventor, is very much the work of the skilful mechanic. Any one, after becoming acquainted with the ideas of an inventor, may work them out in a manner and by machinery very different from the arrangement preferred or used by the inventor; but his merit will be far less than that of the pioneer who has developed to the community all that is new and valuable in the invention—as, in the case before us, the use of a motion independent of the motion of the lifter, for the purpose of detaching the valve.

It remains for you, in view of all the facts in the case, and of the general principles which I have endeavored to explain, to say whether or not the patentee's invention is to be found incorporated, in substance, in the arrangement and combination of the defendant. If it is, it will be your duty to find a verdict for the plaintiff; otherwise, for the defendant.

The only question remaining for your consideration, is that of damages. There are two modes of arriving at these: If the patentee has an established price in the market for his patent-right, or what is called a patent-fee, that sum, with the interest, constitutes the measure of damages. If the patentee has no established price as a patent-fee, then you are to inquire as to the loss or injury which he has sustained by reason of the infringement; and the profits which the infringer has made by the use of the invention, may be taken as the measure of damages. Of course, the defendant cannot complain of that, because, if in fact he is an infringer, he has been using the property of the plaintiff; and whatever profits he has made out of its use, belong, in equity, to its owner. It is a question here, whether or not an established pat-

ent-fee for this improvement has been proved by the evidence. There is evidence that the patentee sold one of his patent-rights in Philadelphia for $250, and that he sold another in Baltimore for $500. He sold several rights to the government, at a rate which, applied to the Metropolis, would amount to about $9,000. As it respects the sales for $250 and $500, you have the explanation of the patentee himself. He says that his object in selling at such prices, was to get the invention into public use, and that, on that account, he made sacrifices of what he deemed its real value, so that the public might see the successful working of his improvement. Undoubtedly, this circumstance is not peculiar to this patentee. His account is perhaps the history of most inventions on their first introduction to public notice. It requires effort, influence, and sacrifice, on the part of the inventor, to introduce them into notice, so that they may acquire the confidence of the community. The public are distrustful of new inventions, and rightfully so. Not one out of one hundred patents issued at the present day is worth, in my judgment, the parchment upon which it is written. It is only now and then that a valuable improvement is produced, and it soon becomes the subject of litigation and contest. And even the most meritorious require time, effort, influence, and the sacrifice of money, to bring them into use. It is quite proper that these views should be taken into account upon the question of the patent-fee. If you are satisfied that the improvement was sold for less than its real value, for the reasons stated by the patentee, and that sacrifices were made for the sake of introducing it into public use, these considerations should be taken into account, in fixing a patent-fee as a measure of damages. It is also important that you should take into account the fact that, if you adopt the patent-fee, whatever you may, upon the evidence in the case, determine that fee to be, it will operate to vest the right to use the invention on the Metropolis throughout the term of the patent. And you should state whether you adopt, as the measure of damages, the patent-fee, or the profits from the use of the invention; because, in the former case, the right to its further use passes, and, in the latter case, it does not pass. Your verdict, in the latter case, will be a compensation for the use of the invention during the sixty days it was used on the Metropolis, before the suit was brought.

The jury found a verdict for the plaintiff for $720, and stated that it was only compensation for the sixty days' use of the invention.

[NOTE. A motion was subsequently made for an attachment against the defendants for violating the injunction granted in this case. The motion was denied as to all the defendants except the defendant Augustus Sturgis against whom a bailable attachment was issued. Case No. 12,833.]

[For other cases involving this patent, see note to Sickels v. Mitchell, Case No. 12,835.]

Case No. 12,833.

SICKELS v. BORDEN et al.

[4 Blatchf. 14.][1]

Circuit Court, S. D. New York. April 14, 1857.

INJUNCTION—VIOLATION—WHAT CONSTITUTES—ATTACHMENT—WHO LIABLE—EMPLOYEE.

1. Semble, that, in order to attach for the breach of an injunction restraining the infringement of a patent, the party to be proceeded against must be a party to the suit, and have had notice of the application for the injunction.

2. What constitutes the violation of an injunction, considered.

3. If an injunction is made broader in its scope than was intended by the order under which it was issued, the defendant should, on being served with it, take immediate measures to set it aside for that reason, and not wait, to raise the objection, until the hearing of a motion for an attachment for a violation of the injunction.

4. Where the chief engineer of a steamboat, owned and run by a foreign corporation between a port in New York and a port in Rhode Island, violated an injunction served upon him as a defendant in a suit: *Held*, that it was no defence to a motion for an attachment against him for such violation, that he was a mere servant of the corporation and subject to the orders of the master of the steamboat.

This was a motion [by William B. Sickels] for an attachment for the violation of an injunction restraining the defendants [William Borden and others] from using "a certain improvement in the cut-off, patented to Frederick E. Sickels by letters patent [No. 4,199] dated September 19th, 1845," "by themselves, their agents, servants, workmen or employees" "on the steamer Metropolis, running on the Sound between New York and Fall River." The injunction was issued under an order made by Mr. Justice Nelson, authorizing the issuing of an injunction "enjoining and restraining the defendants, their agents, workmen and employees, from using or permitting to be used, on the engine of the steamer Metropolis, a certain improvement in the mode of tripping cut-off valves, patented by Frederick E. Sickels on the 19th day of September, 1845, whereby the extent of the cut-off on said engine is regulated by means of a motion at right angles, or nearly so, to the valve-motion of the engine, through the agency of a vibrating sector, with arms moving coincident with the motion of the piston, or nearly so, as the same is now in use on said engine." [See Case No. 12,832.] It was contended by the counsel opposing the motion, that the injunction was broader than the order; that the attachment could have no operation beyond the terms of the order; that, by the terms of the order, the injunction was limited to the use of the adjustable feature of the invention referred to; and that, the defendants not having used that portion of the patented invention, no attachment for a breach of the injunction should

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

be issued. The motion was for an attachment against William Borden, William H. Brown, Augustus Sturgis, and Horatio Allen, the first three being, with the Bay State Steamboat Company, the defendants in the suit. The marshal's return stated that the injunction was personally served on the defendants Borden, Brown and Sturgis, on the 29th of November, 1856.

A notice of a motion for an attachment, dated December 2d, 1856, and a copy of an affidavit of Henry Mason, were served on Horatio Allen on the 3d of December, and on William H. Brown, William Borden and Augustus Sturgis, on the 4th of December. The affidavit of Mason stated that he was an engineer; that he went to Fall River on the Metropolis, on Saturday night the 29th of November, and observed the operation of the engine of the boat; that the valves were operated, on that trip, in the same manner as before the injunction was served, cutting off at about half stroke, by means of a sector, with arms or wipers moving as before, independent of the lifters; that the only change made was in substituting for the screw, which gave the adjustable feature, a smooth rod with collars; and that Sturgis, the engineer of the boat, informed him that Horatio Allen had made the change on the boat. A notice of the renewal of the motion on the 26th of December, was served on Borden, Allen, Brown and Sturgis, on the 23d of December, and gave notice of the use of the affidavit of Mason. That affidavit was the only proof produced on the part of the plaintiff [William B. Sickels] to show a violation of the injunction.

In opposition to the motion, the counsel for Allen, Borden, Sturgis and Brown read the affidavits of Allen, Sturgis and Borden, and the affidavit of one John Fuerst. The affidavit of Allen showed that he was not in court when any injunction was ordered, and that he had never been served with any order or injunction in the case, or with any copy or notice of any such order or injunction. It also stated, that he prepared a plan for the change of the valve-gear of the engine of the Metropolis, under a request to alter such valve-gear so as to prevent its continuing to be an infringement of the Sickels patent; that such plan was submitted to the counsel who defended the suit at law which preceded this suit in equity; that said counsel advised that, when the proposed alterations were made, the valve-gear would not be an infringement upon Sickels' patent; and that the proposed alterations were accordingly made. It also stated, that such alterations entirely stripped the valve-gear of its adjustable feature. The affidavit of Sturgis stated that he was the chief engineer of the Metropolis; that he had not, since the service of the injunction, run the engine with the adjustable feature, but that the engine was altered before the injunction was served; and that he had, ever since such alteration, been, and was now, compelled to use the throttle-valve to regulate the running of the engine. The affidavit of Borden showed, that he was not the owner or charterer of the Metropolis; that he was not in possession of the boat, and was not the manager of it, except under instructions from the corporation owning it; that he did not now run the said boat or control her management; that he did not now use, and never had used, the plaintiff's invention on the Metropolis, or on any other boat; that he had not, since the order for the injunction was made, or before, run or used, or caused to be run or used, the engine of the Metropolis; and that he had no control over the use of the engine. The affidavit of Fuerst showed the alteration of the engine. No affidavit of Brown was produced. He was mentioned by the counsel on both sides, during the argument, as the master of the Metropolis; but this was not shown by the affidavits produced, nor did it appear that Brown was on the Metropolis, or had anything to do with her running, at the time of the alleged violation of the injunction.

Edward N. Dickerson, for plaintiff.
Francis B. Cutting, for defendants.

HALL, District Judge. The injunction issued and served in this cause is directed to the defendants alone, and, by its terms, restrains them, and them alone, from using "a certain improvement in the cut-off, patented by Frederick E. Sickels, by letters patent dated September 19th, 1845," "on the steamer Metropolis, running on the Sound, between New York and Fall River." There is nothing upon the face of the injunction, by which its operation or restraint can be extended beyond the precise limits indicated, and it is, therefore, the "use" only that is restrained, and that use on the steamer Metropolis.

If the injunction had been properly served on Allen, and had been directed to the servants, agents, workmen and employees of the defendants, and had, in terms, restrained such servants, agents, workmen and employees, the very serious question would have been presented, whether persons not parties to the bill could be restrained, under such a general designation, by an injunction issued upon notice only to the parties to the suit. The act of congress requires notice of an application for an injunction; and I am very strongly inclined to the opinion, that, in order to attach for the breach of an injunction, the party to be proceeded against must be a party to the suit, and have had notice of the application for the injunction. But it is unnecessary to determine this question upon the present motion. There is not the slightest proof that Allen has ever used upon the Metropolis the invention referred to in the injunction; but it is sought to attach him because, prior to the use complained of, he made an alteration in the engine of the

steamer. That alteration did not make the engine any more an infringement of the patent. On the contrary, it took away the adjustable feature, by which "the extent of the cut-off can be regulated at pleasure, during the action of the engine, from the full to the least portion of the stroke," which was specifically claimed as a part of Sickels' invention. It was, therefore, a less extensive and less injurious infringement, to use the engine after the change, than before; and certainly the change can afford no ground for an attachment against Allen. It is not shown that he has used the engine before or since the change; and, therefore, even if he had been named as a defendant, and been served with the injunction, no attachment could be issued against him, upon the proof now before the court. The motion, as against Allen, is, therefore, denied.

There is no proof that the defendant Borden has violated the injunction. It is not shown that he has used the invention, or in any way run, used, managed or controlled the engine of the Metropolis, either personally, or by the agency or intervention of others. Indeed, such use, control and management are expressly and implicitly denied. The motion, as against Borden, is, therefore, denied.

There is no proof of the violation of the injunction by the defendant Brown. On the argument, the counsel on both sides spoke of him as the master of the Metropolis; but there is no proof that he was such master, or was on board of the Metropolis at the time of the alleged violation of the injunction, or that he has in any way used, or procured or directed the use of the invention of Sickels in or upon that steamer. It seems to have been assumed that I would take judicial notice that he was the master of the boat, and that I was to take it for granted that he was on board and acting as her master, and responsible for the use of her engine, on the 29th of November. This I cannot do. The motion, as against Brown, is, therefore, denied. I can, however, readily perceive that proof of the violation of the injunction may, perhaps, be made against Brown, and possibly against Borden; and I shall, therefore, give the plaintiff leave to renew the motion as against them, if he shall be so advised.

The evidence of violation against the defendant Sturgis is of a different character, though it must be admitted to be very slight. Mason swears to the use of the engine of the Metropolis on the night of the 29th of November, and describes the change which had been made, and which he says Sturgis, the engineer of the boat, informed him had been made by Allen. This conversation, it is fair to infer, was during this trip of the Metropolis, and, coupled with the statements made by Sturgis himself, in his own affidavit, in which he states that he was chief engineer on board of the Metropolis, which runs between New York and Fall River, and had been such since the boat was put upon the line, and that he had been and was compelled, since the alteration of the engine, to use the throttle-valve, to regulate the running of the engine, shows, I think, that he was running the engine on the Metropolis on the 29th of November, and that he has run it at other times, and has, therefore, used the valve-gear in its modified form, since the service of the injunction. It, therefore, becomes necessary to consider whether such use was a violation of the injunction.

The injunction restrains the use of the improvement patented to Sickels September 19th, 1845. It is possible that the injunction is broader, in this respect, than Mr. Justice Nelson intended it should be, but this does not appear conclusively, upon a comparison of the order with the injunction. The patent embraces two claims or inventions—the first and most important being that by which the drop-valve of the cut-off is tripped by a motion independent of the lifters; and the second being the adjustable feature, by means of which the extent of the cut-off can be regulated at pleasure, during the action of the engine. It is claimed that Mr. Justice Nelson intended that the use of this adjustable feature alone should be restrained by the injunction to be issued in pursuance of such order. There is certainly some force in the suggestion, looking to the terms of the order and the language of the patent. But, if the injunction was too broad, the defendants should, when served with it, on the 29th of November last, have taken measures immediately to set it aside for that reason. They did not do so, and they had not done so when this motion was argued; and I am, therefore, inclined to hold, that the injunction covers both of the devices patented, and must be held valid and effectual to the extent of the language employed to indicate the restraints imposed. The use of the engine after the alteration was, therefore, a violation of the injunction.

But it is claimed that the defendant Sturgis was a mere engineer, having no interest in or control over the vessel, and that he cannot be punished for a violation of the injunction. It was said, arguendo, that it would not do to punish by attachment the hands and firemen, the mere servants of the owners of the boat, who were subject to the orders of the master, and to punishment for disobedience if they refused to aid in the navigation and use of the vessel. I see no weight in these objections, as applied to this particular case. Both the master and the engineer, as the agents and servants of the foreign corporation defendant, are parties to this suit; and Sturgis is admitted to be the chief engineer, and the officer having the principal charge, management and control of the engine whose use constitutes the infringement. For the purpose of enjoining him, as the agent and acting officer of a foreign corporation, he

was properly made a party to the suit; and neither his agency, nor his relationship to the master or to the vessel, affords, in my judgment, any excuse for a violation of the injunction. A bailable attachment must, therefore, issue against him, to bring him before the court, to answer for the alleged breach of the injunction.

[For other cases involving this patent, see note to Sickels v. Mitchell, Case No. 12,835.]

Case No. 12,834.

SICKELS v. FALLS CO.

[4 Blatchf. 508:[1] 2 Fish. Pat. Cas. 202; 9 Pittsb. Leg. J. 89.]

Circuit Court, D. Connecticut. Aug. 13, 1861.

PATENTS — EFFECT — FUNCTION — PRIOR PATENT — REISSUE — STEAM CUT-OFF.

1. The claim in the patent granted to Frederick E. Sickels, September 19th, 1845, extended September 19th, 1859, and reissued February 21st, 1860, for an "improvement in steam engines," to "imparting a co-existing movement to two reciprocating catch-pieces, in the operation of the trip cut-off valves," is a claim for an effect or function, and is, therefore, not patentable.

[Cited in Risdon Iron & Locomotive Works v. Medart, 158 U. S. 68, 15 Sup. Ct. 749.]

2. The claim is also void on the ground that the improvement is substantially described and claimed in a patent granted to the patentee October 19th, 1844.

[Cited in Jones v. Sewall, Case No. 7,495; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 38.]

3. It is also void because, the improvement having been invented in 1844, it was not embodied in the original patent of 1845, or noticed therein until the reissue of 1860.

This was an action at law [by Frederick E. Sickels against the Falls Company] for the infringement of letters patent [No. 4,199] granted to the plaintiff, September 19th, 1845, for an "improvement in steam engines," and extended for seven years from September 19th, 1859, and reissued February 21st, 1860 [No. 910]. The patentee, after describing the nature of his improvement, and the machinery for effecting it, claimed as follows: "Imparting a co-existing movement to two reciprocating catch-pieces, in the operation of the trip cut-off valves."

R. J. & G. R. Ingersoll, E. N. Dickerson, and G. M. Keller, for complainant.

Roger S. Baldwin and E. W. Stoughton, for defendant.

NELSON, Circuit Justice. The claim is, in terms, for an effect, or function, and is, therefore, not patentable. But, without placing the case upon this strict ground, the unanswerable objection to the plaintiff's recovery is, that the improvement is substantially described and claimed in a patent granted to him on the 19th of October, 1844. This is a bar to the subsequent patent.

Another difficulty in the case is, that the patentee admits that he invented the improvement early in 1844. It was not embodied in the original patent of 1845, or noticed therein, until the reissue of February 21st, 1860, more than fourteen years after the invention.

We think that the defendant is entitled to judgment.

[For other cases involving this patent, see note to Sickels v. Mitchell, Case No. 12,835.]

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

Case No. 12,835.

SICKELS v. MITCHELL.

[3 Blatchf. 548.][1]

Circuit Court, S. D. New York. March 3, 1857.

PATENTS—INJUNCTION—DEFENCES TO—WHEN MAY BE ISSUED.

1. In order to successfully resist a motion for an injunction to restrain the infringement of a patent, where no question is made as to the use by the defendant of the thing patented, facts must be shown, on the part of the defendant, tending to prove that the plaintiff was not the inventor of the thing patented within two years before his application for the patent.

2. It is not a sufficient answer to such a motion, that the infringement has been discontinued and is not intended to be resumed, no compensation for the unlawful use having been made.

[Cited in Potter v. Crowell, Case No. 11,323.]

3. There is no necessity that the validity of a patent should be established on a trial at law, before an injunction can be granted, where the case is a clear one for the plaintiff, even though it be shown that the defendant is able to respond in damages.

[Cited in Hodge v. Hudson River R. Co., Case No. 6,560; Consolidated Fruit-Jar Co. v. Whitney, Id. 3,132.]

This was an application [by Frederick E. Sickels] for a provisional injunction to restrain the infringement of letters patent [No. 4,199] granted to the plaintiff, September 19th, 1845, for an "improvement in the mode of connecting the steam-cylinder with the steam-chest." [The patent was reissued February 21, 1860 (No. 910); January 1, 1861 (No. 1,113) and January 21, 1862 (No. 1,260).] The bill alleged that the defendant [Samuel L. Mitchell] had used the patented invention in the engines of the steamships Augusta and Knoxville.

Edward N. Dickerson, for plaintiff.

Erastus C. Benedict, for defendant.

INGERSOLL, District Judge. By the 7th section of the act of March 3d, 1839 (5 Stat. 354), if a patentee is the original and first inventor of an improvement at any time within two years before his application for his patent, this is sufficient to sustain his right to the improvement, although others may have known of it and used it during that period. No claim is made, in this case, that

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

the patent issued to the plaintiff is void on its face. And no knowledge or use of the improvement by any one will deprive him of his exclusive right, unless such knowledge or use was for more than two years prior to his application for the patent. Is there, then, any proof, on the part of the defendant, which tends to rebut the legal presumption afforded by the patent, that the plaintiff was the inventor and discoverer of the improvement, or which tends to show that it was either used or known by any one more than two years prior to his application for a patent?

The only proof upon this subject is that afforded by the affidavits of Thomas B. Stillman and of the defendant. Mr. Stillman is one of the firm of Stillman, Allen & Co., who built the engines of the Knoxville and Augusta with the steam-chests and cylinders which are the subject of complaint. He is brought forward to prove that the plaintiff was not the inventor of the improvement, and that it was known and in use before the issue of the patent. For this purpose he says, "that casting cylinders and steam-chests together is an old practice, well known to the trade before the date of the plaintiff's letters patent." He further says, "and, before that" (the date of the plaintiff's patent), "the very same arrangement as that claimed by the plaintiff was known to the trade." He does not say that "the very same arrangement as that claimed by the plaintiff" was in use before the patent was issued; neither does he say that this arrangement was known two years before the application for the patent. These are all the facts which he states bearing on the question or originality, or prior use or knowledge. As, therefore, he does not deny the allegations in the bill, that the plaintiff was the first and original inventor of the improvement patented, and as he does not state that the improvement patented was either known or used two years before the application for the patent, it must at once be seen, that what he states on this subject (admitting it to be all true) does not tend to prove the essential facts which must be proved in order to deprive the plainfiff of the right to the improvement patented. No material allegation in the bill is denied by the above-recited facts stated by Mr. Stillman. They are all the facts which he states applicable to the question under immediate consideration. He does, indeed, say that he "and his firm deny the validity of the plaintiff's patent, and intend to contest the same in good faith." But the facts which he states as a reason for contesting the patent do not afford even the semblance of a defence to a suit on the patent.

The defendant, in his affidavit, says, "that he does not know whether the plaintiff's alleged patent is a valid patent or not, but he is advised by those who are more competent to judge of such matters than he is, and denies that the said plaintiff has a valid patent for the union of the steam-chest and cylinder in the manner mentioned in the bill," and "that he intends in good faith to contest the same." He does not deny the allegations in the bill, that the plaintiff was, before the date of the patent, the original inventor of the improvement patented, and that said improvement had not been known before his invention. Nor does he allege any use by any one of the improvement patented, prior to the date of the patent. Indeed, he says that the use of it has been but recent. As he does not deny these allegations, he thereby admits them. He says he does not know whether the plaintiff's patent is a valid one or not, but that some one whom he thinks more competent to judge of such matters than he is, has advised him that it is not; and therefore he denies it to be a valid patent. On what other ground, if any, he so denies, it is difficult to conceive. It is not on the ground that the plaintiff was not the original inventor of the improvement patented, for he does not deny that the plaintiff was such original inventor. It is not on the ground that the invention was known and used before the discovery of the plaintiff, for he does not deny the allegation of the bill in that respect, or claim in his affidavit any such prior knowledge or use. He says that he shall contest the patent, but he states no facts which, if established, would justify him in contesting it. Neither of these affidavits makes any allegations which, if taken to be true, would invalidate the patent. It must, therefore, be considered as a valid one.

The next question is—does the defendant use the invention, as charged in the bill? There is no denial by the defendant of such use, except that he says that the steamer Knoxville is destroyed by fire, and that the invention is not now used upon her, and is not intended by him to be used upon her, and that he has no interest in her. He has made no compensation to the plaintiff for such use, and no compensation has been made to him by any one for such use. Upon this state of facts, the plaintiff is entitled to the relief sought by injunction, unless additional facts are made to appear to prevent such a result.

Have such additional facts been made to appear? The defendant says that the validity of the plaintiff's patent has never been tried in any action either at law or in equity; that the steamer Augusta, on which the invention is alleged to be in use, is one of a line of ocean steamers, whose being laid up by an injunction would be a great public calamity; that it would be impossible to remove her cylinder, and substitute another, without an enormous expense, and a consumption of several months of time; that he is not making any profits by the use of the invention; that he is willing to pay for it, whenever the plaintiff's right to it, and the infringement of it, shall have been legally established; that the issuing of the injunction would cause irreparable and unnecessary

injury, without any benefit to the plaintiff; and that he is able to respond in any amount of damages which the plaintiff may recover for the use of the invention.

There is no necessity that the validity of a patent should be established in a trial at law, before an injunction can be granted. The chief use of its being so established, is to show, where a defendant denies that the patentee was the inventor, or claims that the invention was known and used two years before the application for the patent, that there is no foundation for such denial or for such claim. But, in this case, there is no sufficient denial of the invention by the plaintiff, and no sufficient allegation that the invention was either known or used two years before the date of the application for the patent. The other allegations are not sufficient to stop the injunction. It is too much for a defendant, in a clear case, to insist upon having the privilege of using a patented invention, for the reason that he is able to pay the damages which may be awarded against him, at the end of a protracted litigation to ascertain their amount. The plaintiff may not be as able to prosecute a suit as the defendant is to defend. And, if the evils which the defendant sets forth are to follow, by the granting of an injunction, he could easily have avoided them. The ground of complaint in the bill is, that the defendant is using the invention, without paying a reasonable sum therefor. There would have been no cause of complaint, if the defendant had paid a reasonable sum for the use of the invention. This he has not done, and he has refused to pay any thing, unless compelled to pay by the judgment of a court. The plaintiff has a right to demand of the defendant, if he wishes to use the invention, to first pay for such use. And, if he will not pay, and if the evils follow which he predicts, by his being compelled to desist, he has no one to blame but himself. As the case is now presented, the right of the plaintiff is clear, and the violation of right on the part of the defendant is equally clear. I consider the case as it is now presented upon the bill, affidavits, and other papers in evidence, and not as it may by possibility be presented at some other time. Let the injunction issue as prayed for.

[For other cases involving this patent, see Sickels v. Falls Co. Case No. 12,834; Same v. Evans, Id. 12,839; Case v. Borden, Cases Nos. 12,832, 12,833; Same v. Tileston, Case No. 12,837; Steam-Packet Co. v. Sickles, 10 How. (51 U. S.) 419.]

Case No. 12,836.

SICKELS et al. v. RODMAN.

[1 West. Law J. 381.]

Circuit Court, S. D. New York. Dec., 1843.

PATENTS—STEAM CUT-OFF—NOVELTY.

Action on the case for infringement of a patent. This was an interesting case tried in the United States circuit court, before his honor Judge BETTS, and it is one of considerable importance to persons engaged in the business of running steamboats, and to builders of steam engines. The action was brought to recover damages for the violation of a patent granted to Frederick E. Sickels, in May, 1842, for an improvement in the cut-off, by which the valves themselves are made to cut off the steam at any part of the stroke, without noise or slamming, instantaneously, and also to effect a very great saving of fuel. It was proved on the part of the plaintiffs, that Mr. Frederick E. Sickels, a talented and very ingenious young mechanic of this city, had, for two or three years before taking out his patent, devoted his time and ingenuity to this subject, and had, as early as the latter part of 1839, or early in 1840, conceived and made drawings of the plan which forms the subject of the patent. His invention, as described in the patent, consists of an apparatus for lifting and tripping the valves at any required point of the stroke of the piston, and also of a cylinder, with a cup or secondary reservoir at the bottom, and partially filled with water or other fluid, into which cylinder or secondary reservoir works a plunger which is attached to the valve-stem and which permits the valve to descend very rapidly, but checking it the very moment of its reaching its seat, so that it closes without noise or slamming, and with great precision and accuracy. It was further proved, that this invention was one of very great utility and value, and that it was very perfect in its operation, and effected a saving of fuel of about one-fifth what is usually consumed in engines with the ordinary throttle-valve cut-off. One set of the apparatus, which had been used on board the steamer Rhode Island, was exhibited on the trial, and which had run for a year with perfect accuracy, and which effected a saving of fuel of about two tons a passage. It was also proved, that the defendant, who is a manufacturer of steam engines, had, without license from the plaintiffs, constructed an apparatus precisely like that patented by Mr. Sickels, and put it in operation on the engine of the steamboat Westchester, running upon the Hudson river. It was upon this infringement that the plaintiffs brought the suit, as well to establish the originality of the invention and the validity of the patent as for the recovery of damages for the infringement.

On the part of the defendant, witnesses were called to prove, that something similar to the plan of Mr. Sickels had been on board the steamboat South America before the patent, and in other places; and it was also claimed, that the principle of the improvement was set forth in Stuart's Anecdotes of the Steam Engine, in the description of one of Watt's reciprocating engines, in which a retardation of the opening of the valve was effected by means of a weight falling in wa-

ter. The plaintiffs, however, showed clearly that Mr. Sickels had conceived the plan, and made regular drawings of it long before it was put in use on board the South America, and that the secondary reservoir, with the plunger fitted to it, and acting in water, was entirely his own invention, and that the method described in Stuart's work was unlike that of Mr. Sickels, and was for a different object.

His honor Judge BETTS delivered a very able and impartial charge to the jury, after a trial of three days, and the jury found a verdict for the plaintiffs for two hundred and seventy-five dollars damages, being the whole amount claimed—thus establishing the validity of the patent, and the claim of Mr. Sickels to the honor of being the inventor of this highly ingenious and useful improvement.

J. B. Staples and S. P. Staples, for plaintiffs.

R. Ten Broeck and Mr. De Witt, for defendant.

Case No. 12,837.

SICKELS v. TILESTON.

[4 Blatchf. 109.] [1]

Circuit Court, S. D. New York. Oct. 13, 1857.

PATENTS—STEAM CUT-OFF—PRELIMINARY INJUNCTION—PUBLIC CONVENIENCE.

1. Where the patentee of an improvement in a cut-off for a steam-engine had established his patent on a trial at law, and obtained an injunction against a particular apparatus used on a steam-vessel, this court granted a preliminary injunction against a like apparatus used on another steam-vessel, although it was claimed that such apparatus had been patented and was adopted in good faith.

2. Where the rights of the plaintiff are manifest, and the violation of them by the defendant is clear, the consideration of either public or private convenience should have little weight.

[Cited in Hodge v. Hudson River R. Co., Case No. 6,560.]

[This was a bill in equity by William B. Sickels against Thomas Tileston.]

Application for a provisional injunction. The bill alleged that Frederick E. Sickels was the original and first inventor of an "improvement in the mode of tripping cut-off valves," for which letters patent [No. 4,199] were granted to him on the 19th September, 1845; that he, on the 5th of August, 1848, assigned the same to the plaintiff; that the plaintiff, on the 9th of July, 1855, brought an action of law, in this court, against William Borden, agent of the Bay State Steamboat Company, for the unauthorized use of the invention on a steamboat called the Metropolis, which contained an improvement in the mode of tripping cut-off valves, known as "Allen and Wells' adjustable cut-off;" that the defendant in that suit pleaded the general issue and gave notice of the want of novelty; that the issue came to trial at the October term of this court, in 1856; that Horatio Allen was a witness in said action at law, for the defendant; that the jury gave a verdict for the plaintiff, and assessed, as his damages, $750, for sixty days' use of the improvement on the Metropolis; that, afterwards, this court, upon that verdict, granted an injunction, restraining the use of the cut-off on the Metropolis; that the defendant, on board of the steamer Nashville, running from New York to Charleston, was now using a cut-off similar to that used on the Metropolis, and substantially similar to the patented improvement, without the license or permission of the plaintiff; and that the defendant refused to pay the plaintiff for the use thereof, or to desist from using it. [Case No. 12,832.]

Edward N. Dickerson, for plaintiff.

Francis B. Cutting, for defendant.

INGERSOLL, District Judge. It is not denied by the defendant that Frederick E. Sickels was the original discoverer of the improvement described in his patent; or that he is entitled to that which the patent purports to grant to him; or that he has assigned the patent to the plaintiff. The action at law, the verdict of the jury and the injunction granted against the Metropolis, are admitted by the defendant, as stated in the bill. It is admitted also by him that the cut-off improvement used by him on board of the Nashville is like that used on board of the Metropolis; and that they are both what are usually called "Allen and Wells' adjustable cut-off." Upon this state of facts, therefore, it would follow, (there being nothing else in the case,) that if the use of the cut-off on board of the Metropolis was a violation of the plaintiff's rights, which required for their protection the interposition of the court, by way of injunction, the use of the same kind of cut-off on board of the Nashville was a violation of the plaintiff's rights, requiring the same kind of interposition.

But the defendant says, that he is advised by his counsel, that the cut-off he is using is not any infringement upon the patent, and that he intends to defend this suit, and expects to establish, by the decision of this court, that the cut-off now on the Nashville is no infringement of the patent. As this court has, in the case of the Metropolis, upon full investigation, solemnly decided that the cut-off used on board of that boat was an infringement of the patent, and, as it is admitted that the cut-off used on board of the Nashville is like the cut-off used on board of the Metropolis, this court has already decided that the cut-off now on board of the Nashville is an infringement of the patent.

The defendant says, that prior to 1853, when the cut-off used in the Nashville was put on board of her, it had been patented to Allen and Wells. But, whether it was patented to Allen and Wells or not, this court has already decided, that cut-offs made like

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

it are a violation of the rights patented to Sickels; and no subsequent patent can take away rights secured by a prior patent. The defendant further says, that when he adopted the cut-off of Allen and Wells for the Nashville, he adopted it in good faith; and that he had no idea that he was violating any of the rights secured by the Sickels patent. If the determination of this court, as to the injunction already granted, was correct, he now knows that the use of the Allen and Wells cut-off on board of the Nashville is a violation of the rights secured by the Sickels patent. The bill charges, that the defendant, while using, in the Nashville, a cut-off like that used on board of the Metropolis, refuses to pay the plaintiff anything for the use thereof, or to desist from using it; and these charges in the bill are not denied. They are, therefore, admitted. After the decision of this court in the case of the Metropolis, the defendant must, upon the facts presented in this case, do one of these two things—he must either pay the plaintiff for the use of the cut-off, or desist from using it. If he is not willing to pay, he must not use. There is no more reason why an injunction should not issue against the Nashville, than there was why one should not issue against the Metropolis. The cut-offs used in both are the same. If one is a violation of the plaintiff's patent, the other is. Both boats are engaged in the same kind of business—one in carrying freight and passengers to Fall River; the other in the same kind of business between New York and Charleston. The same legal discretion should be used in the one case as in the other; and the consideration of public or private inconvenience should not operate more in the one case than in the other. The rights of the plaintiff are manifest. By the decision of this court in the case of the Metropolis, and the facts admitted in this case, the violation of right on the part of the defendant is clear. He refuses to make any compensation for such violation, and insists upon doing, without making compensation therefor, that which has been adjudged to be a violation. In such a case, the consideration of either public or private convenience should have little weight. The law, so far as this court is concerned, was settled in the case of the Metropolis. In that case, the conscience of the court was satisfied that the Allen and Wells cut-off was a violation of the plaintiff's rights. The defendant admits the validity of the Sickels patent; and does not, in his answer to the plaintiff's application, intimate that he has it in his power to bring forward any new fact which was not brought forward in the Borden Case, and in the case of the Metropolis, to show that the Allen and Wells cut-off is not an infringement of the rights secured by the Sickels patent.

The result is, that a preliminary injunction must issue, as prayed for.

[For other cases involving this patent, see note to Sickels v. Mitchell, Case No. 12,835.]

Case No. 12,838.

SICKELS et al. v. YOUNGS et al.

[3 Blatchf. 293.] [1]

Circuit Court, S. D. New York. Sept. 25, 1855.

PATENTS — PRELIMINARY INJUNCTION — WHEN GRANTED—STEAM CUT-OFF.

1. On a motion for a preliminary injunction, to restrain the infringement of letters patent, the court will not look further into the case than to ascertain whether or not, upon established principles of equity, to prevent an irreparable injury, the interference of the court is required, pending the litigation.

[Cited in Earth Closet Co. v. Fenner, Case No. 4,249.]

2. Such injunction will be withheld, unless the right is clear in favor of the plaintiff.

[Cited in Earth Closet Co. v. Fenner, Case No. 4,249.]

3. Although, on such a motion, it appears that, on the trial of an issue awarded in the cause, on the question of infringement, the jury found in favor of the plaintiff, still the court will not adopt the verdict of the jury, but will examine the whole case, including the evidence given before the jury, and will grant or withhold the injunction according to its own judgment thereon.

4. In this case the court decided, notwithstanding the verdict of the jury in favor of the plaintiff, that the defendant did not infringe, and refused the injunction.

5. The question of infringement discussed as between the claim of Sickels' patent, of May 20th, 1842, for regulating the closing of the valves of steam-engines and preventing them from slamming, "by means of a water reservoir," and the apparatus described in Corliss' patent, of July 29th, 1851, in which the weights that close the valves are prevented from slamming by being cushioned on air, and the latter *held* not to infringe the former.

[This was a bill in equity by William B. Sickels and others against David L. Youngs and Stephen Cutter.]

Motion for a provisional injunction to restrain the infringement of letters patent [No. 2,631], granted to Frederick E. Sickels, May 20th, 1842, for "a new and useful improvement in the manner of constructing the apparatus for lifting, tripping, and regulating the closing of valves of steam-engines." The plaintiffs were assignees of the patent. The bill was filed on the 18th of March, 1853.

Edward N. Dickerson and Charles M. Keller, for plaintiffs.

William H. Seward, Thomas A. Jenckes, and Samuel Blatchford, for defendants.

NELSON, Circuit Justice. The bill charges the defendants with using an engine and machinery constructed and arranged upon the same plan with that of Sickels, that is, "an engine in which the valves are opened by lifters having on them catches, which are detached from the valve-stems, at the de-

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

sired point, by a cam or stop, so as to permit the valves to close rapidly by the force of gravity or by springs," and with regulating the descent of such valves, and preventing them from slamming, "by using a cylindrical vessel containing air, and so constructed that a piston descends in it freely to a certain point, and there is arrested and protected from slamming by the fluid confined in a close chamber under it, substantially in the manner patented as aforesaid."

The defendants, in their answer, deny that they are using and operating an engine constructed substantially on the plan of the plaintiffs; and also deny that they "regulate the closing of the valves, and prevent them from slamming, by means of a water-reservoir, furnished with a piston or plunger attached at the lower end of the valve-stem, and operating within an adjustable cup, substantially as described in Sickels' patent; or that they use any contrivance to regulate the closing of the valves, or to prevent them from slamming, or any water-reservoir whatever, or any adjustable cup, or any other contrivance for effecting the purpose intended and described" in that patent. The defendants further state, that they are using a steam-engine constructed by G. H. Corliss and E. J. Nightingale, of Providence, R. I., and which contains improvements invented by Corliss, for which a patent was issued to him March 10th, 1849, and reissued May 13th, 1851, and for which another patent, for "improved cut-off gear," was issued to him July 29th, 1851; that said improvements are substantially different from those described in the plaintiffs' patent; that, in order to arrest the motion of the weight, after its office of closing the valve has been performed, the weight is dropped into a cylindrical socket, within which it compresses the air, which thus forms an elastic cushion, by which its descent is arrested; and that, in order that the fall and action of the weight may not be checked until after the valve is entirely closed, an opening is made in the side of the cylinder or socket, at a point which the weight will reach after the valve is closed, so that the weight will fall freely to that point, and then be arrested by confining and compressing the air, so as to cause it to form an elastic cushion, to prevent any jar of the machinery from the use of a detached weight after the port is closed.

A motion was heretofore made before me at chambers, on behalf of the plaintiffs, for a preliminary injunction, founded upon the pleadings, together with affidavits and models. After hearing the arguments of counsel, and duly deliberating thereon, I made an order, on the 7th of September, 1854, that the following questions be tried at law at the next term of the circuit court, namely: First, whether or not the construction, arrangement, or combination of the apparatus used by the defendants for the more readily cutting off steam in working the steam-engine, as charged by the plaintiffs in their bill, are substantially identical with the construction, arrangement, or combination of the apparatus described in and claimed by the plaintiffs under the patent granted to F. E. Sickels, May 20th, 1842, for the more readily cutting off steam in working the steam-engine; and, second, whether or not the construction and arrangement of the apparatus for preventing the slamming of the valves in closing, used by the defendants, as charged in the bill, are substantially identical with the construction and arrangement of the apparatus described in and claimed by the plaintiffs under the aforesaid patent.

These issues came on for trial before his honor, Judge Betts, on the 20th of December, 1854, and, after a very elaborate examination of witnesses on both sides, and a submission of the questions to the jury, they returned a verdict in favor of the plaintiffs on both issues.

The motion for the preliminary injunction is now renewed founded upon the evidence taken at the trial at law, and the verdict; also, upon the affidavits before the court on the first motion, and upon further affidavits taken since the trial, and models of the different improvements and machinery, as claimed by the respective parties.

As this is a motion simply for a preliminary injunction, and not a case upon pleadings and proofs for a final hearing, I shall not look further into the mass of papers before me, than to ascertain whether or not a case has been made which, upon established principles of equity, to prevent an irreparable injury, requires the court to interfere, pending the litigation, and restrain the defendants from the further use of the apparatus or machinery charged with infringement, until the right is finally determined. And, upon these principles, it is well settled that, unless the right is clear, upon the papers and proofs presented, and upon which the motion is founded, in favor of the plaintiffs, the injunction will be withheld, and the rights of the parties be left unaffected and unchanged until the case is matured for the final hearing, and definitely disposed of.

Some of the questions that are presented, and which must be determined on the final hearing, and, of course, glanced at upon this preliminary motion, are exceedingly difficult and embarrassing, and, with the best lights that can be furnished by evidence or argument, of no easy solution. I speak not of questions of law, but of questions of fact arising out of the alleged identity of the apparatus and machinery used by the respective parties in tripping the valves of the steam-engine, and cutting off the steam at any given point, and in regulating the closing of the steam-valves, so as to prevent slamming or jarring of the machinery. Experts of the greatest skill and experience in this branch of the arts, and of the highest personal character, have been examined in the case on these questions, by counsel equally eminent in this department of the law, and their testimony is in ir-

reconcilable conflict—the one class maintaining that the apparatus and machinery used by the defendants for tripping the valves, and for regulating their closing, are substantially the same as those described in the plaintiffs' patent, and the other class maintaining that they are not. And, upon the record of the trial at law, we find the most elaborate, ingenious, and learned reasons given by each for the opinions entertained. Under this state of the case, and this pressure of conflicting opinions, I might, perhaps, relieve myself from the embarrassment, by adopting the verdict of the jury. But this would not be in accordance with the practice of the court, or consistent with the duty I owe to the parties litigant. My own judgment must be convinced, before I can either grant or withhold the injunction.

I am obliged, therefore, to look into the evidence and examine it, and into the apparatus and machinery used by the respective parties, for the purpose of forming an opinion on the questions at issue, conceding, at the same time, that the verdict of the jury is entitled to great consideration and respect.

One of the material questions in the case involves the substantial identity of the apparatus used by the defendants for closing the steam-valves, and preventing the slamming and jarring of the machinery.

The apparatus in the plaintiffs' patent, as described by one of their experts, and which description is substantially correct, is as follows: The valve is regulated in its closing, by attaching a piston or plunger to the valve-stem, and by placing around the plunger a vessel containing water or other fluid. The inside of this vessel is bored out in such a manner that the plunger, in the first part of its descent, moves at some distance from the side of the vessel, so that the water can pass freely between the plunger and the inner side, and, at the lower part of the vessel, the bore is contracted, so that, when the plunger reaches it, there will be very little passage for the water between the plunger and the side of the vessel. It follows, that when a weight is attached to the plunger, and dropped by the tripping apparatus, so as to descend, the plunger will fall rapidly through that part of the vessel where the water can easily pass from one side of the plunger to the other, that is, between the outer side of the plunger and the inner side of the vessel; and, when it arrives at the small part of the vessel, the motion of the plunger will be checked, there being scarcely any escape for the water. The object is to permit the valve to cover the port as rapidly as possible, and to check it at the instant it covers the valve-port.

The specification gives minute directions as to the construction of the apparatus, and, amongst other things, directs that the vessel is to contain "water, oil, or other fluid, say to two-thirds of its height, more or less."

The apparatus of the defendants is described in Corliss' patent of July 29th, 1851, as follows: In order to effect the closing of the steam-valves after they are disconnected from the eccentric gear, the rock-shaft arm appertaining to each of them has a weight suspended from it by a rod. These weights are sufficiently heavy to effect the instantaneous closing of the valve, whenever its appropriate lifting-rod is disengaged from the toe of the rock-shaft arm. In order to prevent the slam and jar that would result from the sudden closing of the valves, these weights are fitted to move easily in appropriate sockets or cylinders of equal bore throughout their length. The weights moving in the sockets or cylinders act as pistons to compress the air therein, and thus retard their descent, and as air-cushions to prevent the slam or jar. To enable the weight or piston to close the valve with the requisite speed, an orifice is made in the cylinder, near its lower extremity, to permit the free entrance and exit of air. This orifice is in such a position that the piston, in descending, passes it, and thus cuts off the escape of the air remaining in the cylinder, just before the valve closes its port, when the air, thus caught or shut up in the cylinder, being compressed, will retard the further movement of the weight or piston, and act as an air-cushion to prevent the jar.

It is proper to remark, that apparatus for opening or closing the valves of steam-engines by the falling of weights or the descent of pistons, attached to the valve-stem, into a reservoir or cylinder filled with water, the water being used for the purpose of preventing the slam or jar, is an old contrivance. Watt used it. His weights or plungers were made of cast iron, and were cylindrical, each fitted into a hollow cylinder filled with water. The plunger was made smaller than the barrel to allow a small space, through which, when the plunger descended, the water might arise between it and the barrel. As the plunger descended, the valve closed, and the water displaced rose between the plunger and the barrel; and the resistance thus occasioned to the descent of the weight prevented the slam which would have been produced by its uninterrupted fall. The apparatus of Sickels, and also that of Corliss, are but improvements, therefore, upon that which had long before been discovered. The difficulty with Watt's arrangement was, that the closing of the valve was gradual throughout, being regulated by the descent of the weight into a cylinder of uniform bore, which occasioned loss of steam by what is termed wire-drawing. This is remedied, in Sickels' apparatus, by constructing his dash-pot or reservoir, so that the plunger can move at some distance from the sides of the vessel at first, and the water thus pass freely up the sides, while, at the lower part, the reservoir is contracted, so that, when the plunger reaches it, the escape of the water will be diminished. In this way, the weight passes rapidly at first, till

it closes the valve, and is then checked by the increased resistance of the water, the great object being to permit the valve to cover its port as quickly as possible, and check it at the instant this result is attained.

The question is, whether or not the apparatus of the defendants embraces substantially the same improvement that is found in Sickels'.

In the first place, the mechanical construction of the defendants' dash-pot is different. It is the cylinder or barrel of Watt, without any contraction at the bottom. Its form or shape is, therefore, not only not similar to Sickels', but it is of the form and shape of those previously in use.

In the second place, the construction and form of it are such, that water or other liquids cannot be used in it practically, for the purpose of checking the descent of the weight, and preventing the slam or jar of the machinery. This is admitted. Some of the experts have expressed the opinion that alterations and additions could be made in its construction and arrangement, so that water might be practically used in it. If this were admitted, the fact would not necessarily weaken the force of the argument. No such changes have been made and put into successful operation. The suggestion is but speculation and conjecture, and I am not at all satisfied that it is well founded.

In the third place, the apparatus of the plaintiffs, as constructed, could not be operated successfully by the element or means used by the defendants in the working of their apparatus. I am aware that it is said that the plaintiffs' apparatus might be so altered and arranged, in its proportions merely, as to use air in the place of water. But this, again, is mere matter of opinion. No such change has ever been made, and put into successful operation; and, indeed, it is quite difficult to believe, if the apparatus could be used successfully with air, thereby dispensing with the necessity of filling the dash-pot with water, that the change would not have taken place long ago, on the score both of convenience and of economy.

In the fourth place, the defendants, by a different construction and arrangement of their apparatus, are enabled to operate it without employing at all the element used by the plaintiffs—employing one that is procured without expense, and is always present—simply, the common atmosphere about them. The device that has enabled them to work out this beautiful and useful result, never, so far as appears, successfully produced before by any contrivance or combination, would certainly seem to furnish a claim to the idea of novelty and originality, and to deserve the most careful and searching consideration, before the originator or the public be deprived of it.

It is said that the use of air in the reservoir, as a means of preventing the slamming of the valves, is claimed in the patent of the plaintiffs. Admitting this to be so, if the thing is impracticable, the claim will not benefit them, or harm the defendants. The claim would be simply nugatory. But I am inclined to think this a misapprehension of the true construction of the patent. The specification says: "The reservoir is to contain water, oil, or other fluid, say to two-thirds of its height, more or less. Through the plunger, K, holes, G G, are represented as being made for the passage of water; and H is a valve-like piece, which slides up and down on the lower end of the stem, B. This part of the apparatus, however, may be varied in its form in numerous ways, the intention being to cause the water to offer a determined degree of obstruction to the descent of the plunger, and to admit of this being regulated. This I have sometimes done by making the plunger, K, a flat disk, with a sufficient space between it and the cavity of the cup, L, for the passage of water sufficient to allow of the descent of the plunger, while it shall be so obstructed as to take off the force of the blow of the valve." And again, the claim is this: "I also claim the manner of regulating the closing of the valves, and of effectually preventing them from slamming, by means of a water-reservoir, furnished with a piston or plunger, attached at the lower end of the valve-stem, and operating within an adjustable cup or secondary reservoir, so as to effect the purpose intended, upon the principle, and substantially in the manner, herein described and made known." Now, it will be seen, that the apparatus described contemplates the use of water, or, at most, of some liquid incompressible in its operation and effect, and not the use of air. Indeed, it is manifest that air could not be used at all, according to the arrangement. And, in the claim, which is the summing up of what is deemed the thing discovered, and is required by the statute, a water-reservoir is alone specified. But what is, if possible, still more decisive, the patentee, in describing what the reservoir shall contain, also directs the manner. It is "to contain water, oil, or other fluid, say to two-thirds of its height, more or less." The experts called on the part of the plaintiffs, and their counsel on the argument, maintained that, according to scientific classification, the term "fluid" included air, and hence that this element was embraced in the description. But neither of them undertook to explain how the reservoir could be filled with air to two-thirds of its height, agreeably to the direction prescribed. The thing is simply absurd. The whole description shows that that element was not in the contemplation of the patentee. The terms used necessarily exclude it, and so does the description of the several modes pointed out of using the dash-pot for the purposes intended. No doubt the term "fluid," in its generic and technically scientific sense, includes air and the gases; but, in the sense in which it is used by the patentee, and in the connection in which it is found, it

means a fluid that is tangible, that can be seen and handled, like water or oil, and with which a vessel can be filled wholly or in part, at the option of the patentee. These are the only description of fluids that can be used in his reservoir, in the way pointed out by him.

Without pursuing this branch of the case further, I am inclined to the conclusion, that the construction and arrangement of the apparatus for preventing the slamming of the valves in closing, used by the defendants, are substantially different from that of the plaintiffs; and, further, that the use of air, for which purpose the defendants' apparatus is constructed, is not only not embraced in the plaintiffs' patent, but is, impliedly at least, excluded by it in its description. This was the impression made upon me on the first motion for an injunction; but, as the question was new, and might, in a measure, be affected by the exposition and opinions of persons skilled in this branch of the arts, I sent it to a trial at law.

It had been strongly urged at that hearing, that, although air might not be embraced within the term "fluid," in the sense in which it was used by the patentee, still the use of air in connection with the apparatus of the defendants, as constructed and arranged, was but an equivalent for water used in the apparatus of the plaintiffs, and, as such, was, in judgment of law, within the scope and meaning of the description in their patent. This, I was inclined to think from the first, was the only ground upon which the plaintiffs could maintain this branch of the case, consistently with a proper construction to be given to the patent. That point has not been distinctly put to the jury, and their verdict, therefore, is of no particular weight as it respects that aspect of the case.

It is not material now to determine whether or not it is necessary that the plaintiffs should maintain an infringement of this branch of their improvement—that is, of their water-reservoir, to prevent the slamming in closing the valves—before they can entitle themselves to a decree against the defendants. This seems to have been the opinion of the late Mr. Justice Woodbury, when the case was before him. I think there may be some doubt whether that opinion is well founded.

But, without expressing any definite judgment upon that question, or as to whether the tripping apparatus of the defendants is or is not substantially identical with that of the plaintiffs, and, therefore, an infringement, it is sufficient to say, that upon the views I have expressed, the case is not one in which it is fit and proper to interfere with the defendants' works, on this motion for a preliminary injunction.

The motion is therefore denied.

[For other cases involving this patent, see Sickels v. Gloucester Manuf'g Co., Case No. 12,841; Blank v. Manufacturing Co., Id. 1,532; Packet Co. v. Sickels, 19 Wall. (86 U. S.) 611.]

Case No. 12,839.

SICKLES v. EVANS et al.

[2 Fish. Pat. Cas. 417; 2 Cliff. 203.] [1]

Circuit Court, D. Massachusetts. Oct., 1863.

PATENTS—RESULT—MEANS—STEAM CUT-OFF—REISSUE—DIFFERENT INVENTION.

1. Where proper reference is made, in each claim, to the specification, the claim will be construed not to be for a result, but for the means by which the result is accomplished.

2. The invention of Sickles under his patent dated October 19, 1844, plainly is, as he describes it, a new and useful method of tripping cut-off valves, by a motion independent of the lifter. and, as there described, it has nothing whatever to do with any improvement in the working of valve catches or valve rods, as is evident from a perusal of the entire specification, which contains no reference to any such improvement, but declares that the inventor contemplated no change in valve gear.

3. In Sickles' reissued patent of January 21, 1862, in expanding the invention described in his original patent of September 19, 1845, what was a new and useful method of tripping the drop cut-off valves of steam engines and regulating and adjusting the same, has become a new and useful improvement in steam engines; and what was an improvement in tripping cut-off valves by a motion independent of the lifter. has become an improvement in the co-existing movement of two reciprocating catching-pieces.

4. Comparing the language of the claim of the reissue with the claims of the original, it is clear that they are foreign to each other, and strangers. If the claim in the former were inserted in lieu of those in the latter, there would be nothing in the original specification to justify such a claim.

5. Sickles' reissued patent, dated January 21, 1862, is void, because it is not for the same invention as the original patent.

6. Where the original and reissued specifications are consistent, or where there is no positive conflict or absolute inconsistency, the rule that in the absence of fraud, the reissued patent is evidence of the identity of the inventions, may be applied; but where it appears on the face of the respective specifications, as matter of law, that the specification and claim of the reissued patent are for a different invention from that secured in the original, the rule can not be sustained.

[Cited in Cahart v. Austin, Case No. 2,288; Seymour v. Osborne, Id. 12,688; Chicago Fruit-House Co. v. Busch, Id. 2,669; Milligan & Higgins Glue Co. v. Upton, Id. 9,607; Stevens v. Pritchard, Id. 13,407; Tucker v. Tucker Manuf'g Co., Id. 14,227.]

7. Wherever it appears, upon a comparison of the two specifications and claims, as matter of law arising on their construction, that the reissued patent is for a different invention from that secured in the original patent, then the reissued patent is void and of no effect.

[Cited in Seymour v. Osborne, 11 Wall. (78 U. S.) 546; Bridge v. Brown, Case No. 1,857.]

8. Engines constructed under the reissues of an original patent granted to George H. Corliss, March 10, 1849, do not infringe the reissues of the original patents granted to Frederick E. Sickles, October 19, 1844, or September 19, 1845.

This was a bill in equity [by Frederick E. Sickles against Bailey W. Evans and Caleb

[1] [Reported by Samuel S. Fisher, Esq., and by William Henry Clifford, Esq., and here compiled and reprinted by permission.]

Seagrave] filed to restrain defendants from infringing letters patent [No. 3,802], for an "improvement in the method of opening and closing the valves of steam engines," granted to complainant October 19, 1844; extended for seven years from October 19, 1858; reissued January 1, 1861, in two divisions, numbered 1112 and 1113, one of which, reissue 1113, was again reissued January 28, 1862. Also, letters patent for "an improvement in the mode of tripping cut-off valves," granted to complainant September 19, 1845, extended for seven years from September 19, 1859; reissued February 21, 1860, in six divisions, one of which (No. 910) was again reissued January 21, 1862. The invention is sufficiently described in the subjoined claims and in the opinion of the court.

The claims of the original patent of October 19, 1844, were as follows:

"I claim, first, my improvement in the periods of the movements of the valves, by which they are opened and closed, relatively to each other, and to the movement of the piston, by means of which the piston completes each stroke in equilibrity, or nearly so, without admitting steam against the movement of the piston by a lead to the steam valve; which is effected, as before stated, by opening the lower exhaust valve before the end of the upward stroke of the piston, and before the upper exhaust valve is closed, and opening the upper exhaust valve before the end of the downward stroke of the piston, and before the lower exhaust valve is closed, the movement of the steam valves being so regulated as to admit steam to the cylinder only after the exhaust valve on the corresponding end of the cylinder has been closed. I also claim as my next improvement, and as a means of carrying into effect my first and essential improvement, the arrangement of the toes of the rock-shaft in such manner, relatively to the location and form of the feet of the lifting rods, that at the middle, or nearly so, of the rocking motion of the rock-shaft, both lifting rods, with their exhaust valves, shall be partly up, as herein described; and I also claim, in combination with this arrangement, the slip of the lifters on the steam valve stems, as described, to insure the closing of the exhaust valves before the opening of the steam valves on the corresponding ends of the cylinder, as herein described."

The claims of reissue No. 1113, dated January 1, 1861, were as follows:

"Giving to each exhaust valve, alternately, while the piston is at or near the end of the cylinder furthest from it, a large amount of motion, as compared with the motion of the other exhaust valve, at that time, so as to move freely, exhaust the cylinder with less extent and greater ease of motion to the valves than has been done heretofore, substantially as described. Also, imparting these motions to the exhaust valves by means of a rocker interposed between the first motion from the engine and the valves, so that it will increase and diminish its leverage relative to each valve while moving them, and thereby impart my improved motion."

The claims of the reissue of January 28, 1862, were identical with those of reissue 1113.

The claims of the original patent of September 19, 1845, were as follows:

"I claim tripping the drop valve of the cut-off by a motion independent of the lifters, substantially in the manner and for the purpose herein described. I also claim combining the wiper that drops the valve of the cut-off, whether working horizontally or vertically, with any of the moving parts of the engine, other than the lifters, or their rocking-shaft, by means of the sector and arm or arms, by means of which the extent of the cut-off can be regulated at pleasure, during the action of the engine from the full to the least portion of the stroke, as herein described."

The claim of reissue No. 910, dated February 21, 1860, was as follows:

"I claim imparting a co-existing movement to two reciprocating catch-pieces in the operation of trip cut-off valves."

The claim of the reissue of January 21, 1862, was as follows:

"Imparting a co-existing movement to two reciprocating catch-pieces in the operation of the trip of cut-off valves, substantially as described."

E. N. Dickerson, for complainant.

E. W. Stoughton and B. R. Curtis, for defendants.

CLIFFORD, Circuit Justice. This is a bill in equity brought by the complainant to restrain the respondents from using a certain steam engine which they purchased of George H. Corliss, and which was constructed by the vendor under the reissue of an original patent granted to him March 10, 1849. Relief is sought by the complainant upon the ground that the steam engine in question is an infringement of the exclusive rights secured to him in the respective reissued letters patent described in the bill of complaint, and on which the suit is founded. Letters patent were granted to the complainant May 20, 1842, for a new and useful improvement in the manner of constructing the apparatus for lifting, tripping, and regulating the closing of the valves of steam engines. Whether any application for the extension of the patent was ever made does not appear, but it is conceded that the invention had imperfections; that the patent never was extended, and that it expired by its own limitation, in fourteen years from the time it was granted. Efforts, however, were made on the part of the complainant to remedy the defects of the invention, and he alleges that he afterward completed a set of improvements for that purpose, and

commenced to make a model of what he supposed was a perfect valve gear for a steam engine, and on February 28, 1844, filed a caveat to protect himself in his invention, which is now on file in the patent office of the United States. Steam engines, with few exceptions, as the complainant alleges, were operated at that time by the use of a cut-off valve, independent of the steam valves; that a part of the improvements made by him, on exhaust valves, were adapted to engines of that description; that in the hope of inducing persons who would not incur the expense of changing their cut-off gear to use that improvement, he made a model of a detached part of his invention, and before he completed the model of the perfect valve gear, applied for a patent for the same, as an improvement in the method of working exhaust valves, and that letters patent, according to the application, were granted to him October 19, 1844, under the title of "a new and useful improvement in the method of opening and closing the valves of steam engines." Extension of that patent was duly obtained at its expiration, on October 19, 1858, for the further term of seven years, and the extended patent was afterwards surrendered, and on January 1, 1861, the same was reissued in two parts, numbered seven and eight, with amended descriptions and specifications. Defects, however, still existing in the respective specifications, both of the reissued letters patent were subsequently surrendered, and on January 28, 1862, the original patent of October 19, 1844, as extended, was again reissued to the complainant, with additional amendments in the specifications, and the same, as last reissued, is one of the letters patent on which the suit is brought. After the original patent of October 19, 1844, was granted, the complainant, as he alleges, proceeded to perfect the model he had commenced before he made the application for that patent; that when it was completed he deposited it in the patent office, made application for a patent for the invention, and that a patent was duly granted to him for the same September 19, 1845, but that the claims of the specifications of the patent as issued covered only certain parts of his improvements. He further alleges that on September 19, 1859, he also obtained an extension of the last named patent for the further term of seven years, and that he afterward surrendered the extended patent, and that on February 21, 1860, the same was reissued to him in six parts, which were intended to cover the whole of the improvements of his invention, as exhibited in his completed model of a perfect valve gear. Doubts having arisen, however, whether the specifications of one or more of the reissued patents were sufficient, the several patents were subsequently surrendered, and on January 21, 1862, the original patent of September 19, 1845, as extended, was again reissued to the complainant, which is the other reissued patent on which the suit is founded. Considering that the first patent granted to the complainant has long since expired, it will only be necessary to refer to it as showing the state of the art at the time his later improvements were made. Complainant therein described that invention, as "certain improvements in the manner of constructing and arranging the apparatus for lifting and tripping the valves of steam engines, and by which the steam can be more readily cut off, at any desired part of the stroke, than by the means heretofore adopted; and also an improved water reservoir and plunger, which serve to prevent the slamming of the valves in closing, and consequently to preserve them in good working order for a great length of time." His patent contained two claims in substance and effect as follows:

First. The manner in which he had combined and arranged the valve stem, the spring on the lifter, the adjustable sliding piece with its wedges or inclined planes, and their immediate appendages, so as to co-operate with each other and to effect the tripping of the valves and the cutting off of the steam substantially as therein described.

Secondly. He also claimed the manner described of regulating the closing of the valves, and of effectually preventing them from slamming by means of a water reservoir furnished with a piston or plunger attached at the lower end of the valve-stem, and operating within an adjustable cup or secondary reservoir, so as to accomplish the described effect. Suits were instituted by the inventor alleging the infringement of the exclusive rights therein secured to him, and in the course of the investigations consequent thereon it became necessary for the courts to construe the respective claims of the patent. Their construction was directly involved in Sickles v. Gloucester Manuf'g Co. [Case No. 12,841], heard before Justice Grier, at Trenton, N. J., September term, 1856, as appears by an opinion subsequently delivered by him in that case, in which he held, in respect to the first claim, that the combination and arrangement of all the parts of the invention as described in the patent, had reference to the new manner, method, or arrangement of machinery therein described for tripping puppet valves, and that the specification did not set forth any general principle or any other mode in which the inventor proposed to apply that principle to valves of a different character and of a totally different mechanical action. Thorough examination also was made, at the same time, of the second claim of the patent, and in respect to that claim the learned judge held that it was apparent that the apparatus described in the first claim for tripping the valves, and that described in the second, must be combined to effect the purpose intended, and he deduced that conclusion from the fact that if the valves, when

tripped, should be suffered to fall to their seats without being checked by the device described in the second claim, the whole apparatus would be practically useless. Hence he held that the two things constituted one whole invention, having for its subject the valves known as puppet or lifting valves. Description is given, in the first place, of the devices for operating those valves, and then follows the description of the water reservoir, whose object and purpose are "to prevent them from slamming in closing, which would otherwise destroy the machinery." Although the specification mentioned "oil or other fluid," as well as water, still the learned judge held that it was plain that the word "fluid" was used in its popular sense as a synonym for "liquid." Patentee insisted, on that occasion, that the second claim of his patent covered the use of air as well as water for the described reservoir, but the same learned judge, after explaining very satisfactorily the difference in the action of the one from that of the other, as respected the invention under consideration, held that the claim was for regulating the closing of the valves and preventing them from slamming, by means of a "water reservoir," and that there was no intimation that an elastic fluid could be used for the same purpose or "how it should be used." Patent of October 19, 1844, is also for "a new and useful improvement in the method of opening and closing the valves of steam engines," or, as more fully described in the specification, it is for a new and useful improvement in the apparatus for opening and closing the steam and exhaust valves of steam engines, so that the steam will act with greater practical efficiency than it would without the improvement. Inventor first describes the various parts of the apparatus which, prior to that time, had generally been used to work both the steam and exhaust valves, and the usual combination and arrangement of those parts which had previously been employed, in order, as he states, to show the difference "between the usual mode and his mode of, and improvement in, arranging and combining those parts so as to produce new and useful results." Superadded to the details given in respect to the usual mode employed prior to his invention, the patentee states that while one lifting rod, with its feet, lifters, and valves attached, was in motion, the other lifting rod with its attachments remained stationary. Having explained the state of the art at the date of his invention, he then proceeds to describe the improvement for which he claimed a patent. Referring to the general description, it consists in effect in so regulating the period of the movements of the valves as to leave the piston free to complete each stroke and also to give any desirable lead to the exhaust valves. While it accomplishes those objects, it also, as the patentee states, causes the piston to be in "equilibrio" near the completion of its stroke, which is effected in the first instance by opening the lower exhaust valve before the piston finishes its upward stroke, and before the upward exhaust valve is closed, and secondly, by opening the upper exhaust valve before the piston finishes its downward stroke, and before the lower exhaust valve is closed, but in both cases the steam valve is opened without a lead and after the closing of the exhaust valve on the corresponding end. To that general description, the patentee also adds that his invention further consists in a peculiar arrangement of the toes on the rock-shaft, the feet on the lifting rods, and the connection of the lifters with the valve stems to carry the before-mentioned improvement into effect; and he then gives a very minute description of the several devices of what he calls his improved combination, and the arrangement of the relative position of the toes and feet, together with a description of the effect which such combination has upon the motion of the toes and feet during the revolution of the engine. Special mention is also made of the fact that the nuts attached to the stems of the steam valves are so arranged as to be adjustable, and allow a slip of the lifters thereon, of an inch more or less, and equal, or nearly so, to the rise of the toes above the upper surface of the rock-shaft. Extended explanation is then given of the connection which the preceding combination has with the steam and exhaust valves, and of the improved effect which the whole combination and arrangement have upon the operation of the valves, and the more efficient working of the engine. Modifications of the combination and arrangement of the apparatus are then suggested, but they all, as the patentee well states, involve the same mechanical principles and manifestly were not intended to accomplish any different result, or to change the mode of operation. Certain results are then described as effected by the combination and improvement in the relative position of the toes on the rock-shaft with the nuts on the valve stems, and their relative position to the valves.

First. Any desirable "lead," it is said, may be given to the exhaust valves, without the piston of the steam cylinder being subjected to any opposing force or difficulty in consequence of such movement.

Secondly. That both exhaust valves may be open momentarily at the same time, so that the piston shall be in equilibrio, as before described.

Thirdly. That the result is, or may be, that a portion of the steam which is being exhausted, is shut into the steam chest nearest the piston, so that it may be used in combination with steam emitted from the boiler to drive the return stroke. Complying with the requirement of the patent act, the inventor then specifies and points out what he claims

therein as new, and desires to secure by letters patent. He first claims what he denominates as his improvement in the periods of the movements of the valves, by which they are opened and closed relatively to each other and to the movement of the piston, by means of which the piston completes each stroke in equilibrio, or nearly so, without admitting steam against the movement of the piston by a lead to the steam valve. Such is the substance of the first claim; but it is accompanied by a repetition of the description of the means by which the described result is accomplished, and to that description the patentee adds, that the movement of the steam valves is so regulated as to admit steam to the cylinder only after the exhaust valve on the corresponding end of the cylinder has been closed. His next improvement he claims as a means to carry the first, which he characterizes as the essential improvement, into effect; and such undoubtedly is the true nature and character of the improvement. Taking it as described in the claim, it is the arrangement of the toes and the rock-shaft in such a manner relatively to the location and form of the feet on the lifting rods, that at the middle, or nearly so, of the rocking motion of the rock-shaft, both lifting rods, with their exhaust valves, shall be partly up, as described in the specification. Incident to that arrangement, and in combination with it, the patentee also claims the slip of the lifters on the steam valve stems, to insure the closing of the exhaust valves before the opening of the steam valves on the corresponding ends of the cylinder. Proper reference is made in each claim to the specification, so that the several claims are not for a result, but for the means by which the result is accomplished. Assignees held the title to the patent from August 5, 1848, to the expiration of the original term, but the invention became revested in the complainant October 19, 1858, when the patent was extended for the further term of seven years. Surrender of the extended patent was afterward made, and on January 1, 1861, the same was reissued in two parts, as alleged in the bill of complaint. Comment on the reissued patents of that date is unnecessary, as the original patent was again surrendered and reissued, as already explained. Parties concede that the description of the invention, as contained in the last reissue, is substantially the same as that in the original patent, except in one or two particulars. Those particulars consist of certain additions to the description in the reissued patent, which, when properly considered in connection with the other parts of the instrument, can not be regarded as affecting the questions involved in this suit. Direct reference is made in both patents to the alleged improvement, as one consisting, among other things, in the combination of the toes attached to the rock-shaft, with the nuts attached to the stems of the steam valves, and the relative rise of the toes above the upper surface of the rock-shaft, starting at the connecting point even with the upper surface. All must agree that in these respects the description in the two patents is identical; and they both also speak of the combination as including the slip of the lifters upon the steam valve stems, with the peculiar operation of the valves for admitting steam to and exhausting the same from the cylinder, giving thereby greater efficiency to the engine, and increasing speed or saving steam or fuel. Complete identity in the devices also, as well as in the several combinations and arrangement of the parts, is shown throughout, as is obvious from the entire comparison. Having copied the entire substance of the original specification into the reissued patent, and adopted the same, the patentee then proceeds, to use his own language, "to point out the improvement herein patented," which, as he in effect states, is particularly shown in the second sheet of the drawings, and by the use of which, very high motion in opening the exhaust valves is secured, without moving the valve a long distance previously to its opening, as must be done in all other methods known before in which both valves were moving at the same time.

Special reference is also made to the same sheet of the drawings, as the foundation of the explanations given in respect to the alleged differential motions of the exhaust valves, and the manner in which the same are accomplished. When describing the operation, the patentee states that the exhaust valve which for the moment is farthest from the piston, receives the largest amount of motion, and that the effect is that a free escape of the steam is given from that end of the cylinder without compelling the other exhaust valve to move an equal distance with it. Two claims are made by the patentee, and it will be seen that they are widely different from those made in the original patent. He here claims, in the first place, "giving to each exhaust valve, alternately, while the piston is at or near the end of the cylinder farthest from it, a large amount of motion, as compared with the motion of the other exhaust valve at that time, so as to more freely exhaust the cylinder with less extent and greater ease of motion to the valves than has heretofore been done." Secondly, he claims—"imparting these motions to the exhaust valves by means of a rocker interposed between the first motion from the engine and the valves, so that it will increase and diminish its leverage relative to each valve while moving them, and thereby impart my improved motion." Separately considered, that part of the description here referred to, as an addition or amendment to the specification of the original patent, would seem to indicate that the patentee contemplated, not only that the exhaust valves should move together, but that one of them should move while it was closed. Mechanism, however, to move the exhaust valves after they are closed, or before they commence to open, is cer-

tainly not described in the original patent, and it is equally clear that the additions or amendments made to the specifications, as exhibited in the reissued patent, neither describe nor suggest any new mechanism to accomplish any such function. Recurrence to the specification will show that the patentee first states what the usual mode of working steam engines was, prior to the date of his invention, and then describes his own improvement. His general description of the usual mode prior to that time is, that while one lifting rod, with its feet, lifters, and valves attached, is in motion, the other lifting rod, with its attachments, remains stationary, or, in other words, that while the piston was running up, the exhaust valve at the upper end of the cylinder was open to let the steam run out, but that the lower exhaust valve was closed to prevent the steam from escaping, as it entered from the boiler, through the steam valve to drive the piston up, and so, on the other hand, as the piston was running down, the exhaust valve at the lower end of the cylinder was open to let the steam below the piston run out, but the upper exhaust valve was kept closed for the same reason as that given in respect to the lower exhaust valve when the piston was running the other way.

Taken as a general remark, therefore, it is correct to say that both exhaust valves were never open at the same time, and the same may be said of the steam valves, as then operated, except that one of them was usually opened just before the piston reached it, giving it a "lead," as it was called, in order to slow the piston as it was driven home. Such was the state of the art, as substantially described by the complainant himself, when he invented what he very properly calls his "new and useful improvement on the apparatus for opening and closing the steam and exhaust valves of steam engines." Starting upon the basis of his own prior invention, then duly secured by letters patent, but which have since expired, he devised the improvement afterward embodied by him in the original patent under consideration. Observing that the exhaust valve at the upper end of the cylinder was open as the piston was running up, but that both exhaust valves were never open at the same time, he conceived the idea, among other things, that if he should also open the lower exhaust valve just before the upward stroke of the piston was completed, keeping the steam valve at that end closed, the steam at the lower end of the cylinder would begin to escape as the piston completed its ascent, or at least before it commenced to return, so that when the steam should be let in to drive the piston down, or on the return stroke, the opposing force, as it is called in the patent, or the back pressure from the steam that drove the piston up, might be removed.

Prior to that time the ordinary mode of working steam engines had been, that one exhaust valve was opened and shut before the other was opened, each moving only during a stroke of the piston or half revolution of the engine—that is, one exhaust valve opened at the beginning of a stroke and was shut at the end of the same, and then the other opened at the beginning or the subsequent stroke, and was closed when the stroke was completed.

Knowing that such was the ordinary operation of the exhaust valves, the patentee saw that alterations must be made in the mechanism for moving them, as compared with the apparatus usually employed for that purpose, or with that embodied in his old patent, in order to carry the new idea into effect, as it would obviously require that both exhaust valves should be open, for a limited period, at the same time, instead of one being opened and shut before the other was opened, as in the ordinary mode of working steam engines. Difficulties, however, attended the adjustment of the apparatus to accomplish that object on account of the conflicting mechanical principles which the plan involved. Means could easily be devised and arranged to cause both exhaust valves to be open, for a limited period, at the same time, but it would not do to have the steam valve open at the end of the cylinder toward which the piston was running, while the exhaust valve at that end was also open, because, if such was the arrangement, the steam would run in at the steam valve, and run out at the exhaust valve, which would occasion a waste, if it did not defeat the operation. Unless, therefore, the steam valve could be kept closed until the exhaust valve at the corresponding end should also be closed, the new idea could not be successfully carried into effect. Lifting rods were employed in the old patent of the complainant to move both the steam and exhaust valves, and the same devices, with a certain modification in the attachments, are also employed to accomplish the same purpose in the original patent under consideration in this case. Remark should also be made that each lifting rod had an exhaust valve at one end and a steam valve at the other, and the arrangement was such, in the old patent, that when the rod moved the exhaust valve, it also moved the steam valve, and could not move the one without moving the other also at the same time; but the rods themselves did not move together, and hence, it was true, as already stated, that one exhaust valve was opened and shut before the other was opened, and the corresponding operation of the steam valves was also in the same way. Complainant's new plan required that both exhaust valves should be kept moving, for a limited period, at the same time, but, in order to do that, he must move both rods at the same time, because one exhaust valve was upon one rod and the other upon the other rod, and, consequently, if he did not move both rods at the same time, he could not move both the exhaust valves, as the

new plan required. Conclusive reasons, therefore, existed why he should move both rods at the same time; but another difficulty then arose, which was, that if he did so, he would necessarily move the steam valves also, unless he could devise some means to obviate that difficulty, while the two rods were moving together, to carry the two exhaust valves. All that was required was, that the rods should move at the same time for a limited period, but he could not let the steam valve and the exhaust valve at the same end of the cylinder be open at the same time, because if he did, the steam, as before explained, while it would run in from the boiler, would run out at the exhaust valve. Nothing would overcome this difficulty unless the inventor could contrive some means by which the steam valve should be kept closed, until the two exhaust valves had ceased to be open at the same time. Provision was accordingly made by the patentee for the slip of the steam valve upon its lifter, or, as particularly described in the patent, for the slip of the lifter upon the steam valve stem, until the lifter carrying the exhaust valve at that end of the cylinder should come to a state of rest. Consequently both exhaust valves are kept open, for a limited period, at the same time, by a coexisting motion of the lifting rods, while the steam valve at the end of the cylinder toward which the piston is running is, by the means described, kept closed until the two exhaust valves cease to move together, as required in the patent. Coexisting motion of the rods which carry the valves is certainly described in the original patent, but it is specially described, and must be understood as continuing only during the limited period that both exhaust valves move at the same time. Desiring to keep both exhaust valves open together for a limited period, he devised the coexisting motion of the lifting rods to accomplish that function, and he described it as intended for that purpose and no other. Confirmation of that view is derived from the fact that the patentee describes an apparatus for suspending this peculiar combination altogether, and for so adjusting the movement of the two exhaust valves that they will not both be open together, when of course there would be no coexisting motion of the lifting rods.

Resting the case here, the conclusion would be entirely satisfactory that the patentee never intended to move the exhaust valves or either of them after they were closed, or before they commenced to open; but further confirmation of that view is derived from other parts of the patent. No one, I think, can read the specification of the original patent and fail to see that the complainant, when he framed it, intended to accomplish three things: First. To describe the apparatus usually employed for opening and closing the steam and exhaust valves of steam engines, and its mode of operation. Secondly. To give a full description of his own improvement on such apparatus, and its mode or modes of operation for accomplishing the same objects. Thirdly. To point out clearly the difference between the usual mode and his improved mode, so as to show that his improvement would produce new and useful results. Under the first head he describes every device usually employed for that purpose prior to the date of his invention, but it will be sufficient to say that the description includes the lifters, the lifting rods, the feet on the lifting rods, and the rock-shafts, as well as the toes on the rock-shafts, and the valve stems and rock-shaft pin, and the general statement is, as before remarked, that while one lifting rod, with its feet, lifters and valves attached, is in motion, the other lifting rod, with its attachments, remains stationary. Argument to show that reference is there made to the use of puppet or lifting valves is unnecessary, as the decision of the court in the case of Sickels v. Gloucester Manuf'g Co. [Case No. 12,841] is conclusive upon that subject. Slide valves move all the time, but the puppet valve can not move after it has reached its seat, and as the description is to the effect, that one lifting rod, with its feet, lifters, and valves attached, remained stationary while the other, with its attachments, was in motion, it is clear to a demonstration that the reference is to puppet valves, and not to slide valves. Reasonable doubt can not arise upon that subject, and it is also proper to remark in this connection, that an examination of the complainant's description of his improvement and of the several combinations therein mentioned, will fail to furnish the slightest indication that he intended, in any one of them, to make any change in that device. Describing the nature of his general improvement, he says it consists in so regulating the period of the movements of the valves as to leave the piston free to complete each stroke, also to give any desirable lead to the exhaust valves, and allow the piston to be in "equilibrio" near the completion of its stroke, it not being absolutely necessary, if desirable, to give a lead to the steam valves, as heretofore. Careful attention to the manner in which the function is accomplished, as represented in the specification and heretofore explained, will show beyond doubt that it is the exhaust valve, away from which the piston is running, that is here required to be opened. Suspension or diminution of the motion of the piston is accomplished by allowing the steam admitted to the cylinder to drive it, or some portion of it, to escape through the proper exhaust valve, just before the piston completes its stroke, and, of course, when the exhaust valve is opened for that purpose, the steam valve at that end of the cylinder must be kept closed, else the object of the movement would be defeated.

None of the combinations of the old expired patent would meet this latter requirement, but the patentee, in his improved plan, accomplishes it without any difficulty by means of the contrivance for the slip of the valve upon its lifter, and the manner of its accomplishment affords additional evidence that the patentee never contemplated that the exhaust valves, or either of them, should move after they were closed, or before they commenced to open. Means are also described in the specification for carrying the improvement into effect which consist, as stated by the patentee, in a peculiar arrangement of the toes on the rock-shaft, the feet on the lifting rods, and the connection of the lifters with the valve stems, showing conclusively that the patentee contemplated the use of the same description of valves as those he had employed in the old patent, and that he regarded his new invention as an improvement upon the one which that patent secured. Passing from that subject for the present, it becomes necessary to examine the other patent, on which the suit is founded. Referring to the statement of the case, it will be seen that an original patent was also granted to the complainant on September 19, 1845, and it will be sufficient to say, in addition to the explanations already given, that the other patent in controversy, is the last reissue of that patent, and bears date January 21, 1862. As described in the original patent, the invention was for a new and useful method of tripping the drop cut-off valves of steam engines, and regulating and adjusting the same. Motion for operating the valves of that description, as the patentee states, was derived, prior to the date of his invention, from the lifter, which approached the state of rest as the piston of the engine approached the middle of the stroke or its maximum velocity, and the valve was tripped by the same motion as that which lifted it, and, consequently, very great nicety was required in the adjustment, so as to regulate the extent of the cut-off at about half stroke. His invention in this patent was designed to remedy that difficulty, and its principle or character, as the inventor represents, consists in tripping the valve by a motion independent of the lifting rod, or rods, and also in combining the various parts in such a manner as to regulate the cut-off with accuracy, during the action of the engine.

Description is then given of the means by which those functions are accomplished, and that description is also accompanied by the suggestion of a certain modification, whereby the spring arms may be shifted in the teeth of the sector, and be brought near to, or be removed farther from, each other, "and thus cut off at a less or greater portion of the stroke." Reference is then made to one of the drawings, as representing his first invention, which, it will be recollected, was secured to him by the old expired patent. He there refers to it as his improved drop cut-off, with the lifter A^1, projecting from the lifting rod A^{11}, and operated by the toes of the rock-shaft C, in a manner, as he states, "not necessary to describe." Instead of disengaging the spring of the lifter, however, from the stem to the drop valve, by causing it to strike a permanent cam, as it rises, he employs, as he therein represents, a long spring projecting from the lifter, and fitting in a notch in the stem of the drop valve, as heretofore made, but extending beyond that, and having a curved projection on one of its faces and at the extreme end, against which the outer face of an arm or wiper strikes as it vibrates on its vertical axis. According to the description, the outer face of that arm or wiper is parallel with its shaft, and of greater length than the motion of the lifter, so that it can act on the curved projection of the spring, as it is carried up and down by the lifter, and thus causes it to drop the valve. Suggestion is also made that, instead of the horizontal vibrating motion of the arm or wiper, the spring may be disengaged from the stem of the valve by a vertical, descending motion, as the lifter rises, which motion may be derived from any moving part of the engine. Based upon these representations the patentee claims, first, "tripping the drop valve of the cut-off by a motion independent of the lifters;" and secondly, "combining the wiper that drops the valve of the cut-off, whether working horizontally or vertically, with any of the moving parts of the engine, other than the lifters or their rocking shaft, by means of the sector and arm or arms, by the instrumentality of which the extent of the cut-off can be regulated at pleasure during the action of the engine, from the full to the least portion of the stroke." Taking the statement of the patentee as correct, the valve was tripped in the method practiced prior to the invention under consideration, by the same motion that lifted it, and the motion was derived from the lifter which approached a state of rest as the piston of the engine approached the middle of its stroke. When the piston of the engine approached the middle of its stroke, it was then at its maximum velocity and as the lifter actuated a spring which alternately took hold and let go of the valve stem, very great nicety was acquired in the adjustment of the apparatus so as to regulate the extent of the cut-off at about half stroke. Patentee expressly states that the object of his invention was to remedy that difficulty, and he also states that the principle or character of his improvement consists in tripping the valve by a motion independent of the lifting rod or rods. Plainly his invention is, as he describes it, a new and useful method of tripping cut-off valves, by a motion independent of the lifter, and, as there described, it has nothing to do whatever with any improvement in the working of valve catches or valve rods, as is evident from a perusal of the entire specification. Entire want of reference,

in the specification, to any such improvement, would seem to be a sufficient answer to every such pretense; but the specification itself furnishes even a better answer than that, and one which is entirely conclusive, because it amounts to an express declaration that he, the inventor, did not contemplate any change whatever in valve gear, or in the means of working the valves. Had he intended to make any alterations in the valve gear, as shown in his old patent, or if he had designed to give a coexisting motion to the valve rods as now claimed, it is reasonable to suppose that he would have referred to those matters, as material parts of his improvement, and would have described the nature of the contemplated alterations in the valve gear, and the means of giving the coexisting motion to the valve rods; but he did neither, nor is there any thing in the specification from which any such inference can reasonably be drawn. On the contrary, he refers to his former invention secured to him in the old patent, and characterizes it as his improved drop cut-off with the lifter projecting from the lifting rod and operated by the toes of the rock-shaft in a manner not necessary to describe. Valve gear apparatus was fully described in the old patent to which he referred, and it will be remembered that it embraced no means whatever, to give a coexisting motion to the valve rods; but the complainant himself concedes that whenever one lifting rod, with its attachments, was in motion, the other remained stationary. Mistake could not be made by him upon this subject, as it was his own invention, and when he spoke of the apparatus as being of a character not necessary to describe, he evidently meant to be understood as adopting it as the valve gear of his new improvement. Examination will now be made of the reissued patent of January 21, 1862, which is the only other patent of the complainant that remains to be considered. Improvements secured by reissued patents are very apt to be expanded, but the change in that behalf in this case is so great that in comparing the original patent with the reissue under consideration, it is difficult to find sufficient similarity to establish the identity. What was a new and useful method of tripping the drop cut-off valves of steam engines and regulating and adjusting the same, has become a new and useful improvement in steam engines; and what was an improvement in tripping cut-off valves, by a motion independent of the lifter, has become an improvement in the coexisting movement of two reciprocating catching-pieces. Another feature of the improvement, as described in the reissued patent, is, that each of the two reciprocating catching-pieces moves during a longer time than half a revolution of the main shaft of the engine, whereby, it is said, a greater capacity for adjustment in opening the valve, and a greater certainty in connecting with the catch are secured, than if one catching-piece should come to a state of rest before the other moves, and each catching-piece should move only during one-half the revolution of the engine. Complainant then refers to a certain valve rod or stem which has; as he states, a piston or plunger attached to its upper end, and operating within a reservoir, shaped smaller at the bottom, which may confine the fluid contained therein as the plunger descends, substantially as described in his old patent, so as to regulate the velocity of a falling weight, connected to the stem, that is sufficient to overcome all friction in closing the valve. To this rod or stem, as the patentee states, the valve must be attached, and he also adds in this connection, that either single, double, or slide valves may be used. Certain other representations of the specification must also be briefly noticed. Speaking of the catch-pieces, the patentee states, that they derive a reciprocating opening and closing motion from the valve gear, and operate to determine the admission of steam, when their acting surfaces are in contact with the catches. He also states that the shape of the toes on the rock-shaft C, and the feet on the lifting rods is such, that one rod is moved before the other comes to a state of rest, thereby imparting a coexisting movement to the catch-pieces, permitting them to pass beyond the engaging points, and to return to them to open the valve. And, lastly, he states that the coexisting movement of the catch-pieces can be communicated to them by other sort of valve gear than that shown, and that any valve motion, having a proper coexisting movement in any of its parts, can be used to move the catch-pieces. Such is the substance of the representations upon which the claim is based, so far as it is material to consider them in this case, and the claim is—"Imparting a coexisting movement to two reciprocating catch-pieces in the operation of the trip cut-off valves, substantially as described." Compare the language of this claim with the claims of the original patent, and it is clear that they are foreign to each other and strangers. Strike out the claims of the original patent, and insert the claim here made in their place, and no one can doubt that the claim would be void, because there are no means whatever described in the specification of the original patent, to justify any such claim. Two fatal objections would arise to this claim, if, instead of occupying the place it now does, it were presented as the claim of the original patent. First, it would appear to be a claim for what the patentee had not invented; and secondly, it would be a claim for a new motion, without the description of any means to accomplish the described result. Sufficient description of the alleged improvement, and of the means to accomplish the described result, have been imported into the reissued patent, and the complainant contends that the interpolation of these passages entirely overcomes both of the objections that would have arisen to the claim if it had been

made in the outset, as the claim of the original patent.

Judging from the course of the argument, the proposition is, that in the absence of fraud, the allegations in the specification of reissued letters patent, however different they may be from the description in the specification of the original patent, are, nevertheless, conclusive evidence that the invention was made, and the means to accomplish the result invented, as therein described. Where the two specifications are consistent, or where there is no positive conflict or absolute inconsistency, the proposition may be correct, but where it appears on the face of the respective specifications, as matter of law, that the specification and claim of the reissued patent are for a different invention from that secured in the original letters patent, the rule assumed can not be sustained. Whenever it appears, upon a comparison of the two specifications and claims, as matters of law, arising on their construction, that the reissued patent is for a different invention from that secured in the original patent, then the original patent is void and of no effect. Beyond doubt, whenever any patent, as issued, is inoperative or invalid by reason of a defective or insufficient description, or specification, or by reason of the patentee claiming, in his specification, as his own invention, more than he has a right to claim as new, if the error has arisen by inadvertency or mistake, and without any fraudulent or deceptive intention, the thirteenth section of the patent act authorizes the commissioner, upon the surrender to him of such patent, and the payment of the prescribed duty, to cause a new patent to issue to the said inventor, for the same invention, for the residue of the period then unexpired for which the original patent was granted, in accordance with the patentee's corrected description and specification. 5 Stat. 122. Such reissue, however, must, by the express words of the section authorizing the same, be for the same invention, and, consequently, where it appears, on a comparison of the two instruments, as matter of law, that the reissued patent is not for the same invention as that embraced and secured in the original patent, the reissued patent is invalid, because that state of the case shows that the commissioner has exceeded his jurisdiction. Batten v. Taggart, 17 How. [58 U. S.] 83; O'Reilly v. Morse, 15 How. [56 U. S.] 111, 112; Potter v. Holland [Case No. 11,330]; Allen v. Blunt [Id. 216]; French v. Rogers [Id. 5,103]. Applying that rule to the present case, I am of the opinion that the reissued letters patent, under consideration, must be deemed invalid for the reason that the patent is not for the same invention as that embodied and secured in the original patent, which fully appears, as matter of law, from a comparison of the two instruments. In view of the conclusion announced as to the construction of the respective patents of the complainant, very little need be said upon the subject of infringement. Respondents purchased their engine of one George H. Corliss, who constructed it under the reissues of an original patent granted to him March 10, 1849. Parties and their counsel have proceeded, throughout the hearing and trial, upon the ground that the engine was constructed according to the patent, and there is no evidence in the case to raise any doubt upon that subject. Assuming that to be so, then the only question is, whether the patented invention of the vendor of the engine in question conflicts with one or both of the reissued patents of the complainant. Nothing need be added to what has been said respecting the inventions of the complainant, so that it only remains to explain the patented invention of the vendor of the respondents. He invented new and useful improvements in steam engines, as represented in his patent. They are divided into three parts, but it will only be necessary to refer to the second and third, because the other is entirely disconnected from the particular controversy in this case. Among other things, he contrived the means of using slide valves and introduced into the steam engine a new motion of working them, which consisted in communicating motion to the two valves from one rock-shaft, by connecting each valve with a separate arm or crank-wrist of the rocker, and he so connected that method of working with the governor, so called, that the steam valves should be disengaged at such a point in the stroke of the piston as the governor should indicate, so that as the arms of the governor rise and fall, an unfailing indication was given of the exact point where the cut-off should take place. He also combined liberating gear with slide valves, and devised means for operating the combination upon an entirely new plan, and he also contrived a wrist-plate which preserves a positive connection with the engine all the time, causing the catches to move, and is of itself sufficient to show, that the means employed in the engine of the respondent are substantially different from those employed by the complainant. As was well remarked by the court in the case already referred to, one has perfected one combination of devices to trip a puppet valve, and the other a different combination for a different sort of valve. Suffice it to say, without pursuing the subject further, that I am of the opinion that the respondents do not infringe either of the patents of the complainant.

The bill of complaint is, therefore, dismissed, with costs.

Case No. 12,840.

SICKLES v. GLOUCESTER CO.

[3 Wall. Jr. 186;[1] 13 Leg. Int. 292.]

Circuit Court, E. D. Pennsylvania. April Term, 1856.

TRIAL—EXAMINATION OF WITNESSES—IN EQUITY—ACTS OF CONGRESS.

Under the practice of the courts of the United States, as fixed by the judiciary act of 1789 [1 Stat. 73], a party may examine or cross-examine witnesses ore tenus in equity suits as well as in suits at common law; the power given him in this respect by the 30th section of that act, not being taken away from him by any subsequent act, nor by the 67th rule of practice for the courts of equity promulgated on the 2d of March, 1842, nor in any other manner.

[Cited in Bronson v. La Crosse & M. R. Co., Case No. 1,930; Cochrane v. Deener, 94 U. S. 783; Atwood v. Portland Co., 10 Fed. 283, 285; Wise v. Grand Ave. Ry. Co., 33 Fed. 278.]

This was a question as to the mode of taking evidence in equity suits in the federal courts; and arose upon a bill in equity for the infringement of a patent. The case was thus: The thirtieth section of the act of September 24, 1789, which organized the courts of the United States, and is commonly called the judiciary act, enacts "that the mode of proof by oral testimony and examination of witnesses in open court, shall be the same in all the courts of the United States, as well in the trial of causes in equity, and of admiralty and maritime jurisdiction, as of actions at common law." A section in an act of 1802 (Act April 29, 1802, § 25, [2 Stat. 166]) says "that in all suits in equity, it shall be in the discretion of the court to order the testimony of witnesses to be taken by deposition," with certain provisos. Notwithstanding this first act, it had never been the practice in equity cases in this circuit, nor in any other circuit, so far as was known to the court, or counsel, to take testimony ore tenus, nor, except when proceeding under the act of 1802, otherwise than according to the rules and practice of the court of chancery in England; where, as is known, the testimony is taken by the commissioner on interrogatories and cross-interrogatories previously filed, and without the presence of the parties or their counsel; and where the testimony, when taken, is sealed up, until an order is obtained for publication of it, after which no more testimony can be taken.

On 2d of March, 1842, the supreme court of the United States promulgated a body of "Rules of Practice for the Courts of Equity," the sixty-seventh of which rules runs thus: "Commissions to take testimony may be taken jointly * * * by both parties or severally by either party upon interrogatories filed by the party taking the same * * * ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission. * * * If the parties shall so agree, the testimony may be taken upon oral interrogatories," &c. The sixty-eighth rule is thus: "Testimony may also be taken in the cause * * * by deposition, according to the acts of Congress." 1 How. [42 U. S.] lxii. An act of congress passed soon after, to wit, on the 23d of August, 1842 [5 Stat. 518, § 6] gives to the supreme court "full power and authority * * * to prescribe and regulate and alter * * * the forms and modes of taking and obtaining evidence * * * in suits at common law, or in admiralty and in equity pending in the district and circuit courts * * * and generally to regulate the whole practice of the court."

With these statutes, rules and practice in existence, a rule for a commission had been taken by the defendant; and Mr. E. N. Dickerson, counsel of the other side, having filed the complainant's affidavit that the evidence in the case, if taken before a commissioner upon interrogatories, and cross-interrogatories, would operate unjustly and prejudicially to his interests, obtained a special order that he might have power to cross-examine the witnesses ore tenus, and "that the testimony so taken shall have the same effect as if taken under the sixty-seventh rule" above mentioned.

Mr. Jenks, for the defendant, having protested before the commissioner against such a mode of taking testimony, and having declined to cross-examine, now moved that the depositions should be suppressed, and that an examination of all the witnesses should be had privately before the master.

In favor of the motion: The court had no power to make the order on which this testimony has been taken. The only ground on which it can be pretended that testimony taken, as this has been, can be read; is the thirtieth section of the judiciary act of 1789. But, (1) that section has been interpreted in our favor by a constant practice of sixty-seven years. The supreme court has, moreover, interpreted it by its own rules. The sixty-seventh rule shows that the English practice, in its outlines at least—which practice prevails over our country generally, where there are courts of equity, and has always prevailed in this court,—was meant to be continued. However plain the language of the judiciary act may seem to us, we are bound to receive an interpretation so long and so clearly put upon it by the practice and rules of the supreme court; an interpretation hardly inferior in solemnity to a judgment of the court. Indeed, an uninterrupted practice of sixty-seven years can hardly be said to be, in any respect, of less value than a judgment. It is the best of all judgments. "The great authority with me," says C. J. Bridgman, "is constant practice if I am well informed." It is "law solidified into fact." (2) The thirtieth section of the judiciary act has been in effect repealed. The act of 23d August, 1842, gives to the supreme court pow-

[1] [Reported by John William Wallace, Esq., and here reprinted by permission.]

er to "alter" the "forms and modes of taking and obtaining evidence." The sixty-seventh rule, which we rely on, was indeed made in March, 1842, and before the act of 23d of August was passed; but it has been acknowledged, ratified, re-adopted and republished, by being retained and constantly acted upon up to this hour. (3) The truth is, that the section in question of the old judiciary act, meant to establish a mode of taking testimony which it thought would be regarded by the profession as more convenient than the old one. But the old one was familiar to the bar, they liked it best, and never abandoned it. This provision, therefore, of the judiciary act, without being formally repealed, became obsolete, effete and forgotten.

GRIER, Circuit Justice. The jus pretorium of the Roman law, from which our system of equity has its origin, was introduced when chancellors were priests. The writ of subpœna is said to have been first devised by Chancellor Waltham, bishop of Salisbury. It met with opposition at the beginning by parliament, "because its proceedings were according to the civil law and the law of holy church, in subversion of the common law." But notwithstanding the opposition then, and also of Sir Edward Coke and the common law courts at a later day, the chancellors persevered in extending their jurisdiction, and when the office ceased to be in the hands of ecclesiastics, a system of jurisprudence and jurisdiction was built up on a rational foundation by the learning and ability of Nottingham and his successors. Yet it still retains some of the features which originally caused the enmity of the common lawyers and the parliament. One of these is the mode of taking testimony. At common law it was considered as essential to justice and the protection of the rights of the litigant that the witnesses should be examined in presence of the parties to be affected, and of the tribunal whose decision was to be governed by the testimony. The mode of taking testimony in chancery, as introduced from "the civil law and law of holy church," is by secret inquisition. The reason given for this practice is said to be "in order to avoid the risk of defects being discovered in the course of taking it, and false evidence being procured to remedy them." Adam, Eq. 64. As a reason for a foregone conclusion, this was no doubt considered satisfactory, though it might as well read "to avoid the risk of defects and falsehood being discovered, and true evidence being procured to remedy them."

And yet, while it is true that as a general rule of courts of chancery, all witnesses will be examined on interrogatories, either by the regular examiner of the court or through the medium of commissioners specially appointed, it has never been decided that a chancellor had no power to order otherwise in a particular case, where he might consider it necessary to a proper investigation of the facts. No court is so enslaved by its general rules as to be powerless, when justice requires an exception to their operation. Accordingly, numerous cases of exceptions may be found in the books of Practice. Daniell, Eq. Prac. 1048. The practice also of sending issues of fact to a court of law to be tried by a jury and according to the principles of the common law, may be truly said to be an exception to this ecclesiastical rule of trying facts by secret inquisition, and an admission of its incompetency for a proper investigation of the truth.

But assuming a court of equity to be so bound up by their general rules, that they have no power to deviate from them in a special case for sufficient cause shown; is there any statute or iron rule of practice which compels the courts of equity of the United States to adhere to this policy of the civil and ecclesiastical law as a fundamental principle in the administration of justice?

The act of 1789, constituting the courts of the United States, declares "that the mode of proof by oral testimony and examination of witnesses, shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law."

Whatever, therefore, may be the force and binding effect of this fundamental principle as to the peculiar "mode of proof," in the English courts of chancery, it is clearly repudiated and abolished as a rule of practice in the courts of equity of the United States.

It is not a fair construction of the sixty-seventh rule of court, which imputes to it an intention of repealing or overruling an act of congress admitted to be within the scope of its constitutional power.

It being found inconvenient and dilatory in practice, and seldom necessary to a proper investigation of causes, to have witnesses examined ore tenus in open court, in chancery cases, the sixty-seventh rule merely provides, that "after the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term."

When witnesses live at a distance, the parties are compelled to resort to this rule in order to obtain their testimony; and in most cases, when the witnesses might be brought into court, this practice is pursued as most convenient. Judges have been rather disposed to discountenance the production of witnesses in court, on account of the delay consequent on an ore tenus examination. Besides, counsel, who are more apt to look to books of chancery practice than to their own statute books, have either not been aware of the rights of their clients, or not thought it a matter of sufficient importance to urge them. Hence it is, that the old practice has been generally pursued, and perhaps enforced, without much inquiry.

The act of 1789 is a fundamental statute; and we have, therefore, as a fundamental principle in the administration of equity in the courts of the United States, that the mode

of proof by oral testimony, and examination of witnesses in courts of equity, shall "be the same as in actions at law." Either party has a right, therefore, to cross-examine witnesses ore tenus, and when not examined in open court, to have notice of the time and place of taking the testimony, so that he may see the witness face to face, and thus examine or cross-examine him. In many cases, as has been shown by experience, it is absolutely necessary that the party be allowed this privilege, in order to elicit the whole truth, and save himself from a garbled statement of it, which may be as injurious as direct perjury. This may be said to be the general rule, and any deviation from it is the exception. The party who claims his right is not asking a favor of the court, or making a demand which the chancellor, in his discretion, may deny; but is demanding a right guaranteed to him by the law of the land; not one held at the discretion of a judge, nor to be abolished by custom or rule of court. The secret examination of witnesses within reach of the process of the court is contrary to the policy of the law; either party may object to it at his discretion, and the court are bound to allow it. A court may dispense with their own rules in a special case, but cannot deny to a party a right guaranteed to him by statute, or the law of the land.

The circuit courts of the United States have original jurisdiction in patent cases, and do not exercise their authority merely as auxiliary to a court of law, and for a more effectual remedy. Hence we do not feel bound in all cases to send a party to establish his right in a court of law, before granting a final injunction. In many questions of originality and infringement of patents, the concurrent opinion of twelve men, with little knowledge of the principles of science and philosophy which affect the case, may give but little satisfaction to the conscience of a chancellor: Hence it is becoming more common to examine these questions in courts of equity, without the aid of a jury, unless where the issue depends rather on the credibility of witnesses, than the value of their opinions as experts or philosophers. But such cases cannot be properly brought before the court by secret examination of the witnesses. It is almost impossible to frame interrogatories in chief so as completely to elicit the truth, where the witness has to refer to complex models or drafts. The whole truth can seldom be obtained, or falsehood detected, unless by a sharp cross-examination ore tenus, by skilful counsel. It is sometimes the case also, and in fact, too often, that the party, or his counsel, prepare the answers for their witnesses after consultation, so that the witness comes before the examiner and reads off his answers to the several interrogatories, as prepared for him by the party who produces him. That such things are sometimes done, we know; but how often, we cannot know. And however ready a court may be to suppress testimony thus made up, the fact must be known to the opposite party before he can make proof of it; and this secret mode of taking testimony, gives no opportunity for its discovery.

As a question of mere policy and the proper administration of justice, we believe that the truth of a case can be better eviscerated, by an ore tenus examination of the witnesses by counsel, than by the secret method of inquisition borrowed from "holy church."

We are of opinion, therefore—

1. That this portion of the peculiar policy of courts of equity has in the courts of the United States been rejected by statute, and that it never has been a fundamental principle in their administration of equity.

2. That the sixty-seventh rule of the series of rules promulgated by the supreme court, in 1842, does not affect to annul the act of congress, or the policy established by it.

3. That a party has therefore a right to demand an examination of witnesses within the jurisdiction of the court, ore tenus, according to the principles of the common law, either by having them produced in court, or by having leave to cross-examine them face to face before the examiner.

4. That the court had not only power to make the rule or order complained of in this case, but was bound to allow it, not only as requisite to a proper development of the facts necessary to its just decision, but also as a right of the party guaranteed by law.

Motion denied.

Case No. 12,841.

SICKLES et al. v. GLOUCESTER MANUF'G CO.

[1 Fish. Pat. Cas. 222; 13 Leg. Int. 388; 4 Blatchf. 229.][1]

Circuit Court, D. New Jersey. Sept., 1856.

PATENTS—EQUITABLE JURISDICTION—DISCOVERY—EQUIVALENTS—SCOPE OF SPECIFICATIONS — STEAM CUT-OFF.

1. The courts of the United States have their jurisdiction over cases arising under letters patent by statute, and do not exercise it merely as ancillary to a court of law.

2. Having such original cognizance of these controversies they do not in all cases require a verdict at law on the title before granting a final injunction, or concede a right to either party to have every issue as to originality or infringement tried by a jury.

3. A bill praying for a discovery and account of profits, for the infringement of letters patent, will be sustained, after the expiration of the patent, although an injunction can not be decreed.

[Cited in Imlay v. Norwich & W. R. Co., Case No. 7,012; Perry v. Corning, Id. 11,003; Vaughan v. East Tennessee, V. & G. R. Co., Id. 16,898; Gordon v. Anthony, Id. 5,605;

1 [Reported by Samuel Fisher, Esq., and here reprinted by permission. 13 Leg. Int. 388, contains only a partial report.]

Smith v. Baker, Id. 13,010; Atwood v. Portland Co., 10 Fed. 283.]

4. The comparative value of the complainant's invention and the defendant's machine is a question not relevant.

5. The title or description given to the invention in the grant is never expected to be specific, but only to indicate the nature and design of the invention. The specification, as its name indicates, must be searched for the exact description of what the patentee claims.

6. Courts will always construe letters patent favorably to the patentee, but they can not make a new specification with more extensive claims than the original, or stop the course of inventors by a fanciful application of the doctrine of equivalents.

7. The originality of Sickles' patent for improvement in cut-off valves for steam engines, investigated and established.

[Cited in Johnson v. McCabe, 37 Ind. 538.]

8. The slide valves upon what is known as the "Corliss" engine, do not infringe the Sickles' patent. The invention of Sickles is confined to the puppet valve.

[Cited in Sickles v. Evans, Case No. 12,839.]

This was a bill in equity [by William B. Sickles and others against the Gloucester Manufacturing Company] to restrain the infringement of letters patent [No. 2,631] for an improvement in steam engines, granted May 20, 1842, to Frederick E. Sickles, and assigned to plaintiff. The patent expired May 20, 1856, previous to which time, the bill had been filed praying for an injunction, discovery, and account of profits. The cause came on for hearing at the September term, 1856, when it was insisted by the respondents that the bill ought to be dismissed, upon the ground, that, the patent having expired, no injunction could be decreed, and the bill could not be sustained for a discovery and account unaccompanied by injunctions. The defense was, that the Sickles patent was void for want of novelty, and that the defendants did not infringe. To defeat the novelty of the invention, evidence was offered that the invention was described and used in England, prior to Sickles' invention, by Watt; that it was used in this country, by one Bennett on the steamer Dispatch, and by one Hogg on the steamers South America and Balloon. The description of the invention and claims of the patentee are very fully set forth in the opinion.

B. F. Thurston, E. N. Dickerson, and C. M. Keller, for complainants.

T. A. Jenckes, S. Blatchford, and W. H. Seward, for defendants.

GRIER, Circuit Justice. The complainants in this case are assignees of Frederick E. Sickles, to whom a patent was granted May 20, 1842, for "a new and useful improvement in the manner of constructing the apparatus for lifting, tripping, and regulating the closing of the valves of steam engines."

The bill charges that, in 1843, an issue at law had been tried between the patentee and one John F. Rodman, in which the validity of the patent to F. E. Sickles was put in issue, and that the jury found that said Sickles was the first and original inventor of the thing patented.

It charges also that the defendants "are using and operating an engine constructed substantially on the same plan as patented by said Sickles," and prays for an injunction and account of profits.

This bill was filed in March, 1853, and since the filing of the bill, viz: on the 20th of May, 1856, the term of the patent expired.

The argument of the case has presented for our consideration three points, on which the decision of it must depend.

1. It is contended that courts of equity entertain jurisdiction of patent and copyright cases only for the purpose of injunction; that the equity for the account is strictly incident to the injunction; and that, therefore, if an injunction is refused, or for any reason can not be decreed, an account can not be given, but the plaintiff must resort to a court of law

2d. It is denied that Frederick E. Sickles is the original and first inventor of the thing patented.

3d. It is denied that the machine used by the defendants infringes the plaintiff's patent.

I. The first proposition may be conceded as a correct statement of the general rule, as settled in England. See Adams, Eq. 219; Hind. Pat. 361; Baily v. Taylor, 1 Russ. & M. 73. This doctrine had its origin in the case of Jesus College v. Bloom, 3 Atk. 264, and Amb. 54, as applied to bills to restrain waste; but, since that time, the exceptions to the rule have become so numerous, that the rule can hardly be recognized as existing. The bill needs only to pray a discovery for the purpose of account, and it will be sustained for the account only. See 2 Eden, Inj. (by Waterman) 245.

The proposition, it is said, can not be maintained, that a court of equity will not interfere to direct an account when indebitatus assumpsit will lie at law. Nor is the converse of the proposition true, that equity will decree an account in all cases where an action for money had and received, or indebitatus assumpsit, may be brought.

But, whenever the subject-matter can not be as well investigated in those actions, a court of equity exercises a sound discretion in decreeing an account. See Carlisle v. Wilson, 13 Ves. 214, etc.

As it appears in this case that, in order to ascertain the extent of the plaintiff's damages, it might become necessary to have a discovery and account of profits from saving of fuel by using his invention, I see no good reason why the court might not retain jurisdiction of the case for that purpose, even on the principle of the English cases.

The jurisdiction of the court ought not to depend on the accident of the date of its decree. If, in this case, the decree were dated on the 19th of May, 1856, the jurisdiction of

the court could not be doubted, while it is challenged as impotent to give any decree on the 21st of the same month. If the complainants are able to sustain their case on the other points, and it was absolutely necessary to sustain our decree, that an injunction form a part of it, I would order the decree to be entered nunc pro tunc as of the date of the 19th of May last. The delays of a court of chancery should not be suffered to operate as a bar to the complainant's suit.

But the courts of the United States have their jurisdiction over cases of this nature by statute, and do not exercise it merely as ancillary to a court of law. The seventeenth section of the patent law of 1836 ordains that "all actions, suits, controversies and cases arising under any law of the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries, shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States."

Besides this original and general cognizance or jurisdiction over the whole subject-matter, a special power is conferred on the circuit courts to grant injunctions. Having such original cognizance of these controversies, the courts of the United States do not, in all cases, require a verdict at law on the title, before granting a final injunction, or concede a right to either party to have every issue as to originality or infringement tried by a jury.

Exercising our jurisdiction in these controversies, not by assumption for a special purpose only, or as ancillary to other tribunals, but under plenary authority conferred by statute, the technical reason which compelled the English chancellor to refuse a decree for an account where he could not decree an injunction, can have no application.

This first point is, therefore, overruled.

II. Is Frederick E. Sickles the first and original inventor of the improved machine claimed in his patent of May 20, 1842?

On this point, I must say that, after a careful examination of the very voluminous and contradictory testimony relating to it, I feel satisfied that Frederick E. Sickles is the first inventor of the improved machinery for effecting a cut-off in steam-engines, as described in his patent.

Others may have, about the same time, or even before him, conceived the idea of tripping puppet-valves, that they might fall suddenly into their seats, and thus avoid wire-drawing the steam; but they had failed in giving it practical effect. It required, perhaps, no great degree of mechanical ingenuity to invent a mode of detaching a valve at a given point; and it is true, also, that water had been before used, to retard the motion of falling bodies. But no one had succeeded in inventing a combination of devices, by which a valve could be tripped at any given point, before or after half-stroke, and made it practically useful, by adding thereto devices by which the motion or momentum of the falling valve might be arrested at the very moment of closing, without the slam or jar which would otherwise be destructive of the valve and its seat.

That this invention of Sickles is one of very great value, is also clearly established. But it has met the usual fate of such inventions. Undervalued and even persecuted at first by ignorance and prejudice, when, at length, it has compelled an acknowledgment of its merits, every contemporary failure to do the same thing, is raked from oblivion, antedated, and its merits magnified, by the fruitful imaginations of willing or malevolent witnesses.

It is not my purpose to defend this opinion by a tedious exhibition and comparison of the testimony. The whole subject is difficult and embarrassing to one who is not a practical engineer, and an attempt at explanation would be unsuccessful, without the assistance of drafts or models. Stating results, therefore, without attempting to support them by argument, my opinion is—

1. That the detaching apparatus used by Watt was different, both in its devices and its objects, from that used by Sickles. Watt used a latch to hold fast the moving parts, which served as a trigger to let a weight fall which opened the valve suddenly, while it was gradually closed by the action of the engine. The Watt dash-pot was not intended, and was wholly incapable, to effect the purpose of Sickles' dash-pot. The one was used to retard the closing of the valve, which would be otherwise suddenly jerked into its seat by the pressure of the steam—the other, to accelerate the closing of the valve, and arrest its motion precisely at that point, so as to prevent what it technically called "slamming"—a problem not solved by Watt, and a result not sought for or produced by him.

2. Bennett's cut-off arrangement on the "Dispatch" was an unsuccessful attempt to do what Sickles has succeeded in doing. Bennett had a contrivance to detach or trip his valve, but his attempts to arrest its momentum at a given point, by a dash-pot, were wholly unsuccessful. The evidence on this point tends to show this only—that others had perceived the benefit to arise from a sudden closing of the valves; that they had a notion that water or air might be used somehow to prevent the injurious concussion, but had wholly failed in devising the means to effect it.

3. The invention of Hogg, erected and used on board the "South America." The truth with regard to this, when sifted out of the voluminous and contradictory testimony, seems to be, that Hogg had devised a tripping apparatus about 1838–'39, for the "Balloon," which was not used, and which, for want of some invention to prevent the slamming, never could be used successfully; that this attempt was again repeated in the spring of 1841, on the "South America," and experiments were made both with air and water, which were unsuccessful, till Sickles, by a

letter (signed Finisher), suggested to them his invention, and requested them to try it. They accepted his suggestion, used his invention, and then denied his right to it.

Several witnesses have been produced to antedate this successful use of the dash-pot before the receipt of the Finisher letter. It is remarkable that Hogg, the pretended inventor, is unwilling to swear to the fact, while others, who were apprentices at the time, have grown up into a recollection of dates now, after fifteen years, varying from their recollection of the same events ten years before, when this issue was tried by a jury and found in favor of Sickles.

It has happened in this case, as in many others, that the party producing a witness has to rub the rust off his recollection of many things, and more especially of dates. In doing this, he may leave marks which did not exist before. Hence, witnesses are often found to swear boldly as to dates, ten or fifteen years after the event, and in complete contradiction to their testimony given soon after the event; and much more may this be the case, where, under pretence of secret examination in chancery, the answers to the interrogatories are drawn up by the party or his attorney.

III. We come now to the last and most difficult question in this case—that of infringement.

This involves a comparison of the invention of Sickles, as claimed in his patent, with the machine actually used by the defendants. The comparative value of the complainant's invention and those patented to Corliss is a question not relevant. Nor need we inquire whether the defendants infringe what Sickles might have claimed as his invention, if his specification had been drawn up by the very able and learned counsel of complainant, with their present knowledge of the arts. The subjects to be compared are not the black model, with such a generalization of its principle as may now be made, and the machine of defendants. We must take the specification of plaintiff's patent, and see what he there claims to have invented, and see if the machine used by the defendants has infringed any of these claims as set forth therein.

The law requires every patent to "contain a short description or title of the invention or discovery, correctly indicating its nature and design, etc." The law requires also, as a condition precedent, that "before any inventor shall receive a patent for any such new invention or discovery," he shall deliver a written description of his invention or discovery, etc., "and, in case of any machine, he shall fully explain the principle and the several modes in which he has contemplated the application of that principle or character, by which it may be distinguished from other inventions, and shall particularly specify and point out the part, improvement, or combination which he claims as his own invention."

The short description or title of this invention, as contained in the patent, is "a new and useful improvement, in the manner of constructing the apparatus for lifting, tripping, and regulating the closing of the valves of steam engines." Now, though this term—"valves of steam engines"—might include "slides," or sliding valves, as well as puppet valves, yet the terms, "lifting, tripping, and regulating the closing," would seem to point more particularly to what are known as puppet valves. For, it appears from the evidence, that other valves do not require to be lifted, nor were they subject to the difficulties with regard to closing which adhered to the valves most commonly in use, to wit: puppet valves.

But, the title or description given to the invention in the grant is never expected to be specific, but only to indicate the nature and design of the invention. The specification, as its name indicates, must be searched for the exact description of what the patentee claims. This seems to set forth two separate improvements, not claimed jointly as one machine, but as distinct improvements of two separate parts of a known machine. The patentee describes his invention thus: "certain improvements in the manner of constructing and arranging the apparatus for lifting and tripping the valves of steam engines, and by which the steam can be more readily cut off at any desired part of the stroke, than by the means heretofore adopted; and, also, an improved water reservoir and plunger, which serves to prevent the slamming of the valves in closing, and consequently to preserve them in good working order for a great length of time.

In this description of his invention, the patentee does not claim to be the first inventor of apparatus for lifting and tripping valves, but to have invented "improvements in the manner of constructing and arranging" it; the object of it being that "steam can be more readily cut off at any desired part of the stroke." Thus far, too, he uses the general term "valves," though he speaks of "lifting and tripping" them—terms more especially applied to puppet valves. Nor does he pretend to be the inventor of water reservoirs or plungers, on which others were then experimenting, though unsuccessfully, but of an "improved water reservoir and plunger."

The specification then proceeds to describe particularly the invention:

1. The "valve box containing the puppet valves which are to be lifted and closed."

Here we have a known machine the subject-matter of the improvement. The next thing described is the valve stem, passing through the stuffing box, on the bonnet of the valve box. Thirdly, a lifter, acted on in the usual way, which is to raise the valve. Thus far it describes the puppet valves, and the well known parts of the apparatus for lifting them. It next describes a spring attached to the shaft

of the lifter, the outer ends of which embrace the sides of the valve stem. Here commences his improvement.

2. The next device peculiar to the invention is the projecting edges, or feathers, which, while the valve is being lifted, rest upon the upper edges of the spring.

3. The next device applicable to his improvement is a standard, rising vertically from the valve box, so that its upper flat end shall be nearly in contact with the outer ends of the springs.

The purpose of this standard is to support the fourth part of the improvement—an adjustable sliding-piece, which may be shifted, and held to its place by a screw. On the face of this sliding-piece, there are two projecting, wedge-formed pieces, or inclined planes, which serve to open the ends of the springs, and liberate the stem. When the stem is liberated at its greatest rise, the steam will be cut off at half-stroke; if placed lower, at proportionably less than half-stroke; and, if the wedges be reversed, at more than half-stroke.

A fifth part of the combination, for the purpose of effecting the immediate cut-off, in order to cause the stem to descend instantaneously, when the spring is opened, is a spring on the upper side of the lifter, to which it is attached by one end, while the other end bears upon the stem.

Thus far, in compliance with the patent law, in its first requirement, a written description of the manner of constructing the machine, so as to enable any person skilled in the art to construct it, is exhibited. But, as the invention comes within the category of a machine, the law requires the specification to explain the principle, and the several modes in which he has contemplated the application of that principle. Now, I do not find, thus far, any general abstract statement of the principle of his invention, or how it may be applied to any other than puppet valves. Taking the word "principle" to mean the "modus operandi," the specification describes how a puppet valve, raised in the ordinary way, may be tripped at any given point, but gives no intimation of any other "mode in which he has contemplated the application of that principle," to an entirely different species of valves, which are not lifted up from their seat, nor disposed to fall into it by their own weight, when tripped, or set at liberty.

The subject-matter of the improvement selected by the patentee, is a puppet valve, acted on in the usual way, connected with a valve stem, and raised by a lifter. The devices for tripping the valves are connected with these parts, without an intimation of any general or abstract principle which may be applied to other or all possible kinds of valves.

In obedience, also, to the requirements of the law, that the patentee shall "particularly specify and point out the part, improvement, or combination which he claims as his own invention or discovery," the claim to this part of the invention is thus set forth: "I claim the manner in which I have combined and arranged the valve stem B, the spring F, on the lifter, the adjustable sliding piece I, with its wedges or inclined planes and their immediate appendages, so as to co-operate with each other and to effect the tripping of the valves, and the cutting off of the steam, substantially in the manner set forth."

The claim here is for the "manner" of combining or arranging, or in other words, a combination and arrangement of certain devices, viz: the valve stem, the spring, the wedges, and their immediate appendages, so as to co-operate with each other and effect the tripping of the valves, and cutting off of the steam.

Of course, this will include all combinations of these devices, to effect the same purpose, which are substantially the same, or, in other words, are mere colorable changes of some of the parts.

Now, it is to be observed that the patentee does not claim to be the first inventor of the scheme of tripping valves in order to make them close suddenly and prevent wire-drawing; but, thus far, he claims only a combination of certain devices as an improvement in the manner of tripping the valve or setting it loose from the gearing so that it may return quickly to its seat.

On the question of the substantial identity of the defendants' machine with this claim of the Sickles patent, the experts, as usual, are diametrically opposed. If it were a question depending on the veracity of the witnesses, and the mere weight of testimony as to the truth of a fact, I should be glad to have the verdict of a jury on which to repose. But, where it is the mere difference of opinion between men of equal skill and experience, I can not lean with equal confidence on the opinion of twelve men, who can hardly be supposed to have either superior knowledge or experience. I am willing to transfer responsibility from my own shoulders to those of a jury whenever I conscientiously can. I have endeavored to submit my mind to the verdict rendered on this subject in an adjoining district, and have listened, with a willing ear, to arguments showing the correctness of that decision. It may probably arise from some obliquity in my own mental vision, or want of clear ideas on these intricate subjects. But, I can not bring my mind to the conclusion that the machine of the defendants is an infringement of the plaintiff's claim in this behalf, as set forth in his patent. This point was, in fact, not submitted to the jury. But a certain model was exhibited, which was treated as incorporating the complainant's invention, and a like model of the defendants' machine which included the inventions patented to Corliss. No construction of the claims of the Sickles patent was given

to the jury. But certain generalizations, or abstract definitions of the principles, or modus operandi of the machine, as exhibited by the model, were assumed, by the very ingenious and skillful experts, as the subject of the comparison. Thus, the whole machine, without separating the new from the old, or defining the extent of the improvement claimed by the patentee, was tacitly assumed to be the invention of the patentee, and, by means of the doctrine of equivalents, astutely used, every other mode of opening, shutting, or tripping valves could be demonstrated to be substantially the same, if the same result were produced by any mechanical combination whatsoever.

Experience has shown that inventions which, to support their claim to originality, were made narrow enough to pass through the eye of a needle, when once established, and in a battle with supposed infringers, become as large as camels.

In this case, the patentee has devised a new "manner," or method, or arrangement of machinery for tripping "puppet valves." The combination and arrangement of parts, as claimed by him, have all reference to that peculiar sort of valve, nor does the specification set forth any general "principle," or any other "mode in which he has contemplated the application of that principle" as applicable to valves of a totally different character and mechanical action. I can not discover in the defendants' machine the complainant's "manner of combining and arranging the valve stem B, the spring F, on the lifter, the adjustable sliding piece, etc."

The valves of the defendants are those which slide in the arc of a circle, which are not lifted up, as puppet valves having a valve stem passing through a stuffing box, by which they are raised from their seats. The peculiarity of the action of this circular valve requires a different and peculiar valve gear. Four several rockshafts, which actuate the four valves, receive their motion from the eccentric on the main shaft, communicated by it to a wrist plate, which is, in effect, four arms or cranks set at different points around a circle. These hook rods, as they are called, moved by this wrist plate, have a longitudinal as well as a lateral movement, by means of which, in combination with other parts of the machinery, the valves may be detached or tripped at certain periods of the movement, up to half-stroke. This is regulated by a sliding bar connected with a governor, so that the cut-off may be effected at a variable point under half-stroke, and may be automatic. The particular devices, and their action, could not be intelligibly described without models or drawings. I shall not, therefore, attempt to specify them.

Now, as Sickles' claim, as exhibited in his patent, is only for an improvement in the "manner of constructing and arranging the apparatus for lifting and tripping the valves," and for the manner of combining the valve stem, the spring, etc., I am unable to see that the defendants' contrivances are merely colorable changes, or that the devices they use are merely mechanical equivalents, for those used by the complainant. By an abuse of this doctrine of mechanical equivalents, experts can demonstrate every machine which effects a certain purpose, to be substantially the same with every other which effects the same purpose. I do not see the combination of the patent in the defendants' machine, nor any hint in it how the devices described as applicable to puppet valves could be accommodated to sliding valves, nor any attempt in defendants' machine to invade the plaintiff's rights, by colorable evasions of his claims.

Whether it required invention to make the combination in defendants' machine, after seeing that of complainant, is a question on which experts differ.

But it is not an unusual case, even among learned engineers, to see a thing after it is done, which never occurred to their minds before. I am disposed to distrust that wisdom which succeeds the event.

But, the decision of this portion of the case is of very little importance, as the subject of the first claim in the patent is wholly useless without the second. The patentee seems to have claimed two several improvements in the steam engine, neither of which is of any benefit without the other, and has not claimed the whole as one machine, which he might well have done.

2. We come now to the second claim of the patent, called the "Sickles dash-pot."

If the claim in the patent had been stated in the terms used by the learned counsel, in their interrogatories, this point would be easily decided. For, if the defendants' device for cushioning the weight of the valves on air had to contend with the following claim, they must undoubtedly succumb: "I claim the combination of any fluid whatever, with a dash-pot and plunger, so arranged that the plunger, in descending, when near the end of its fall, confines the fluid beneath it, so as to arrest the violent motion without concussion or slam, for the purpose of stopping the motion of ponderable bodies, without destruction of the parts, in an insensibly short space of time."

But, as this is not the claim made by the patentee, the question of infringement is one of much more doubt and difficulty. The defendant has to contend with the claim as set forth in the patent, and not with the ideal or abstraction presented by the learned counsel. The specification describes this portion of the invention in general terms, as follows: "And also an improved water reservoir and plunger, which serves to prevent the slamming of the valves in closing, and consequently to preserve them in good working order for a great length of time."

This water reservoir is described as attached to the lower side of the valve box.

Its interior is cylindrical, and has within it a cup, or secondary reservoir, adjusted by a graduating screw. The continuation of the valve stem has a plunger, or piston attached to it. When the valve is stripped, and falls to its seat, the plunger enters the cup, "into the upper cylindrical part of which it passes freely, and to such depth as may be found necessary, which is determined by means of the graduating screw."

"The reservoir is to contain water, oil, or other fluid, say to two-thirds of its hight, more or less." The object and purpose of this apparatus is said to be, that "the valves may be made to shut so silently as scarcely to be heard, while the retardation is so perfectly graduated as not to be accompanied by any sensible loss of time, as it takes place in the last moment of their descent only."

Under this head the claim of the patentee is as follows: "I also claim the manner of regulating the closing of the valves, and of effectually preventing them from slamming, by means of a water reservoir, furnished with a piston, or plunger, attached to the lower end of the valve-stem, and operating within an adjustable cup, or secondary reservoir, so as to effect the purpose intended, upon the principle, and substantially in the manner herein described and made known."

It is apparent that the apparatus described in the first claim, for tripping the valve, and that described in the second, must be combined to effect the purpose intended. For, if the valves, when tripped, should be suffered to fall to their seats, without being checked by the device described in the second claim, the whole apparatus would be practically useless. The two things constitute one whole invention, having for its subject the valves known as puppet or lifting valves. The object and purpose of the water reservoir is to prevent the slamming of these valves in closing, which would otherwise destroy the machinery. Although the specification mentions "water, oil, or other fluid," it is plain that the word fluid is used in its popular sense, as a synonym for liquid. Water and other liquids are practically nonelastic, while air and gases are elastic and compressible.

Water acts by displacement, or by a gradual dimunition of the volume of escape, and air by compression. Steam, as an elastic substance, is used to cushion the piston in every steam engine, and hinder the jar from its sudden arrest. The claim is for regulating the closing of valves, and preventing them from slamming, by means of a "water reservoir." There is no intimation that an elastic fluid could be used for the same purpose, or how it should be used. The experiments made since the trial, to show that air may be used in place of water, by some slight alterations, or for a short time, or on small engines, with light valves, is a discovery made since the opinion of Judge Nelson was delivered, and for the purpose of showing that he was mistaken in the facts.

Now the device used by the defendants, which is said to be an infringement of the Sickles dash-pot, differs from it in these essential particulars:

1. It is not a "water dash-pot," using the term water to represent all liquids.

2. It is not used for the purpose of regulating the closing of the valves, and preventing them from slamming. Although that phrase is used in the Corliss patent, it is very plain, that with a sliding valve turning on an axis, there can not be that slamming which arises from the fall of a puppet valve, nor a necessity for that nice adjustment in closing it.

3. The invention of Sickles had in view not only the sudden closing of a puppet valve, but the arresting of it precisely at the very moment of closing. Hence the necessity for the adjusting apparatus of his cup. The defendants require only the arresting or cushioning of a falling weight, so that it may not jar the general machinery of the engine.

No particular accuracy is required, as the valve is closed before the weight is arrested; and the air used to cushion the weight, may, by its elasticity, raise the weight above its lowest depression, without affecting injuriously the object or purpose of the device. This weight, too, is not necessarily connected by a rigid connection with the rock shaft, but would operate with a string. Corliss wanted nothing but a cushion for his weight.

That either air or water might be used to arrest the descent of a falling body, or cushion a piston, were well known facts. His device was to make his weight in shape of a piston falling in a socket, with a small hole pierced near the bottom.

In fine, Sickles had showed an improved manner of tripping a puppet valve, and preventing wire-drawing by its sudden closing. This had been done before, but, as a machine or improvement, it was, by itself, useless. The great problem solved by Sickles was—how to have the benefit of this sudden closing without the destructive slam, or jar, consequent on the sudden closing of that species of valves by falling to their place. He has skillfully overcome this difficulty by means of a water reservoir with an adjustable cup, and has made a very valuable improvement, for which he has probably never received sufficient recompense.

Corliss has invented an improved method of opening and shutting circular slides, or sliding valves; has shown another combination of devices for tripping the valve, and how his falling weight used to close the valve may be cushioned without jar on an air cushion. One has perfected one combination of devices for tripping a puppet valve—the other a different one for a different sort of valve. One has discovered and perfected a water reservoir to prevent the destruc-

tion of his valves when falling into place. The other has converted his falling weight into a piston working into a socket and cushioned on air, so as to break the shock of its fall. They have each perfected a different machine, by appropriate devices, so as to operate beneficially; and I can not perceive that the combination of elements in each is the same, or that their difference is merely colorable, and not substantial.

If the whole question of infringement had been left to the jury on the trial in New York, I would have held the parties concluded. But the jury was asked in that case to give a verdict which should exhibit the result of a comparison, while no definition of the extent of the claims of the patent was given to them. They were left to compare the defendants' machine with an ideal claim, which the very able and learned counsel, with their present knowledge of the subject, have shown might have been made if the inventor, or the person who drew his specification, had been fully aware of the principle and extent of his discovery or invention.

But the law requires a clear and particular specification of the principle and several modes in which the patentee contemplates its application. Courts will always construe these instruments favorably to the patentee; but they can not make a new specification with more extensive claims than the original, or stop the course of inventors by a fanciful application of the doctrine of equivalents. The plaintiff's patent claims only to have invented a new mode of regulating the closing of valves (such as were described throughout his patent), and of effectually preventing their slamming by means of a water reservoir, furnished with a piston or plunger attached to the lower end of the valve stem, and operating within an adjustable cup, etc.

The fact that air might have been used successfully by some slight alterations, and that the invention of each may use the agent of the other, is but an accident of this case, discovered since the litigation arose. The specification of the patent gave no notice to the world that it claimed cushioning the fall of all ponderable bodies, by means of both elastic and non-elastic fluids. To give it that construction now, would be granting a new patent; and, without such an amendment of the specification, the defendants' machine, which does not embody the combinations of the patent either in form or functions, can not be truly said to infringe it.

The complainant's bill is therefore dismissed, because the court is not satisfied that the defendants' machine infringes the patent granted to plaintiffs, and for no other reason.

[For other cases involving this patent, see Sickels v. Youngs, Case No. 12,838.]

SICKLES v. PACIFIC MAIL STEAMSHIP CO. See Case No. 12,842.

Case No. 12,842.

SICLES v. PACIFIC MAIL STEAMSHIP CO.

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

PATENTS—NOVELTY—TWO YEARS' USE—ISSUE MADE UP.

1. Where, on a bill filed for the infringement of a patent, and for an injunction, the defence was set up that the invention had been known and used prior to the invention thereof by the patentee, but the evidence was so uncertain and insufficient that no satisfactory judgment could be founded upon it, *held*, that an issue should be ordered to decide: First, whether the patentee was the discoverer or inventor of the thing patented to him, and, second, whether such invention was known and used by others two years before the application for a patent.

2. No knowledge or use of an invention, by any one, will deprive the first and original inventor thereof of the exclusive right to make and use the same, unless such knowledge and use was for more than two years prior to the application for a patent.

[Cited in Law, Pat. Dig. 331, 607, to the points as stated above. Nowhere reported; opinion not now accessible.]

SIDDLE (CHANDLER v.). See Case No. 2,-594.

SIDENBERG (MACDONALD v.). See Case No. 8,768.

SIDENBERG (WOOSTER v.). See Case No. 18,039.

Case No. 12,843.

SIDENER v. KLIER.

[4 Biss. 391.][1]

District Court, D. Indiana. July, 1869.

BANKRUPTCY—FRAUDULENT MORTGAGE—INTENT—KNOWLEDGE OF MORTGAGEE.

More than four months, and within six months, before a petition for adjudication of bankruptcy was filed, the bankrupt mortgaged all his property to a creditor to secure bona fide debts and liabilities. *Held*, that, in order to entitle the assignee to recover from the mortgagee the property thus mortgaged, it must be proved that, at the time of the execution of the mortgage, the mortgagor was insolvent, or in contemplation of insolvency or bankruptcy; that the mortgagee had then reasonable cause to believe that such was the fact; and that such mortgage was made with a view to prevent the mortgaged property from coming to the mortgagor's assignee in bankruptcy, or to prevent the same from being distributed under the bankrupt act [of 1867 (14 Stat. 517)] or to defeat the object of, or delay, hinder, impair, or impede the operation of, the bankrupt act, or to evade some of its provisions. The mortgage cannot be avoided simply because it gave a preference to the mortgagee.

[This was a proceeding by Joseph D. Sidener, assignee, against Bernhard Klier. Submitted for final hearing and decree.]

Elliott & Holstein, for complainant.
Edward T. Johnson, for defendant.

McDONALD, District Judge. This is a bill in chancery filed by Joseph D. Sidener, as-

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

signee in bankruptcy, against Bernhard Klier. The bill charges that, on the 22nd of May, 1868, Ernest Degelow filed his petition in this court to be adjudged a bankrupt; that he was afterwards so adjudged; and that the complainant has been duly appointed his assignee.

The bill further states that, on the 21st of January, 1868, the bankrupt mortgaged all his property to the defendant Klier, as security for a pretended indebtedness; that Degelow was, at the time, insolvent; that Klier had then reasonable cause to believe, and did believe, that Degelow was insolvent; and that the mortgage was made with a view to prevent the mortgaged property from coming to the hands of the assignee in bankruptcy of Degelow, and to prevent the same from being distributed under the bankrupt act, and to defeat, impair, hinder, delay, and impede the operation of that act.

The answer of Klier denies all the material charges in the bill; and alleges that the mortgage was made bona fide to secure honest debts due to him by Degelow, and to indemnify him as surety on divers notes for Degelow. A common replication to the answer is filed; and numerous depositions have been taken.

The case is now submitted for final hearing and decree on the bill, answer, and depositions.

The only question of any difficulty to decide, is one of fact, namely, does the evidence establish the case made by the bill?

I am satisfied by the evidence that, at the time when the mortgage in question was made, Degelow was insolvent; that Klier knew him to be so; and that Klier, in procuring the mortgage, intended to obtain a preference over the other creditors of Degelow. But this mortgage was executed more than four months before Degelow filed his petition for adjudication of bankruptcy. Now, in order to defeat the preference in such a case, the 35th section of the bankrupt act, requires that the preference shall have been obtained within four months next before the filing of the petition for adjudication of bankruptcy. Had this mortgage been executed two days later than it was, I should have felt no difficulty in pronouncing it fraudulent and void under the bankrupt law. But, as the matter stands, I cannot hold it void merely because it was intended to give a preference to the mortgagee.

The latter clause of said 35th section, however, provides, that "if any person being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, transfer, assignment, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of, this act, the sale, assignment, transfer, or conveyance shall be void," &c. Under this provision the lapse of time does not bar the complainant's claim, for the mortgage was made less than six months before Degelow applied to be adjudged a bankrupt.

But in proceedings under this clause of the 35th section, as I construe it, the complainant, in order to succeed, must prove that the mortgagor, at the time of executing the mortgage, was either insolvent or contemplated insolvency or bankruptcy, and that the mortgagee, at the time, had reasonable cause to believe this fact. And, in addition to this, it must be proved that the mortgage was made with a view either to prevent the property mortgaged from coming to the assignee in bankruptcy, or to prevent the same from being distributed under the bankrupt act, or to defeat the object of, or in some way impair, hinder, impede, or delay the operation of, the act; or to evade its provisions. Both these propositions must be proved. The first of them, in my opinion, as already intimated, is proved. But, as to the second proposition, standing as it does on several alternatives, yet all relating to attempts to defeat the bankrupt act, I do not believe that any one of these alternatives is proved. I must, indeed, presume that the mortgagor and mortgagee perfectly understood all the provisions of the bankrupt law. But I cannot perceive from the evidence that in the execution of the mortgage either of them had any view to any of the provisions of that law. As I regard the evidence, I think that Klier, perceiving that Degelow was in pecuniary trouble, feared that he might at some future time be broken up; that, to make himself secure, and to obtain a preference over others in the event of such a breaking up, he thought it prudent to demand a mortgage; and that, on such demand, Degelow very reluctantly executed the mortgage without any thought, in so doing, of violating the bankrupt law, or of doing any other dishonest act; and I think that the thought of becoming a bankrupt never entered into his mind till some four months afterwards.

With this view of the case, I must find that there is no equity in favor of the complainant. The bill is therefore dismissed at his costs.

Case No. 12,844.

In re SIDLE.

[2 N. B. R. 220 (Quarto, 77).] [1]

District Court, S. D. Ohio. 1868.

BANKRUPTCY—PROVABLE DEBT — CONCEALMENT— FRAUDULENT DEBTS.

1. A judgment obtained on breach of promise to marry, is a debt provable in bankruptcy, and is barred by discharge.

[Cited in Re Sheehan, Case No. 12,737.]

[Cited in Hun v. Cary, 82 N. Y. 80.]

1 [Reprinted by permission.]

2. Concealment to oppose discharge of bankrupt must be wilful.

3. A fraudulent debt must be one made with a view to give a preference. Payment of attorney's fees is not such a preference as will prevent discharge of bankrupt.

[Cited in Re Seeley, Case No. 12,628; Re Boynton, 10 Fed. 279.]

By GILBERT B. MUNSON, Register:

I, Gilbert D. Munson, one of the registers in said court of bankruptcy, do hereby certify that, in the course of the proceedings of said cause before me, the following questions arose, pertinent to said proceedings, and were stated and agreed by counsel for the opposing parties, to wit: Hon. Lucien P. Marsh, who appeared for the bankrupt, and John O'Neill, Esq., who appeared for Sarah E. Tanner, creditor of said bankrupt. It appears from the evidence that in the year 1861, ——— day of August, the bankrupt promised to marry said creditor, by means of which promise he gained her confidence and person to his purposes, &c. Upon this breach of promise to marry her, said creditor, in the May term, A. D. 1867, court of common pleas, Muskingum county, Ohio, obtained a judgment against said bankrupt for ten thousand dollars and costs, which amount has been proved against his estate in bankruptcy. This state of facts is admitted by counsel opposing. It was further shown, or sought to be shown by evidence, that said bankrupt promised to marry said creditor, intending, all the time of making said promise, not to keep the same, but making it as a means whereby he might gain the confidence and seduce the creditor. The question then arose whether or not the bankrupt can be discharged of a debt created by judgment for breach of promise to marry, and whether, under the peculiar circumstances sought to be established by the evidence, this debt was not created by fraud on the part of the bankrupt, to wit: the liability being for breach of said bankrupt's promise to marry, the promise being fraudulently made for the purpose of seducing creditor. The second question being whether or not the bankrupt concealed a part of his estate, to wit: he is a stout, healthy, unmarried man of twenty-seven years of age; lived and worked with his father, a farmer, all his life, except while in the military service, from 1862 to 1865, less than three years; further, that while in the service he drew no pay at less rate than the pay of a first sergeant. The third question being whether or not bankrupt has disposed of his property in view of his bankruptcy, so as to give preference to creditors, to wit: that shortly before he filed his petition in bankruptcy he owned a good horse, and he reports no creditor except Sarah E. Tanner. Specification in opposition to discharge, deposition of creditor and bankrupt, with proof of debt, and certified transcript of the case in court of common pleas, are hereto annexed, and made exhibits A, B, C, D and E.

OPINION OF REGISTER.—As to the first question, can a judgment for a breach of promise to marry be discharged under the act? it would seem undoubted, after a careful view of the authorities, that it can. It is a debt, and clearly comes within the provisions of the nineteenth section, eleventh and thirty-second sections of the bankrupt law. In case the debtor had been driven into bankruptcy, the woman could undoubtedly have proved her claim, and have obtained a dividend. If, then, it is a debt in this case, it is in the other. All debts that may be proved are barred by the discharge. To this general rule the statute makes some exceptions. In determining, then, whether or not a claim is barred by a discharge, it is only necessary to determine if it were provable, and is not included in any of the exceptional classes named in the statute. [14 Stat. 517] §§ 19, 33; Avery & H. Bankr. p. 234. Where a claim sounds in tort, as, for instance, for assault and battery, slander, &c., it is a claim for unliquidated damages, and could not be proved; this is true of any personal action, as for breach of promise to marry; but, in these cases, the judgment liquidates the damages, and at common law an action for debt could be brought on the judgment.

Parsons says: "A judgment may have the effect of making a claim provable, which of itself would not lie. If one brought his action for assault or slander, no damages for which would, as we have seen, be provable, and his action ripens to judgment before the insolvency, there is no more reason why he may not prove this judgment debt, than why he should not prove a promissory note for the same cause." 3 Pars. Cont. (5th Ed.) p. 516, also note "X." See Crouch v. Gridley, 6 Hill, 250; Thompson v. Hewitt, Id. 254; Graham v. Pierson, Id. 247; Luther v. Deyo, 19 Wend. 629; Hayden v. Palmer, 24 Wend. 364. The same view is maintained in Stone v. Boston & M. R. Co., 7 Gray, 539. It is there said "that an action for damages to the person is not property, nor the right of property, nor a debt, until it is reduced to a judgment, and then it passes, because it has assumed the form of a debt. The reason is, a claim for damages, when liquidated, must be liquidated in money, and a judgment for the money is to all intents and purposes a debt, or specialty." The same reasoning is applicable to an action for breach of promise to marry; the judgment, then, becoming a debt, is provable and discharged under the act. But allowing the consideration of this judgment to be inquired into, a far more troublesome question presents itself. Judge Blatchford (U. S. Dist. Ct. S. D. N. Y.) in Re Patterson [Case No. 10,817], seems to hold that a judgment may be inquired into. Parsons on Contracts (5th Ed. vol. 3, p. 515) might seem to lead to the same conclusion. It would seem very doubtful, whether upon principle, in such case as the one in question, this could be done. Parsons evidently means (Id.) that

this might be done to show there was in fact no debt, no claim; that the whole thing was bogus, and would not seem to conflict with the general doctrine, that a judgment wipes out, merges, as it were, the aforesaid qualities of a cause of action for tort, in the judgment. Still, as there is no opposition by counsel for the bankrupt, testimony has been introduced to show that at the time of making the promise of marriage, the bankrupt did not, in fact, intend to keep such promise, but only to seduce creditor. This point is sustained by the testimony of the creditor herself; but there is nothing to corroborate her statement in this; the fact is hardly established. Still, had it been fully established, in my opinion it is not such a fraud as is meant by the act to prevent a bankrupt's discharge. Supposing the testimony fully shows this state of facts, that he obtained the woman's person with the intention not to marry her, still I think this is not fraud. Suppose a man contracts to marry a woman, all the while in his innermost heart intending not to marry her, would that be fraud? Hardly, but rather a breach of contract. Suppose a man borrows money, intending not to pay it; is that fraud? Hardly, but rather a breach of contract. So that inquiry into the mere intention here, even if it shows conclusively an intent not to keep the contract, would not be fraud. Then, the woman ought not to have trusted the man. Matrimony is the only legal justification for yielding her person. The creditor is not without grave fault, though there may be many palliating circumstances, the "art of her seducer," &c. But it is certainly contrary to public policy to say that she is so innocent as that she had a right to rely upon his representations, and thus permit herself to be seduced; yet must this position be taken in order to make her case one of fraud. Moreover, the basis of the action for breach of promise is contract, and the seduction is only given in evidence in aggravation of damages. Where a party is charged with fraud in this case as well as the other cases, it is not enough to show his intention was fraudulent, but the other ingredients, such as reliance, and the like, must be present. Consequently, I think it is no fraud, and that this judgment debt may be proved and discharged under the act.

As a second ground for opposing the bankrupt's discharge, it is alleged that he has concealed a part of his estate. In support of which allegation it has been shown by the evidence that bankrupt is a stout, healthy, unmarried man, of twenty-seven years of age, lived and worked with his father, a farmer, all his life, except while in the military service from 1862 to 1865, less than three years; further, that while in the service, he drew no pay at a less rate than the pay of a first sergeant. But there has been no proof of concealment made. Concealment, as contemplated by the statute, must be wilful, not accidental, as a mere omission to disclose property. "It must be an act inconsistent with good faith on the part of the debtor." Atkins v. Spear, 8 Metc. [Mass.] 490; Robinson v. Wadsworth, Id. 67; Coates v. Blush, 1 Cush. 567; Rugely v. Robinson, 19 Ala. 404; Loud v. Pierce, 12 Shep. [25 Me.] 233. Concealment is not sufficiently established by the proof; and the intent to conceal, or defraud, seems to be entirely wanting.

As a third ground for opposing a bankrupt's discharge, it is alleged that he has disposed of his property in view of his bankruptcy, so as to give preference, to wit: That shortly before he filed his petition in bankruptcy, he owned a good horse, and he reports no creditor except the said Sarah E. Tanner. A fraudulent preference must be one made with a view to give preference. See sections 29 and 35 [14 Stat. 517]. It is strictly a statutory offence, and every ingredient required by the statute going to make up fraud must exist and be shown. If the preference was given in contemplation of becoming a bankrupt for the purpose of preferring, &c., there must be an intent to place the party on a better footing than other creditors. Avery & H. Bankr. 214. In the present case the quo animo seems to be entirely wanting; the contract to pay his attorneys fifty dollars each, and to fulfil which the horse was sold, was made by the bankrupt before the trial of the case for breach of promise, although payment was not made until after suit.

Payment of one's attorney is not a preference such as the law contemplates, by reason of public policy, which makes faith in matters of attorney's fees obligatory upon parties, for the better administration of justice in the courts, &c. Here the client was under the influence and power of his attorneys, whom he also employed to conduct his cause in the bankrupt court. I can not think that payment to them of their fees was such a preference as the law intends shall prevent a discharge. Respectfully submitted.

LEAVITT, District Judge. The opinion of the register is approved and affirmed.

Case No. 12,845.

SIEBERT v. GARRATT.

[8 O. G. 600.]

Circuit Court, D. California. Sept. 30, 1875.[1]

PATENTS—INTERFERENCE—ORIGINALITY OF INVENTION.

[This was a bill in equity by Nicholas Siebert against William T. Garratt, for the infringement of certain letters patent.]

A. H. Evans & Co. and McAllister & Bergin, for complainant.

M. A. Wheaton, for defendant.

SAWYER, Circuit Judge. This cause came on to be heard at the February term,

[1] [Affirmed in 98 U. S. 75.]

A. D. 1875, of this court, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz: "That defendant, William T. Garratt, was not the first or original inventor or discoverer of the improvement or discovery claimed by him, in and by those certain reissued letters patent of the United States, number five thousand three hundred and twenty-eight, (No. 5,328), for an alleged new and useful improvement in lubricators, issued by said defendant, William T. Garratt, on the 18th day of March, A. D. 1873, and is not entitled to a patent therefor; and that said reissued letters patent number five thousand three hundred and twenty-eight (No. 5,328), are declared void, and the same are hereby vacated and set aside by reason of their interference with those certain letters patent of the United States number one hundred and eleven thousand eight hundred and eighty-one, (No. 111,881), for a new and useful improvement in lubricators, issued to complainant, Nicholas Siebert, on the fourteenth (14th) day of February, A. D. 1871." It was also further ordered, adjudged, and decreed that complainant do have and recover of and from defendant his costs and expenses to be taxed herein.

[On appeal to the supreme court, the decree of this court was affirmed. 98 U. S. 75.]

Case No. 12,846.

The SIERRA NEVADA.

[6 Adm. Rec. 67.]

District Court, S. D. Florida. April Term, 1858.

SALVAGE—SHIP ON REEF—AMOUNT OF COMPENSATION.

[A ship grounded on Crocus Reef in imminent danger of total loss was saved after 36 hours labor by the aid of eight wrecking vessels carrying 92 men. The ship and cargo were worth $85,000. *Held*, that $17,000 was a reasonable salvage compensation.]

[This was a libel in rem by Richard Roberts and others against the ship Sierra Nevada and cargo for salvage.]

Adam Gordon, for libelant.

S. I. Douglas, for respondent.

MARVIN, District Judge. This ship, laden with 3,090 boxes of sugar and 58 bales of tobacco, from Havana, bound to Marseilles in France, on the morning of the 21st of March last, struck upon that part of the Florida reef known as "Crocus Reef," where she remained fast. She drove into thirteen and fourteen feet water, drawing seventeen feet. The reef on which she lay is exposed to the sea. The ship worked and ground heavily upon the bottom, chafing the after part of her keel off down to the garboard, and cutting into the plank badly. There can be no doubt, that the ship and cargo were exposed, while on the reef, to imminent danger of total loss; and that they would both have been totally lost but for the services of the wreckers. They carried out the ship's anchor, and lightened the ship of 1,049 boxes of sugar in about thirty six hours, and heaved her off, and brought her to this port. Eight wrecking vessels, of the aggregate burden of six hundred and eighty seven tons, carrying in all ninety two men, were employed in this service. The ship and cargo may be considered as worth $85,000. I think that $17,000 is a reasonable salvage.

It is therefore ordered, adjudged and decreed, that the libelants have and recover in full compensation for their services, the sum of $17,000 and their costs of suit, and that upon the payment thereof, the marshal restore said ship and cargo to the master thereof, for and on account of whom it may concern.

Case No. 12,847.

SIEVERS v. NORTH.

Circuit Court, D. Massachusetts. April 13, 1877.

SALE—FAILURE TO DELIVER—MEASURE OF DAMAGES.

The defendants, North & Co., agreed to deliver certain pork backs free on board vessels at Boston, and also to procure freight to Antwerp. In an action for a breach of contract by defendants, *held*, that the measuring of damages in the case was the difference between the contract price of the goods and the market value of the goods at the time of the breach of the contracts at the place of delivery, to wit, Boston, with the proper charges of purchasing, packing and putting them on board.

[Cited in 15 Alb. Law J. 332, to the point as stated above. Nowhere reported; opinion not now accessible.]

Case No. 12,848.

Ex parte SIFFORD.

[5 Am. Law Reg. 659.]

District Court, S. D. Ohio. 1857.

HABEAS CORPUS—RETURN—CUSTODY OF MARSHAL—CONFLICT OF AUTHORITY.

1. A return to a writ of habeas corpus, issued by a judge of the United States, under the judiciary act of 1789 [1 Stat. 73], showing an imprisonment under process, legal and valid on its face, is conclusive, and precludes further inquiry into the cause of imprisonment.

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

2. But the seventh section of the act of congress of the 2d of March, 1833 [4 Stat. 634], expressly confers on a judge of the United States the power to issue the writ of habeas corpus, in all cases of imprisonment by any authority of law, for any act done or omitted in obedience to a law of the United States; and where such imprisonment is for an alleged violation of a state law, and by state authority, the judge or court issuing the habeas corpus may inquire into the circumstances under which the alleged crime was committed, with a view to the question whether the act complained of was done or omitted in the proper discharge of official duty, and under the authority of the United States; and, if it appears the act was so done or

omitted, the judge or court is authorized to discharge the party from such imprisonment.

[Cited in Re Neill, Case No. 10,089.]

3. A marshal having a person in custody under lawful process, is bound to retain such custody, and in so doing may use such force as is necessary; and in the proper use of such force, is not guilty of a crime against the law of the state in which the transaction occurred.

[Cited in U. S. v. Fullhart, 47 Fed. 804.]

4. A state judge has no jurisdiction to issue a habeas corpus for a prisoner in the lawful custody of an officer of the United States, with a knowledge that he is so held; and if, on the return of the writ, it appears the imprisoned party is held by an officer of the United States under legal process, the jurisdiction of the state judge ceases, and all further proceedings by him will be coram non judice.

[Cited in Re Farrand, Case No. 4,678; Re Reynolds, Id. 11,722.]

5. A sheriff, or other state officer, having a so-called writ of habeas corpus, under the Ohio statute of 1856, and having knowledge that the prisoner named in the writ is in the custody of an officer of the United States, under legal process, is under no obligation to serve, or attempt to serve, such writ; and his return of the facts is a sufficient justification for not serving it.

6. A marshal, having custody of a prisoner under the authority of the United States, is not bound to surrender such prisoner upon the demand of a state officer, having a writ issued under the said Ohio statute, requiring him to take the prisoner from such custody.

[Cited in brief in Ex parte Holman, 28 Iowa, 94.]

7. But if the habeas corpus in the hands of the state officer is issued in good faith, and is the well known writ of that name, requiring the officer of the United States having the custody to bring the prisoner before the judge or court issuing the writ, with the cause of the caption and detention it is the duty of such officer to obey such writ, as thereby he does not part with the custody of the prisoner; and such obedience will not be in conflict with his duty.

8. It is well settled by the adjudications, both of the courts of the Union and the states, that, in case of concurrent jurisdiction, the tribunal or court to which jurisdiction first attaches shall retain it; and neither has a right to interfere with the other.

[Cited in Bruce v. Manchester & K. R. Co., 19 Fed. 344.]

At law.

Stanley Matthews, George E. Pugh, and C. L. Vallandingham, for petitioners.

R. Mason and C. P. Wolcott, contra.

LEAVITT, District Judge. There is no cause to regret the indulgence which has been extended to counsel, in the presentation and discussion of this case, or the time, which, for reasons not necessary to be stated, has elapsed since the hearing commenced. In some aspects, the questions arising are important, and require great deliberation in their decision. Every case of conflict between the national and state authorities casts upon the judge or court called to pass upon it a most responsible duty; and such cases are the more embarrassing and difficult when the jurisdiction of the judge or court is challenged, and a decision of that question becomes necessary. It has been my aim to consider with calmness the case before me, and to reach such conclusions as my judgment will approve. If I have succeeded in this, the criticisms of those differing from me in my views will, I trust, have no disturbing influence.

On the 27th of May last, Lewis W. Sifford, the marshal of the United States for the Southern district of Ohio, presented his petition, duly sworn to, for a writ of habeas corpus, alleging, among other things, that Benjamin P. Churchill and nine others, being deputy and assistant marshals, were unlawfully imprisoned in the jail of Clark county, by a process issued by a justice of the peace of said county, for acts done, or omitted to be done by them, as such deputies and assistants, in the proper discharge of their duties under a law, and by the authority of the United States. A writ of habeas corpus was issued, according to the prayer of the petition, directed to John E. Dayton, sheriff of said Clark county, requiring him to have the said Churchill and others, forthwith, before this court, with the cause of their caption and detention. The sheriff has promptly obeyed the writ, and has made a special return, stating the circumstances under which the deputies and assistants were delivered into his custody. The important questions arising in the case are presented on a motion for the discharge of these persons.

The facts necessary to be noticed, preliminary to the consideration of the points presented, are, that on the 23d of May last, separate warrants were issued by Edward R. Newhall, a commissioner of the circuit court of the United States, for the arrest of Hiram Gutridge and three other persons, residents of Champaign county, on charges of having aided and abetted a fugitive slave in his escape, and having resisted and obstructed the officers of the United States in the arrest of such fugitive. The persons named in the warrants were arrested by the deputy marshals and assistants; and when conveying them to Cincinnati, where the warrants were returnable, an attempt was made by the sheriff of Clark county to take said prisoners from the custody of the officers by a habeas corpus issued by the probate judge of Champaign county. The sheriff, in his return to the habeas corpus issued to him from this court, alleges that the writ issued by the probate judge was put into his hands for execution by the sheriff of Champaign county, and that, in company with one Compton as an assistant, he attempted to serve it, by taking possession of the four prisoners in the custody of the deputy marshals and their assistants; and that in this attempt he was violently resisted and assaulted, and failed to execute the writ according to its command. It appears that, on a complaint made before one Huston, a justice of the peace of Clark county, that the deputies and their assistants had unlawfully assaulted and beat the said sher-

iff, they were subsequently seized by a large armed force and taken before the said justice, and by him committed to the jail of Clark county; and while so in custody, a new complaint was made against them for an assault on the sheriff with intent to kill, and for shooting at said Compton with intent to kill, &c., before one Christie, a justice of the peace for said county, on which they were again arrested and committed to jail. It may be noticed here that, after the seizure of the deputy marshals by the armed force, as above stated, and the consequent rescue of the prisoners from their possession, they were taken by the sheriff of Greene county before the probate judge of Champaign, by virtue of the habeas corpus issued by him and were summarily discharged by his order, and have since been at large.

In considering the question before me, I shall not attempt to review the extended and able arguments of the counsel, or notice all the points raised in the discussion. It has been insisted very strenuously that this court cannot order the discharge of the deputy marshals, on the ground that, at the time the writ of habeas corpus was served, the imprisonment alleged as existing when the writ issued had ceased, and they were then in custody on process afterwards issued. I do not propose to consider this point further than to remark that, from the return of the sheriff of Clark county, it would seem at least doubtful whether, at the time of the service of the habeas corpus, the deputies were in custody under the first or the second warrant. There seems to have been a continuous custody under these warrants; and it would be somewhat technical, in such a case as this, to base an order for remanding the deputies on the ground stated. It is also urged—and this is the main point of the argument of the counsel resisting the discharge of the persons in custody—that, as it appears from the return to the habeas corpus, they are in the custody under process issued by a justice of the peace, regular and lawful on its face, this court has no jurisdiction to go behind that process, and inquire for what cause and under what circumstances it issued.

It is admitted that, in reference to the writ of habeas corpus issued by the courts and judges of the United States, under the judiciary act of 1789, the position assumed is undoubtedly correct. The return of the officers showing a detention under process, legal and valid on its face, would be conclusive and preclude the court or judge from further inquiry under that act. But the habeas corpus now in question, was issued under the second section of the act of the 2d of March, 1833, which provides, "that either of the justices of the supreme court, or a judge of any district court, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases of a prisoner or prisoners in jail or confinement, when he or they shall be committed or confined on or by any authority of law for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof—anything in any act of congress to the contrary notwithstanding." The words of this provision are so explicit and intelligible, that there would seem to be no room for doubt as to their meaning. They do confer and were intended to confer, on a federal judge, the power to issue the writ of habeas corpus whenever there is an imprisonment "by any authority of law for any act done or committed under a law of the United States." Now, the point to be inquired into and determined by the judge issuing the habeas corpus is, whether the act for which the party is imprisoned has been done in the discharge of official duty, under the authority contemplated by the provision referred to. But if the return to the writ, showing an imprisonment, under state process, shuts out all further inquiry, the act of congress is a dead letter and its purpose altogether defeated. The occasion of the passage of the act of congress of 1833 has been referred to; and, it is contended in argument, that it must be limited in its operation to a state of things similar to that then existing; and was intended only to guard against nullification, when it appeared in the form of resistance by state authority, to the revenue laws of the United States. It was doubtless such threatened resistance that called the law into being. But, it has been permitted to remain on the statute book, in full force for upward of twenty-five years. This has not been the result of accident or inadvertence. It was obvious to the members of congress, and the statesmen, who have, since the enactment of the law, participated in the affairs of the country, that it was a wise provision and necessary to meet any subsequent case of improper interference by a state with the legislation of congress, in matters pertaining to the national government, and within the range of its exclusive powers.

There is high judicial authority for the exercise of the power in question by a judge of the United States, under the act of 1833 in the case of Ex parte Robinson [Case No. 11,935], known as the Rosetta Case. The facts stated are, that a female slave, traveling in company with her master, in the state of Ohio, was taken by a writ of habeas corpus before a probate judge, at Columbus, and adjudged by him to be free. She was afterwards arrested by the marshal, as a fugitive, upon a warrant issued by a commissioner; and upon a habeas corpus, issued by Judge Parker of the court of common pleas of Hamilton county, the alleged fugitive was discharged from the custody of the marshal. She was again arrested upon another warrant issued by the same commissioner, and, while in custody, and before

the examination by the commissioner, Judge Parker adjudged the marshal guilty of a contempt for re-arresting the female; and he was committed to jail under that judgment. Judge McLean, on the petition of the marshal, issued a writ of habeas corpus, returnable before him; and after full argument on the facts stated, ordered the marshal to be discharged from imprisonment. The learned judge did not hesitate to issue the habeas corpus, under the statute of 1833, and admitted evidence of the facts relating to the imprisonment of the marshal, and discharged him on the ground that he was imprisoned for an act omitted to be done in obedience to law. Although in that case there had been a judgment by a court of record, that the alleged fugitive was entitled to her discharge, this was not held to be conclusive; and the judge asserted the right of going behind the judgment and examining the whole proceeding. The result was, that the imprisonment of the marshal was declared to be illegal, and for an act omitted, pursuant to the law of the United States. In his opinion, the judge says: "A sense of dûty compels me to say that the proceedings of the honorable Judge Parker were not only without authority of law, but against law, and that the proceedings are void, and I am bound to treat them as a nullity." Another case, cited in argument, Ex parte Jenkins [Case No. 7,259], asserts the power of a federal judge to issue the writ of habeas corpus in all cases within the language of the act of 1833, and to discharge, under all circumstances, where the imprisonment is for an act done by authority of the United States. The learned Judge Grier, of the supreme court of the United States, in his opinion in that case, says: "The authority conferred on the judges of the United States, by this act of congress, gives them all the powers which any other court could exercise, or gives them none at all. If under such a writ they may not discharge their officer, when imprisoned by any authority, for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the act was passed. Is the prisoner to be brought before them only that they may acknowledge their utter impotence to protect him?" The case last referred to is very similar, in several of its aspects, to the one before this court. In that case several deputy marshals were resisted in their attempts to arrest a fugitive. A complaint was made before a justice of the peace, charging the deputies with an assault and battery on the fugitive; a warrant was issued by the justice and the deputies were lodged in jail. They applied for a writ of habeas corpus; and although it appeared on the hearing they had been committed on process, legal and right on its face, Judge Grier received evidence that the deputies were imprisoned for an act done in the discharge of their duty, and without hesitancy delivered them from the custody of the jailer. These cases establish beyond doubt, that a federal judge, or court, upon the return of a habeas corpus issued pursuant to the act of 1833, setting up an imprisonment under state process, regular on its face, may receive evidence as to the facts connected with such imprisonment; and, if it appears to have been for an act done or omitted in the performance of official duty, to order the discharge of the party. There is no reason to doubt the correctness of this construction. It does not imply any invasion of the sovereignty of the state, whose process is thus treated. Nor is it based on any assumption or claim that a federal court or judge has any jurisdiction to revise or set aside, the judgments of the courts or magistrates of the state. It is merely the exercise of power to inquire into the cause of imprisonment; and if such cause is within the contemplation of the act, to grant an order for the discharge of the imprisoned party. Neither does it import, as suggested in the argument, that a federal judge or court can protect an officer of the United States from punishment for a crime committed against the laws of the state, under pretence that he was doing his duty. If the jurisdiction, to the extent indicated, does not exist, it is very clear the sovereignty of the United States is liable every day to be contemned and trampled upon. Upon any other view, it is entirely in the power of any one, corrupt enough to make a false oath against an officer of the United States, having charge of offenders against its laws, to procure their release, and most effectually to obstruct and nullify the legislation of the Union for the punishment of crime. It is easy to conceive, how not only the fugitive-slave law, but the laws for the protection of the post-office department, and laws punishing the making of spurious coins of the United States, may be defeated in their salutary operations, if the jurisdiction referred to does not exist.

It is now proper to inquire, whether from the facts before the court, it sufficiently appears the deputy marshals were in the rightful and proper discharge of their duties, when the act charged upon them as a crime against the state of Ohio was committed. I shall endeavor to do this as briefly as possible. In the first place it may be remarked, that these deputies were in the possession of lawful process for the arrest of parties charged with a violation of the laws of the United States. And it may be also noticed, that it was not optional with them whether they would serve the process. They were under the obligation of an oath, not only to support the constitution of the United States, but faithfully and promptly to serve all legal process which should come into their hands for service, and were subject to punishment for not doing so. There is no question, from the evidence, that the warrants referred to, were legally served, and that the prisoners

were legally in the custody of the deputy marshals. Having the prisoners thus in lawful custody, they had an undoubted right to use all the force necessary to retain them in such custody. And in case of an open, undisguised attempt to rescue them by force, they would be justified in killing the assailants, if that were necessary to retain the possession of their prisoner; and such killing clearly would not be a crime against the state of Ohio. But it is insisted that the sheriff of Clark county was in possession of a valid and legal writ of habeas corpus, which he was attempting in good faith to serve, and that he was violently and illegally resisted by the deputy marshals in such attempt. On the other hand, it is urged that the habeas corpus placed in the hands of Sheriff Layton was merely colorable, issued in fraud of the law, and was a part of a conspiracy by which to effect the rescue of the prisoners. This writ has been the subject of much comment by counsel; and authorities have been cited to show that it was a nullity, and that the sheriff was under no obligation to serve it. As a consequence, it is insisted, the deputy marshals were not bound to respect it, and could incur no liability for resisting its execution.

I cannot take the time necessary to discuss or decide all the points made in the argument in reference to this writ. The transcript of the proceedings by the judge of probate of Champaign county, who issued the writ and to whom it was returnable, and by whose order the prisoners were discharged, is before me. The writ was obtained upon the application of one F. W. Greedhough, who, against the truth of the case, took upon himself the responsibility of swearing that the prisoners were detained in custody, by Churchill, without legal authority. It was issued under the Ohio act of 1856, and is directed, not to the person having the prisoners in charge, but to any and all the sheriffs of the state of Ohio, without any showing, "by affidavit or otherwise," that the officer or person having the prisoners in custody will refuse or neglect to obey the writ. This obvious disregard of the provisions of the statute, I suppose, invalidates the writ, and a sheriff would have incurred no liability by a refusal to serve it. But I do not propose to discuss this question, nor to comment on the strange and anomalous provisions of the statute referred to. It will suffice to say that while it provides for a writ, designated as a writ of habeas corpus, the writ has really none of the qualities or characteristics of that great writ of right. Whatever may have been the design of the statute, it seems admirably suited to effect the rescue of any prisoner in the custody of an officer of the United States. All that is needed for this purpose, is an affidavit that such prisoner is illegally detained in custody, and by the aid of this statute it would be practicable upon the oath of an unscrupulous affiant, to effect the discharge of a prisoner in the penitentiary, under sentence of any court of the United States.

But it is further objected to the writ issued by the probate judge, that he had no jurisdiction, and that the writ is therefore a nullity. A great number of cases have been referred to in the argument in support of this position. Without a critical notice of these cases, it may be sufficient to remark, that the doctrine seems now to be settled that a state judge has no jurisdiction to issue a writ of habeas corpus for a prisoner in custody of an officer of the United States, if the fact of such custody is known to him before issuing the writ. And it is well settled that if, upon the return of the writ, it appears the prisoner is in custody under the authority of the United States, the jurisdiction of the state judge is at an end, and all further proceedings by him are void. In Case of Sims, reported in 7 Cush. 285, the supreme court of Massachusetts decided, that in all cases "before a writ of habeas corpus is granted, sufficient probable cause must be shown; but when it appears upon the party's own showing that there is no sufficient ground prima facie for his discharge, the court will not issue the writ;" and again the court say: "It is not granted as a matter of course, and the court will not grant the writ of habeas corpus, when they see that in the result they must remand the party." In the case of Norris v. Newton [Case No. 10,307], Judge McLean says: "I have no hesitation in saying that the judicial officers of a state, under its own laws, in a case where an unlawful imprisonment is shown by one or more affidavits, may issue a writ of habeas corpus, and inquire into the cause of detention." The learned judge, it will be noticed, has reference to an imprisonment under the authority of the United States, and decides, as the condition on which a state judge may issue a writ of habeas corpus, that it shall first be shown, by affidavits or otherwise, that such imprisonment is unlawful. And he holds, that when it is known to the judge that the imprisonment is under a law of the United States, his jurisdiction ceases, and all further proceedings in the case will be coram non judice.

It does not appear from the transcript of the proceedings before the probate judge of Champaign county, that the prisoners were in custody under process of the United States; but it is hardly supposable that the fact was not known to that judge. But as this is not shown in the transcript, it cannot be assumed as a fact. A strong light is, however, cast upon this transaction by the proof before the court, that when the prisoners were brought before the probate judge, and when it was his duty to inquire into and ascertain the precise ground on which they were held in custody by the deputy marshals, he ordered them to be summarily discharged. The reason of this order, as appears from the transcript, was, that no one appeared to show by

what authority the prisoners were arrested and held in custody. The truth was—whether known to the probate judge does not appear—that the deputy marshal named in the proceedings, and who was so solemnly called and defaulted for his non-appearance, was, at the time, a close prisoner in the jail of the adjoining county of Clark!

It is also insisted, in argument, that if the deputies had the lawful custody of these prisoners, and were justified in resisting any attempt to take them by a state officer, that such resistance was excessive, and that, by such excess, they have forfeited the protection intended by the act of 1833, and are amenable to the law of Ohio. As before noticed, the only question with which I am now to deal is, whether the act charged as criminal against the deputies was done in the proper discharge of their official duties. This inquiry necessarily leads to a notice of some of the facts before the court, in connection with the attempted rescue of the prisoners. Many of the statements in the affidavits have no reference to this transaction, and need not be specially noticed. It is the alleged violence of the deputies in resisting the sheriff, that forms the basis of the complaint against them before the justice of the peace of Clark county. If in this they have done no more than their official duty justified them in doing, they are within the protection of the act of congress. In stating my views on this point of the case, I shall not attempt a critical examination of the statements of the witnesses on either side. In some important particulars there are discrepancies and contradictions in the facts set forth in the numerous affidavits which have been read. I shall make no effort to reconcile these; nor is it necessary that I should indicate an opinion as to the credit due to the conflicting statements.

There are some considerations which are conclusive of the question indicated. In his oral evidence, if not in his affidavit, Sheriff Layton admits he was notified when the writ of habeas corpus was placed in his hands, that the persons having the custody of the prisoners were deputy marshals, and held the prisoners under the authority of the United States. It is very clear, upon the authorities before referred to, that, with a knowledge of this fact, even if the writ were valid, the power of the sheriff was at an end, and he was wrong in attempting the service. As an officer sworn to support the constitution of the United States, he was under no obligation to serve it, and would have incurred no liability in refusing to do so. His return of the fact that the prisoners were held by the paramount authority of the United States, would have been a complete justification for not serving the writ. He was fully aware that the writ could not be served without bringing the authorities of the United States and the state of Ohio into direct collision, and that the issue to be settled was purely one of physical power. If unnecessarily, and against the obligations of official duty, he placed himself in a position of peril, he may be supposed to have done so with a full knowledge of what the consequences might be, and a determination to meet them at all hazards. To understand the nature of this conflict, it should be remembered that the deputy marshals, by their official oaths, were under a positive and paramount obligation to retain their prisoners, and to oppose all attempts to rescue them. The prisoners were lawfully in their custody, and they would have been derelict in duty to have parted with that custody, unless compelled to do so by an overpowering physical force. The sheriff had a writ which commanded him to take the prisoners from the custody of these officers of the United States. It was not the usual and well-known writ of habeas corpus, summoning the party having the alleged unlawful custody of the persons named in the writ, to have them before the officer issuing it, with the cause of their detention, but a writ requiring them to be taken, forcibly, if necessary, from those having the prior and lawful custody. This was the only way of serving the writ; and the question whether it could be served, was simply a question of power. So the sheriff understood it; and hence he and his assistants deliberately armed themselves, as a preparation for the conflict which they foresaw was inevitable. In serving the writ, their first object was to do what the writ required—namely, to take the prisoners from the custody of the deputy marshals. Counting, probably on the active co-operation of the prisoners, they made this attempt. It is altogether immaterial whether the sheriff, on coming up with the United States officers, announced his official character, or that he had a writ requiring him to take the prisoners. If such announcement were made—which is doubtful from the weight of the testimony—it was an idle form, which the deputies were not bound to respect, and which can have no influence in the decision of this question. They would have been faithless to their duty if they had quietly surrendered their prisoners upon such a notice.

It is apparent, from facts not in controversy, that the sheriff and his assistant well understood how the writ was to be served. They were apprised that a mere statement that they were officers of the state of Ohio, and had a writ of habeas corpus for the prisoners, would come altogether short of the exigency of the writ. They knew that nothing but the actual capture of the prisoners and their corporeal custody would answer its demands. Hence, the first movement was the seizing, by the assistant of the sheriff, of the bridle of the horse in the foremost carriage. He was resisted in this attempt, and immediately aimed his revolver at the deputy; and, if he did not actually fire, it is beyond all question he made the attempt. Whether he fired, or only made the attempt,

the officer whose life was thus put at hazard, had an undoubted right, in self-defence, to disable his assailant, and was fully justified in firing at him with this view. It may be noticed here, as throwing some light on the intention of the sheriff and his assistant, that the sheriff states as his impression that his assistant, as he drove past the rear carriages, pointed his pistol from the carriage in which he rode; thus giving a very significant indication of what might be expected if the prisoners were not peaceably surrendered. But it is said the sheriff was most wantonly injured in this affray. In his oral testimony he states that, after leaving his buggy, he approached the carriage in which Churchill rode, with pistol in hand, prepared to fire, and intending to fire at Churchill. This fact is clearly proved by many other witnesses in their affidavits; and it is also proved beyond doubt, that it was when the sheriff was thus approaching Churchill, that the latter seized him, with the sole view of disarming him, and thus saving his own or the life of another person. It is greatly to be regretted that the sheriff was so severely injured in this rencounter; but if any fact is established in this case, it is that these injuries resulted from the conflict in the attempt to disarm him. In such a contest, the degree of force which may be used cannot be graduated with absolute precision. If the writ put into the hands of the sheriff had been issued in good faith, and were the well-known writ of habeas corpus, requiring the deputy marshals to produce the bodies of the prisoners, for the purpose of inquiring into the cause of their detention, it would have been the duty of those officers to take the persons before the judge. If not as a matter of legal obligation, the courtesy due to the authorities of another jurisdiction would have required this. In doing this they would have retained the possession of the prisoners, as no state judge, it may be presumed, would have authorized their discharge, when it was made known to him that they were held under valid United States authority. But, as before noticed, the writ under the extraordinary Ohio law of 1856, requiring the officer to whom it is directed to take the prisoners, no matter by whom or by what authority they are detained, is a wholly different thing. This act seems to have been inconsiderately passed, and in its practical execution must lead to frequent conflicts between the national and state authorities. It might, with great propriety, be designated as an act to prevent the execution of laws of the United States within the state of Ohio.

It seems clear that the deputy marshals were right, under the circumstances of this case, in resisting the attempt to rescue the prisoners from their custody. Judge Nelson, one of the justices of the supreme court of the United States, has stated the law on this point with great force and accuracy. While he concedes that there may be cases in which a state judge may be justified in granting a habeas corpus for a prisoner in confinement under United States process, he asserts that, if the process is legal, the officer having the person in charge will not be justified in surrendering that custody under any circumstances. The learned judge says: "In such case—that is, where the prisoner is, in fact, held under process issued by a federal tribunal, under the constitution, or a law of the United States, or a treaty—it is the duty of an officer not to give him up, or to allow him to pass from his hands at any stage of the proceedings. He should stand upon his authority; and, if resisted, maintain it with all the power conferred on him for that purpose." 1 Blatchf. 635. Even in cases where there is concurrent jurisdiction in the general government and a state, it is well settled, both by the adjudications of the federal and state courts, that the tribunal to which the jurisdiction first attaches shall retain it. In the case Ex parte Jenkins, before cited, Judge Grier says: "Where persons or property are liable to seizure and arrest by the process of both, that which first attached should have the preference. Any attempt of either to take from the legal custody of the officers of the other, would be an unjustifiable exercise of its power, and lead to most deplorable consequences." Such is the law where there is an admitted concurrent jurisdiction. With how much greater force does it apply where the right or power exercised is exclusive in the United States?

It cannot be necessary to notice further the legal points arising in the case, or the numerous facts set forth in the affidavits. The conclusions indicated seem to be fully sustained by the law and the facts. There is, however, a general view of the case, that leaves no doubt as to the real character of the transaction involved. It cannot be controverted, that there was a settled purpose, in at least a portion of the community in which these occurrences took place, to prevent, either by direct or indirect means, the execution of a law of the United States. Four persons had been arrested, under legal process, for an alleged violation of one of the provisions of the fugitive-slave law. There is known to exist, in the counties to which reference has been made, a decided feeling of hostility to that act; and the opinion is entertained—it may be honestly by many—that the law has no validity, and is not entitled to respect or obedience. Those entertaining these extreme views, seem to suppose there is not only no wrong, in any attempt to prevent its execution, but that such attempt is in itself meritorious. With such views, it is not strange that men should be prepared for extreme and indefensible measures to render the law inoperative. It does not admit of a doubt that practical nullification was the purpose of those who opposed the officers of the United States in the execution of their duties on the occasion referred to. Great excite-

ment prevailed, and crowds followed the officers in charge of the prisoners. From their excited bearing, there were reasons for the apprehension that an undisguised and forcible attempt at a rescue would be made. It does not change the real character of the views and purposes of these persons that they deemed it most expedient to effect their object by a resort to the forms of law.

Much has been said by counsel on the importance of the questions involved in this case. The danger of invading the sovereignty of the state of Ohio has been exhibited in most eloquent and forcible terms; and the court has been admonished of the fearful results of the exercise of jurisdiction in this case. It is readily conceded that a federal judge or court should tread with cautious steps upon the line dividing the national and state sovereignties. But it should be remembered that sovereignty pertains to the government of the United States as well to that of the states. The general government within its constitutional limits is supreme and its action is paramount to any opposing action on the part of the states. Every right-thinking and right hearted American citizen will feel and admit the obligation resting on him to sustain the just powers of the Union as well as of the state in which he resides. A proper fealty to both is due from and demanded of every citizen; and these obligations are neither repugnant or inconsistent. Upon the just recognition of each depends the existence and perpetuity of our government.

Now, the practical question in this case is, whether a law of the United States can be evaded and set at naught, either by direct and violent opposition, which is rebellion, or by the specious pretences of law. And this question is in no degree affected by the character of the law sought to be nullified. I know well there is a deep seated hostility to the fugitive-slave act of 1850 throughout most of the free states. I am also aware that there is among the people of Ohio an almost unanimous sentiment in opposition to slavery; and that there are few, if any, of her citizens, who desire its introduction into the state. But these considerations do not excuse or justify attempts to defeat the national laws, sanctioned by the constitution of the United States, growing out of the existence of that institution, in other portions of the Union. There may be very strong and well-founded objections to the law referred to, but, while it is a law, it must be respected and obeyed as such. The power called forth in its enactment is one which belongs exclusively to the government of the Union, and with which the states have no right to interfere. It should be remembered, too, that it is an emanation of the will of the nation, expressed through the representatives of the states and the people, according to the forms of the constitution. Its repeal, by the same power that passed it, is the only method by which it can cease to have the force of law. It is unquestionably true. that every citizen has a right to, and may enjoy and express, without stint or hindrance his opinions upon any law or measure of public policy; but it does not follow that he may evade or resist the execution of a law, because he regards it as unjust or inexpedient. If one man is to be tolerated in such evasion or resistance, in regard to one law, others may do the same as to other laws. The result would be, that every man, being a law unto himself, and acting under some vague notion of a higher law, would choose for himself what laws he would obey. This would produce a state of unmitigated anarchy, and effectually undermine the foundations of the social fabric. It is wholly beyond the limits of man's mental power to estimate the deplorable results of the prevalence of such a doctrine. As an unavoidable sequence, the bands of that union, which has been so potent for good to our country, so instrumental in its rapid advance to prosperity and greatness, would be dissolved. In this event, a future would be presented which none could contemplate without the deepest horror. I trust no such calamity is in store for this nation. It is matter of devout thankfulness that the safety of the Union is not placed in the keeping of politicians, or extremists of any school or any section of the country. In the underlying depths of public opinion, whatever may be the agitations on its surface, there is an overmastering power which, if the emergency shall arise, will come forth as a strong man armed in defence of the common bond of national brotherhood and national existence.

The deputy marshals are discharged.

SIGEL (FREEDMAN v.). See Case No. 5,080.

SIGEL, The FRANZ. See Case No. 5,062.

SIGEL, The GENERAL FRANZ. See Case No. 5,311.

SIGER (CHAPIN v.). See Case No. 2,600.

SIGNAIGO (GAFFNEY'S ASSIGNEE v.). See Case No. 5,169.

Case No. 12,849.

SIGSBY v. WILLIS.

[3 Ben. 371;[1] 3 N. B. R. 207 (Quarto, 51); 1 Am. Law T. R. Bankr. 171; 2 Am. Law T. 169.]

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

BANKRUPTCY — EQUITABLE DEBT — PARTNERSHIP TRANSACTIONS—MISAPPROPRIATION OF PARTNERSHIP FUNDS.

1. The "debt provable under the act" [of 1867 (14 Stat. 517)], which a creditor must have as a foundation for a petition in involuntary bankruptcy, may be an equitable demand.

2. If the nature of the debt is set forth in the petition, which avers that the debt is provable under the act, the question whether it is so

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

provable is to be determined as a question of law and not of fact.

3. Where a petition in involuntary bankruptcy averred that the petitioner and the alleged bankrupt had been partners; that the partnership had been dissolved, but no settlement had been made between them, and that the alleged bankrupt was indebted to the petitioner "by reason of such partnership transactions for assets and money of said copartnership," which had come into his hands above his share: *Held*, that the allegation was insufficient, and that the petitioner was not entitled to an adjudication upon the facts stated.

4. A member of a firm which has been dissolved, is not entitled to an adjudication of bankruptcy against his copartner on the ground that he can prove a debt against him in respect to bonds and mortgages given by them jointly, under the 19th section of the bankruptcy act.

5. Nor can he have such an adjudication on the ground of his having a contingent debt against his copartner.

[Cited in Hester v. Baldwin, Case No. 6,438; Re Stansell, Id. 13,293.]

6. But, if one partner fraudulently misappropriates the partnership funds, the other partner may treat the misappropriation as foreign to the copartnership, and prove the claim as a debt, precisely as though no partnership had existed.

[This was a proceeding by William P. Sigsby against Alexander E. Willis.]

M. Hale, for petitioner.

Geo. Gorham, for respondent.

HALL, District Judge. The petition in this case alleges that the petitioner and the alleged bankrupt were partners in business for some time previous to April 3d, 1869, and that on that day their copartnership was dissolved; that no settlement has been made between them, but that the alleged bankrupt is indebted to the petitioner "by reason of such partnership transaction for assets and money of said copartnership which have come into the hands of said Alexander E. Willis over and above his share thereof, and otherwise, in the sum of about seven thousand dollars;"—and this is the alleged indebtedness upon which the petition is based.

On the return of the order to show cause, it was insisted that a debt of the character of that thus set forth would not support a petition in bankruptcy against the debtor; there being no legal debt for which an action could be maintained at law, but only a right to compel an account in a court of equity.

Under the earliest English bankrupt acts, this objection would have been fatal. Under these acts it was held that debts recoverable in a court of equity only, would not support a commission in bankruptcy, even though provable for the purposes of a dividend; and that one partner could not petition against another partner in respect to any indebtedness arising out of the transactions of the copartnership, unless the debt was such that he might maintain an action at law. 1 Christ. Bankr. 2352–2356, notes, and 2 Christ. Bankr. 475; Ex parte Nokes, 2 Mont. Bankr. 148; Ex parte Hylliard, 1 Atk. 147, 2 Ves. Sr. 407; Medlicot's Case, Strange, 899; Ex parte Lee, 1 P. Wms. 783; Murphy's Case, 1 Schoales & L. 44; Jeffs v. Wood, 2 P. Wms. 128; Eden, Bankr. Law, 42, 43; Marson v. Barber, Gow, 17; Henley, Bankr. Law, 42, 43; Sutton's Case, 11 Ves. 163; Broadhurst's Case, 19 Eng. Law & Eq. 466; Windham v. Paterson, 1 Starkie, 145.

The English courts have, however, repeatedly held that an equitable debt might be proved under a commission obtained by another creditor, although such debt would not support a commission (James, Bankr. Law, 87; Ex parte Yonge, 3 Ves. & B. 31; Jeffs v. Wood, 2 P. Wms. 128; Murphy's Case, 1 Schoales & L. 44; 2 Christ. Bankr. 473, 474); and also, that a solvent partner, winding up the partnership concern, was entitled to prove, under the commission against bankrupt partners, the share of the loss which each partner ought to have borne, as a debt against his separate estate (Ex parte Watson, 4 Madd. 477). And the same rule would appear to be established in this country under the bankruptcy act of 1841. Butcher v. Forman, 6 Hill, 583. In the case last mentioned, the English authorities which support the position that solvent partners of the bankrupt, having paid all the joint debts of the firm, are regarded as standing in the light of sureties, or persons liable for him, and therefore entitled to come in and prove in respect to the bankrupt's share of the copartnership debts (Eden, Bankr. Law, 177; Ex parte Yonge, 3 Ves. & B. 31; Aflalo v. Fourdrinier, 6 Bing. 306), were approved, and the discharge was said to be a good bar to an action for contribution, when the debt of the firm was paid by the solvent partner after the bankrupt's discharge.

These decisions of the English courts were made under English statutes which are probably different, in some material respects, from our present bankrupt act, in regard to the persons who may become petitioning creditors. Under our present statute, it is only necessary that the petitioning creditor should have a "debt provable under the act," to the required amount, and the question to be determined is, whether the debt set forth in the creditor's petition is so provable.

It is averred in the petition that the debt of the petitioner is so provable, but the nature of the petitioner's demand being stated in the manner above set forth, the question to be determined is one of law, and not of fact merely; and the court is therefore called upon to determine whether such a debt is provable under our present bankrupt act.

The petition concedes that the indebtedness grew out of the copartnership transactions, and that no settlement has been made between the parties. It does not allege that all the copartnership debts have been paid, or that all the copartnership property has been disposed of; and, as it alleges the indebtedness to be in part for assets of the copartnership, which have come into the hands of the alleged bankrupt,

without alleging that they have been disposed of, there is ground for the inference that such assets are still in the hands of the alleged bankrupt. If so, they are liable to the payment of the copartnership debts; and, by a proceeding in equity for an account, and also for a receiver and an injunction, this property may be secured for the payment of joint creditors, in which case, the alleged bankrupt could not be properly charged therewith; nor, in case he should be adjudged a bankrupt, could such assets, if still the property of the copartnership, be charged to him, as between him and his former partner, so as to become the property of the bankrupt, and thus swell his separate estate, out of which his individual or separate creditors would be paid, to the prejudice of the creditors of the copartnership.

Considering these statements of the petition in the light of the English decisions, and also the omission of such allegation as would make the petitioner's debt provable against the separate estate of the alleged bankrupt, under the rules which govern the administration of copartnership and separate estates, in bankruptcy, I am strongly inclined to think that this allegation of the petition is insufficient, and that the petitioner is not entitled to an adjudication upon the facts alleged in his petition. And, in respect to this allegation of indebtedness, the amended petition, heretofore filed, is, in substance, like the original petition, and gives to the petitioner no stronger case against the alleged debtor.

The petitioner has asked leave to file a supplemental or second amended petition, for the purpose of amplifying and making more particular the statements of the nature of the petitioner's demand against the alleged bankrupt, and this proposed amended petition, which is duly verified, sets out that the petitioner and the alleged bankrupt entered into copartnership about the first day of February, 1867, in the milling and flouring business, and that, at the time of forming such copartnership, the petitioner purchased of said Willis one half of a certain real estate, mill and water privilege, &c., and received a conveyance thereof, and paid said Willis ten thousand dollars therefor; that about the first day of April, 1867, the petitioner and Willis executed and delivered to one Wessel T. B. Van Orden a mortgage upon said real estate to secure the payment of $7,000 and interest, which was due from their said copartnership to said Van Orden, and on which the sum of $7.000 and interest from the 1st day of April, 1869, is still due; that on the 28th of December, 1868, Willis, without the knowledge of the petitioner, executed and delivered to Noble H. Johnson, a mortgage upon said Willis's undivided interest in the premises, for securing the sum of $4,000, being for the individual debt of said Willis; that on or before the 1st day of December, 1868, their said firm became indebted and embarrassed, and effected a compromise with their creditors, by which their creditors agreed to take fifty cents on the dollar of their demands, which said Johnson agreed to pay to such creditors, and that thereupon the petitioner and Willis, to indemnify said Johnson against his said liability, turned over and delivered to him certain accounts and other personal property worth about $5,000, and also, on the 30th of March, 1869, executed and delivered to him their bond and a mortgage upon said real estate, to secure the payment of $3,700; that the said firm now owes no debts, except said seven thousand dollars and interest to said Van Orden, and the said indebtedness to said Johnson, which will not exceed the sum of $6,000; that one-half of said indebtedness of $13,000 belongs to Willis to pay, but that the petitioner is legally liable to pay the whole amount that may become due on the mortgage to Van Orden, and said $3,700 to said Johnson upon the bonds given by him as aforesaid; that by reason of said $7,000 given by Willis to said Johnson, and the insolvency of Willis, the petitioner is in danger of being compelled to pay all that may be due on the said $3,700 mortgage to Johnson, &c.

This supplemental or amended petition further states "that without reference to said liability of your petitioner for said Willis's share of said partnership debts, said Willis is indebted to your petitioner in a sum not less than $7,000; that the said Willis had entire charge of the books of said firm, and kept the same falsely and fraudulently; that your petitioner has discovered since the dissolution of said partnership that said Willis, at various times during said partnership, drew funds from the Coxsackie Bank belonging to the said firm amounting to upwards of $8,000, and from the Catskill Bank, funds belonging to the said firm amounting to $7,546, no part of which sums was charged to said Willis, or appeared at all upon the books of said firm, but which sums were, as your petitioner believes, fraudulently appropriated to his own use by said Willis."

It was insisted upon the argument, that the petitioner was entitled to prove a debt against the alleged bankrupt in respect to the bonds and mortgages given by him and the petitioner jointly, under the provisions of the 19th section of the bankruptcy act, which provides in substance that "any person liable as bail, surety, guarantor, or otherwise for the bankrupt, * * * and who has not paid the whole of said debt, but is still liable for the same or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same, either in the name of the creditor or otherwise, as may be provided by the rules, and subject to such regulations and limitations as may be established by such rules;" but, as no such

rules have been established, and as this provision may not, in any event, be deemed to authorize the party so liable to petition against the debtor (as it ought, probably, to be held to authorize proof by the party so liable only in a case where the real creditor could prove, and as the creditor could not prove in this case, because he has security upon the property of his debtor), I am of the opinion that this provision of the statute does not aid the petitioner.

Nor do I think that the petitioner can sustain his position, on the ground that he has a contingent debt or a contingent liability against Willis. It can hardly be supposed that it was intended that a petition against a debtor should be maintained upon the allegation that upon a certain contingency, which might never happen, the party proceeded against would become a debtor. The provision that authorizes an application to the court to have the present value of the debt or liability ascertained, only authorizes proof for the amount so ascertained; and it is, to say the least, very doubtful whether, in a case like the present, there is any provable debt within the meaning of the statute, until the amount is so ascertained. I should not, therefore, be inclined to maintain the petition on either of these grounds.

The other allegations of the proposed supplemental or second amended petition, remain to be considered. They are not sufficietly full and precise: as it is desirable, if not necessary, that, in such a petition, the precise amounts, and the time of each fraudulent withdrawal and fraudulent misappropriation of copartnership funds, without any entry on the books of the firm, should be specifically alleged, so that a distinct and defined issue can be presented by the respondent's answer; and it should be so drawn, and the original petition be so amended, as not to concede that an indebtedness caused by such fraudulent misappropriation arose out of the copartnership transactions. This proposed amendment will, therefore, be considered as an affidavit in support of a motion for leave to file proper amendments, setting forth particularly, and in due form, the facts stated generally in the petition; and, in that view, the question whether such an amendment would present a debtor or demand on which a petition can be maintained, will be considered.

The fraudulent misappropriation of the copartnership funds, which is charged against Willis, was, of course, wholly unauthorized by the contract of copartnership, and is of the nature of an unrighteous embezzlement of the petitioner's share of such funds; and both common sense and high judicial authority would justify the proof of the amount of the interest of the other parties in such funds, misappropriated by such embezzlement, against the separate estate of the wrongdoer, as having no connection with the general result of all their copartnership business, and as not arising out of their copartnership transactions. Ex parte Yonge, 3 Ves. & B. 31, and cases there cited. The partner thus wronged by such dishonest and fraudulent acts of his copartner, is entitled to treat the misappropriation as entirely foreign to the copartnership business, and to prove the debt precisely as though the copartnership had not existed, for in no just sense can a debt created by such fraudulent misappropriation of copartnership funds be considered as arising out of the partnership transactions. Leave to file proper amendments to his petition is, therefore, given to the petitioner, upon the payment of $25 costs, &c., to the respondent, such payment to be made, and the amended petition to be filed, and a copy to be served on the attorney of the respondent within fifteen days from the entry of the order.

Case No. 12,850.

SILL et al. v. LAWRENCE.

[1 Blatchf. 605.] [1]

Circuit Court, S. D. New York. Oct. Term, 1850.

CUSTOMS DUTIES—FANCY BOXES — MANUFACTURES OF EBONY.

Fancy boxes, made of common wood and veneered with rose-wood or ebony, invoiced as rose-wood boxes and ebony boxes, and known to the trade by those names and also as fancy boxes and furnished boxes, fall within Schedule B of the tariff act of July 30, 1846 (9 Stat. 44), and are subject to a duty of 40 per cent. ad valorem, as "manufactures of ebony, rose-wood, &c.," it not appearing that there are any articles known as ebony boxes or rose-wood boxes made wholly out of those woods.

The plaintiffs [Henry W. Sill and Mason Thomson] brought this action against [Cornelius W. Lawrence] the collector of the port of New York, to recover back an excess of duties.

Elias H. Ely, for plaintiffs.

J. Prescott Hall, Dist. Atty., for defendant.

NELSON, Circuit Justice. This is an action brought to recover excessive duties paid by the plaintiffs upon rose-wood and ebony boxes. They were invoiced and entered at the custom-house as rose-wood and ebony boxes. The foundation is made of common French wood, and they are veneered with rose-wood or ebony, and some of them are inlaid with brass, and filled with articles for the toilet. They are called in the trade by different names, such as fancy boxes, furnished boxes, rose-wood boxes, and ebony boxes. Boxes of this description are rarely, if ever, imported made wholly of rose-wood or ebony; but are only veneered with the article even when called by that name.

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

On the part of the defendant it is claimed, that the article ranges under Schedule B of the tariff act of July 30, 1846 (9 Stat. 44), and is chargeable with a duty of forty per cent. ad valorem, within the description of "manufactures of cedar wood, granadilla, ebony, mahogany, rose-wood, and satin wood." The plaintiffs claim, that it should be classed under Schedule C, and be charged with a duty of only thirty per cent. ad valorem, within the description of "paper boxes and all other fancy boxes."

If it had appeared that articles made wholly or chiefly of ebony or rose-wood were imported and known in commerce by the denomination of ebony or rose-wood boxes, there might be force in the view taken by the plaintiffs, as that fact would lay the foundation for a distinction between such boxes and the articles in question. But there does not appear to be any article of this description made wholly out of these materials and known as ebony or rose-wood boxes; and, unless the article in question is referred to, among others, by the clause quoted from Schedule B, that clause would seem to be without meaning as it respects the particular article.

Besides, it is well understood that most of the articles of furniture which have the name of a particular kind of wood appended to them, take the name of the wood with which they are veneered; and it is quite clear, we think, that they were intended to be classed under Schedule B within the terms "manufactures of cedar wood, granadilla, ebony, rose wood, &c."

We think, therefore, that the clause does not look to an article manufactured wholly out of the materials mentioned; but, that when it is made even chiefly of other kinds of wood for the foundation, and is veneered with these materials, it must be regarded as falling within this clause, and therefore chargeable with a duty of forty per cent. ad valorem.

There must be a judgment for the defendant.

SILLIMAN (BATTEN v.). See Case No. 1,106.

Case No. 12,851.

SILLIMAN v. HUDSON RIVER BRIDGE CO.

COLEMAN v. SAME.

[4 Blatchf. 74.] [1]

Circuit Court, N. D. New York. July 25, 1857.

BRIDGES—OBSTRUCTION TO NAVIGATION—DRAWS—PRELIMINARY INJUNCTION.

1. The purpose and object of the bridge across the Hudson river at Albany, authorized by the act of the legislature of New York, passed April 9, 1856, entitled, "An act authorizing the construction of a bridge across the Hudson river at Albany" (Sess. Laws 1856 c. 146), were not simply the transportation of railroad trains, but, in addition, the accommodation of the public in general, in travel and business, by the use of it as a common highway.

2. On a bill filed, alleging that a bridge constructed according to the directions in that act, for the conveyance over the same of trains of railroad cars, and for the accommodation of the travelling and business public in general, would constitute an obstruction of the free navigation of the river, within the meaning of the constitution and of the acts of congress securing a right to the enjoyment of the same, the question presented, on a motion for a provisional injunction, before the erection of the bridge is actually commenced, is, whether a case is presented which calls upon the court to interfere and arrest the erection of the bridge, until an opportunity is afforded for a more full examination of witnesses, and a more mature consideration of the alleged obstruction.

[Cited in Miller v. New York, Case No. 9,585.]

3. In a case of that kind, the work contemplated ought to be promptly enjoined, if there be any reasonable ground for believing that the bridge may finally be held an obstruction, and hence subject to be abated, as the expense and loss to the defendants may otherwise be heavy and ruinous.

4. In the present case, the legal right of the plaintiff to a free and unobstructed navigation of the Hudson river being clear, and the defence being that the bridge contemplated would not substantially obstruct or impede such right, and the court being in doubt whether the erection of the bridge in the mode provided by the act, in connection with the powers conferred in the use of it, would not be a serious or material obstruction to the free navigation of the river, the court enjoined the proceedings in the erection of the bridge, until the final hearing of the case.

[See Baird v. Shore Line Ry. Co., Case No. 758.]

5. The real question in the case stated to be, whether or not, regarding the probable travel and transportation across the bridge by railroad cars and as a common highway, and also the business depending upon the free navigation of the river, up and down, at the place where the bridge is to be erected, the draw or draws provided for will furnish reasonable means to prevent the navigation from being seriously or materially impaired.

6. Another question involved stated to be, how far the personal duties and obligations imposed by the charter of a bridge upon its grantees, to remove obstructions to navigation occasioned by its erection, should be taken into account in determining the question of its lawfulness.

7. Another question stated to be, how far the business of commerce upon the rivers of the country is to yield to the convenience and accommodation of the conveyance of passengers upon railroads.

8. The navigation between different ports upon a public river within the same state, comes within the power to regulate commerce "among the states."

9. The power conferred by the constitution upon congress, to regulate commerce, is paramount to the power in a state to authorize the building of a bridge across a public river navigable from the sea.

In equity. This was an application for a provisional injunction. The plaintiff in the first suit [Robert D. Silliman] was a citizen of Troy, N. Y., engaged in the navigation of the Hudson river from Troy and Albany to New York, with vessels of which he was part owner, enrolled and licensed, under acts of

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

congress, to carry on the coasting trade. The plaintiff in the second suit [Frederick W. Coleman] was a citizen of Barnstable, Mass., engaged in trade between the port of Barnstable and the ports of Albany and Troy and intermediate places, and between Albany and Troy and Boston and other ports, with a vessel, of which he was master and part owner, enrolled and licensed, under acts of congress, to carry on the coasting trade. The defendants were a corporation created by the state of New York. The bills were sworn to October 2, 1856. This application was made in November, 1856, upon affidavits, before the putting in of the answers to the bills. The injunction prayed for by the bill was to restrain the erection of a bridge across the Hudson river at Albany, on the ground that it would seriously obstruct the free navigation of the river. The defendants claimed the right to erect the bridge under the authority conferred on them by an act of the legislature of New York, passed April 9, 1856 (Sess. Laws 1856, c. 146), entitled: "An act authorizing the construction of a bridge across the Hudson river at Albany." The bill averred that the whole of the capital stock of the defendants had been subscribed, that the site of the bridge had been established, and a certificate of its location filed, under the provisions of the act, and that the defendants were preparing to construct the bridge at such location.

Reverdy Johnson and William A. Beach, for plaintiffs.

Nicholas Hill, Jr., and John H. Reynolds, for defendants.

NELSON, Circuit Justice. The eighth section of the act relied on by the defendants provides for the erection of a bridge, which "shall be constructed at an elevation at least twenty feet above common tide-water, so as to allow under it the free passage of canal boats and barges without masts, and with a draw therein of sufficient width to admit the free passage of the largest vessels navigating the said river, and at least two hundred feet in width, or of two draws of at least one hundred and fifty feet each, which draws shall not be obstructed by piers or otherwise, and in such a manner as to cause no substantial impediment or obstruction to the free navigation of the said river; and the said corporation hereby created shall, at all times during the season of navigation, cause the said draw to be opened, and kept open, except for the passage of railroad trains of cars, and shut whenever the same may be necessary; and boats or vessels wishing to pass such draw, shall, at all times, have a preference over railroad trains of cars or engines, and such draw shall be promptly opened to any such boat or vessel on signal, if given before any railroad train or engine shall have appeared and given signal of their intention to pass." There are other clauses in the act relating to the towing of sailing vessels through the draw, for lights at night on the bridge, and for the removal of sandbars or other obstructions, caused by the erection of the bridge or the piers of the same.

There are some provisions of the charter which would seem to indicate an intent to limit the use of the bridge to the transportation of trains of railroad cars across the river, but, upon a careful perusal of the whole of the act, I am inclined to think that the power conferred upon the defendants is more extensive. The first section, constituting the stockholders a corporation, declares the object to be "erecting and maintaining a bridge for the purposes of railroad travel and transportation across the Hudson river," &c., and the eighth section contains a clause, that the company shall "cause the said draw to be opened, and kept open, except for the passage of railroad trains of cars, and shut whenever the same may be necessary," &c. But the twelfth section provides, that "after the said bridge shall have been completed, such tolls and charges may be collected for crossing the same on foot, and with wagons, cars, or carriages of any kind, and with horses, or other animals, or otherwise, as the directors may from time to time establish," &c., "and any person crossing or attempting to cross said bridge without paying the proper toll, shall be subject to a penalty of ten dollars, in addition to three times the amount of toll such person or persons ought to have paid." This section must be read in connection with the two clauses already referred to, and is significant of the intent and meaning put upon them by the legislature, and very clearly indicates that the purpose and object of the bridge were not simply the transportation of railroad trains, but, in addition, the accommodation of the public in general, in travel and business, by the use of it as a common highway. I shall not stop to reason out this view by collating the various provisions of the charter bearing upon it, but shall content myself by stating it. I think it can be established beyond any reasonable doubt.

The grave question in the case, therefore, is, whether or not a bridge constructed according to the directions in the charter, for the conveyance over the same of trains of railroad cars, and for the accommodation of the travelling and business public in general, will constitute an obstruction to the free navigation of the river, within the meaning of the constitution, and of the acts of congress, which secure to the plaintiff and other citizens a right to the enjoyment of the same. The affirmative is maintained by the plaintiff, and denied by the defendants.

The proofs now before me bearing upon the question, are very voluminous and conflicting, and if I were called upon to determine the case finally upon them, I should feel considerable hesitation and embarrassment.

The question, however, as presented on this motion, is of less weight and urgency, as it is limited to the simple inquiry, whether a case has been presented which calls upon the court to interfere and arrest the erection of the bridge, until an opportunity is afforded for a

more full examination of witnesses, and a more mature consideration of the alleged obstruction.

A preliminary inquiry in this and like cases should especially be made by the party complaining, and the work contemplated be promptly enjoined, if there be any reasonable ground for believing that the bridge may finally be held an obstruction, and hence subject to be abated, as the expense and loss to the defendants may otherwise be heavy and ruinous. A consideration that pressed most strongly upon the court, in passing upon the obstruction in the case of the Wheeling bridge, was the heavy expenditure of the defendants in the erection, and regret was expressed that the judge before whom the application for the injunction was first made, had not enjoined any further proceedings till the great question involved had been finally disposed of. No court can avoid feeling the weight of this consideration, or being considerably influenced by it, in deliberating upon the application for an injunction. A refusal is an encouragement to go on, and may greatly embarrass the determination on the final hearing. The case is very different from the ordinary one, where the only loss or suffering arising from the refusal is that which accrues to the plaintiff. In such cases, if the right is regarded as doubtful, the injunction is usually withheld till the right is established by a trial at law, or on the final hearing. But, in the present and similar cases, not only is the injury to the plaintiff involved, but, also, encouragement to the defendant to go on, leading to heavy expenditures, which the court may feel bound, at the final hearing, to disregard and render useless. These considerations have led the court of chancery in England, especially where the title of the plaintiff is clear but the obstruction is denied, and the case is sent to a court of law for a trial, to accompany the order with an injunction until the hearing after the coming in of the result of the trial at law.

Now, in this case, there is no question as to the title, or, in other words, the legal right of the plaintiff to a free and unobstructed navigation of the Hudson river. This has been secured by the constitution and by the acts of congress under which the right is claimed, and, as I understand it, was not denied on the argument. The defence was placed on the ground, that a bridge constructed as provided for in the charter, would not substantially obstruct or impede this right, but, on the contrary, was consistent with its full enjoyment. It is upon this question that I entertain doubt at the present stage of the proceedings and proofs in the case, and am not prepared to agree with the defendants. I cannot say, as at present advised, that the erection of the bridge in the mode prescribed, in connection with the powers conferred in the use of it, will not be a serious or material obstruction to the free navigation of the river. What the truth may be upon a more full and thorough development of the facts, it is, of course, now impossible to determine. I speak only of the case as now presented. Many of the facts upon which the question of obstruction must ultimately turn have not been sufficiently attended to by either of the parties. Before the final hearing they will doubtless realize their importance, and present them with more method and accuracy to the court.

In my judgment, the real and turning point in the case is, whether or not, regarding the probable travel and transportation across the bridge by railroad cars and as a common highway, and, also, the business depending upon the free navigation of the river, up and down, at the place where the bridge is to be erected, the draw or draws will furnish reasonable means to prevent any substantial obstruction to such navigation—that is, prevent the navigation from being seriously or materially impaired. Now, this is a question of fact, and in looking at it with a view to an intelligent determination, the extent of the travel and transportation across the bridge must be inquired into. Every railroad train of cars, and every vehicle, animal or person crossing in the course of common highway transportation or travel, will necessarily require the draw or draws to be closed. Then the navigation must, in fact, be obstructed. Will the closing of the draws, for the accommodation of this transportation and travel, be compatible or consistent with the fair use of the river, for the purposes of the transportation of freight and persons, by steam vessels and other water craft, at this point, up and down the same? The data for the solution of this question are not sufficiently before me. It is manifest that the crossing at this point in both directions will be great. Whether the conflict may not be reconciled by means of proper draws, so that each privilege or right claimed may be reasonably enjoyed, it is not for me, at present, to say. Indeed, it is impossible to give any satisfactory judgment in the matter, upon the present proofs in the case.

Some idea of the extent of the business, as confined to railroad trains, may be derived from a perusal of the sixteenth section of the charter. It provides, that "any railroad corporation whose road now has, or shall have, a terminus at, or shall run its trains to or from, said city of Albany, or East Albany, or shall run its trains in connection with any road having such terminus, shall be permitted to use said bridge for railroad purposes, upon such terms as the directors of the several companies interested may agree; and, in case they shall not be able to agree, the terms shall be fixed by the canal board." Under this clause, all the railroads running to and from Albany or East Albany, and all roads running in connection with them, are entitled to the ben-

efit of the use of the bridge. This includes all the several lines of road leading to and from these points now in operation, or that may be hereafter constructed; and, in addition to this use, is to be taken into the account, the use for common travel, as a public highway.

As to the business up and down the river carried on by vessels propelled by steam and sails, some idea may be gathered of the extent of the business, and of the number of passages through the draws, from a fact stated by several witnesses, that at least seven-eighths of all the freight upon the Western and Northern canals, arriving at and leaving tide-water, enters and leaves the Hudson river at West Troy; and to this is to be added the business growing out of the coasting trade carried on with the towns above the bridge.

There is another question involved in this case that I desire to have discussed, namely, how far the personal duties and obligations imposed upon the grantees of the charter of a bridge to remove obstructions to navigation occasioned by its erection, should be taken into account in determining the question of its lawfulness. This assumes that the structure would operate as an impediment to navigation, but that the difficulty could be relieved by the agency of the grantees, as the obstructions occurred. For instance, in this charter, it is made the duty of the defendants to keep in readiness steam-tugs to tow sailing vessels through the draw; and it is also provided that they shall not suffer sand-bars to continue, that may be formed by reason of the erection of the bridge or piers, but shall remove the same. Suppose that the draw constructed would not admit of the passage of sailing vessels without the aid of the tug, would this provision of the charter legalize the bridge? Again, suppose it should be admitted that the piers of the bridge would be the means of the formation of bars above and below them, so as to impede navigation, would the duty enjoined upon the defendants in the charter to remove the obstructions, answer the legal objection to the bridge? This question, so far as I know, is new, and, as a general principle, is of very great importance, and may have a considerable bearing upon this case, on the final hearing. The opening and closing of the draw must depend more or less upon human agency. This must necessarily be so, as long as it is admitted that a proper draw may relieve the bridge from obstructing the navigation. The question is, how much farther may such agency be relied on, in cases where the bridge, from its construction, constitutes an obstruction even with the proper management of the draw?

Another question, also, may be involved in the final determination, requiring the most deliberate consideration; and that is, how far the business of commerce upon the rivers of the country—the great natural highways for the convenience of trade and intercourse—is to yield to the convenience and accommodation of the conveyance of passengers, the chief and primary business and use of railroads. It is undoubtedly true, that railroads furnish very considerable facilities for the transportation of goods as well as of passengers, and deserve the fostering care and encouragement of the government and the country; but it will, probably, not now be denied, after the experience that has been had in the practical use of them, that, in the transportation of goods, especially heavy freight, they cannot compete with the great natural thoroughfares subjected to such use by steam vessels and other water craft. Great care, therefore, should be taken that the facilities thus furnished by a beneficent Providence for the convenience of the business and commerce of the country, should not be so encumbered and obstructed by the erection of artificial means of crossing, as to render them virtually useless for the purposes of navigation. And it is especially important that some general principles should be arrived at in this case, whereby, while the fair and reasonable navigation of the river is secured to the public, every facility consistent with the same may be extended to railroads in their passage across the stream. The principles proper to be applied to this case, will be, generally speaking, applicable to every other instance of bridging this river, and it is apparent that they must so regulate and control the erection of bridges, as that, however multiplied they may be, as the exigencies and business necessities of the country may demand, the reasonably unobstructed navigation of the river may still be maintained. No one can desire to see this great natural thoroughfare seriously obstructed, or its business and commerce materially crippled. The guarantees of the constitution and of the acts of congress, but harmonize in this respect with what must be the feelings and wishes of the whole business community.

A question once presented in this state, in the court of chancery, and in the court for the correction of errors, and decided, namely, whether or not the navigation between different ports upon a public river within the same state comes within the power to regulate commerce "among the states," need not be considered, as no such question has been made by the defendants. The affirmative has been maintained by the highest authority in this state. Steamboat Co. v. Livingston, 3 Cow. 713; People v. Rensselaer & S. R. Co., 15 Wend. 113.

Nor need I examine the question, whether or not the power in the state to authorize the building of a bridge across a public river navigable from the sea is not subordinate to that conferred by the constitution upon congress, to regulate commerce, as no such question has been made in the case. That

the power in congress is paramount was conceded on the argument, as it was, also, in the fullest and broadest terms, by the distinguished judge (Chief Justice Savage), who delivered the opinions of the court in the two cases already referred to.

Upon the whole, on the grounds and for the reasons assigned, I have arrived at the conclusion, that it is due to the rights and interests of the parties, as well as to the questions involved, to enjoin the proceedings in the erection of the bridge until the final hearing of the case.

I would further suggest, that although neither of the parties has furnished me with a copy of an amendment to this charter, made by the legislature since the argument, and pending the consideration of the motion, it has come under my notice; and that, if the charter is to be regarded as a public act, I shall feel bound to consider it at the final hearing. This amendment reduces the width of the draw, if but one, from two hundred feet to one hundred and eighty feet, and if two draws, from one hundred and fifty feet to one hundred and ten feet each. It is true that certain officers named may, in their discretion, direct these draws to be enlarged, but this qualification presents a contingency I cannot notice or attribute any weight to, in passing upon the question involved. It will be for the parties to consider, whether it will not be for the convenience of all concerned that, in the preparation for the final hearing, the amendment of the charter shall be taken as modifying the original act, so as to embrace the whole case in one hearing. Much of the evidence now before me relates to a bridge with the draws as originally prescribed, and, of course, would be entitled to diminished weight when used to uphold the draws as altered in the amendment.

Let an injunction issue according to the prayer of the bill.

[NOTE. This cause was again before the court on final hearing on pleadings and proof. The judges being opposed in opinion (Case No. 12,852), a division of opinion was certified to the supreme court, where the judges of that court were also equally divided. 1 Black (66 U. S.) 582. This court then made decrees dismissing the bills. Case No. 2,983. From those decrees the plaintiffs appealed to the supreme court where the decrees of this court were affirmed. 2 Wall. (69 U. S.) 403.]

Case No. 12,852.

SILLIMAN v. HUDSON RIVER BRIDGE CO.

COLEMAN v. SAME.

[4 Blatchf. 395.] [1]

Circuit Court, N. D. New York. Oct., 1859.

BRIDGES — OBSTRUCTIONS TO NAVIGATION — COMMERCE AMONG THE STATES—CONFLICTING INTERESTS—STATE LEGISLATION—INJUNCTION.

1. The granting of injunctions by the courts of the United States, considered. Per Hall, J.

2. Injunctions, in cases of public nuisance or purpresture, are only to be granted in order to prevent irreparable mischief, or to prevent or suppress continual, oppressive, or vexatious litigation. Per Hall, J.

3. The right of the plaintiff, and the serious character of the injury, ought to be clearly established by a trial at law, or otherwise, before a court of the United States should grant an injunction to restrain the construction of a bridge authorized by an act of the legislature of the state in which it is proposed to be erected. Per Hall, J.

4. The question, whether the bridge proposed to be constructed in this case, one over the Hudson river at Albany, would materially obstruct navigation, discussed. Per Hall, J.

5. In the present case, the extent of the threatened injury, and of the public benefit to be secured by the erection of a bridge, may be proper subjects of inquiry, and a remedy by injunction should not be afforded unless the impending injury is irreparable, and the right of the plaintiff free from serious doubt. Per Hall, J.

[Cited in Blanchard v. Western Union Tel. Co., 60 N. Y. 514.]

6. The mere grant of power by the constitution to congress, to regulate commerce among the several states, is not, per se, and without any exercise of the power by congress, an absolute inhibition of all state legislation which may interfere with or affect the inter-state commerce of the United States. Per Hall, J.

7. The states retain the power to legislate in regard to turnpike roads, railroads, bridges, ferries, and the public health, and generally in regard to the internal commerce and police of the state. Per Hall, J.

8. The construction of the bridge in this case, it being authorized by an act of the legislature of New York, cannot be restrained by this court, by injunction, unless the provisions of the act are repugnant to the constitution or laws of the United States, or, unless the bridge, if erected, would practically conflict with and abridge the rights to which the plaintiff is entitled under the laws of the United States. Per Hall, J.

[Cited in Miller v. New York, Case No. 9,585; Ormerod v. New York, W. S. & B. R. Co., 13 Fed. 372.]

9. The extent of the plaintiff's rights, as the holder of a coasting license, granted under the act of February 18th, 1793 (1 Stat. 306, § 4), discussed. Per Hall, J.

10. The cases of Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1, Wilson v. Blackbird Creek Marsh Co., 2 Pet. [27 U. S.] 245, and Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. [54 U. S.] 518, and 18 How. [59 U. S.] 421, considered. Per Hall, J.

11. The power of deciding between the conflicting interests of river navigation and of transportation across navigable rivers by permanent structures, is a legislative and not a judicial power. Per Hall, J.

12. The legislature of a state may, in the absence of any restraint by congressional legislation, authorize the erection of a bridge over its navigable waters. Per Hall, J.

13. Congress can prohibit the erection of the bridge in this case, or prescribe what facilities it shall afford for the navigation of the river; but, in the absence of congressional legislation, the law of the state must govern, and, unless the legislation of the state conflicts with that of congress, or with the constitution of the United States, this court has no authority to annul the legislation of the state by the restraining process of injunction. Per Hall, J. See the opinion of

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

Nelson, J., in Silliman v. Hudson River Bridge Co. [Case No. 12,851].

[Cited in Miller v. New York, Case No. 9,-585.]

[These were bills in equity by Robert D. Silliman and Frederick W. Coleman against the Hudson River Bridge Company.]

These are the same cases reported [in Case No. 12,851], in which a provisional injunction was there granted. They came up in September, 1858, on final hearing, on pleadings and proofs.

Reverdy Johnson and William A. Beach, for plaintiffs.

William H. Seward, Nicholas Hill, John H. Reynolds, and John V. L. Pruyn, for defendants.

[Before NELSON and HALL, District Judges.]

NELSON, District Judge, delivered no written opinion, but was in favor of a decree for the plaintiffs, on the grounds set forth in his opinion, Silliman v. Hudson River Bridge Co. [Case No. 12,851], on granting the motion for a provisional injunction.

HALL, District Judge. The plaintiff Silliman is a resident of the city of Troy, and a citizen of the United States. He prosecutes his suit as part owner of seven barges, which, at the time of the filing of his bill, were, and, for several years prior thereto, had been, duly enrolled and licensed for the coasting trade, under the acts of congress in such case made and provided, and which were then actually employed in the navigation of the Hudson river and other navigable waters of the United States.

The plaintiff Coleman is a resident of the state of Massachusetts, and a citizen of the United States. He prosecutes his suit as part owner and master of the schooner Vintage, a vessel enrolled and licensed for the coasting trade, under the laws of the United States, and which, prior to the commencement of his suit, had been regularly employed in carrying on the coasting trade between Barnstable in Massachusetts, and the ports of Albany and Troy, and between the last-mentioned ports and other ports and places in various states of the Union.

The defendants having indicated their purpose to construct a bridge over the navigable waters of the Hudson river, at Albany, in pursuance of their act of incorporation, these bills were filed by the respective plaintiffs therein; and they severally pray that the act of the legislature of New York, authorizing the construction of a bridge across the Hudson river, may be decreed to be unconstitutional and void; that the defendants may be restrained from erecting the proposed bridge, and from erecting any bridge over the tide waters of the river, or below the city of Troy, by which any permanent structure shall be placed in the river or over the same, unless elevated above the ordinary height, at all stages of the water, of all masts and chimneys of the various craft navigating the river; and that the plaintiffs may be protected in the enjoyment of the free navigation of the river, and may have such other and further relief as may seem meet and agreeable to equity.

The plaintiffs severally rely upon their coasting licenses, as the foundation of their alleged rights, and they consequently claim that such rights are secured to them by and under a law of the United States. They assume that the rights secured to them by such licenses are about to be violated by the defendants, and they, therefore, ask this court to interpose by injunction, to prevent the injury which, it is insisted, this threatened violation will produce.

It is not denied, that, in a proper case, this court may interfere, by injunction, for the protection of rights secured to our citizens by the constitution and laws of the United States. The courts of the United States are expressly authorized by an act of congress to issue this writ. It must, however, be issued or refused in accordance with the legislation of congress and the settled rules of practice of courts of equity in such cases. By the law of the United States, (Act Sept. 24, 1789, § 16; 1 Stat. 82,) it is provided, "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law;" and, by the settled practice of courts of equity, injunctions in cases of public nuisance or purpresture, are only to be granted in order to prevent irreparable mischief, or to prevent or suppress continual, oppressive or vexatious litigation. The right of the plaintiff and the serious character of the injury, ought to be clearly established by a trial at law, or otherwise, before a court of the United States should grant an injunction to restrain the construction of a bridge authorized by an act of the legislature of the state in which it is proposed to be erected. The English court of chancery does not ordinarily issue a permanent injunction to restrain acts alleged to amount to a nuisance, until a court of law has decided that they constitute a nuisance. White v. Cohen, 19 Eng. Law & Eq. 146, 149; Earl of Ripon v. Hobart, 1 Coop. t. Eld. 333; Id., 3 Mylne & K. 169. And this is substantially the rule in our own courts. Mohawk Bridge Co. v. Utica & S. R. Co., 6 Paige, 554; 2 Story, Eq. Jur. §§ 924, 924a; Hart v. Mayor of Albany, 3 Paige, 213.

The act of congress, above referred to, which provides that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy can be had at law, and the further provision (Act March 2, 1793, § 5; 1 Stat. 334, 335) that writs of injunction shall not be granted in any case without reasonable previous notice to the adverse party or his attorney of the time and place of moving for the same, sufficiently indicate the spirit and policy of the legislation

of congress on the subject of suits in equity and of injunctions. To encourage either, in preference to the ordinary common law remedies, has not been the policy or purpose of the national legislature, and, therefore, ought not to be the policy or purpose of the courts of the United States.

There may be cases in which, on the right of the plaintiff being established to the satisfaction of a court of equity, no previous trial at law should be required. But I confess that I am not entirely satisfied that this would be a proper case for an injunction, even if it were clearly established that the plaintiffs might, in an action at law, recover any damages sustained by them in consequence of injury or detention caused by the bridge authorized by the defendants' act of incorporation. I shall state some of the considerations which have influenced my judgment upon this branch of the case, before proceeding to consider the question of the plaintiffs' alleged right under the constitution and laws of the United States; on which, as the main and most important question in these cases, rather than upon any minor question, I prefer to rest my decision.

It is not asserted that the defendants, in the construction of the proposed bridge, are about to exceed or violate the provisions of their charter. Whether such a bridge as their charter assumes to authorize, would materially obstruct the navigation, was deemed an important question, and was argued at great length and with great zeal and ability. The question is not free from difficulty, and the evidence bearing upon it is exceedingly conflicting and contradictory. The defendants' act of incorporation requires the bridge thereby authorized to be constructed at an elevation of at least twenty feet above common tide water, so as to allow under it the free passage of canal boats and barges without masts, with draws, or a draw, of sufficient width to admit the free passage of the largest vessels navigating the Hudson, and in such manner as to cause no substantial impediment or obstruction to the free navigation of the river. The defendants are also required to keep in readiness one or more steam boats or steam tugs, suitable for towing vessels through the draw; to tow all sail vessels through said draw, whenever required so to do by the officers of such sail vessels, on their regular passage up and down the river, without charge; to afford all such other facilities as may, in the judgment of the canal board, be requisite in passing through the said draw without hindrance or delay; and to remove bars and obstructions which may be formed in the river by reason of the bridge or the piers thereof. And these, with the other provisions made for the freedom and security of the navigation, it must be presumed are all that the legislature deemed necessary for that purpose. It is clear, from the provision of the charter allowing treble damages to any party aggrieved by any unnecessary delay or refusal to open the draw, and other provisions of the charter to which it is not necessary to refer in detail, that the legislature supposed it to be necessary, or at least expedient, to provide a remedy to parties who should be injured by the defendants' neglect, or by their non-compliance with the terms of the act; and, upon these provisions, it has been argued, with much earnestness and force, that the act of incorporation, notwithstanding the provision that the bridge shall be so constructed as to cause no substantial impediment or obstruction to the free navigation of the river, bears upon its face a substantial admission that cases may occur in which vessels will be impeded, obstructed, or injured by reason of the erection of the bridge, or the negligence of the officers or agents of the defendants. Upon the question of the extent to which the bridge would obstruct navigation, many witnesses have been examined by the respective parties; on the one side, for the purpose of showing that the bridge proposed to be erected will be, and, on the other side, for the purpose of showing that it will not be, "a material obstruction to navigation." The meaning of these words, when used by counsel and judges in the discussion of cases of this character, or by witnesses in their testimony, is not capable of any precise and definite determination. Different witnesses attach different meanings to them, and, if it be, held that the obstruction complained of must be a material obstruction to navigation, in order to justify the interposition of this court, it will be nearly impossible to fix any definite and satisfactory meaning to these terms. Nor is it yet authoritatively and conclusively settled, that the rights of the parties, in cases of this kind, do not depend upon the magnitude and comparative importance of the conflicting interests involved in each particular case—upon the importance of the navigation of the river as compared with the importance of the trade and travel to be accommodated by the bridge. In a suit at law brought to recover damages occasioned by an unlawful obstruction to the exercise of conceded rights of navigation conferred by a coasting license, it would probably be sufficient to show that the obstruction and damage were appreciable, however slight. This would entitle the plaintiff to recover his actual damages, as his strict legal right. But, on an application for an injunction, which is ordinarily addressed to the sound judicial discretion of the court, I incline to the opinion, that, in a case like this, the extent of the threatened injury, and of the public benefit to be secured by the erection of a bridge, may be proper subjects of inquiry, and that this extraordinary remedy by injunction should not be afforded unless the impending injury may well be denominated irreparable, and the right of the claimant properly regarded as free from serious doubt.

The evidence in this case justifies the conclusion, that the proposed bridge, if built, will

sometimes, and perhaps not very unfrequently, produce slight delays, and, possibly, at times, no inconsiderable injury to boats and vessels navigating the river across the line of the bridge. But the act of incorporation which authorizes the construction of the bridge, contains such provisions as the legislature thought necessary and expedient in order to protect the interests of commerce, and to prevent any material obstruction to navigation, as well as to secure full and perfect remedies to all persons who should be injured by the wrongful acts of the defendants. It is, therefore, not certain that any injury will ever accrue to these plaintiffs, even if the defendants shall erect and maintain the bridge provided for in their act of incorporation; and there is nothing in the bills of complaint to show that the plaintiffs, in case the bridge should be built and they should continue, under renewed licenses, to employ their vessels in the coasting trade, and should suffer injury, detention and damage in consequence of the erection of the bridge, would not have a full and adequate remedy at law.

A particular vessel like the Vintage might pass the bridge for years, without detention, delay or injury; although it might possibly be delayed and injured upon the first attempt to pass. All is uncertain, yet the probabilities of loss may possibly be sufficient to authorize the injunction, if the plaintiffs' right is clear, as the granting of the injunction, if the bridge cannot lawfully be erected and maintained, must be an advantage rather than an injury to the defendants. I confess, however, that I entertain serious doubts upon the question of issuing the injunction, independent of the constitutional questions which were raised upon the argument. But important constitutional questions have been pressed upon our attention, questions which will ultimately demand the serious consideration of the court of dernier resort, whatever may be the final determination of this court.

I shall not attempt the discussion of the question whether the constitutional provision that congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," is, per se, and without any exercise of the power by congress, an absolute inhibition of all state legislation which may interfere with or affect the foreign and inter-state commerce of the United States. I deem the discussion of that question unnecessary, because I consider it settled, by paramount authority, that the mere grant of power cannot have this effect; and because congress, by the passage of the act under which the plaintiffs have received licenses, and other laws, has actually exercised the power to regulate commerce with foreign nations and among the states. I deem it abundantly established, by numerous decisions of the supreme court of the United States, that the states have an undoubted right to pass many laws, which may have, incidentally, not only a remote, but an immediate and very considerable influence upon commerce among the states. In the leading case of Gibbons v. Ogden [9 Wheat. (22 U. S.) 1], it was very clearly intimated by Mr. Chief Justice Marshall, in delivering the opinion of the court, that such laws formed "a portion of that immense mass of legislation which embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws, of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, &c., are component parts of this mass."

The power to regulate commerce is not the source from which the right of a state to pass such laws is derived. Even if it should be conceded that the mere constitutional grant of power to congress "to regulate commerce," &c., necessarily, and at once, without the exercise of the power by that body, destroyed and annihilated all regulations of commerce previously existing under state authority, and forever inhibited the states from the making of any future regulations which affect only the instruments and operations of commerce, and could flow from no other source of power than that to regulate commerce with foreign nations and among the states, it is entirely clear that the states still retain the power to legislate in regard to turnpike roads, railroads, bridges, ferries, and the public health, and generally in regard to the internal commerce and police of the state; and that all laws made in the fair and legitimate exercise of this power, are beyond the control or power of the courts of the United States, unless they are repugnant to, or practically conflict with, some provision of the constitution of the United States, or of some law of congress passed in the exercise of the powers granted by the constitution of the Union. It is conceded, that, when there is such repugnancy or conflict, the laws of the United States, being of paramount authority, must necessarily prevail over the legislation of the states.

I shall, therefore, assume, that the legislature of New York has full power to pass an act authorizing the construction of a bride over the Hudson at Albany, and that no objection to the construction of such a bridge as the legislature of the state has authorized, can be urged, in this court, as the basis of an injunction to restrain such construction, unless the provisions of the act authorizing such construction are repugnant to the constitution or laws of the United States; or unless the bridge, if erected, would practically conflict with and abridge the rights to which the plaintiffs are entitled under the laws of the United States.

It will hardly be urged, that there is anything in the defendants' act of incorporation

to render it unconstitutional or otherwise objectionable, if the bridge authorized to be erected will in no manner obstruct the navigation of the river, and will not practically interfere with the rights of commerce and navigation acquired under the constitution and laws of the United States. This is substantially conceded by the plaintiffs, who allege that the bridge, when built, will be a material obstruction to navigation, and that any such obstruction is a violation of their rights under the laws of the United States.

The plaintiffs' rights under those laws, rest solely upon their coasting licenses. The precise terms of these licenses are prescribed by the act of congress which authorizes their issue, and the language of the license, so far as it relates to the character and scope of the privileges thereby granted, is very brief. It is by this language, and the general provisions of the act which authorizes the issue of these licenses, that we must determine the character and extent of the rights thereby conferred.

The granting words in the license are: "License is hereby granted for the said" (inserting here the description of the vessel) "called the" (inserting here the vessel's name) "to be employed in carrying on the coasting trade, for one year from the date hereof, and no longer." The privileges conferred by this license have not been otherwise defined or limited by act of congress, nor has their precise character or extent been determined by any judicial decision which has fallen under my observation. The privilege expressly given, is simply to be employed in the coasting trade. It was held, in Gibbons v. Ogden [supra] that the license gave to the licensed vessel a right to carry on the coasting trade from one state to the interior of another; and that a law of New York which assumed to make it unlawful for a vessel having such license to carry on the coasting trade between that state and New Jersey, without license, from Livingston and Fulton, under the laws of New York, if such vessel were propelled in whole or in part by steam, was repugnant to the provisions of the laws of the United States authorizing such coasting license, and, consequently, as it respected such licensed vessel engaged in inter-state commerce, unconstitutional and void. In that case, the respondents claimed under a law which assumed to give to certain parties and their grantees, the sole and exclusive right to navigate the waters of New York, in vessels propelled by steam—in other words to confer a monopoly of steam navigation; and it was very properly held that such law must yield to the paramount law of congress, with which it was in direct and practical conflict. In Gibbons v. Ogden there was no physical impediment interposed to the practical exercise of the right of trade and navigation conferred by the license issued under the authority of the United States, but the state had said, in direct terms, by its act of legislation, that the vessel of the appellant, which had the right to carry on the coasting trade from state to state, under its license issued in pursuance of the act of congress, should not navigate the waters of New York by steam power, without the additional license required by the state law. The state of New York had thus assumed to make a regulation of commerce—a regulation which affected only the instruments and operations of commerce—inconsistent with those made by the United States. In effect, the law of the United States declared that the vessel licensed might engage in and carry on the coasting trade between New York and New Jersey, and the law of the state declared that she should not; and, of course, the law of the state was held to be void, when thus directly and practically opposed to the law of the United States. The case of Gibbons v. Ogden, did not, however, decide, that the legislature of a state could not authorize a ferry or drawbridge over a navigable river within its own territory and jurisdiction. On the contrary, the language of Mr. Chief Justice Marshall, in delivering the opinion of the court, as already referred to, very clearly indicates that the states still have that power. And, I apprehend, no case in the supreme court of the United States can be found, sanctioning the claim of the plaintiffs in this suit.

But waiving, for the present, any examination of authorities, let us look for one moment to the act of congress which defines the character of the vessels which may become entitled to a coasting license. By reference to its provisions it will appear, that all vessels of twenty tons burthen and upwards, owned, &c., may be enrolled and licensed for the coasting trade, and that vessels of five tons and upwards and under twenty tons burthen, may be licensed for that trade without being enrolled. Act Feb. 18, 1793; 1 Stat. 305. The form of the license is substantially the same in each case, and there is nothing in the language or the policy of the act, to justify the conclusion that the vessel of six tons does not obtain the same privileges, in respect to trade and navigation, as one of a thousand tons. The act applies with as much force to waters where only the smaller craft can navigate, as to the deeper and broader and more important watercourses navigated by the other; and, if the states can close, or authorize physical obstructions or impediments to, the free navigation of the one, may they not, with equal right, do the same in respect to the other? If it be otherwise, who is to determine, in the absence of congressional legislation, how large the vessel must be, to bring it within the protection of its license, and to give it the power to override state legislation. In my judgment, there can be no difference, in this respect, in the privileges conferred by these licenses, whether

the vessels be large or small; nor do I find anything in the license, or in the act which authorizes its issue, to justify the conclusion, that congress, by the act referred to, intended to take away the right of the states to bridge their own rivers, whenever they thought proper to do so, in the exercise of their acknowledged powers of internal or domestic legislation. The very small size of the smallest vessels authorized to be licensed, the great number of vessels entitled to such licenses, and the great number and incalculable extent of the streams navigable by such craft, which would be withdrawn from state legislation by such a construction of the act, appear to me to furnish satisfactory evidence, that congress did not intend, by that act, (in which there is certainly no direct expression of such intention,) to give to the licenses issued in pursuance thereof, any such sweepingly destructive effect, or to endow them with the capacity to produce, by their legitimate use, any such momentous consequences. Very many of our large cities are built, like Chicago and Cleveland, upon both sides of streams navigated by numerous vessels of larger or smaller dimensions. Bridges across these streams are of the first importance, not to say necessity, to the convenience and prosperity of the inhabitants of such cities, and even to the prosperity of the commerce between the states, and such bridges obstruct the navigation of the river across which they are thrown, much less than it would be obstructed by the ferries necessary to supply their place. If these streams cannot be even momentarily obstructed by a drawbridge, if every vessel having a coasting license has a right to run against and destroy such bridge, and if every owner of a vessel of six or more tons burthen, having such coasting license, has a right to come into the courts of the United States, and obtain an injunction to prevent the construction or use of such a bridge, or to obtain a decree that it shall be abated as a nuisance, those licenses will have a potency for evil, of which, for more than half a century after the passage of the act authorizing their issue, no one had the least suspicion; and consequences of vast moment, never contemplated by congress at the time of its passage, would flow from the act authorizing the issuing of such licenses.

But the case is not without authority on this point. The case of Wilson v. Black Bird Creek Marsh Co., 2 Pet. [27 U. S.] 245, which was decided in 1829, after the decision in Gibbons v. Ogden, is, I think, quite decisive of this question. The legislature of Delaware had authorized the construction of a dam across a navigable creek passing through a deep level marsh, adjoining the Delaware river, up which creek the tide flowed some distance; and the defendants, being the owners of a sloop of more than 95 tons burthen, regularly enrolled and licensed for the coasting trade according to the laws of the United States, broke and injured the dam erected under state authority, and were then sued for trespass and damage. Mr. Chief Justice Marshall, as in Gibbons v. Ogden, delivered the opinion of the court. He declared, that the dam authorized by the act of the legislature of Delaware stopped a navigable creek, and must be supposed to abridge the rights of those who had been accustomed to use it; but that such abridgment, unless it was in conflict with the constitution or a law of the United States, was an affair between the government of Delaware and its citizens, of which the supreme court of the United States would take no cognizance. He also declared, that congress had passed no act, in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows; that the power to regulate commerce had not been so exercised as to affect the question; and that the act authorizing the dam before referred to was not repugnant to the power to regulate commerce in its dormant state, or in conflict with any law passed on the subject. See U. S. v. New Bedford Bridge [Case No. 15,867]; Withers v. Buckley, 20 How. [61 U. S.] 84; Smith v. Maryland, 18 How. [59 U. S.] 71; Cooley v. Board of Port Wardens, 12 How. [53 U. S.] 299; and Passaic Bridge Cases, 3 Wall. [70 U. S.] 782, before Mr. Justice Grier.

The case of Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. [54 U. S.] 518, and 18 How. [59 U. S.] 421, remains to be considered. It was, probably, in consequence of the supposed ruling in that case, as explained and acted upon by Mr. Justice Grier in Devoe v. Penrose Ferry Bridge Co. [Case No. 3,845], that the counsel for the defendants, on the argument of the motion for a preliminary injunction in this case, made "no question as to the title, or, in other words, the legal right of the plaintiffs to a free and unobstructed navigation of the Hudson river," which, as was then understood by the presiding judge of this court, before whom such motion was made, "was not denied on the argument." See Mr. Justice Nelson's opinion, Silliman v. Hudson River Bridge Co. [Id. 12,851]. No such concession of the plaintiffs' right was made upon the final hearing; and, since the argument on the motion for the preliminary injunction, Mr. Justice Grier, in the Passaic Bridge Cases, has deliberately repudiated the interpretation of the Wheeling Bridge Case, on which he acted in Devoe v. Penrose Ferry Bridge Co. [supra].

The right claimed by the plaintiffs being denied, and the defendants' counsel having insisted that the Wheeling Bridge Case has no application to the case here presented, we have been called upon to examine that case, and to determine whether the decision made in it must control the case now before us. Although the chief justice and Mr. Jus-

tice Daniel dissented from the opinion of the court in the Wheeling Bridge Case, I have no inclination to resist it, because the decision was pronounced by a divided court. If I could satisfy myself that it was decisive of this case, I should unhesitatingly and cheerfully follow that decision. It would then be enough for me to say, "Ita lex scripta est," and to assent to a decree for the plaintiffs. I cannot now do so, for, after a careful and deliberate examination of the Wheeling Bridge Case, I am unable to perceive that it is necessarily decisive of the questions involved in the present controversy.

In that case, the plaintiff claimed no right under a coasting license, and, of course, the effect of such a license and of the law of the United States under which such licenses are granted, was not then a subject for judicial determination. The obstruction complained of, was a bridge across the Ohio at Wheeling, which, (though afterwards assented to and declared to be of lawful height and in conformity with the intent and meaning of its charter,) was not, when erected, of the character and height required by the act incorporating the bridge company, and was, therefore, at that time, unauthorized by congressional or state legislation. It was, however, subsequently sanctioned by the legislature of Virginia, and the power of the state legislature to authorize the bridge was, therefore, considered by the court. Mr. Justice McLean, in delivering the opinion of a majority of the court, (13 How. [54 U. S.] 557,) enters upon the discussion of the plaintiff's right to the free and unobstructed navigation of the Ohio river, by stating (page 561) that, "on the 18th of December, 1789, an act was passed by Virginia, consenting to the erection of the state of Kentucky out of its territory, on certain conditions, among which are the following: 'that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory that shall remain within the limits of this commonwealth, lies thereon, shall be free and common to the citizens of the United States.' Rev. Code Va. 1819, p. 19. To this act the assent of congress was given. 1 Stat. 189." Afterwards, in answer to the objection that there was "no act of congress prohibiting obstructions in the Ohio river, and that, until there shall be such a regulation, a state, in the construction of bridges, has a right to exercise its own discretion on the subject," he says (page 565): "Congress have not declared, in terms, that a state, by the construction of bridges or otherwise, shall not obstruct the navigation of the Ohio, but they have regulated navigation upon it, as before remarked, by licensing vessels, establishing ports of entry, imposing duties upon masters and other officers of boats, and inflicting severe penalties for neglect of those duties, by which damage to life or property has resulted. And they have expressly sanctioned the compact made by Virginia with Kentucky at the time of its admission into the Union, 'that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory that shall remain within the limits of this commonwealth, lies thereon, shall be free and common to the citizens of the United States.' Now, an obstructed navigation cannot be said to be free. * * * This compact, by sanction of congress, has become a law of the Union. What further legislation can be desired for judicial action? In the case of Green v. Biddle, 8 Wheat. [21 U. S.] 1, this court held a law of the state of Kentucky, which was in violation of the compact between Virginia and Kentucky, was void; and they say this court has authority to declare a state law unconstitutional, upon the ground of its impairing the obligation of a compact between different states of the Union. * * * No state law can hinder or obstruct the free use of a license granted under an act of congress. Nor can any state violate the compact, sanctioned as it has been, by obstructing the navigation of the river. More than this is not necessary to give a civil remedy for an injury done by an obstruction." In view of this language, and of the fact that Pennsylvania claimed under no license, and had no interest in vessels navigating under licenses granted by the authority of the United States, but prosecuted her suit on the ground that the state, as owner of lines of canals and railways, had a deep interest in keeping the navigation of the Ohio open, and free, and unobstructed, according to the terms of the compact sanctioned by congress, I think it proper to assume, (especially as the court did not profess to repudiate the doctrines in regard to domestic or state legislation put forth by Mr. Chief Justice Marshall in Gibbons v. Ogden, or to overrule the case of Wilson v. Black Bird Creek Marsh Co. [supra]), that it was upon the ground of this compact and its congressional sanction, that the decision of the Wheeling Bridge Case was made; and that the reference to the other legislation of congress, in respect to the navigation of that river, was not to show the direct and immediate ground upon which that case proceeded, but was rather intended to show, that congress had continued to act upon the assumption, that such compact was binding upon the states, and that the rights thereby secured "to the citizens of the United States" were insisted upon by congress, and had been in some sense made the subject of congressional regulation. I admit that there is much in the opinion of Mr. Justice McLean to favor the conclusions which the counsel for the plaintiffs seek to draw from the decision in that case, but it is well known that the opinions of that learned judge in regard to the power to regulate commerce, are not always in consonance with those of a majority of the court; and, to adopt the conclusions in respect to the Wheeling Bridge Case urged upon us by the counsel for the plaintiffs, would require us to act upon principles

of constitutional law which would subvert the just and proper authority of the state governments, and which I shall not willingly adopt until they have the unequivocal and unmistakable sanction of the supreme court of the United States.

In the examination of these cases, the question has naturally occurred, whether the very great change in the relative importance of natural and artificial channels of commerce and communication, caused by the progress of civilization and the arts, has changed or at all affected the rights of navigation which were established when commerce between different states, and between different portions of the same state, was, from necessity, almost entirely carried on by means of ships and vessels which traversed the naturally navigable waters of the country. Not only the course of trade and commerce, the interests of travel and traffic, but also the best interest of all classes, then required that a free and unobstructed use and navigation of the navigable watercourses of the country should be maintained. But the introduction of canals and railroads has so changed the lines and modes of transportation and the course and character of trade, that the commerce which passes up and down a river is, in many cases, quite unimportant and scarcely worthy of a moment's consideration, in comparison with the trade and commerce and travel which cross it, on the lines of canal and railroad transportation running nearly at right angles with its course. In such cases, a wise and just policy would seem to require, that the unimportant and trivial interest of river navigation should be required to submit to such slight abridgment of its ancient rights as may be reasonably required for the proper development of the superior advantages of the more modern, more useful, and more important modes of transportation by railroad or canal. In other cases, the known importance of the two conflicting interests may be nearly equal, or their relative importance, present and prospective, quite uncertain; and it would, therefore, seem to be necessary that some department of government should have the power to decide between these conflicting interests, to give preference to the one or the other, or to provide for the simultaneous exercise of rights which the public interest might require to be accorded to each. I do not doubt that such a power exists, but, in my judgment, it is a legislative and not a judicial power. The courts cannot make or change the law applicable to either of these cases. They can only administer the existing law, and they must leave to the legislature the duty of modifying it, as the changes in the condition and course of the business of the country and the ever varying interests of trade, commerce and navigation may require. And this naturally brings us to the consideration of the question of the authority, exclusive or concurrent, paramount or subordinate, absolute or relative, which can properly be exercised over this subject by the state and national legislatures, and how these powers may be harmoniously exercised, the national and state governments being respectively confined to their appropriate spheres of action.

I cannot doubt that the legislature of a state may, in the absence of any restraint by congressional legislation, authorize the erection of a bridge over its navigable waters; and, as the Hudson at Albany, and as far above as tide water extends, is extensively used in carrying on foreign and inter-state commerce, I do not doubt that congress has, and, whenever the public interests shall require it, may properly exercise, the power to prohibit the erection of any bridge across the river at Albany, or to prescribe what draws and other facilities for passing shall be required, in case it chooses to prohibit the erection of any bridge which shall not give to the interests of navigation such privileges and facilities in passing it as may be prescribed by congress. When congress has legislated, this court can act upon such legislation; but, in the absence of congressional legislation, the law of the state must furnish the rule for our decisions, precisely as though we were sitting in a state court.

The state legislature, until the national legislature shall, either directly or indirectly, otherwise determine or provide, may authorize a bridge upon such terms and of such mode of construction as it may deem just and expedient; and I can discover no solid ground upon which a court of the United States can proceed to overturn such state legislation. The courts of the United States can exercise no authority in such cases, until it has been given by congress, by the passage of an act within its constitutional powers, and which necessarily restrains, or practically conflicts with, the legislation of the state.

In most cases of this kind, the action of congress must necessarily be restrictive or prohibitory; or in the nature of a regulation declaring the terms upon which, only, a bridge may be built. This results from the character of the question, and the nature of the powers over the subject, which are possessed by the national and state legislatures respectively. Congress has power to regulate commerce with foreign nations and among the states, and has, therefore, the power to say that the navigation of the Hudson, which is essential to the prosperity of that commerce, shall not be obstructed by a bridge; but it has no power to construct, or to authorize individuals to construct, a bridge across the Hudson at Albany, unless such bridge is required for some purpose national in its character, so as to bring the case within the delegated powers of the national legislature. The power to authorize a bridge, in the absence of congressional restraint, is, therefore, with the state, and is to be exercised by the state legislature, which can most properly and judiciously exercise the power of abridging the common law right of navigation, and of de-

termining what measures shall be adopted by the proprietors of a bridge, in order to secure, as far as practicable, a substantial enjoyment of the rights of navigation, and at the same time give to the public the substantial and beneficial enjoyment of the advantages to be attained by the construction of the bridge. These rights are not so far incompatible, that they may not, under proper arrangements, be simultaneously exercised, without any very material abridgment of either; and, to devise and provide such arrangements, is the appropriate business of the legislature, while it is not within the legitimate province of the judicial department of the state or of the national government.

If the state legislature assume to authorize what congress, in the legitimate exercise of its delegated powers, has prohibited, the courts of the United States may declare the state legislation which contravenes that of the nation to be void, and that the proper authority of the United States shall be upheld; but, until the legislation of the state conflicts with that of congress, or with the constitution of the United States, this court has no authority to annul the legislation of the state, by the restraining process of injunction.

The bills of complaint in these causes should be dismissed, with costs.

The judges being thus opposed in opinion, a division of opinion was certified to the supreme court, in October, 1859. The points so certified are set forth in the report of the case in that court, in 1 Black [66 U. S.] 582. On those points the judges of that court were equally divided. This court then made decrees dismissing the bills. [Case No. 2,983.] From those decrees the plaintiffs appealed to the supreme court, and, on the hearing of those appeals, the judges of that court being equally divided [Albany Bridge Case] 2 Wall. [69 U. S.] 403, the decrees of this court were affirmed.

SILLIMAN v. HUDSON RIVER BRIDGE CO. See Case No. 2,983.

Case No. 12,853.

SILLIMAN v. TROY & W. T. BRIDGE CO. et al.

[11 Blatchf. 274.] [1]

Circuit Court, N. D. New York. Aug. 16, 1873.

BRIDGES — OBSTRUCTION TO NAVIGATION — COMMERCE AMONG THE STATES.

1. An injunction being asked, to restrain the building of a bridge across the Hudson river, between the city of Troy and the village of West Troy, on the ground that the bridge would essentially obstruct the navigation of the river, and would interfere with the use by the plaintiff of vessels owned by him, enrolled and licensed for the coasting trade by the United States, the court held, as matter of fact, on the evidence, that the erection of the bridge, as proposed, with piers, would not create shoals or bars, and that, with two draws, each 111 feet wide in its opening, and with an elevation of 32 feet above ordinary tide-water, the bridge would not materially obstruct the navigation of the river, and that the injunction must be refused.

[Cited in Miller v. New York, Case No. 9,-585; Ormerod v. New York, W. S. & B. R. Co., 13 Fed. 372.]

2. The cases reviewed, on the subject of when a bridge over a navigable stream will be regarded as an interference with commerce among the states.

[This was a bill in equity by Charles A. Silliman against the Troy and West Troy Bridge Company and others.]

Motion for a preliminary injunction, to restrain the defendants from proceeding in building a bridge across the Hudson river, between the city of Troy and the village of West Troy, and was founded upon the pleadings and affidavits.

William A. Beach and Robert H. McClellan, for plaintiff.

Roscoe Conkling and Esek Cowen, for defendants.

HUNT, Circuit Justice. The bill of complaint in this case was filed in October, 1872. It alleges the passage of an act by the legislature of the state of New York, in April, 1872, authorizing the construction by the defendants of a bridge across the Hudson river, from the foot of Congress street, in the city of Troy, of not less than thirty feet elevation above ordinary tide-water, with a draw of sufficient width to allow of two openings therein, of not less than one hundred feet in width, and sets forth the whole of the act on the subject. It alleges, that the plaintiff is a citizen of the state of New Jersey, and is part owner of the barge St. Nicholas, and of the canal-boat Amelia Curtis; that the barge and the canal-boat are duly enrolled as United States vessels, and licensed to carry on the coasting trade, and are engaged in that trade; that Troy is a port of delivery; that the tide ebbs and flows in the Hudson river above Congress street, and in front of the whole city of Troy; that the bridge company have contracted with the other defendants to build the bridge; and that they intend to erect the same, and are proceeding in the construction thereof. The bill describes the character of the river, its channels and commerce, and the vessels engaged in it, the city of Troy and its surroundings, and charges that the proposed bridge will essentially obstruct the navigation of the river, and will materially hinder the complainant and others from using it as they have been accustomed to do, will interfere with the use of the licenses to the plaintiff, will hinder the subjects of foreign countries in the exercise of their rights of navigation, and will interrupt trade, commerce, and navigation, to the common nuisance and irreparable injury of the complainant and other citizens of the United States. The bill further alleges, that bars and shoals will necessarily be formed by the piers of the bridge, that the United States own extensive and costly

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

works on the Hudson, opposite Troy, and have expended large sums in improving the navigation of the river, and that there is no public necessity for the bridge, concluding with a prayer that the act authorizing the construction of the bridge may be declared unconstitutional and void, and that the defendants may be restrained from erecting the same, unless placed at a height sufficient, at all stages of the water, to permit the passage of vessels with their masts and chimneys standing, and that a preliminary injunction may issue.

The answer was verified on the 30th of December, 1872, and served at about the same time. It is not necessary here to detail its contents. Affidavits in support of, and in opposition to, the motion are also read.

The parties differ in their views of the law applicable to this subject. They differ largely as to the effect that it is supposed will be produced by the erection of the bridge. As to the facts as they exist at this time there is no great difference between the parties. They are substantially as follows: At the point in question the Hudson river is 672 feet in width, and the tide rises and falls about two feet. The bridge is to be built upon three piers, all of which cover the space of forty-two feet in width, leaving a clear space of 630 feet. The pivot or draw-pier in the middle of the river is twenty-eight feet in width, and is built in form of the letter V, with the pointed end up the stream. On each side of this pier there is to be a draw, and an opening 111 feet wide, and the elevation of the entire bridge is to be 32 feet above ordinary tide-water. Considerable progress has been made in the construction of the bridge, and there has been expended in such construction, and in procuring materials intended for such construction, the sum of $150,000. At a distance of about one-half mile above the proposed bridge is the bridge of the Rensselaer & Saratoga Railroad Company, on the same river, which is also used as a highway bridge. A short distance further up the stream is the state dam, extending entirely across the river and entirely closing the same to boats and vessels except by the use of a lift-lock at the easterly end thereof. Six miles below, at the city of Albany, are two other bridges across the same stream, used exclusively for railroad purposes, the one having been in use for eight years and the other for two years. One of these bridges has its two draws of the width of 117 feet each, and the other of 111 feet each, and said bridges have an elevation of 30 feet only above ordinary tide-water. The usual landing place for the passenger steamers between Troy and New York is about nine hundred feet above the proposed bridge. One entrance into the river from the Erie canal is 700 feet above the bridge, and there is another entrance some distance below it.

Troy is a flourishing city of 50,000 inhabitants, connected in commerce and social intercourse with the city of Cohoes, and the villages of West Troy and Lansingburgh and Waterford, and has a commerce upon the river above and below the bridge, by means of steamers, barges, canal-boats and sail vessels. I do not deem it necessary to be more precise as to the extent of this commerce. If this commerce is illegally excluded from the river, or is materially and illegally interfered with, there is enough of it, in any view of the case, to sustain this action and this motion. If this injury is not sustained, or is not occasioned in a manner forbidden by law, it cannot, of course, be important whether it is large or small.

The plaintiff is a part owner of a barge and a part owner of a canal-boat, both of which are registered and, under licenses from the United States authorities, are engaged in the navigation and commerce of this river between Troy and points upon the river farther down the stream.

The matters of fact above stated are undisputed. The points of fact in dispute are these: (1) Whether, above or at the intended bridge, the current of the river runs westerly from the Troy bank towards the other shore, thus striking the middle pier upon its broader side, instead of meeting the sharp point of the pier, as intended, and as is alleged to be the fact by the bridge company; and (2) whether bars and shoals will be formed above and below the piers of the bridge, by the existence of such piers, whereby the navigation of the river will be essentially impaired. This is a matter of science or of speculation as to a future occurrence, rather than a dispute as to the existence of a present fact.

On the first point, viz., of the course of the current at a point above the bridge, Luther Eddy, Daniel Hartnett, Lewis D. Deming, Francis Teson and H. Swartwout testify, in substance, that the current runs diagonally across the river from the eastern to the western shore, and give their opinion that the necessary effect of this current against the pier will be to form shoals and bars. They differ, however, upon the point as to where the current commences to change its course. Hartnett says, that the change commences below the new bridge, while the most of the others state that the change commences at the bridge. I can not but think that the effect of the change of current at a point at or above the bridge must be different from that occurring at a point below the bridge. In the latter case, the running water would be carried clear of the piers, and the liability to create shoals or bars would not exist, or would be less than where the water should come directly against the piers. The effect of the plaintiff's affidavits is weakened by this diversity. The statement is also directly denied by the affidavits of Mr. Fuller, an engineer; Mr. Robinson, who is engaged in the transportation business; Mr. Mosher, who is in the same business; Mr. Vandecar, a pilot

and captain; and Mr. Burdett, who was engaged for many years, under the direction of the legislature, in improving the navigation of the Hudson river near Albany and Troy. Each of these persons testifies that the divergence of the current at or above the bridge is very slight, and that it runs almost directly parallel to the Troy docks. Upon this evidence, I must hold that there is but a slight divergence of the current at or above the bridge from its general direction, and that the centre pier would meet the current almost directly upon its pointed end.

2. Many affidavits are introduced upon each side of the question, whether the building of this bridge as described, will create shoals or bars in the river, above or below the bridge. On the part of the plaintiff, Luther D. Eddy, who has been a civil engineer for forty years, is of the opinion that the piers of the bridge "would tend to the formation of shoals, not only immediately below the piers, but for a very considerable distance, and even for miles, below them." He is also of the opinion that a shoal will be formed above the middle pier, which will extend to and connect with an existing shoal on Centre Island, a short distance above the bridge, and that a shoal will also be formed southerly and westerly of the pier, which will tend to fill up the channel in front of, and will seriously injure, the docks at West Troy.

Daniel Hartnett, who runs a ferry across the river, testifies, that he has for many years been well acquainted with the river, and is of the opinion that a shoal will be formed above the pier, which will be liable to connect with the shoal at Centre Island, and thus prevent the crossing of boats above the bridge.

Francis Teson, who is a pilot and master of a passenger steamer on the river, testifies that he is well acquainted with the river and its navigation, its tides and currents, and that, in his opinion, the building of the pier will destroy steamboat navigation above it, and that a shoal will be formed which will connect with the Centre Island shoal. He is also of the opinion that the "shoal which will necessarily be formed below the pier, will tend, by causing eddies and back-water, to fill up the river with deposits," and that shoals will be formed for a considerable distance below the bridge.

Mr. Deming, a pilot and master of a passenger steamer, expresses the same opinion and in similar language. He also states, that, in the summer of 1871, his steamer grounded under the draw of the upper bridge at Albany, and where the water, before the erection of the bridge, had been of abundant depth; and that a shoal of seven feet in thickness was formed in about six hours.

Mr. Shook, another pilot and master, expresses the same opinion. He further says, that he has observed the formation of shoals in the river at high water, at low water, and at ordinary water, and remembers the grounding of the steamer spoken of by the last witness, in 1871, in seven one-half feet of water, and the formation of a shoal about her, of seven feet in thickness in a few hours.

Mr. Swartwout, employed for some years as a pilot and navigator on the river, also expresses the like opinion as to the formation of shoals by the intended bridge.

These are the opinions of practical men, and, so far as opinions are to be weighed, must be duly considered. It will be observed, that but a single fact is stated in any of these affidavits, viz.: the occurrence, and the effect, of the grounding of Captain Deming's steamer, in 1871, under the draw of the upper bridge at Albany, where he says there was previously a sufficient depth of water. This apparently striking fact loses its significance when we reflect that, although Captain Deming had carried his vessel through this draw twice every day, in the navigating season, for many years before the occurrence, and for two years afterwards, the grounding never occurred on any other occasion. It seems clear, that the grounding was from a cause temporary and exceptional, and not from the existence of the piers. They have been in the same place for eight years past, and, if the bar was caused by their existence, it would have been of frequent occurrence, if not permanent in its character. Yet, of all the vessels passing this draw, including that of Captain Deming, none other is shown to have met with the difficulty, and it never happened to Captain Deming except on this single occasion. The affidavit of Levi Smith contains an explanation of the occurrence, which may sufficiently account for the existence of a temporary bar. Captain Deming and Captain Shook testify, that, in a few hours after the grounding of the vessel of the former, a large shoal formed about her, of the thickness of several feet. There is no statement of whether the vessel laid across the channel, or what extent of surface she presented to the current. I can well conceive, that a vessel lying across this draw would present an obstruction which would cause the formation of shoals and bars to an extent that would soon fill up the channel. I can also readily believe, that the sinking of a large steamer of 40 or 50 feet in width, in a channel of one hundred and eleven feet wide, whatever her position, would be the cause of shoals and bars in the channel above and below the vessel. But, these facts and these concessions have but little influence on the case as it is actually presented, where there is a free current of one hundred and eleven feet in width on each side of a pointed pier.

In opposition to the opinions presented in the moving affidavits, are numerous opinions of witnesses presented in the opposing affidavits. William J. McAlpine testifies, that he has been a civil engineer for forty-six years, engaged in constructing railroads, canals, and harbor and river improvements, has been chief engineer of the state of New York, has held many similar public positions, which are

specified, has planned and constructed many bridges, observed the effect produced on streams by building piers, constructed the tide locks on this river above Troy, removed the bars at Castleton below, and knows of more than one hundred bridges in the United States over navigable streams; that he is familiar with the location in question, and is of opinion, that, if properly constructed, the proposed bridge will be no substantial impediment to the navigation of the river, and will produce no effect in causing bars in the river; and that he has examined the affidavits of Eddy and others, and is of opinion that their apprehensions in regard to forming bars in the river above and below the bridge, and especially that a bar may be formed connecting with Centre Island shoal, are totally without foundation. Mr. McAlpine gives at length the reasons for his opinions.

Charles L. Fuller, an engineer for twenty years, and for many years connected with the city of Troy and with West Troy, as an engineer, holds the same opinion, and for the reasons given by him.

Robert Robinson, for many years engaged in the transportation business on the river, testifies at great length upon all the material points in the case, including that now under consideration, and to the same effect. Richard Vandecar, of the same occupation, Alfred Mosher, in the same business, Silas Betts, Hiram Tinslair, Lewis Rousseau, John J. Winne, D. W. Talcott, H. D. Finch, D. A. Rousseau, C. D. Rousseau, James E. Craig, James Kerslake, William Andrews, Jonathan Freeman and George C. Burdett, all testify, that, in their opinion, no bars or shoals will be formed by the building of the piers in question.

Upon this point, as well as upon that of the direction of the current, important evidence is given by Mr. Howard Ellis, who is the designer and superintendent of the erection of the proposed bridge. He says that the piers have been carefully located parallel with the current of the water, and that there is no perceptible divergence of the current from the east bank of the river. He testifies that the theories respecting the formation of bars are entirely erroneous, and shown to be so by the experience of the Albany bridge, and that, instead of forming bars, the tendency will be to scour out the bed of the river.

The preponderance of numbers in the defendants' favor is not, in my opinion, so conclusive as is the testimony afforded by the experience of the Albany bridges. On the point of the formation of shoals and bars, and the immateriality of the obstruction necessarily arising from a bridge with draws, the results are clearly in favor of those advocating the existence of a bridge. The time occupied in passing a vessel is from two to four minutes, and tugs are provided to aid in the passage. It cannot be denied, that the existence in the river of any material substance, whether fixed or floating, whether occupying hundreds of feet or but one foot, is, in the broadest use of language, an obstruction. This is not, however, what is meant, in law, by an obstruction of navigation. This will be defined in the cases which I shall presently cite. Upon the evidence before me, and upon the evidence derived from the bridges upon the same stream six miles below, I am of the opinion that the erection of the bridge in question will not materially obstruct the navigation of the Hudson river.

This river is a great highway of commerce. All peoples and all individuals, as a general rule, have the right to sail up and down its waters, with their persons and their property. Neither state nor individual may lawfully prevent this passage and this use. This stream, however, is for the use of the state of New York and its citizens, at least equally with the citizens of other states and other countries. The right to cross the stream is equal to the right to sail up or to sail down it. Those living on its banks cannot be prevented from using it for this purpose. I see no conflict in these rights. Each must be preserved. Neither can be so exercised as to cut off the others. The Jerseyman may sail up the river. The New Yorker may cross it, in his boats or by his bridge, in his wagons or his railroad cars, but the bridge must be so built as not to cut off the up or down passage of those who desire so to use it.

Neither do I see a necessary conflict of right or jurisdiction, in the fact that New York owns the entire bed of the Hudson river from its source to its mouth, including that portion opposite to the state of New Jersey (1 Rev. St. N. Y. p. 65, marg.), and the fact that congress possesses exclusive power to regulate commerce on the navigable waters of the country. The regulation of commerce, strictly, is a power vested exclusively in congress. The regulation of many matters incidentally connected therewith is not exclusive in its character, such as pilot, health and quarantine laws. Cooley v. Port Wardens, 12 How. [53 U. S.] 299. Of the same nature is the power to use and control a stream for the benefit of the citizens of the state in which it may be, to establish ferries, authorize bridges, fisheries, &c. This power is not inconsistent with the other, but is subordinate to it, and, when and so far as congress does not act, may be legally exercised. Gilman v. Philadelphia [3 Wall. (70 U. S.) 713].

The matter we are considering has been the subject of frequent judicial consideration. I shall refer to a portion only of the authorities presented in the learned and elaborate arguments made before me.

The fundamental principles by which this class of cases is governed were laid down in Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1. The brief head note of that case is this: "The acts of the legislature of the state of New York, granting to Fulton and Livingston the exclusive navigation of all the waters within the jurisdiction of that state, with boats moved by fire or steam, for a term of

years, are repugnant to that clause of the constitution of the United States which authorizes congress to regulate commerce, so far as said acts prohibit vessels licensed according to the laws of the United States, for carrying on the coasting trade, from navigating the said waters by means of fire or steam." The constitutional power which was in that case, as in this, in question, is in the words following: "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." It appears, from the opening argument of Mr. Webster (page 4), that New York had enacted that no person should navigate the Bay of New York, the North river, the Sound, or the lakes, by steam vessels, without a license from the grantees of the state of New York, under a penalty of forfeiture of the vessel. By the law of the adjacent state of Connecticut, no person was permitted to enter her waters with a steam vessel having such license. By the law of New Jersey (across the North or Hudson river), if any citizen of that state should be restrained from using steamboats between the ancient shores of New Jersey and New York, he was entitled to an action for damages in the state of New Jersey, with treble costs, against the parties impeding him under the law of New York. This was called an act of retortion. Great confusion and embarrassment was thus likely to arise from this conflicting legislation, and the interests of commerce and navigation were likely to be seriously affected. The case was elaborately argued and carefully considered. In reaching its conclusion, the court decided: (1) That the word "commerce" was not limited to trade or traffic, but included the navigation of the rivers, bays and harbors of the several states, and the intercourse between nations or citizens, connected with such navigation. (2) That this constitutional power was not limited to the external bounds of a state, but extended to the interior thereof, when the citizens of other states were claimants of the use, but not to cases between man and man in a state, or between different parts of the same state, not extending to or affecting other states. (3) That, unlike the power to lay and collect taxes, the power to regulate commerce is, in its nature, exclusive in congress, incapable of division, and that no part of it can be exercised by a state. Inspection, quarantine and health powers are exercised by the states upon a different principle and under a different power. (4) That the act of congress of 1793 "for enrolling or licensing ships or vessels to be employed in the coasting trade or fisheries, and for regulating the same," and the license issued by virtue thereof, was an exercise of its power by congress, and gave to the holder of such license the right to sail from port to port, to engage in trade at such ports, or to carry passengers to and from the same. The lapse of a half century has not impaired the influence of this decision. Repeated decisions of the supreme court of the United States have recognized and confirmed the authority of this case, and this so lately as at the last term of that court. Case of the State Freight Tax, 15 Wall. [82 U. S.] 232; Morgan v. Parham, 16 Wall. [83 U. S.] 471.

In State of Pennsylvania v. Wheeling Bridge Co., 13 How. [54 U. S.] 518, the power of a state to authorize a bridge over a navigable river was distinctly presented. It was there decided, that the Ohio was a navigable stream, subject to the commercial power of congress, and that the state of Virginia could not lawfully authorize the erection of a bridge over it which would obstruct its navigation. The bridge there in question was a single span, about 980 feet in length, which would not allow the passage under it of large steamboats or sail vessels, and was not provided with draws or openings. It was condemned by the court, and ordered to be removed, unless the defendants, by a day named, should open an unobstructed passage through the channel of the river. This, it was held, might be done by the erection of a bridge which, for the space of 300 feet over the channel of the river, should have an elevation of 111 feet above low water mark (page 578). In delivering the opinion of the court, Mr. Justice McLean says: "If the obstruction be slight, as a draw in a bridge, which would be safe and convenient for the passage of vessels, it would not be regarded as a nuisance, where proper attention is given to raise the draw on the approach of vessels" (page 577). It was suggested, that a draw might be constructed in a bridge over the western channel of the river, which would give a sufficient passage. A plan was subsequently presented for this drawbridge, having two spaces of 100 feet each in the clear, which was deemed sufficient by the court, and, being acceded to by the parties, the bridge, as constructed over the main or eastern channel, was allowed to stand (pages 619, 627).

The case of Willson v. Blackbird Creek Marsh Co., 2 Pet. [27 U. S.] 245, had been decided before the Case of Wheeling Bridge Co., and after that of Gibbons v. Ogden. The state of Delaware had authorized the building of a dam across the Blackbird creek, a sluggish stream, in which the tide ebbed and flowed. The defendant, navigating his enrolled sloop under a United States license, for the purpose of passing the dam, tore it down. The court held, that the state had power to authorize the dam, and that the defendant was a trespasser in his action. The opinion in this case was delivered by the same eminent chief justice who delivered the opinion in Gibbons v. Ogden, and was declared by the court in the Wheeling Bridge Case not to be in conflict with that case, which was recognized as authority. I concede the authority of the case, on the ground that it does not appear that the defendant's vessel was bound to a port of entry above

the dam, or that there was any such port above the dam. Had those facts existed in the case, the decision would have been in hostility to all the other cases on the subject. It would authorize the state of New York to build a dam across the Hudson at Troy or at Poughkeepsie, over or through which not a fish could make its way, much less a steamboat or a sailing vessel. The extent of draws or the height of bridges would be no longer a subject of consideration. I can not consider the case as authority to that extent.

The case of Gilman v. Philadelphia, 3 Wall. [70 U. S.] 713, was decided in 1865. In that case, a bridge of the height of thirty feet above the water, with no draw or opening, over the Schuylkill, a tidal stream, entirely within the state, and having a large amount of coal commerce, was about to be erected under the authority of the state of Pennsylvania. A bridge over the same stream, and about 500 feet lower down, had stood for many years, and yet remained. The plaintiff was a citizen of New Hampshire, and an owner of valuable dock property on the river above the proposed bridge. The court maintained the legality of the proposed erection, holding that it was within the principle of the Blackbird Creek Case; also, that, congress not having acted on the precise subject, the state had concurrent jurisdiction over it; also, that the importance of the commerce up and down the river, and that across the river, were the proper subjects of consideration by the municipal authority, and that its decision on that point was conclusive. Mr. Justice Clifford delivered a dissenting opinion, which was concurred in by Justices Wayne and Davis. A strong circumstance to sustain this case is found in the fact of the previously existing bridge, by which all commerce except that of low coal barges had, for many years, been excluded from the river. This case, however, and the Passaic Bridge Case, 3 Wall. [70 U. S.] 782, in their reasoning, stand very much on the principle of the Blackbird Creek Case, above considered. Neither in the Passaic Case nor the Gilman Case was the action brought by an owner or navigator of a vessel, or one having a coasting license, but by a plaintiff who was owner simply of a dock of wharf on the river bank. In the Passaic Case, also, the bridges were required to have two draws of sixty-five feet each, for the passage of vessels. The learned judge who gave the decision at the circuit in the latter case, lays down the position, that a state may, by a bridge or dam, close the navigation of a tidal river lying wholly within its own territory. This proposition was not involved in the case of the Passaic bridges, nor is it involved in the present case. When it is distinctly presented, it will be necessary to decide it. The affirmance of the decree by a divided court simply affirmed (giving to it the effect claimed by the defendants' counsel) that a bridge with two draws of sixty-five feet each, under the circumstances described, did not constitute a material obstruction to the navigation of the Passaic river.

Of all the instances of bridging rivers, that of the Albany bridge, or rather of the bridges, is the most satisfactory, both as to the facts and as an authority upon the law. Silliman v. Hudson River Bridge Co. [Case No. 12,851]; Silliman v. Hudson River Bridge Co. [Id. 12,852]; [Silliman v. Hudson River Bridge Co.] 1 Black [66 U. S.] 582; [Albany Bridge Case] 2 Wall. [69 U. S.] 403. The case was presented in 1856, and finally decided in 1864. The character and particulars of the bridges have been already stated, and it is sufficient to say, that the erection of this bridge was justified, that it has not only stood since that time without complaint of interference, but that another one of the same character has been built a short distance below it, and, so far as it appears, without objection by any one. I think that it is safe, also, to say, that the bridge has produced none of the evils that were predicted. Commerce continues, trade increases. Albany improves, while Troy becomes more rich and prosperous than before. Shoals and bars are not increased by it, and navigation finds no greater hindrances than existed before the bridges were erected.

I do not understand that there is any conflict among the cases in the United States courts, in relation to bridges with suitable openings, neither is there in the courts of New York. The judgment of that state was expressed many years since, in an able and learned opinion of the supreme court, by Savage, C. J., in People v. Rensselaer & S. R. Co., 15 Wend. 113. He says: "The state legislature has the power to build bridges where they shall be necessary for the convenience of its citizens. The right must be so exercised, however, as not to interfere with the right to regulate and control the navigation of navigable streams. Both governments have rights which they may exercise over and upon navigable waters; and it is the duty of both so to exercise their several portions of the sovereign power, that the greatest good may result to the citizens at large. * * * It fortunately happens, that, in the particular case now under consideration, there is no necessity for collision. The maxim 'Sic utere tuo ut alienum non lœdas,' is the rule for both governments. A bridge with a draw which shall be opened free of expense for every vessel sailing under a license as a coasting vessel, affords all the accommodations necessary for citizens in the vicinity, or for travellers, and does not impede the navigation in any essential degree." He further says: "The Hudson river is admitted by the pleadings to be a public, navigable river; it is, of course, subject to the navigation laws of congress, and the bridge can only be justified upon the principles which I have previ-

ously endeavored to maintain. There is a material distinction between a drawbridge, which detains a vessel for only a short time, and a dam, which stops the navigation entirely. The bridge in question, with a draw, is no greater obstruction than the dam erected by the state a short distance north of the bridge. That dam would be an illegal obstruction but for the lock by which vessels pass it. So would the bridge without a draw; but, having a draw, it is no greater obstruction than the dam with a lock."

I do not consider the question of the necessity of this bridge. This is a political and not a judicial question. If the state may authorize its erection, if the bridge is necessary to the public interests, it is for the state alone to say whether that necessity exists. The state has so declared, and no further inquiry is needed on the point. Gilman v. Philadelphia, supra.

I hold it to be established by the evidence, and by the experience of the two bridges over the same stream at Albany, (1) That the bridge of the height and with the openings proposed will not materially obstruct or hinder the commerce upon the Hudson river at or above Troy; (2) that there is no good reason to apprehend the formation of shoals or bars, by which the navigation will be injured. I am of the opinion, therefore, upon the authority of the cases discussed, that the proposed bridge will not be an interference with the commerce among the states, which will justify this court in prohibiting its erection.

The motion for a preliminary injunction is denied, with costs.

SILSBEE (MELLUS v.). See Case No. 9,404.

SILSBY (FOOTE v.). See Cases Nos. 4,916–4,920.

SILVER (DUNLOP v.). See Case No. 4,169.

Case No. 12,854.

SILVER v. HENDERSON et al.

[3 McLean, 165.] [1]

Circuit Court, D. Indiana. May Term, 1843.

NOTES—DEMAND—ASSIGNMENT—PLEADING.

1. Where a note is made payable at a particular place, a demand at such place, when the note becomes due, is not necessary, to maintain an action against the maker.

2. An averment that the note was assigned on the day, or at the time of its execution, is sufficient.

3. Where an action is brought against two, as the survivors of one, who executed a joint note, it is not essential to allege in the breach, that the note had not been paid by the deceased.

[Cited in Ripka v. Pope, 5 La. Ann. 61.]

At law.

Mr. Coombs for plaintiff.

Mr. Cooper, for defendants.

OPINION OF THE COURT. This action was brought on a promissory note, payable at the branch bank at Fort Wayne. The defendants demurred to the declaration, and assigned the following causes of demurrer: (1) That prèsentment and demand of payment of the note at the bank, when it became due, is not averred in the declaration. (2) That the suit is brought in the name of the assignee, and the declaration does not aver that the money had not been paid to the assignors, nor that it had been assigned before due. (3) That the suit is against Stevens and Henderson, survivors of William A. Henderson, upon an alleged joint contract; and the breach is, that the money was not paid by the survivors to the assignee.

As to the first ground of demurrer, it is settled that, as against the maker of a note, payable at a particular place, no demand of payment is necessary. There was, at one time, much discussion in England on this point; and it was decided differently by the courts of king's bench and common pleas; the latter requiring a demand of payment at the place stipulated; and this construction was sustained by an appeal to the house of lords. But parliament interfered and established the contrary rule, as decided by the king's bench. In this country there has been a diversity of decisions on the point, but the supreme court, in Covington v. Comstock, 14 Pet. [39 U. S.] 44, held that a demand in such a case was unnecessary to sustain an action against the maker of the note. If the defendant was ready to pay, or in fact did pay into the bank the amount to be paid to the holder of the note, it is matter of defence. To sustain an action against an indorser, a demand, of course, must be made.

As to the second ground of demurrer, the declaration alleges the date of the note to be December 8, 1836, payable in twelve months, and that it was then and there assigned; that is, on the day it was executed. This averment is sufficient.

The third cause of demurrer is not sustainable. William A. Henderson, who is dead, is not a party to this suit. If during his life he paid the note, it is matter of defence. Where a person declared upon a bill of exchange, drawn upon and accepted by three persons, and it was proved to have been drawn upon and accepted by three, jointly, with a fourth, plaintiff recovered, and it was held to be no variance. Mountstephen v. Brooke, 1 Barn. & Ald. 224. It is usual in the declaration on a joint demand, as for goods sold, &c., against the survivor of a partnership, to allege the joint undertaking, &c., the death of one of the partners, who did not, in his life time, pay, &c., but a count is good on promises by the surviving partner, or, where the amount is stated, without noticing the deceased. 2 Saund. Pl. & Ev. 709. In 1 Johns. Cas. 405,

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

in an action of assumpsit for goods which were sold to two partners, against the survivor, it was held "to be unnecessary to notice the survivorship. In such case, the executor of the deceased partner, at law, is discharged from liability."

The demurrer is overruled. Judgment.

Case No. 12,855.

SILVERMAN'S CASE.

[2 Abb. U. S. 243;[1] 1 Sawy. 410; 4 N. B. R. 522 (Quarto, 173); 13 Int. Rev. Rec. 52.]

District Court, D. Oregon. Nov. Term, 1870.

CONSTITUTIONAL LAW—ACTS OF BANKRUPTCY—PLEADING.

1. The constitutional grant of power to congress, to establish uniform laws on the subject of bankruptcy, is not limited to passing enactments similar in scope and operation to those in force in England, when the constitution was adopted. It gives congress plenary power over the subject of bankruptcy; under one limitation only, that the laws passed upon that subject shall be uniform throughout the United States.

2. The reasons why this power should be vested in the national government,—explained.

3. Under the constitution any and all uniform legislation, tending to promote the distribution of an insolvent debtor's assets among his creditors, and his discharge from their demands, is within the power of congress.

[Cited in Re Reiman, Case No. 11,673; Re California Pac. R. Co., Id. 2,315.]

4. The wisdom and soundness of the policy of allowing insolvent debtors to dictate preferences in the distribution of their assets,—questioned.

5. In the district court, sitting as a court of bankruptcy, pleadings must be special. Hence, a mere general denial of the intent with which an act relied upon as an act of bankruptcy is alleged to have been done, is not a good defense to the charge; but the respondent must also allege and prove with what intent he did such act.

6. When the unlawful intent is the necessary consequence of the act charged, as in the case of a payment of one creditor by an insolvent debtor, a mere denial of such intent is no answer to the petition, and judgment may be given against the respondent as upon a failure to answer.

7. Inasmuch as every man is presumed to intend the necessary consequences of his acts, a debtor who has paid one creditor to the exclusion of others, cannot be heard to say that he did not intend to give such creditor a preference. The necessary effect of such payment is, to give a preference. Judgment may be given against a respondent whose answer sets up no other matter of defense than the denial of the intent, as upon failure to answer.

[Cited in Re Seeley, Case No. 12,628; National Security Bank v. Price, 22 Fed. 699.]

Petition in involuntary bankruptcy.

Mr. Fechheimer, for the petition.

Mr. Stout, opposed.

DEADY, District Judge. On December 7, 1870, Livingston and Levy, doing business as the firm of Livingston & Co., at San Francisco, filed a petition in bankruptcy against Charles A. Silverman, praying that he might be adjudged a bankrupt.

It appears from the petition that the debt due from Silverman to the petitioner amounts to five hundred and thirty-one dollars and fifty cents, for goods sold and delivered to Silverman in February, 1869, and that Silverman has since committed the following acts in bankruptcy:

First. That on or about November 15, 1870, Silverman sold and transferred his property to certain persons, to wit: an undivided one-fourth of the property and effects of the Oregon Dray Company, with intent to thereby hinder, delay, and defraud his creditors; and with the intent to delay and defeat the bankrupt act.

Second. That on or about November 16, 1870, Silverman being insolvent, paid Wasserman & Co., one of his creditors, the sum of one hundred dollars, with intent to thereby give a preference to Wasserman & Co.

On December 16, 1870, Silverman answered the petition, denying that he sold his property or made the payment to Wasserman & Co., with the intent in the petition alleged.

On the same day the petitioner filed a motion for judgment on the pleadings, upon the ground that the answer of Silverman in fact admitted the acts of bankruptcy charged in the petition; and on December 28 the motion was argued and submitted.

Upon the argument, counsel for the debtor confidently asserted that congress had no power to pass a bankrupt law applicable to other persons than traders, and that an insolvent person had a natural right to dispose of his effects as he chose, and by such disposition to prefer one creditor to another. Counsel cited no authority in support of the objection to the constitutionality of the act, but maintained generally that the power of congress in the premises was limited to the passing of such bankrupt acts as were in force in England at the time of the formation and adoption of the constitution, and that these did not apply to any one except traders.

The constitution (article 1, § 8) provides: "The congress shall have power * * * to establish * * * uniform laws on the subject of bankruptcies throughout the United States."

If language means anything, this is something more than the power to re-enact the particular bankrupt act then in force in Great Britain. It is a grant of plenary power over the "subject of bankruptcies." Now the subject of bankruptcies includes the distribution of the property of the fraudulent or insolvent debtor among his creditors, and the discharge of the debtor from his contracts and legal liabilities, as well as all the intermediate and incidental matters tending to the accomplishment or promotion of these two principal ends. Congress is given full power over this subject, with the one qualification, that its laws thereon shall be uniform throughout the United States. Whether these laws shall apply to

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

all fraudulent or insolvent debtors or only to such as are engaged in trade, is committed by the constitution to the wisdom and discretion of the law-making power. This may be illustrated by reference to the clause in the section above quoted whereby the constitution gives congress power "to establish post-offices and post-roads."

Is this to be considered a plenary grant of power over the subject of the collection, conveyance, and delivery of all such letters, newspapers, and other things, as in the progress of society it may be found useful and convenient to transmit from place to place by public post; or does it merely authorize congress to establish and maintain such a meagre and primitive postal system as was then established in Great Britain by act of parliament? It seems to me it is only necessary to state the latter conclusion or proposition, to show its absurdity.

If the power to establish post-offices and post-roads is not full power over the subject, to be exercised from time to time, according to the varying demands and necessities of society, then it is clear, upon the argument against the bankrupt act, that carrying the mail by steam, carrying it by railway, transmitting books through it, and dispatching it daily, are all unconstitutional, for the system in force in England at the adoption of the constitution provided for none of these things.

In Re Klein, decided in the circuit court for the district of Missouri, and reported in 1 How. [42 U. S.] 277, Mr. Justice Catron held the bankrupt act of 1841 [5 Stat. 440], which was not restricted to traders, to be constitutional. In that case, the objection to the act was twofold: First. That it allowed the debtor to avail himself of the benefit of the act upon his own petition; and, Second. That it was not restricted to traders—contrary in both particulars to the provisions of the English act. In considering these objections, the learned judge said:

"If the power conferred on congress carries with it these restrictions, then the district court properly refused to discharge the applicant, Klein, because the act of congress was unconstitutional in his case. But other and controlling considerations enter into the construction of the power; it is general and unlimited; it gives the unrestricted authority to congress over the whole subject, as the parliament of Great Britain had it, and as the sovereign states of this Union had it before the time when the constitution was adopted. * * * The district court relied confidently on the ground, that congress can pass no law violating contracts; and that the clause of the constitution conferred no such authority, because the English bankrupt laws, by which the power is supposed to be restricted, only permitted the contract to be annulled at the election of four parts in five of the creditors in number and value; and therefore, they annulled it by a new contract. This argument proceeds on the assumption, that a proceeding in bankruptcy can only be had at the election of and for the benefit of creditors; and that every material step is their joint act; to which the debtor is compelled to submit. For the present it will only be necessary to say, that one prominent reason why the power is given to congress, was to secure to the people of the United States, as one people, a uniform law, by which a debtor might be discharged from the obligation of his contracts, and his future acquisitions exempted from his previous engagements; that the rights of debtor and creditor equally entered into the minds of the framers of the constitution. The great object was to deprive the states of the dangerous power to abolish debts. Few provisions in the constitution have had more beneficial consequences than this, and the kindred inhibition on the states, that they should pass no law impairing the obligations of contracts. The inhabitants of states producing largely, must be creditors; the inhabitants of those that are consumers, will be debtors. Bankrupt laws of the latter states might ruin the producers and creditors. They having no interest or power in the government of the consuming states, and it being the interest of the latter to annul the debts of non-residents, no remedy would exist for the grossest oppression. No laws of relief would be more effectual in time of pressure by foreign creditors, nor more likely to be adopted. If one state adopted such a measure, it would furnish a fair occasion for others to do the same, on the plausible pretext of self-defense; others would be forced into a similar bad policy, until discredit and ruin would overspread the entire land, by an extinction of all debts, and a consequent prostration of morals, public and private, on the subject of contracts. This evil had, to a certain extent, occurred, and was fresh in the minds of the framers of the constitution; and no doubt it would again occur in some of the states but for the provisions under consideration standing in the way of abrogating the private contracts of non-residents. But if congress passed the law, it must be uniform throughout the United States; then the entire people are equally represented, and have the power to protect themselves against hasty and mistaken legislation, by its repeal, if found oppressive in practice. * * * In considering the question before me, I have not pretended to give a definition; but purposely avoided any attempt to define the mere word bankruptcy. It is employed in the constitution in the plural, and as a part of an expression—'the subject of bankruptcies.' The ideas attached to the word in this connection are numerous and complicated; they form a subject of extensive and complicated legislation; of this subject congress has general jurisdiction, and the true inquiry is—to what limits is that jurisdiction restricted? I hold, it extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit; its greatest is the discharge of a debtor from his contracts. And

all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of congress. With the policy of a law letting in all classes—others as well as traders—and permitting the bankrupt to come in voluntarily, and be discharged without the consent of his creditors, the courts have no concern; it belongs to the law-makers."

The natural right of an insolvent to dispose of his property as he chooses, is not exactly pertinent to the question before the court; but as counsel seem disposed to attach some importance to the claim, and made it the basis of an indirect attack upon the justice and policy of the act, if not its constitutionality, it may be well to inquire if there is any such right. Whence comes the property of an insolvent? A moment's reflection will satisfy any one that it represents in whole or in part the credit given to the insolvent by his creditors, and therefore, in good morals, belongs to them, and not him. Strictly and truthfully speaking, an insolvent has no property, and therefore, he has no natural right to dispose of the property in his possession otherwise than with the consent of the real owners—his creditors.

I know that, after a series of conflicting decisions, it was established at common law, that a debtor in failing circumstances might prefer a creditor. But the doctrine and practice were never regarded as consonant with good morals, and by the intervention of the legislature in the enactment of bankrupt and insolvent laws, the contrary rule has been generally established. In Cunningham v. Freeborn, 11 Wend. 256, Mr. Justice Nelson, upon this subject, and the kindred one of voluntary assignments, says:

"The root of the vice in all these cases of voluntary assignments by failing debtors lies in the principle of preference. It affords the pretense for putting the property into the possession of a friendly trustee, and thereby may substantially secure to the debtor the control of it for a long time after the law presumes it to have passed from him, and when his own possession would be incompatible with its security. In Estwick v. Caillaud, 4 Term R. 424, Lord Kenyon said, that 'it was neither illegal nor immoral to prefer one kind of creditors to another.' The soundness of this proposition loses some of its weight, when advanced in a case one would be apt to select above all others to illustrate the reverse; but I can well imagine one that would justify it. As a general proposition, however, the experience and observation of mankind must bear witness against it; and no one knew better than his lordship, and those familiar with courts of justice, how frequently the principle is perverted and made subservient to the gratification of vindictive feelings and the foulest ingratitude, as well as injustice towards honest and confiding creditors."

The answer of the debtor impliedly admits the indebtedness and insolvency as alleged in the petition, as well as the debtor's property and the payment of one of his creditors, and simply denies that such sale or payment was made with the intent to defraud or prefer.

Counsel for petitioner, assuming that these denials, or some of them, are mere traverses of conclusions of law from the facts admitted, asks that they be disregarded, and that judgment be given against the debtor notwithstanding, in accordance with the prayer of the petition.

It is a well settled rule of pleading that a traverse or denial must not be taken on a mere matter or conclusion of law, for the effect would be to submit the question of law to the jury rather than the court. But when the conclusion is a mixed one of law and fact, then it is clearly traversable, and the issue raised thereby triable by a jury under the directions of the court as to the law. 1 Chit. Pl. 645; 2 Estee, Pl. & Prac. 660. But under rule 36 of this court, which provides that "all pleadings and allegations of fact shall be special and verified," a simple denial of the intent alleged in the petition is not, in any case, a sufficient defense thereto.

If the debtor, notwithstanding the admitted circumstances, did not sell his property, or make the payment complained of, with the intent alleged by the petitioner, he should state with what other intent he did make such sale or payment. By this means the petitioner will be apprised of what the particular defense is, and come prepared to meet it at the trial, or if he thinks it insufficient in law he may demur to it. In this way much unnecessary trouble, vexation, delay, and expense is saved to both parties. For instance, if such were the fact, the debtor might allege in his answer that he sold his property as in the petition alleged, for the purpose and with the intent of investing the proceeds in real property in Portland, or for the purpose of loaning the sum on note and mortgage, or investing it in the public funds, as he might lawfully do, and not with the intent to thereby hinder, delay, and defraud his creditors, as alleged in said petition.

The sale of his property by a debtor is not necessarily an act of bankruptcy. It depends upon the intent with which it is done, and as this intent is not a mere conclusion of law, but of law and fact compounded, it may be traversed or denied, and the matter tried by a jury under the direction of the court as to the law. Yet it is probable that the act should be so construed as to hold any disposition of a debtor's property to be, prima facie, fraudulent, and contrary to the act, and thereby put the burden of proof upon the debtor to show that the same was done with a lawful intent, and is therefore not an act of bankruptcy. Such, at least, seems to be the necessary effect of the provision in section 41, which in terms declares,

that upon the trial of a petition in involuntary bankruptcy the debtor shall be adjudged a bankrupt, unless he proves the facts set forth in the petition not to be true.

But, as has been shown, under the rules of this court a mere general denial of the intent with which Silverman is alleged to have sold his property is not a sufficient plea, but the same must not only traverse the intent alleged, but must state with what other intent it was in fact done. Still I think that when the act is indifferent—not necessarily unlawful, contrary to the statute—that a general denial of the unlawful intent alleged is sufficient to raise an issue and prevent the petitioner from having judgment on the pleadings as for want of an answer. The defect in the answer should be taken advantage of by demurrer. But if the parties choose to go to trial upon such a plea, proof of a lawful intent can be made under it.

So far, then, as the first act of bankruptcy alleged is concerned, the motion must be denied.

As to the payment of the one hundred dollars to the creditor of Silverman, I am satisfied, upon the facts admitted, that he must be conclusively presumed to have intended to give such creditor a preference. The necessary effect of such payment is to give a preference. I cannot conceive of any circumstances under which an insolvent debtor can make a payment to one of his creditors without intending to thereby prefer such creditor, unless it be when the debtor is ignorant at the time of his insolvency. In this case the debtor admits that he was insolvent at the time he made this payment, and there is no pretense that he was not aware of it. Indeed, he is presumed to know it until the contrary appears. Under these circumstances, a mere denial of the intent to give a preference is a traverse of a conclusive presumption of law, and therefore frivolous and immaterial.

In Cunningham v. Freeborn, cited above, it was alleged in the bill that a certain voluntary assignment was made with a fraudulent intent. The answer of the defendant admitted the assignment, but denied the intent. The case was heard on bill and answer, and in the course of the opinion, the court held that the admission of facts which are per se fraudulent in judgment of law, "are as much so and as conclusive upon the defendant as if he had in express terms admitted a fraudulent intent in his answer; and, in such case, any subsequent disclaimer of such intent will not avail him."

In Re Drummond [Case No. 4,093], it was held that a payment by an insolvent debtor to one of his creditors necessarily gave such creditor a preference, and that the debtor, being presumed to know the consequence of such act, was conclusively presumed to have intended it.

In Driggs v. Moore [Id. 4,083], there was a similar ruling. The syllabus states the conclusion of the court, in these words: "If, from the circumstances under which the mortgage was given, it must necessarily have operated as a preference, the creditor will not be heard to say, in support of the transaction, that the debtor did not intend to create one."

In Campbell v. Traders' Bank [Case No. 2,370], H. & E., being insolvent, gave their note, with a warrant to confess judgment thereon, in settlement of a debt due the Traders' Bank. Drummond, J., held, that H. & E. must have intended to give a preference to the bank. In the course of the opinion he says: "It is to no purpose that a man says, when he is insolvent, and signs a note and warrant of attorney, and gives it to his creditor, the effect of which is to enable a creditor to enter up judgment, and issue execution, and levy on his property, that he did not intend to give a preference. Actions in this, as in so many other cases, speak louder than words; and the conclusion necessarily follows, from such a state of facts, that he does intend to do what is the reasonable consequence of what he does, or, according to the oft-repeated statement of the books, a man is supposed to know what is the necessary consequence of his own acts."

In Re Smith [Case No. 12,974], among other things, the petition alleged that Smith, being insolvent, made a voluntary general assignment of his property for the benefit of all his creditors, with the intent to defraud or delay the operation of the bankrupt act, and to prevent his property from being distributed according to the provisions of said act. In answer to this allegation, the respondent pleaded that such assignment was made without preference, for the sole purpose of having his creditors share equally his property, in proportion to their debts, and not with the intent alleged in the petition. The petitioner moved for judgment on the pleadings, and the motion was allowed. Hall, J., in the course of his opinion, after demonstrating that such an assignment, if upheld, would necessarily and absolutely defeat the operation of the bankrupt act, says: "There can be no possible doubt that the execution of the general assignment, under the circumstances of this case, was an act of bankruptcy; and the only question upon which there can be the slightest doubt is, whether, in the absence of any rebutting proof—and even in the absence of a replication to the respondent's answer—the denial of the intention imputed to him, and which is necessary to constitute the act of bankruptcy, must not prevent an adjudication until the question of intention has been submitted to a jury."

Every person of a sound mind is presumed to intend the necessary, natural, or legal consequences of his deliberate act. This legal presumption may be either conclusive or disputable, depending upon the nature

of the act and the character of the intention. And when, by law, the consequence must necessarily follow the act done, the presumption is ordinarily conclusive, and cannot be rebutted by any evidence of want of such intention. See, also, In re Sutherland [Case No. 13,638], decided in this court.

In opposition to these cases, no authority is cited by counsel for respondent. He rests his case upon the narrow ground, that because the intent to prefer is a necessary ingredient in the act of bankruptcy, it may be denied, and tried as an issue of fact. But this assumes that the presumption which the law makes from the facts admitted—namely, that a preference was intended—is only a disputable presumption, and may therefore be controverted. If, however, the preference is a necessary consequence of the payment, the law conclusively presumes the intent to prefer. This position is correct beyond a doubt, upon both reason and authority. Now, that the giving of a preference is a necessary consequence of the payment by an insolvent debtor of one of his creditors, is self-evident. Argument cannot make the matter plainer than the statement of the proposition. The creditor is preferred, because he has received his debt and his fellow creditors have not. The debtor, being insolvent, has not the means to pay them, and by paying one in full, he has defrauded the others of their just proportion of his estate. Other motives may also have actuated the debtor, but that makes the payment none the less a preference. Indeed, he may expect to become able in time to pay all his creditors in full, and may intend to do so as soon as he can, but this does not affect the question. The creditor whose debt is paid is nevertheless preferred over his fellows. He has his money, but they must depend upon the often double uncertainty of whether their debtor will in time become both able and willing to pay their debts in full.

Notwithstanding the length of this opinion, I cannot omit to notice the oft-repeated declaration of counsel for respondent that proceedings in bankruptcy are quasi criminal, and must be strictly construed in favor of the respondent. If any part of the act should be so construed, it is section 39, which provides for involuntary adjudication.

In Re Locke [Case No. 8,439], Lowell, J., in speaking of this section, says: "It is highly remedial, and should be construed liberally in favor of creditors, because its scope and purpose are to oblige insolvent traders to take advantage of the act, and thus insure an equal distribution of their estate under its carefully framed provisions."

In Re Muller [Id. 9,912], decided in this court, in reply to a similar argument from counsel against the operations of the act, the court said: "In my judgment, this view of the matter is not supported by reason or authority. The act does not attempt to punish the bankrupt, but to distribute his property fairly and impartially between his creditors, to whom in justice it belongs. It is remedial, and seeks to protect the honest creditor from being overreached and defrauded by the unscrupulous. It is intended to relieve the honest but unfortunate debtor from the burden of liabilities which he cannot discharge, and allow him to commence the business of life anew. The power to pass laws on 'the subject of bankruptcies' is one of the express grants of power to the national government; and history teaches that the want of a uniform law on this subject throughout the states, was one of the prominent causes which led to the assembling of the constitutional convention and consequent formation and adoption of the federal constitution.

"Such a statute is not to be construed strictly as if it was an obscure or special penal enactment, and this was the sixteenth instead of the nineteenth century. The act establishes a system, and regulates, in all their details, the relative rights and duties of debtor and creditor. Such an act must be construed—as indeed should all public acts—'according to the fair import of its terms, with a view to effect its objects and to promote justice.'"

The petitioner is entitled to judgment declaring the respondent a bankrupt, on the ground of having paid Wasserman & Co., with intent to give them a preference.

Order accordingly.

SILVERMAN, In re. See Case No. 12,855.

SILVERMAN (UNITED STATES v.). See Case No. 16,288.

Case No. 12,856.

The SILVER MOON.

[1 Hask. 262;[1] 11 Int. Rev. Rec. 118.]

District Court, D. Maine. Feb. Term, 1870.

TRIAL—ADMIRALTY—FORFEITURE—WITHHOLDING EVIDENCE.

1. A claimant present in court during the trial, who does not choose to deny facts within his own knowledge that the witnesses for the libellants have sworn to against him, confesses their truth.

2. The testimony of a party, relative to his own conduct and knowledge, is the best evidence, and the withholding of it awakens distrust and suspicion of evidence less explicit and satisfactory.

In admiralty. Libel in rem by the United States, claiming a forfeiture of the schooner, Silver Moon, for importing liquors in packages smaller than allowed by law. William Decker made claim to the vessel and answered denying the allegations of the libel.

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

George F. Talbot, Dist. Atty., for the United States.

Wales Hubbard and Josiah H. Drummond, for claimant.

FOX, District Judge. This vessel was licensed for the fisheries, and sailed in December, 1865, from Southport for New Brunswick, to obtain a cargo of herring, having a permit to touch and trade. She took on board a portion of her cargo in Back Bay, a place described by the witnesses as situated about twelve or fifteen miles easterly from St. Andrews, and the balance in that vicinity. The charge is, "that a quantity of spirituous liquor was taken on board at St. Andrews, viz: brandy in packages less than fifteen gallons, and rum and gin in packages less than ninety gallons, and thus brought in her to Boothbay in this district, whereby the vessel was forfeited to the United States."

The case is presented for decision under very peculiar circumstances. The libel was filed in April last, and a partial hearing was had at the December term, when the government produced the deposition of one of the crew of the vessel on this voyage, in which he testified that the schooner, after taking on board her cargo of herring, went into St. Andrews; that all hands went on shore, and the master bought, in the presence of all the crew, a lot of brandy, rum, and whiskey, which was put into kegs of five to ten gallons, there being fifteen to twenty kegs in all; that the same were taken by the crew on board the vessel, and brought in her to Boothbay. It was testified by another witness for the government, that soon after the arrival of the Silver Moon, the claimant Decker brought to his house in a sleigh, very early in the morning, eight or ten kegs of liquor, which were put in the cellar, and which Decker said came up in the Silver Moon on the herring trip. Three other witnesses also testified to statements of Decker, that he had liquor come in the Silver Moon on this voyage, to some of whom, at the time, he either sold or gave liquor, which he said came in the schooner on this trip. Decker was called as a witness to prove that the vessel had at the time a permit to touch and trade, but no other inquiries were put to him by the counsel for either party. Others of the crew were in court at the December term while the trial was in progress, but they were not called as witnesses. The counsel for Decker, at this stage, asked for a continuance to the present term, agreeing, as the court understood, that if his request was granted he would not appeal from the decision if adverse, but not advising the court whether he expected to offer any rebutting testimony. At the present term, the master and remainder of the crew, two in number, are called as witnesses by the claimant, and they all testify that the vessel did not go to St. Andrews on this voyage, and was not at any time within six miles of that port, and that the master did not purchase any liquor at that place. The master states, that his brother-in-law, who resided near Back Bay, procured for him five gallons of brandy at one time, and ten gallons of West India rum afterwards, which were used for ship stores and by the men from the shore who were engaged in catching herring for the Silver Moon, and that no other liquor was bought or taken on board the schooner, excepting a small quantity purchased at Eastport, where they spent Christmas on their way to Back Bay. The seamen in all respects corroborate the master's testimony. The evidence was closed without any inquiries having been put to the claimant concerning his knowledge of liquors having been brought in the vessel, or of his reception of any such liquors, and as he was present, the court thought it not improper to suggest, as it was then about the usual hour of adjournment at noon, that there did not appear, in the minutes of the testimony taken at the December term, any evidence from the claimant, respecting his personal knowledge of or his connection with this alleged importation, and the law permitted him to be a witness in chief in a suit of this nature, in regard to all matters within his own personal knowledge. The court then adjourned. At the afternoon session no further testimony was offered by either party.

In this state of the cause, the testimony of one of the crew being strongly sustained by the acts and declarations of the claimant, as testified to by four other witnesses, and the claimant, although present in court, and well advised of the nature and effect of all this evidence against him, and of its direct bearing upon his own conduct in aid of the illegal importation, not having seen proper to afford by his own evidence any explanation or contradiction thereto, or to purge himself, as of old, from the charge by his own oath, what is the inference which any one must necessarily draw from his silence, under such cogent evidence against him of his personal connection with this transaction? Four witnesses unite in testifying, that at different times, when liquor was present before them either for sale or as a gift, he told them that it came on this trip of the Silver Moon. He knows whether he actually did make these statements, and whether if made by him, they were true or false. No one can know, better than himself, what the truth of the matter really is. He has not denied the statement of a single one of these witnesses, but remains in court with sealed lips, wishing me to presume that all these witnesses have stated falsely, because of the denial by the master and two of his crew, that liquors were imported in the vessel at this time. I admit that there can be no doubt but that on the one side or the other, the rankest perjury has been committed, and if the cause entirely depended on the testimony of those who went in the vessel on the voyage, I should the rather have inclined to give credit to the wit-

nesses for the claimant; but the testimony of the government witness, who was one of the crew the entire voyage, is most direct and circumstantial and persistent, and is corroborated so very forcibly by the other testimony of the acts and declarations of the claimant, that the fact was thus left in very great doubt and uncertainty in my mind, caused to a very great extent by the evidence as to the acts and declarations of the claimant. If the claimant's defence is just and right and true, why should he stand aloof, and in no way help by his own testimony in dissipating the doubts which hang around the cause? Why should the claimant require me to believe, that the witnesses for the government have given false testimony against him, when he is not willing to so assure the court by a denial of their statement under the sanction of his oath? Why this marked, deliberate silence, if he could conscientiously deny the truth of these statements? It is not from any scruples as to taking an oath, as he has testified as to the existence of a permit to touch and trade, and this after the testimony of the government had all been introduced against him; but he was very careful not to allow a word of contradiction to escape his lips. What else can I infer from the course he has adopted, than that the truth would not profit his cause, that he recognizes the binding obligation of an oath, and that in the presence of these witnesses and of their testimony, as a witness he could say nothing contradictory; and that without denial from him, their testimony must be received and acted upon, whatever may be the consequences to his defence? I can only understand from his silence, that the witnesses against him have testified truly, and that if called upon to testify in relation to their evidence, he would corroborate them instead of contradicting them, and would thereby destroy all hope or chance of a defence. I cannot but regard his conduct, in the presence of the court, as a fact which ought to have weight, and influence my decision, in determining with whom the truth in this matter is. The pressure of the government testimony was so severe against him, that I feel confident he would have denied it before me, by his own testimony, if he could have done so conscientiously; and not having denied it in any respect, I consider it equivalent to a positive admission from him that the witnesses in behalf of the government have testified the truth.

Under such circumstances, the claimant was called upon by the strongest considerations, if innocent, to bring to the support of his defence the very best evidence that was in his possession. This evidence existed in his own breast, and although cautioned, he has neglected to produce it for the information of the court, leaving the obvious presumption to be made against him, that the best evidence would be detrimental to his defence. As remarked by a learned writer, "if the weaker and less satisfactory evidence is given and relied on in support of a fact, when it is apparent to the court, that proof of a more explicit and direct character is within the power of a party, the same caution which rejects secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory, and it may well be presumed that if the more perfect exposition had been given, it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal." 2 Evans, Poth. Obl. 149. [There is no evidence that the liquors were not landed in open day.] [2] The permit to touch and trade justified the vessel in going to and trading at a foreign port, [and saves her and her cargo from condemnation under the third and fourth counts;] [2] but I am compelled to the conclusion that she did bring to Boothbay as alleged, liquors in packages less than was permitted by the acts of congress, and that for this reason I am bound to adjudge her to be forfeited to the United States.

[Decree of forfeiture of vessel for causes set forth in first count in the libel, and of restoration of the outfits and cargo to the claimant, with certificate of probable cause.] [2]

Let it be so decreed.

Case No. 12,857.

The SILVER SPRAY.

[1 Brown, Adm. 349.] [1]

District Court, E. D. Michigan. Feb., 1872.

SALVAGE — UNDER CONTRACT — LIMITATION — AMOUNT AGREED ON—SUBSALVORS.

1. Services rendered in pulling boilers out of a navigable river, into which they had fallen from a steamboat, are salvage services.

2. An agreement for a specific sum dependent upon success does not alter the nature of the service as a salvage service, but only furnishes a rule of compensation.

[Cited in The Marquette, Case No. 9,101.]

3. Such an agreement will not be set aside and a commensurate salvage awarded because it proves to be a hard one for the salvor.

4. A person hired by the salvor to assist him, with knowledge that his employer is operating under a contract, is also limited in the amount of his recovery by the contract price, and the fact that he is misinformed as to the terms of the contract creates no additional liability on the part of the property or its owners.

[See Baker v. The Tros, Case No. 783.]

On the libel of David Beard and Robert McArthur, for salvage. The libel alleged the loss of the boilers from the wreck of the Silver Spray, in Lake Huron, while the wreck was being raised (the vessel having been sunk by a collision), the abandonment of the boilers by the owners and insurers, and the raising and saving of the same by the libellants; that the value of the boilers was $2,000; and that the value of the libellants' labor, time,

2 [From 11 Int. Rev. Rec. 118.]

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

skill, expenses and use of machinery and teams were, in all, $1,825, for which they claim a lien on the boilers. The answer of John H. Moore admitted the boilers dropped into the water from the wreck while being raised, substantially as alleged in the libel, except that it happened in St. Clair river instead of Lake Huron, but denied that the same were lost or abandoned, as alleged; admitted that libellant McArthur raised the boilers and put them on shore, and at some trouble and expense, but not to the value and amount alleged, and denied that the boilers were worth $2,000; alleged that the boilers were so raised by express agreement with said McArthur to do the same for $100, and a tender of that sum before the libel was filed.

On the facts, which will appear in the opinion of the court so far as necessary, it was contended on the part of the respondent: (1) That there was a contract with the libellant McArthur to raise the boilers and put them on shore for $100, and no more. (2) That there being such contract the claim was not a salvage claim, and that, therefore, the libel must be dismissed. (3) That if a salvage claim, notwithstanding the contract, then the decree must be for the $100, and no more. (4) That there having been a tender after suit brought, costs could be awarded only up to the time of such tender.

On the part of libellants it was conceded that there was a contract with McArthur, but it was contended: (1) That such contract was for "$100 and salvage." (2) That if the contract was as contended by respondent, for $100 and no more, then, the amount being so grossly inadequate to the amount of labor, skill, and money actually expended, the court would disregard the contract and award a proper sum as salvage. (3) That the libellant, Beard, not being a party to the contract, was entitled to salvage without reference to it.

John Atkinson, for libelant.
W. A. Moore for claimant.

LONGYEAR, District Judge. It being conceded that there was a contract, the point to be determined is what was the compensation agreed on, that being the only point in dispute in this regard. The bargain, whatever it was, was made before anything had been done toward raising the boilers. Moore, the claimant, testifies that the bargain was for $100 for all services and expenses in raising the boilers and putting them on shore. McArthur testifies that it was for $100 "and salvage"—that the $100 was for finding the boilers, and that for raising them and putting them on shore he was to have a fair salvage compensation. McArthur's son testifies that he was present during a portion of the conversation, that he heard his father say he must have salvage, that he heard something said about $100, but did not understand what it was for. A Mr. Reilly, who had been acting for Moore in the matter, was also present, and he testified that he heard nothing said about salvage in addition to the $100, but he understood that amount to be in full for all services and expenses in raising the boilers, but as he was quite hard of hearing his testimony is not entitled to very much weight as to verbal statements, although he is an intelligent and a credible witness as to all facts within his knowledge.

The statements of Moore and McArthur are positive and in direct conflict, and that too in regard to a matter of fact in regard to which there should be no dispute between them. This being the case, the surrounding circumstances become of great importance. The boilers dropped from the wreck, and filled and went to the bottom very near where they dropped. This was of course in presence of persons in charge of the wreck, and being in a narrow river and in only about 20 feet of water, the finding of them by those interested could be no very difficult task. McArthur testifies that he discovered them accidentally while crossing the river in a skiff. Moore testifies positively that he knew where they were before he learned it from McArthur, and that, although the owners had abandoned the wreck to the insurers, the insurers, for whom he was acting, had not abandoned the boilers, but were intending to recover them, and in these statements Moore is in no manner contradicted. Is it probable that McArthur would claim, or Moore agree to pay, $100 for information which thus accidentally fell in the way of the former, without any expenditure of labor, skill, or money, and which was already in possession of the latter, or which was at all events of so easy access? I think not. This is rendered still more improbable, and the true nature of the agreement becomes still more apparent, when we consider what transpired before Moore and McArthur met. It appears that Reilly, who lived near where the boilers were, and knew McArthur, wrote to Moore, who lived in Buffalo, recommending McArthur as a proper person to employ to get the boilers out. Moore, in reply, wrote to Reilly, under date of May 19, 1870, as follows: "I am informed it will not cost over $30 to drag the boilers on shore. Simply throw chains or ropes around them, and put a snatch-block, with a horse, and drag them ashore in half a day. But if your man will take them on shore, up on the bank of course away from the water, I will give him $100. * * * Please write me what the man says, or let him do it." Reilly testifies that, after he received Moore's letter, he had an interview with McArthur, and read the letter to him, which is also admitted by McArthur in his testimony. Reilly further testifies that, immediately after this interview, he wrote to Moore, which letter, under date of May 23, 1870, was put in evidence, and as the statements in it correspond with Reilly's testimony, and are entitled to some additional

weight because they were made while the facts were fresh in the writer's memory, I quote from it. Reilly, in this letter, says: "I have seen and read your letter to McArthur. He will go to work in a few days and see what he can do. The weather does not permit just yet. I think that there will be a little more difficulty than you think about drawing the boilers on shore, on the ground that there is a steep bank which they have to be dragged over, and that bank is a bank of sand. However, I told him that no matter how much work he done that he would get nothing for it unless that he took the boilers clear away from the water." Reilly further testifies that in his negotiations with McArthur the latter set up no claim, nor even mentioned any claim, for finding the property, nor for salvage, in addition to or otherwise than at the price proposed by Moore in his letter, but, on the contrary, what took place between them, and the result of it, is substantially set forth in his (Reilly's) letter to Moore. It was in this state of the case, and under these circumstances, that Moore and McArthur met, some four or five days after the interview between Reilly and McArthur, and the bargain was concluded. These circumstances strongly corroborate Moore's statement that nothing was said about salvage in addition to, or otherwise than the $100, and my mind is led irresistibly to the conclusion that the contract was that the $100 was to be in full for all services, time, labor, skill and expense in getting the boilers out and putting them on shore, and that such was the clear understanding of its terms by both parties at the time.

Another consideration adds much strength to this conclusion. If the contract was for $100 and salvage, as now claimed by libellants, why did they not set it up in their libel as the basis of their claim? That they did not do so; but set up a claim for salvage merely, is a circumstance of great weight, tending to show that at that time they had no such understanding, and that the claim now set up is an after-thought. The theory of the libellants in filing their libel undoubtedly was the same which the court is now asked to adopt, viz.: That the contract, having turned out in the event to be a hard one for the libellants, it would be disregarded, and salvage proper be awarded. I find, therefore, that the service was rendered under a specific contract with McArthur, to be paid $100, in case of success, in full for all labor, time, skill and money, expended in the premises. Beard's relation to the matter will be noticed hereafter.

The second point made by respondent's advocate was not insisted on, and indeed it is well settled in England and in this country that an agreement for a specific compensation does not alter the nature of the service as a salvage service, but only furnishes the rule of compensation; especially where, as in this case, the right to receive the compensation agreed on was made dependent upon success. 2 Pars. Shipp. & Adm. 309, notes 1, 2; The William Lushington, 7 Notes Cas. 361; The Catharine, 6 Notes Cas. Supp. xliii., li. (where the question is quite fully discussed); The A. D. Patchin [Case No. 87]; The Emulous [Id. 4,480]; The Whitaker [Id. 17,524, Id. 17,525]; The Independence [Id. 7,014]; Williams v. The Jenny Lind [Id. 17,723]. That the nature of the service was a salvage service, I think, admits of no doubt, even though the property saved may not have been derelict. 2 Pars. Shipp. & Adm. 291. It was maritime property, and it lay sunken in maritime waters. In The Emulous [supra], Judge Story says: "I take it to be very clear, that wherever the service has been rendered in saving property from the sea, or wrecked on the coast of the sea, the service is, in the sense of the maritime law, a salvage service" (see also cases cited supra).

The third point made by the respondent, and the second point made by libellants, will be considered together. On the part of the respondent it is contended that the compensation must be limited to the contract price, and, on the part of the libellants, the court is asked to disregard the contract, and award them a sum as salvage somewhat commensurate to their expenditures. As the matter turned out, it was no doubt a hard bargain for the libellants. But I do not understand that a court of admiralty will set aside a contract for that cause alone, where it is free from all fraud, deception, mistake, or circumstances of controlling necessity. McArthur had ample time for consideration, and there is no pretense of any fraud or deception on the part of Moore or his agent Reilly, or that McArthur did not know all about the situation, and the difficulties in the way of getting the boilers out, and there was no controlling necessity, of duty or otherwise, to undertake the job. The contract appears to have been entered into openly and fairly in all respects, and there is no principle or authority upon which the court can disregard it, or make a new contract for the parties. It must; therefore, be enforced as it stands. See 2 Pars. Shipp. & Adm. 307, notes 2–5; The True Blue, 2 W. Rob. Adm. 176, 180 (a case very much like the present, except that in that case the expense was largely increased by a storm having come on, and yet the contract was enforced although the disparity was great); also The Henry, 2 Eng. Law & Eq. 564; The Phantom, L. R. 1 Adm. & Ecc. 59; The Salacia, 2 Hagg. Adm. 262; The A. D. Patchin [supra]; The Whitaker [supra],—a case very much like the present; Bearse v. 340 Pigs of Copper [Case No. 1,193]. McArthur was under no obligation to continue the work after he saw it must be a losing operation. His compensation was dependent upon success, and he was at liberty to abandon the work at any time. Parties, after having entered into a deliberate and explicit agreement, must not be encouraged to make large ex-

penditures beyond the contract price at the expense of the owners, by the courts, loosely or without the most cogent reasons, disregarding contracts thus entered into, and free from all circumstances of fraud, deception, mistake, or oppression existing at the time the contract was made. Parties must understand that contracts fairly entered into will be strictly enforced in admiralty, as well as elsewhere.

But it is contended that the libellant Beard, not being a party to the contract, is entitled to salvage, without reference to the contract. I do not think this position can be maintained. Beard was hired by McArthur, and was informed by the latter that he was operating under a contract. If McArthur misinformed him as to the terms of the contract, that is a matter between them, and such misinformation cannot operate to create any additional liability on the part of the property or its owners. McArthur was not, by virtue of his employment, an agent of the owners to create any liability beyond that for which he had contracted. The case of The Whitaker (cited supra) was very much like the present case, except in that case the original contractor Holbrook gave up the job entirely to Otis, who undertook and performed it. The court refused to decree in favor of Otis, without Holbrook being first made a party libellant with him; and then, although Otis had expended between $2,000 and $3,000 in that service, the court limited them to the contract price, which was only $900. Beard's compensation, like McArthur's was dependent upon success. He, therefore, stands in as good position as McArthur as to lien, but no better as to amount.

As suit was brought immediately after the service was completed, and without any demand or refusal to pay, no interest can be allowed. The tender was made September 10, 1870, which was after this suit was commenced. Costs must, therefore, be allowed up to, but not after that date. As the money tendered was not brought into court, a decree must be passed in favor of libellants.

Let a decree be entered in favor of libellants for $100, and costs up to September 10, 1870. Decree for libellants.

See The Marquette [Case No. 9,101].

Case No. 12,858.

The SILVER SPRING.

[1 Spr. 551;[1] 17 Law Rep. 264.]

District Court, D. Massachusetts. March, 1854.

FORFEITURE — SEIZURE — PLEADING—PLEA OF NO FORFEITURE.

1. A libel in rem, for a forfeiture, must allege that the property has been seized by the collector.

[Cited in The Fideliter, Case No. 4,755.]

2. A plea of no forfeiture, puts that allegation in issue, and if it be not proved, the libel is not sustained.

3. Correspondence between the collector, secretary of the treasury, and district attorney, and directions to the latter to file a libel, while the vessel is lying within the collector's district, do not constitute a seizure by the collector.

A libel was filed on the 1st of April, 1854, by the district attorney, on behalf of the United States, to enforce the forfeiture of the Silver Spring, of Harwich, a fishing schooner of 67 tons burden, alleged to have obtained the fishing bounty for the summer of 1853, by fraud and deceit, and to have become forfeited thereby. The claimants pleaded that there was no forfeiture. The proceeding was instituted on the part of the government, under the act of congress passed July 29, 1813 (chapter 35, §§ 5-7). The allegations of the libel stated that the vessel was seized on the 27th of March, 1854, before the filing of the libel, by the collector of the district of Barnstable, on waters of admiralty and maritime jurisdiction in said district. The evidence showed that the vessel, at the time of filing the libel, was lying at a port in the district of Barnstable; that several communications had passed between the collector of that district and the secretary of the treasury relative to proceedings against the Silver Spring; and that the collector, acting under instructions from the treasury department, had written to the district attorney, requesting him to bring an information against the vessel. But that the collector had not taken possession of the vessel, or in any way notified the owners of these proceedings, prior to the arrest of the vessel, by the marshal, under the warrant of the court, issued on the filing of the libel.

T. K. Lothrop, for claimants, contended, that this evidence failed to support the allegation of seizure; that the government were bound to prove a seizure by the collector, because they had alleged one: that the allegation was material, because the place of seizure determined what court should have jurisdiction to enforce the forfeiture; and also, because the statute made it essential to the power of the court to proceed to enforce a forfeiture, that there should be a valid seizure actually existing at the time of filing the libel. Act Cong. Sept. 24, 1789, c. 20, § 9 [1 Stat. 76]; The Ann, 9 Cranch [13 U. S.] 289.

B. F. Hallett, Dist. Atty., for the United States, contended: First, that a seizure was not necessary, and need not, therefore, be alleged. Second, that if it was necessary to allege a seizure, it was a merely formal allegation, and need not be proved. The Bolina [Case No. 1,608]. Third, that the various communications of the United States' officers, already referred to, constituted sufficient seizure. Fourth, that the claimants had waived their right of objection to the

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

jurisdiction of the court by the plea which they had put in.

THE COURT (SPRAGUE, District Judge.) The point taken by the counsel for the defence is, that there was no seizure of the vessel before the filing of the libel. The objection is founded on the statute 24th September, 1789, and the decision of the supreme court of the United States in The Ann, 9 Cranch [13 U. S.] 289.

The decision, in that case, did not depend upon the construction of the particular statute under which the property then became forfeited, but upon the construction of the act 24th September, 1789 (the "Judiciary Act"), which is equally applicable to the present proceeding. And, therefore, the rule laid down by the supreme court in that case, "that before judicial cognizance can attach upon a forfeiture, in rem, there must be a seizure," must govern the present case. The citation made by the district attorney, of The Bolina [supra], does not support the doctrine contended for, namely, that the allegation of seizure need not be proved. The objection there taken was, that the seizure was made by a verbal and not a written authority; and Judge Story, in his opinion, says that in England, under St. 9 Geo. II. c. 35, the allegation of seizure contained in the information is held sufficient proof thereof. But he nowhere says that a seizure is not necessary at common law, nor that it need not be proved in an information brought under any statute of the United States. The argument, on behalf of the government, that the facts of the case show a sufficient seizure, cannot prevail. The evidence proves various communications between the collector of the port of Barnstable, the secretary of the treasury, and the district attorney; and the argument is, that these communications, and the filing of this libel by the district attorney, in conformity with the instructions of the collector, in connection with the fact that the vessel was, at the time, in the collection district of Barnstable, and that this was known to the collector, constitute a sufficient seizure. But the collector did not take possession of the vessel, nor even give notice of any kind to any party in interest. And no cases give color to the theory, that where the vessel, at the time of filing the libel, is within the district, there need be no seizure. The supreme court of the United States say, that "it is a wise provision of law that requires the vessel to be seized;" that "the seizure gives jurisdiction to the court." And the court, before issuing a warrant to arrest the vessel, will see that the libel alleges a seizure. Some actual taking is necessary to give this court jurisdiction. Here there was no previous taking.

It is further argued, that this objection comes too late, that it was waived by the filing of the plea. But this is a question of the existence of those facts, which will warrant the court in proceeding to decree a forfeiture. See The Abby [Case No. 14].

In requiring a seizure, by the collector, prior to the filing of the libel on the part of the government, the legislature has made that fact a pre-requisite to a condemnation. And the plea in this case is like the plea of not guilty to an indictment, and puts in issue all the material allegations of the information. And if, upon the trial, it does not appear that there was a seizure previously to the filing of the libel, the information is not sustained, and a forfeiture will not be decreed.

A suggestion was made, on the part of the district attorney, that, if the allegation of seizure was immaterial, he might be permitted to amend his libel by omitting that allegation. But the information would be defective, if this allegation were omitted. Libel dismissed.

See The Washington [Case No. 17,223].

SILVER SPRING, The (WHALEN v.). See Case No. 17,477.

Case No. 12,859.

SILVERTHAIN'S ASSIGNEE v. MITCHELL.

[Nowhere reported; opinion not now accessible.]

SILVER WIRE & SKIRT MANUF'G CO. (WEST v.). See Case No. 17,425.

SIM (BURNS v.). See Case No. 2,184.

Case No. 12,860.

In re SIME et al.

[2 Sawy. 320; [1] 7 N. B. R. 407; 5 Pac. Law Rep. 217.]

Circuit Court, D. California. Dec. 16, 1872.[2]

DISQUALIFICATION OF JUDGE.

1. At the time of the adjudication in bankruptcy, the circuit judge was a creditor of the bankrupt, and he afterward made the necessary proof of his claim in the usual mode. After proof of the claim, he sold and assigned his claim against the bankrupt to another creditor, and received the consideration, and thenceforth ceased to have any interest in the matter. A petition by a party claiming to be a creditor having been presented to the circuit judge, under section 2 of the bankrupt act, praying a review of an order of the district court, and the proper orders to appear having been made on the application of the petitioner, when the cause was called for hearing, the petitioner's counsel raised the objection that the circuit judge was disqualified: *Held*, that the circuit judge was not disqualified.

2. There being no legal disqualification, and practically no other judge who could act for a long time to come, the circuit judge could not

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

[2] [Affirming Case No. 12,861.]

properly decline to act on a point of delicacy, and thus obstruct or delay the due administration of justice for an indefinite period of time, to the injury of a large number of creditors.

[In review of the action of the district court of the United States for the district of California.]

A petition having been filed, under the second section of the bankruptcy act, asking the circuit court to review an order of the district court in a proceeding in bankruptcy, the petitioner's counsel objected to the sitting of the circuit judge, on the ground that, at the time of the adjudication in bankruptcy, the judge was a creditor of the bankrupt [John Sime & Co.], and that he had since proved his claim, and was, therefore, disqualified.

J. L. Crittenden, for petitioners.

J. B. Harmon, contra.

SAWYER, Circuit Judge. Objection is made to the jurisdiction of the circuit judge on the ground of disqualification. At the time of the failure of the banking house of John Sime & Co., I was a depositor, having a balance to my credit on the books of the bank of $625.03. My claim has since been purchased and paid for by another creditor, and duly assigned to him. I took no part in the proceeding other than formal, such as making the proof of my claim in the prescribed mode, and assenting without examination to one or two steps in the proceedings, at the request of other creditors. The party objecting is the attorney of the assignee in bankruptcy of one King, who sets up a large claim against the bankrupts' estate for the conversion of certain stock, and which is contested by the trustees, and is in course of litigation in a suit pending in the state courts. The same party was the first to invoke my action while still a creditor, and when my interest was known to him, by presenting his petition to me for a revision of the action of the district court, and asking the necessary orders for the trustees to answer the same, and for staying the payment of any dividend until the rights of his client could be determined on said petition in this court. No action was taken by me until after the assignment of my claim, and then the first order made was on the application mentioned of the same party. Having invoked my action to bring the case before this court, and after thus getting it here, having raised and argued, without objection, a point of practice of a character tending to delay the proceeding, which was overruled by me, he now, for the first time, objects to my further action on the ground of legal disqualification, well knowing that if the point can be sustained, all further proceedings will be suspended till the return of Mr. Justice Field. After a careful consideration of the subject, I am satisfied that I am no longer disqualified under the law from sitting. No statutory disqualification is brought to my notice, and the point must be determined by the principles of the common law. I have now no interest whatever in the proceeding, pecuniary or otherwise. While a creditor of the estate, I took no part other than the mere formal one mentioned. I never examined or formed any opinion concerning any question involved in the proceeding, and I am not now conscious of any bias in any manner connected with it. I was once a creditor, it is true, but I have sold and assigned my claim and received the consideration. Doubtless the motive of the purchaser in buying was to relieve me from disqualification, and prevent the proceeding from being utterly obstructed for an indefinite period of time by appeals to the supervising jurisdiction of the circuit court, and for want of a judge competent to act. This is, certainly, not an improper motive on the part of the purchaser; and, as to myself, I could have no interest beyond getting my money. It is well known that Mr. Justice Field has just held a term in each district of his circuit, and is not required by law, and does not intend to come to the circuit again for a period of two years. I am not aware that there is any legal objection to removing the disqualification of a judge, or any impropriety in doing it in a lawful manner. No authority is cited against it, and I have been unable to find any. On the contrary, the case of Bank of North America v. Fitzsimons, 2 Bin. 454, clearly implies the propriety of such a course. When witnesses were incompetent, on the ground of interest, it was a matter of every day experience to remove the disqualification in open court, by releasing the witness from any liability, or by the witness himself releasing or receiving satisfaction for any claim that might render him incompetent. I do not perceive that there is any greater objection to removing in a legal manner the disqualification of a judge. I am, therefore, satisfied that I am now in no sense legally disqualified to act in this case.

It only remains to consider the question of delicacy, which is a matter of especial interest to myself alone. Although wholly unconscious of any bias that could in any possible degree warp my judgment upon any question that may arise, yet, as I was once a creditor, and as I have sold my claim to another creditor, whose motive in buying could only have been to remove any disqualification on my part, in case the jurisdiction of the circuit court should be invoked, and for the purpose of preventing a delay in the proceedings, I should gladly decline to act, if I could persuade myself that I could do so without a gross violation of official duty. If there was another judge competent to act, who could sit in the case without any unreasonable delay, I should not hesitate to leave the case to him. But there is practically none. As before stated, Mr Justice Field is not expected to be here for two years, and there is no other who can act. And when he does come he can only remain for a few days, and dispose of such questions as shall then have arisen. Others would be continually liable to

arise, rendering other delays necessary, till he should come again two years afterward, and these delays are liable to be repeated till the proceedings would become practically interminable. This would be equivalent to a total denial of justice. The estate in question amounts to several hundred thousand dollars, and numerous parties are interested in its speedy settlement. The parties interested are, at least, entitled to have an early adjudication of their rights. They may, or may not, be entitled to a dividend upon their claims before the termination of the objector's suit. However that may be, they are certainly entitled to have the appropriate tribunals determine whether they are so entitled or not, or what their rights are; and for a judge to refuse to hear their case simply on a point of delicacy, because he happens to find himself in an embarrassing position, though not legally disqualified, and when there is practically no other judge who can sit, would, in my judgment, be a gross injustice. Chancellors Kent and Walworth both sat in cases when they were disqualified by the express terms of the statute. Ex parte Leefe, 2 Barb. Ch. 39; People v. Edwards, 15 Barb. 529. In the latter case, Judge Strong decided the case, although interested in the question, but not in the case. An interest in the questions to be litigated does not appear to have been regarded as disqualifying the judge, provided he is not interested in the case. In Stuart v. Mechanics' & Farmers' Bank [19 Johns. 496], Chancellor Kent was a stockholder in the bank. In Mooers v. White, 6 Johns. Ch. 360, he was also disqualified. Chancellor Kent sat in these cases after consulting Chief Justice Spencer, and with his approval. This action was put on the ground that there was no other judge who could sit, and there would otherwise be a failure of justice. Pearce v. Atwood, 13 Mass. 340, Com. v. Ryan, 5 Mass. 90, and Hill v. Wells, 6 Pick. 109, and other cases, recognize the propriety of the course in such cases. The judges of the state district courts in San Francisco have, during the past twenty odd years, tried numerous cases in which the city was a party, involving in the aggregate millions of dollars, and in which the judges, as taxpayers and property holders, were necessarily interested. So, also, have the supreme court judges, although citizens of San Francisco, finally adjudicated such cases on appeal, and many others in which the state was a party, and in which they must necessarily have been interested as citizens, liable through taxation to respond. But in this case it is not necessary to go so far, as I am no longer in any manner interested either in the case or any of the questions involved, or otherwise legally disqualified. I must decline to act, if at all, on a mere matter of delicacy, because, under the circumstances, I find it unpleasant to do so. The bankrupt act manifestly gives the circuit court supervisory jurisdiction over all matters during the course of the proceedings, embracing every interlocutory order, in order that the rights of parties may be summarily adjudicated. A refusal to act by the only judge whose action can be invoked for a period of two years, when another judge will be present for a short time only, would utterly thwart the wise policy of the law.

After mature consideration, I am fully satisfied that I am not legally disqualified to act in the case, and further, that being qualified, I am not at liberty upon a matter of mere personal feeling or preference to decline the responsibility thrown upon me by my official position; nor, in my judgment, would I have been justified, under the circumstances, in declining to permit the disqualification to be removed, by refusing to sell my claim for the purpose of avoiding that responsibility. Notwithstanding the fact that my own mind had reached the conclusions announced, I was still unwilling to trust wholly to my own judgment in a matter of some delicacy. I have, therefore, consulted two of the United States district judges of this circuit, and all of the present justices of the supreme court of the state upon the point, and I am permitted to say that, without exception, they fully concur in the view that I am not disqualified, and being qualified, that I cannot decline to act under the circumstances without a gross and inexcusable violation of my official obligations. If I had entertained a doubt upon the point, I should still feel constrained to yield to the unbiased and disinterested judgment of jurists so eminently qualified to advise in a matter of the kind, especially as their judgment is in favor of my assuming jurisdiction in a matter wherein (if I could do so consistently with my own convictions of duty), I would gladly avoid action. The objection to the jurisdiction on the ground of disqualification of the judge is overruled.

Case No. 12,861.

In re SIME et al.

[3 Sawy. 305; [1] 12 N. B. R. 315.]

District Court, D. California. March 23, 1875.[2]

BANKRUPTCY — NEGOTIABLE PAPER — PURCHASER FOR VALUE.

1. After the bankruptcy of the maker his certificates of deposit are dishonored paper, and after they have been proved as claims against his estate no longer possess the qualities of negotiable paper.

2. Such claims are not entitled to the protection allowed by law to negotiable instruments, but stand on the same footing as a claim proved for an open account.

3. A person who takes an assignment of a claim proved in bankruptcy, as security for an antecedent liability from him in whose name the claim is proved, and who is apparently, though not really, the owner thereof, is not a purchaser for value and cannot hold the claim against the true owner.

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

[2] [Affirmed by circuit court in Case No. 12,-860.]

Petition of Sol. A. Sharp for an order restraining the trustee, P. J. White, from paying certain moneys in his hands to one Wm. T. Garratt, and directing the payment of said moneys to the petitioner. The material facts are as follows: John Sime & Co. were bankers, and on the first day of November, 1871, filed a petition and were adjudged bankrupts. At the time of the failure, Wm. R. Briggs was the holder of two certificates of deposit issued to him by Sime & Co. of the usual form payable to himself or his order on return of the certificate properly indorsed, one for $4,000 and the other for $3,500. At the same time the petitioner, Sharp, had a balance on an open deposit account to his credit of $1,413.92. Prior to the said first of November, two suits had been commenced and were still pending, one against John N. Risdon, and the other against Risdon & Coffee, the plaintiff in each being one Smith, who sued as assignee of John Sime & Co. and for their use and benefit. In these suits the property of John N. Risdon had been attached and released upon an undertaking executed by William Ware and the respondent Garratt. Garratt had also paid out for Risdon $3,200 on a note. Before executing the undertaking Garratt obtained from Risdon a conveyance of certain real property on Bush street as security for the money paid, and against his liability on the undertaking.

In this state of affairs, an agreement was made between Briggs, Sharp and Risdon on the same day (November 1), whereby it was agreed between them that Sharp and Briggs should assign their claims against Sime & Co. to Risdon; that Risdon should execute notes for sixty per cent of their amount, the notes to be indorsed by Ware; that the certificates of Briggs, and the account of Sharp, when indorsed and assigned, should be placed in the hands of R. H. Lloyd, and the notes in the hands of John R. Jarboe; and that in the event Risdon was able to use these claims as a setoff in the before-mentioned suits, then Lloyd was to deliver the certificates and account to Risdon, and Jarboo the notes to Briggs and Sharp. If the claims were not used as a setoff, then the notes were to be given up by Jarboe to Risdon, and the claims to Briggs and Sharp, by Lloyd. At the time of making the agreement it was supposed that Sime & Co. would go into bankruptcy, and it was uncertain whether the claims would be assigned before the filing of their petition so that they could be used as setoffs. In pursuance of this agreement Sharp made a written assignment of his account to Risdon, and Briggs indorsed his certificates; the notes were executed and placed in the hands of Jarboe and the claims in the hands of Lloyd. Briggs' indorsement was as follows: "Without recourse, W. R. Briggs." The assignments from Briggs and Sharp to Risdon were made after the petition was filed. On the ninth of December, 1871, Lloyd made out formal proofs of these claims in his hands, which were sworn to by Risdon. They were then left in the hands of register Bates, Mr. Lloyd stating to the register, that he was acting for other parties in the matter, and claimed a right to control the claims. Subsequently the claims got into the hands of the trustee White, and on the twelfth of September, 1872, into those of register Clarke. Prior to this no file mark appears on the claims. Attached to the proof is a copy of Sharp's account with the written assignment and the original certificates of Briggs indorsed in blank as aforesaid. So that on their face the claims appeared to be Risdon's. On each proof over the date of October 21, 1872, is a statement signed by the trustees to the effect that the claim is allowed, but that they think the assignment was made after the petition was filed, and that the claims cannot be used by Risdon as a setoff. On November 21, 1872, Risdon, by an assignment filed with register Clarke, assigned both claims to the respondent, Wm. T. Garratt, as security, in addition to the real property before conveyed, for the liability on the undertaking and the money paid as aforesaid. No new or present consideration was paid by Garratt for the assignment. When the agreement was made it was supposed the Sime & Co.'s estate would pay about twenty-five cents on the dollar. Afterwards by an advance in stocks the estate became able to pay dollar for dollar. The suits against Risdon went to judgment without the claims being used as setoffs; ever since the trustee and his attorney have refused their assent to the allowance of them as a setoff in the bankruptcy matter. Before the filing of the present petition Briggs assigned his interest in the claims to the petitioner, Sharp.

Sharp & Lloyd and Walter H. Tompkins, for petitioner.

M. M. Estee, for respondent.

HILLYER, District Judge. Upon the facts it is plain that Risdon never has become, and he never can become, the true owner of these claims, under the agreement between him and Sharp and Briggs. Because he never did, and he never can, use them as a setoff to the demand of Sime & Co. against him. The construction sought to be put upon the agreement by counsel for Garratt, that it was the intention of the parties to transfer the absolute title to Risdon subject only to a right on his part to return the claims and receive the notes, if he could not use them as a setoff, is not the true one. This is evident from the fact that Sharp and Briggs, by the terms of the agreement never could become entitled to a delivery of the notes to them until the claims were used as setoffs. The agreement must all be construed together; and so taken, the use of the claims as a setoff was the thing upon which the right of Risdon to the claims, and of Sharp and Briggs to the notes, hinged.

So far, then, as the parties to the agreement are concerned the property in these claims never was in Risdon. His assignment of them, under the circumstances, was a fraudulent act, and the only question in this case upon which I have felt any hesitation is, whether Garratt got them under such circumstances as to debar the true owners from asserting their title against him.

But little need be said in answer to that portion of respondent's argument which went upon the assumption that the two certificates of deposit were negotiable instruments, and came into Garratt's hands as indorsee without notice of any of the facts impeaching Risdon's title. For, after the bankruptcy of the maker, they were dishonored paper, and, after they were proved and filed as claims in the bankruptcy court, they no longer had the qualities of negotiable paper. The claims, as such, were neither transferable by delivery nor indorsement; they could still be assigned but not delivered or taken from the files. It is surely a complete misnomer to call such claims negotiable paper. The claim, then, which embraces the certificates, stands on the same footing as the one proved for the open account. These claims must be treated as personal property, and as not entitled to the immunities and protection allowed by law to negotiable instruments.

The general rule of the common law is, that no one can give a better title to personal property than he has himself. Murray v. Lardner, 2 Wall. [69 U. S.] 110. It is said in Root v. French, 13 Wend. 570, that one exception to this rule which will give a third person a better title and a superior equity to the true owner, is made in favor of a third person who has given value for the property or incurred some responsibility upon the credit of it, and without notice of the fraud.

Garratt claims that he is a purchaser for value without notice of the fraud. Is he? It has been held that "a person who takes a bill which upon the face of it was dishonored, cannot be allowed to claim the privileges which belong to a bona fide holder without notice. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it; and is in no better condition than the person from whom he received it." Andrews v. Pond, 13 Pet. [38 U. S.] 65. And again: "A note overdue or a bill dishonored is a circumstance of suspicion to put those dealing for it afterwards on their guard, and in whose hands it is open to the same defenses that it was in the hands of the holder when it fell due. After maturity such paper cannot be negotiable in the due course of trade, although still assignable." Fowler v. Brantley, 14 Pet. [39 U. S.] 318. If this is true of notes and bills which pass by delivery, a fortiori it must be so of claims, like those in the present case, assigned after the bankruptcy of the maker and actually proved up and filed in the bankruptcy proceedings. Nor can the fact that the claims were proved up in the name of Risdon be regarded as any higher evidence of title in him than would his possession of the assigned account and the indorsed certificates had the claims not been proved and filed.

If it is prima facie evidence of title it is not conclusive against the true owner. Possession, says the supreme court of California, of personal property is only prima facie evidence of ownership, and never prevails against the true owner, except with reference to negotiable instruments and whatever comes under the general denomination of currency. The principle that no one can be divested of his property without his consent, and the maxim that no one can transfer a better title than he has himself, control all questions arising as to property, of which a transfer is attempted, with the exception stated. Wright v. Solomon, 19 Cal. 64. Wetmore v. San Francisco, 44 Cal. 294, cited by respondents, is not against this, because there the assignor of the demand against the city was the true owner of it, and assigned it absolutely. Here, Risdon was not the owner, and, under the general rule, could convey no better title than he had.

But is Garratt a purchaser for value? Whether in the case of the transfer of a negotiable instrument as security for a pre-existing debt, the transferee is a holder for value so as to cut off equities between the antecedent parties, is a very unsettled question. The tendency of the supreme court of the United States seems to be towards holding that the transferee under such circumstances takes the paper clear of equities of which he had no notice. Swift v. Tyson, 16 Pet. [41 U. S.] 1; and Goodman v. Simonds, 20 How. [61 U. S.] 343. But this, if ever it is done, will be on account of the favor with which the commercial law regards negotiable paper from a desire to make its circulation as safe and untrammelled as possible. The same reason, however, does not apply to this case, and unless the respondent gave value, incurred some responsibility, parted with something, on the credit of the assignment, he can have no equity superior or equal to that of the true owners.

But Garratt has parted with nothing on the faith or credit of Risdon's assignment, and will be in no respect worse off, if these claims are returned to the true owner, than he was before they were assigned to him. The assignment of the claims to Garratt as a security for pre-existing debts and liabilities does not constitute him a "purchaser for value" according to the legal import of that term, nor enable him to invoke the rule, that where one of two innocent parties must suffer, from the fraud of a third person, he shall suffer who by some act of his has put it in the power of the third person to commit the fraud. On the other hand, these claims represent so much coin deposited by

Sharp and Briggs with Sime & Co., and hitherto they have received nothing for them. The notes in Jarboe's hands are not, and as we have seen, they cannot, under the agreement, become available to them. So that, if the respondent were to succeed, he would get some $10,000, for which he had actually given nothing. Or Risdon himself would get it in case this additional security was not needed to make Garratt whole on the liabilities he has incurred for Risdon. Such a result is repugnant alike to law and equity. In addition to this, the testimony of Garratt leaves little doubt in my mind that he took the assignment with full knowledge of the true state of Risdon's title. I rest the decision, however, upon the ground that Garratt is not a purchaser for value, and cannot, therefore, hold these claims against the true owner, whom I find to be the petitioner.

There must be a decree for the petitioner as prayed, with costs.

On appeal, Sawyer, Circuit Judge, affirmed the decree of the district court. [Case No. 12,-860.]

SIMM (EMERSON v.). See Case No. 4,443.

SIMM (KING v.). See Case No. 7,805.

SIMMES (McGUNNIGLE v.). See Case No. 8,817.

Case No. 12,862.

SIMMES v. MARINE INS. CO.

[2 Cranch, C. C. 618.][1]

Circuit Court, District of Columbia. Nov. Term, 1825.

MARINE INSURANCE — INSURABLE INTEREST — FREIGHT—BILL OF LADING—DESTINATION OF VESSEL.

1. A person, for whose use a vessel worth $3,000 or $4,000 was built, and who held the builders' bond of conveyance of the same, upon the payment of $1,260, and who had the entire possession and use of the vessel, had an insurable interest in the freight, and truly represented himself to the underwriters as the owner of the vessel, although the register was in the name of the builder, and that fact not disclosed to the underwriters at the time of executing the policy.

2. Upon an open policy from St. Thomas to Havana, it was not necessary to disclose the fact that the vessel had sailed from Alexandria to Buenos Ayres, where a part of the cargo was discharged, and thence to St. Thomas.

3. The owner of a vessel is entitled to reasonable freight only, unless he shows an express contract for a specific sum, or price.

4. The bill of lading was not conclusive evidence of such a contract.

5. The bond of conveyance of the vessel, by the builder, to the plaintiff, was not conclusive evidence that the ownership, so far as the freight was concerned, was in the builder at the time of the insurance.

6. It was no valid objection to the plaintiff's recovering freight from the Danish island, St. Thomas, to the Spanish colony, Havana, that the vessel had been chartered at Buenos Ayres, then in a state of revolt against Spain, by Danish subjects, resident at St. Thomas, for a voyage from Buenos Ayres to Havana, with leave to stop at St. Thomas, where she did stop and changed her papers, and took a new bill of lading without unlading the cargo.

This was an action [by Alexander Simmes against the Marine Insurance Company of Alexandria] upon an open policy on freight of the schooner Eleanor Simmes, from St. Thomas to Havana, amounting to $3,100. The vessel was lost near Havana.

The facts of the case appeared to be, that the vessel was built by one Levin Stewart, for the plaintiff, who was master of the vessel, and who had her rigged at his expense. That she was delivered to the plaintiff by Stewart, who registered her in his own name, and gave the plaintiff a bond to convey her to him upon the payment of the balance due for the building of her, amounting to $1,260. The value of the vessel being between $3,000 and $4,000. The application for insurance called her the Eleanor Simmes, Alexander Simmes, master and owner.

Hewitt & Key, for plaintiff.

Taylor & Swann, for defendants.

Mr. Swann, for defendants, moved the court to instruct the jury, that the plaintiff had shown no insurable interest in the freight; but that if he had, the nature of his interest ought to have been disclosed. He contended that freight cannot be insured as freight by any person who is not the owner of the vessel, unless the nature of the plaintiff's claim for freight be disclosed to the underwriters at the time of executing the policy. That the plaintiff had no insurable interest in the freight, until he had paid the $1,260. Riley v. Delafield, 7 Johns. 522; Camden v. Anderson, Marsh. Ins. (Portland Ed.) 91.

Mr. Taylor, on the same side, contended that the plaintiff should also have disclosed the previous voyage from Buenos Ayres to St. Thomas. Murdock v. Potts, Marsh. Ins. 230.

Mr. Key, contra. The ownership may be proved by circumstantial evidence, and we have a right to contend before the jury, that the plaintiff is the owner notwithstanding the register is in the name of Stewart. Both Simmes and Stewart had an insurable interest in the vessel. She was worth $4,000, and only $1,260 were due to Stewart. Simmes rigged her at his expense, and fitted her out. Stewart must be considered as a mere mortgagee. He had an interest in the vessel to the extent of his $1,260, and no further. All the earnings of the vessel belonged to Simmes. He had the whole use of the vessel. Stewart could not have claimed the freight from the consignees. The fact that a part of the cargo was taken in at Buenos Ayres, does not affect the plaintiff's right to freight from St. Thomas to Havana. The courts of one nation do not enforce the revenue laws of another nation.

THE COURT refused to give the instruc-

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

tion, as prayed, but instructed the jury, in effect, that if they should be satisfied by the evidence that Levin Stewart only retained the legal title as his security for $1,260, and permitted the plaintiff to take possession of the vessel, and use it for his own benefit, and that the plaintiff rigged, fitted out, and furnished the said vessel at his own expense, for the voyage mentioned in the policy, and that the vessel was built for and sold to the plaintiff; then the plaintiff had an insurable interest in the freight, and the representation made by the plaintiff's agent to the underwriters was a sufficient disclosure of his interest.

The defendants' counsel then prayed the court to instruct the jury that the plaintiff could only recover a reasonable compensation for the freight.

THE COURT refused to give the instruction as prayed, but gave it with this qualification, to wit, unless the plaintiff should prove an express contract for a specific sum, fairly made; and that the bill of lading, although permitted by the defendants to be read in evidence, is not conclusive evidence of such a contract.

THE COURT also refused the defendants' prayer to instruct the jury, that the bond of conveyance of the vessel from Stewart to Simmes was conclusive evidence of the ownership being in Stewart, and that Simmes had not an insurable interest in the freight as owner, as represented in the written order for insurance.

THE COURT also refused the defendants' prayer to instruct the jury, that if they should find from the evidence, that the vessel was chartered at Buenos Ayres, by the agent of Burgurt and Ullhorn, Danish subjects, resident in the Danish Island of St. Thomas, for a voyage thence to Havana, with leave to touch at St. Thomas, where her cargo, after touching there, was not taken out; that Buenos Ayres was in a state of revolt against Spain, but claiming to be independent, and that Havana was in subjection to Spain; that her papers were changed at St. Thomas, and the bill of lading there signed, the voyage was illegal, and the plaintiff cannot recover upon this policy.

The verdict was for the plaintiff.

Bills of exception were taken, but no writ of error.

Case No. 12,863.

Ex parte SIMMONS.

[4 Wash. C. C. 396.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1823.

SLAVERY—FUGITIVE SLAVE LAW—SIX MONTHS' RESIDENCE IN PENNSYLVANIA.

1. The act of congress respecting fugitives owing service and labour does not apply to slaves brought by their masters from one state to another, who afterwards escape, or refuse to return.

[Cited in Jones v. Van Zandt, 5 How. (46 U. S.) 228.]

[Cited in Anderson v. Poindexter, 6 Ohio St. 646; Com. v. Aves, 18 Pick. 222; Eells v. People, 4 Scam. 514; Willard v. People, Id. 473.]

2. A sojourner, who brings his slave with him to Pennsylvania, cannot claim him as a slave after he has resided there six months. He is free by the act of that state of March 1, 1780.

[Cited in Polydore v. Prince, Case No. 11,-257; Osborn v. Nicholson, Id. 10,595.]

This was an application made to WASHINGTON, Circuit Justice, in Philadelphia, out of court, by Mr. Simmons, under the third section of the act of congress respecting fugitives from justice, &c. (see 1 Story's Laws, 274), for a certificate as provided by that section. The evidence was, that Mr. Simmons came to Philadelphia from Charleston, South Carolina, where he resided, and has plantations, in February 1822, and rented a house for one quarter, which he furnished, and in which he continued to reside with his family for three quarters and six weeks. That he brought with him his slave, as his property, who remained during that period, or the greatest part of it, in his service as a domestic, and who has remained in Philadelphia until the present time, without any attempt being made by his master to remove him back to South Carolina, until the present application.

By WASHINGTON, Circuit Justice. The judge refused to grant the certificate upon the following grounds:

1. That this is not a case within either the words or the intention of the third section of the act of congress, under which this application is made. That relates to fugitives from one state or territory to another. The words of the law are, that "when any person held to labour in any of the United States, &c. under the laws thereof shall escape into any other of the said states," &c. the owner or his agent may seize "such fugitive from labour," and upon proof made to the satisfaction of the judge, that the person so seized doth, under the laws of the state "from which he fled" owe service, &c. it is made the duty of the judge to grant the certificate. The second section of the fourth article of the constitution of the United States is confined to persons held to service or labour in one state, under the laws thereof, escaping into another. If the constitution and law relating to this subject were susceptible of a construction broader than the language used, so as to embrace the case of persons owing service brought or carried into another state, it would clearly follow, that the act of this state, passed the 1st of March, 1780, for the gradual abolition of slavery (see 1 Smith's Laws, 492), so far as it respects slaves coming into this state from other states, would be repugnant to the above section of the constitution of the United States, and consequently void. But in

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

the case of Butler v. Hopper [Case No. 2,241], decided in the circuit court of the United States for this district, in which this point was made, the court said that the law of this state was not a violation of the constitution of the United States, inasmuch as the constitution does not extend to the case of a slave voluntarily carried by his master into another state, and there leaving him under the protection of some law of the state declaring him free, but to slaves escaping from one state to another. The slave in this case having been voluntarily brought by his master into this state, I have no cognizance of the case, so far as respects this application, and the master must abide by the laws of this state so far as they may affect his rights. If the man claimed as a slave be not entitled to his freedom under the laws of this state, the master must pursue such remedy for his recovery as the laws of the state have provided for him.

2. I am of opinion that the alleged slave is free under the act of the assembly of this state before referred to. The exception in the tenth section of the act in favour of members of congress, foreign ministers, and consuls, and sojourners, bringing their domestic servants into the state, is qualified by the proviso, as to sojourners and persons passing through the state, in such a manner as to exclude them from the benefit of the exception, where such domestic slave is retained in the state longer than six months. This man has been retained in the state, and in Mr. Simmons' service, for a much longer period than six months.

Certificate refused.

Case No. 12,864.

In re SIMMONS.

[10 N. B. R. 253; [1] 1 Cent. Law J. 440.]

District Court, E. D. Michigan. Aug. 3, 1874.

BANKRUPTCY—THE PETITION—DEFECTIVE VERIFICATION—VERIFICATION BY EACH PETITIONER—AMENDMENT—JURISDICTION.

1. Several creditors filed a petition against their debtor to have him adjudged a bankrupt, on the 11th day of July, 1874, which petition the debtor alleged was defective as to the verification; a motion was then made to amend by annexing to the petition a new verification, in case the verification shall be held insufficient. *Held*, that when the petitioners, constituting one-fourth in number and one-third in value of the creditors, are less than five, it is not necessary for the person verifying the petition, as agent, to state the residence of his principals as a foundation of his right to act in the premises.

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

2. Where several petitioners join in the petition in separate and distinct rights, each stands as a separate and distinct party to the litigation so far as the right in which he prosecutes is concerned, and a verification by or on behalf of each petitioner is required.

3. The court has jurisdiction when a petition is filed, notwithstanding the insufficiency of the verification, and therefore power to allow an amendment of it.

[Cited in Re Rosenfields, Case No. 12,061; Re Hanibel, Id. 6,023; Re Mann, Id. 9,033; Re Donnelly, 5 Fed. 787.]

On the motion of respondent [Solomon Simmons] to vacate the order to show cause and dismiss the petition for want of a sufficient verification to the petition, and the cross motion of the petitioning creditors to amend by supplying a sufficient verification. By the 12th section of the amendatory act of June 22, 1874 [18 Stat. 180], section 39 of the original act [14 Stat. 536] was, among other things, amended so as to provide that any person residing and owing debts, and committing any one of certain acts, as therein specified, shall be deemed to have committed an act of bankruptcy, and, subject to conditions therein mentioned, "shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable: * * * And the petition of creditors under this section may be sufficiently verified by the first five signers thereof, if so many there be. And if any of said first five signers shall not reside in the district in which such petition is to be filed, the same may be signed and verified by the oath or oaths of the attorney or attorneys, agent or agents, of such signers."

The petition in this case was filed July 11, 1874, by four creditors, who are described in the introduction of the petition as follows: "The petition of Simon Heavenrich and Samuel Heavenrich, doing business under the firm name of Heavenrich Brothers, of Detroit, Michigan, in said district; of L. Morris; of Dessar, Stern & Co., a partnership composed of A. Dessar, D. Stern, J. B. Dessar, and D. Dessar; of Meyer & Schwab, a partnership composed of Julius R. Meyer, and Jacob Schwab, all of the city, county, and state of New York." The petition is signed as follows: "Heavenrich Brothers, per Samuel Heavenrich. L. Morris, per Samuel Heavenrich, Agent. Dessar, Stern & Co., per Samuel Heavenrich, Agent. Meyer & Schwab, per Samuel Heavenrich, Agent."

The verification of the petition is as follows: "Eastern District of Michigan, ss.: I, Samuel Heavenrich, being duly sworn, says that he is one of the firm of Heavenrich Brothers, of Detroit, Michigan, and make this affidavit on their behalf—that he is also agent for L. Morris, Dessar, Stern & Co., and Meyer & Schwab, and has full power and authority from them to make this petition, do hereby make solemn oath that the statements contained in the foregoing petition by me subscribed are true of my own knowledge, so far as the same are stated upon my own knowledge, and that those matters which are stated therein on information and belief, are true

[1] [Reprinted from 10 N. B. R. 253, by permission.]

according to the best of my knowledge, information, and belief. Samuel Heavenrich.

"Subscribed and sworn to before me, this 11th day of July, A. D. 1874. Jno. Graves, U. S. Commissioner, East. Dist., Michigan."

The grounds of the motion to vacate and dismiss are: First, that the affidavit does not show any authority in Samuel Heavenrich to sign and verify the petition for the last three petitioners named, because it does not state that they do not reside in this district; and, second, that it is not in fact made on behalf of the said petitioners. On behalf of the petitioning creditors it was contended as to the first ground of motion, that even if the provision quoted applies to this case, the statement of the residence of petitioners in the introduction of the petition is sufficient to confer the authority to sign and verify the petition by agent or attorney; but it was at the same time contended that the provision in question applies only where there are five or more petitioners, and that, in a case like the present, where the number is less than five, the law as to verification remains as it was before the amendment, and that by that law a verification by one of several petitioning creditors was sufficient. And as to the second ground of motion, it was contended that it is sufficient to state that the person making the oath is agent and has authority to make the petition; and that, in this instance, the person making the oath, being himself one of the petitioners, his statement that the contents of the petition are true of his own knowledge, so far as stated upon his own knowledge, was sufficient, because what was stated upon the knowledge of all the petitioners was necessarily upon the knowledge of each one of them. While opposing the motion, however, a motion was interposed on behalf of the petitioning creditors, to amend by annexing to the petition a new verification in case the verification shall be held insufficient.

Don. M. Dickinson, for petitioning creditors.

H. M. Duffield, for respondents.

LONGYEAR, District Judge. By the amendatory act of June 22, 1874 (section 12), non-residence within the district in which the petition is to be filed is made the sole ground of the right or privilege to have the petition signed and verified by agent or attorney; and I am of opinion that in all cases coming within the provisions of the amendment, such non-residence should be stated and sworn to in the affidavit by which the petition is verified, especially where, as in this case, the residence of the petitioners is stated in the petition by way of description merely, and not by way of positive averment. But it is unnecessary to elaborate this point, because I am of opinion that this case does not come within the provisions of the amendment so far as the matter of the verification of the petition is concerned. The language of the provision under consideration is, "And if any of the said first five signers shall not reside in the district," etc. The words "said first five signers" relate back to the next preceding sentence, viz.: "And the petition of creditors under this section may be sufficiently verified by the oaths of the first five signers thereof, if so many there be." If there be not so many as five, then, certainly, the provision can have no application, because it was not made, neither was it needed for any such case; in all such cases the law was left as it was before the amendment. In the present case the petitioners are less than five in number, and therefore it was not necessary for the person verifying the petition as agent to state the residence of his principals as a foundation of his right to act in the premises. The sufficiency of the verification, then, must be tested by the law without reference to the provision in question.

The position of petitioners' counsel is that the verification is certainly sufficient as to one of the petitioners, viz: Heavenrich Brothers; and that a verification by one of the several petitioners is sufficient (the whole number being less than five), and that it has always been so treated and held in practice. Such was my first impression, but upon reflection, and a somewhat critical search for decisions of the courts upon the question, I am satisfied that the position cannot be maintained where, as in the present case, the petitioners join in separate and distinct rights, and not in one and the same right as partners or otherwise. Where several petitioners join in the petition in the same right, the practice is, I believe, well settled, to treat a verification by one as sufficient, and no good reason is apparent why it should not be so. But the case of petitioners joining in separate and distinct rights is very different. Then each stands as a separate and distinct party to the litigation, so far as the right in which he prosecutes is concerned. The debt, or right to prosecute of each may be contested separately from all the others. They are allowed to join in order to make up the requisite number and amount, but when so joined the matter stands precisely the same as if each had filed a separate petition on his own separate debt, based upon the same act or acts of bankruptcy, and then consolidated into one suit; and a verification by or on behalf of each petitioner is just as necessary in the one case as in the other.

The only remaining question upon this branch of the matter, therefore, is, was the verification sufficient as to each one of the petitioning creditors? As to Heavenrich Brothers, it was no doubt sufficient, and it was so conceded. As to the others, however, I think it was insufficient. True, Samuel Heavenrich, who signed the petition on

behalf of the others as their agent, swears to his agency and to his authority "to make" the petition. This no doubt sufficiently establishes his authority to sign and verify the petition on their behalf. But the difficulty is, he utterly failed to so verify. His affidavit is not in terms, nor by any implication whatever, on behalf of any of the petitioners other than Heavenrich Brothers. On the contrary, it is in terms, and by necessary implication, limited to them and them alone. In the first place, he swore that he was a member of the firm of Heavenrich Brothers, one of the petitioners, and that he made the affidavit on their behalf; and then, when he came to the substance of the verification, he swore "that the statements contained in the foregoing petition by me subscribed are true of my own knowledge so far as same are stated upon my own knowledge;" thus clearly limiting his verification to himself and his firm, and excluding any application of it to the other petitioners. There was, therefore, no verification whatever as to the three petitioners, Morris, Dessar, Stern & Co., and Meyer & Schwab; without which the order to show cause was not authorized. It results that the motion of respondent must be granted, so far at least as to vacate the order to show cause.

The only question remaining is that arising upon the motion on behalf of the petitioning creditors for leave to amend by supplying a sufficient verification. The solution of this question depends upon whether jurisdiction of the suit or matter depended upon there being a sufficient verification in the first instance. In Re McNaughton [Case No. 8,912], this court held that jurisdiction was obtained by the filing of the petition, and that the verification of the petition and depositions of debt and of act of bankruptcy were necessary only to obtain jurisdiction of the person of the alleged bankrupt by the process of the court, to wit: the order to show cause. See, also, In re Raynor [Case No. 11,597]. On a review of the grounds of judgment in Re McNaughton, I still adhere to the opinion there expressed. It is true that decision was made before the recent amendments, but the amendments have not changed the law so far as it bears upon the question now under consideration. The language of the act, both before and after the amendments (section 39), prescribing the means of acquiring jurisdiction so far as relates to the petition, is, "Shall be adjudged a bankrupt on the petition of one or more of his creditors." Nowhere in the act, nor by any rule or order is any verification of the petition expressly required. Why then is a verification necessary at all? By some this question is answered by saying, because the supreme court have so indicated by the forms prescribed by them. But, in my opinion, that would be ascribing to the supreme court the exercise of an unwarranted power in the absence of anything in the act itself making a verification necessary. In my opinion the answer to the question is found in the provision of section 40, prescribing upon what showing an order to show cause may be made. That provision is as follows: "That upon the filing of the petition authorized by the next preceding section, if it shall appear that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause," etc. That "sufficient grounds exist" can be made "to appear" only by some sort of legal evidence; and by the prescribed forms the supreme court have, in effect, said what that evidence shall be, viz.: First, a verification of the entire petition, and second, depositions as to the alleged debt and act or acts of bankruptcy. The verification is no part of the petition. It is necessary that it should accompany the petition only in order to predicate upon it certain prescribed action in furtherance of the jurisdiction acquired by the filing of the petition, viz: the order to show cause. The filing of the petition is mentioned in section 40 as authorized by the next preceding section as an accomplished fact; and then, for the first time, creates a necessity for a verification; and the commencement of proceedings is made to date from such filing. Section 38.

Therefore, having jurisdiction of the matter, notwithstanding the insufficiency of the verification, the court has power to allow the amendment asked. As no good reason appears why it should not be allowed, and as it does appear that a denial of the motion to award and a dismissal of the petition would be a denial of the right of creditors to proceed at all by a new petition, for the reason that the six months' limitation, within which a petition can be filed for the act of bankruptcy alleged, has expired since the filing of this petition, I think the amendment ought to be allowed, and the same is allowed accordingly. But it must be upon terms of payment by the petitioning creditors of all costs upon the order to show cause hereby vacated, and the costs of these motions, to be taxed, including a solicitor's fee of ten dollars. Ordered accordingly.

Case No. 12,865.

SIMMONS' CASE.

[1 Brown, Adm. 128.] [1]

District Court, E. D. Michigan. Nov., 1865.

CUSTOMS DUTIES — SMUGGLING — DEFINITION OF "WEARING APPAREL IN ACTUAL USE."

A person who goes to a foreign country for the purpose of buying clothing, is not within the provisions of section 3 of the act of March 3, 1857 [11 Stat. 194], providing for the free entry of "wearing apparel in actual use * * * of persons arriving in the United States," notwithstanding he wears the same in returning home.

Information for smuggling. From the defendant's admission to the collector, it ap-

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

peared that being a resident of Washtenaw county, Michigan, on the 17th of November, A. D. 1865, he went from there to Windsor, Canada West, for the purpose of buying an overcoat for his son, a lad of eighteen, who accompanied him. It was purchased and put on by the young man; the father and son recrossed the river into the United States, the son wearing the overcoat, passed by the custom house, and when stopped by a custom house officer, who seized the coat, declared that they had no intention of entering the goods.

Alfred Russell, Dist. Atty., for United States.

WILKINS, District Judge (charging jury). If the jury find the facts as stated in the testimony of the collector, I instruct you that the offense as matter of law is complete. Section 5 of the act of June 30, 1864 (Sess. Laws 1864, p. 207), provides for duty on clothing, as follows: "On clothing, ready made, and wearing apparel of every description, composed wholly or in part of wool, made up or manufactured wholly or in part by the tailor, seamstress or manufacturer, except hosiery, twenty-four cents per pound, and in addition thereto, forty per centum ad valorem." The defendant relies upon section 3 of the act of March 3, 1857 (11 Stat. 194), which provides for the free entry of "wearing apparel in actual use, and other personal effects (not merchandise), professional books, implements, instruments, and tools of trade, occupation or employment, of persons arriving in the United States." In my view of the law, the overcoat, although on the back of the young man, was not in "the actual use of a person arriving in the United States," within the meaning of the exemption. The use referred to in the statute is use prior to coming into the United States, by a person who has been abroad, or lived abroad, and who has not visited the foreign country for the very purpose of bringing in the clothing upon his body, with the design of thereby escaping the payment of duty. Otherwise a dozen men might cross repeatedly during the day, and bring over clothing enough on their backs to supply a clothing store. Moreover, in all cases of wearing apparel in use, tools, etc., a free entry must be made at the custom house, and a declaration made under oath, in writing, bringing the party within the exemption. See General Regulations Treasury Department, pp. 560, 600. I understand the practice is quite general of persons going to Canada and wearing back new clothes, sending the old ones by express. This is in direct violation of the law, and if satisfied of the facts, your verdict should be guilty.

Defendant convicted.

SIMMONS (AMERICAN COTTON TIE CO. v.). See Case No. 293.

Case No. 12,866.

SIMMONS et al. v. BLACKINTON et al.

[3 Ban. & A. 481.] [1]

Circuit Court, D. Massachusetts. Oct., 1878.

PATENTS—UTILITY—ORNAMENTAL CHAIN LINKS—NOVELTY.

1. Where a patented invention possesses peculiar advantages, derived from mode of construction, which are not found in prior devices of generally a similar character, there is sufficient utility to support the patent.

2. Letters patent No. 193,543, for "an improvement in ornamental chain links," the claims of which are: "1. The combination, in a box-chain link, of the independent perforated and externally-plated sides, A, having mitred edged, and soldered together at said edges or from the inner side of the link, substantially as specified," and "2. The combination of the perforated sides A having plated exterior surfaces, and mitred joints at their edges, united internally by solder s, and the end rings, B, entered and soldered within the open ends of the box-link formed by the sides A, essentially as described," *held* valid.

3. Such invention is limited to links made of plated metal, and is not anticipated by a solid gold link with open sides, and mitred together at the corners of the blanks or pieces of which it is composed; nor by a link made of plated material, but so constructed that the material must be plated on both sides, and, therefore, without the advantages pointed out in the patent, of saving the more precious material obtained by the process of rolling the gold or silver upon one side only of the strip of inferior metal.

[This was a bill in equity by Robert F. Simmons and others against William Blackinton and others to enjoin the infringement of letters patent No. 193,543, granted July 24, 1877.]

Smith & Bates, for complainants.

George D. Noyes, for defendants.

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

LOWELL, District Judge. The complainants are the patentees in letters patent No. 193,543, of an invention of Ernst Nortemann, which was assigned to them after the application for the patent and before its issue. The title is "An Improvement in Ornamental Chain Links." The specification declares that the object of the invention, as applied to gold or silver-plated ornamental chains, is to produce a plated chain having certain of its links of a box-like or tubular construction, and with ornamental perforations in its sides, thus giving lightness, as well as beauty, to the chain, which, moreover, is capable of taking a fine finish. It describes the invention as consisting in a box-link having three or more perforated sides, each of which latter is made of a separate piece of plated metal, beveled at its edges, so that when the several sides are put together they form a mitre joint, and are united by soldering from the inside of the link, the plated surface be-

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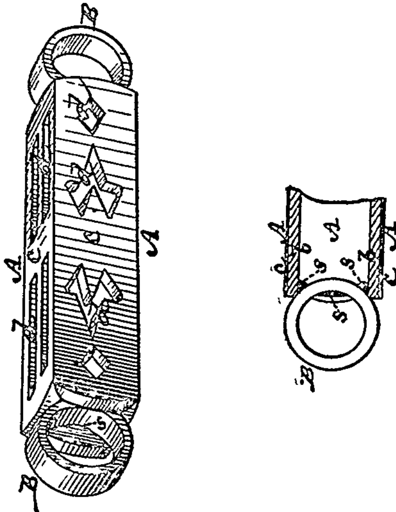
[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

ing on the exterior of the latter. By this construction of the box link, the specification proceeds, the plated surface of the link is kept intact at the edges, corners or angles of its sides, and said edges are brought up sharp with the plated surface wholly on the exterior of the link and without any exposure of the inside solder, by which the sides are united. End links are also combined with the box-link to connect said link with other links, etc. There is then a full description of the mode of making the links, with appropriate figures. The method is to take brass stock in the form of a plate, which is coated or plated with gold or silver on one surface by rolling, and, after cutting this plate into suitable strips, to cut out a series of blanks, in which ornamental perforations are then made, and they are afterward beveled on the inner or stock side by the action of revolving burrs or cutters. The necessary number of sides having been made they are soldered together on the inside. The inventor repeats that by thus constructing the box-link, the plating on the outside is brought up as sharp on the edges as if it were made of gold or silver, and the plated surface is preserved intact on the edges. Neither is any gold or silver wasted, as all the plating is on the outside of the link; and by making the perforations in the blanks, a highly ornamental and light, hollow or box-link is easily and cheaply produced.

The claims are: "1. The combination, in a box-chain link, of the independent perforated and externally-plated sides A, having mitred edges, and soldered together at said edges on or from the inside of the link, substantially as specified.

"2. The combination of the perforated sides A, having plated exterior surfaces, and mitred joints at their edges, united internally by solder, s, and the end rings, B, entered and soldered within the open ends of the box-link formed by the sides A, essentially as described."

[Drawings of patent No. 193,543, granted July 24, 1877, to E. Nortemann; published from the records of the United States patent office.]



These quotations have been made from the specification, because while the defendants' links are admitted to come exactly within the specification and claims, they insist that the patent is for a link of the box-like form, of whatever material it may be made, including solid gold or silver, and that if there are any special features adapted to plated chains, they are only incidental and do not limit the invention. The plaintiffs, on the other hand, contend that the patent is for a new article of plated links. The question is important in view of the state of the art in 1877.

We are of opinion that the description of the patent, and more especially the language of the claims, clearly confine the inventor to links made of plated metal. Both claims are expressly limited to this.

Under this construction we have carefully examined the two links which the evidence shows to have been made before the date of the plaintiffs' invention, represented by the Exhibits "Bidet 1," and "Blackinton 1."

"Bidet 1" is a solid gold link, with open sides, and mitred together at the corners of the blanks or pieces of which it is composed. If this link showed substantially the construction of the plaintiffs' link, then though that construction might serve a peculiarly useful purpose when used in plated work, it would be impossible to sustain a patent for it, notwithstanding the fact that they have confined their claim to plated links, because the supposed invention would be merely a change from one known material to another: Hotchkiss v. Greenwood, 11 How. [52 U. S.] 248; Hicks v. Kelsey, 18 Wall. [85 U. S.] 670. But the peculiar advantages which the link, as a plated link, derives from its mode of construction would not be found in one made after the model of "Bidet 1," and, therefore, a small field of invention is left on which the precise link made by the plaintiffs and copied by the defendants may rest.

The other link is made of plated material, but so constructed that the material must be plated on both sides, and, therefore, without the advantage which the specification distinctly points out of the saving of the more precious material obtained by the process of rolling the gold or silver upon one side only of the strip of inferior metal. This appears to us to be a sufficient utility to support the patent.

We, therefore, decide that the plaintiffs' plated link is new as a distinct article of manufacture. The infringement is admitted.

Interlocutory decree for the complainants.

SIMMONS (COMMERCIAL NAT. BANK v.). See Case No. 3,062.

SIMMONS (FOSTER v.). See Case No. 4,983.

Case No. 12,867.

SIMMONS v. GIRD.

[2 Cranch, C. C. 100.] [3]

Circuit Court, District of Columbia. April Term, 1814.

SLAVERY—SUIT FOR FREEDOM—ONE YEAR'S RESIDENCE.

The time of a slave's sailing on a voyage from Alexandria, is not to be considered as a part of his year's residence so as to entitle him to freedom, under the Virginia law of December 17, 1792, § 2.

[This was an action by negro Robert Simmons against John Gird.]

The plaintiff was a slave, brought into Alexandria, whence he sailed on a voyage, and returned to Alexandria, but was not "kept therein one whole year together, or so long, at different times, as amounted to one year," unless the time of his sailing on the voyage should be included.

This being stated in a special verdict, THE COURT rendered judgment for the defendant.

SIMMONS (HOPKINS v.). See Case No. 6,691.

SIMMONS (THORPE v.). See Case No. 14,-007.

SIMMONS (UNITED STATES v.). See Case No. 16,289.

SIMMONS (VALK v.). See Case No. 16,815.

Case No. 12,868.

SIMMS v. BAKER.

[1 Brunner, Col. Cas. 205; [1] Cooke, 146.]

Circuit Court, Tennessee. [2] 1812.

PUBLIC LANDS—GRANT—CALLS—NATURAL OBJECTS.

A call in a grant or entry for distance gives way to a call for a natural object or boundary, and the party must go to the natural boundary, though it vary both course and distance.

This was an action of ejectment [by Simms' lessee against Baker] brought to recover possession of a tract of land. The plaintiff produced a grant, dated the 15th of July, 1793, from the state of North Carolina, calling for five thousand acres of land, "lying on both sides of the south fork of Duck river, beginning on the north bank of the river, where the lower line of a survey made for John G. Blount and Thomas Blount crosses the same." The survey of the Blounts was made on the 25th day of August, 1792, calling for five thousand acres of land, "on both sides of the two main forks of Duck river, beginning opposite the mouth of the Wartrace fork, at a black walnut, plum tree and hickory; running thence west eight hundred and ninety-four poles to a hackberry; thence south eight hundred and ninety-four poles to a stake, crossing the river; thence east eight hundred and ninety-four poles to a stake; thence north eight hundred and ninety-four poles, crossing the south fork of Duck river, to the beginning." The beginning corner to the survey of the Blounts was well established, but no actual survey ever had been made; nor had there been an actual survey of the land claimed by the plaintiff. The line, in the survey of John G. Blount and Thomas Blount, calling to run south eight hundred and ninety-four poles to a stake, crossing the river, by actual survey stops one mile and eight poles short of the river. The grant of the plaintiff calls to begin where this line crosses the river. The material question before the court was, whether John G. and Thomas Blount had a right to extend their south line beyond the distance called for to the river?

Dickinson, Whiteside & Hayes, for plaintiff.
Grundy & Cooke, for defendant.

McNAIRY, District Judge (TODD, Circuit Justice, absent). The cases produced by the plaintiff have not been answered particularly by the counsel for the defendant. They seem to rely more upon the reason of the case than upon authority. It is not necessary for me to say what would be my opinion, were this a case res integra. It is sufficient that the question has been long settled, both in this state and North Carolina. If the calls in an entry or grant are for a given course and distance, this course and distance must be pursued; but if there be also a call for a marked tree, or a natural boundary, the party must go to the tree, or natural boundary, although it may vary from both course and distance. The natural boundary called for in this case is Duck river; and although the distance given falls short of the river one mile and eight poles, yet, under the influence of the principle just mentioned, the grantees have a right to extend their line as far as the river. The call for crossing Duck river evidently shows that it was the intention to run at least to the bank on the opposite side of the river; and as the distance called for has given out, the line must there stop, as there is nothing to which it can be attached to extend it beyond this point. What would be the opinion of the court in a case where there was an excessive surplus is not now necessary to be stated, as this is not so great as many cases where the rule has been adhered to. Indeed, so far as my knowledge on the subject extends, no instance has occurred where the courts have been guilty of a departure from the rule.

I am, therefore, of opinion that John G. Blount and Thomas Blount, or those claiming under them, have a good legal claim, by virtue of their grant, as far as the river. Wherever this line crosses the river is the

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

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

[2] [District not given.]

place where the plaintiff is to begin, which renders his place of beginning certain. 1 Hayw. 252; 2 Hayw. 160.

SIMMS (BIRCH v.). See Case No. 1,427.
SIMMS (COX v.). See Case No. 3,306.

Case No. 12,869.

SIMMS v. DICKSON.

[1 Brunner, Col. Cas. 196;[1] Cooke, 137.]

Circuit Court, Tennessee.[2] 1812.

GRANT—NOTORIETY OF OBJECTS CALLED FOR IN ENTRY.

Notoriety will cure a defective description in an entry, and in case of conflicting rights will be sufficient, if such notoriety is established before the date of the conflicting entry.

In this case both plaintiff [Simms' lessee] and defendant [Dickson] claimed under grants from the state of North Carolina. The grant under which the lessors of the plaintiff claimed title was dated in 1792, and was of an older date than the grant of the defendant. The defendant produced in evidence an entry made on the 23d day of October, 1783, in the following words: "Jonathan Greaves enters three thousand acres of land lying on the north side of Duck river, on the first creek above Spring creek, beginning on said river three quarters of a mile below the mouth of said creek, running north and east for quantity." Upon which entry a grant issued in 1795, containing the following description of the land: "Beginning on the north side of Duck river, on the said river, about three quarters of a mile below the mouth of the first creek above Spring creek, at a beech, running thence north," etc. The grant then describes the boundaries. Spring creek was proved to be notorious as early as February, 1784; and the witnesses who proved this notoriety also stated that a Mr. Drake, since dead, told them it had been named by himself and another man in the summer of 1783. It did not appear that any person except those two men had ever been on Spring creek at or before the entry of Greaves was made. The creek has been called Spring creek ever since. There was no proof that the corners and lines called for in the defendant's grant could be found or were in existence. The defendant also produced a plat of the survey upon which the grant issued, describing the land in the same words used in the grant.

Hayes & Dickinson, for plaintiff.

Cooke & Whiteside, for defendant.

[Before TODD, Circuit Justice, and McNAIRY, District Judge.]

TODD, Circuit Justice. The first question which presents itself is as to the notoriety of Spring creek. Whether it possessed sufficient notoriety is a question of fact to be determined by the jury; but it may not be amiss to make some observations upon the subject of notoriety. Let it first be observed that the oldest grant cannot be set aside but by a special entry previously made. What is a special entry? Nothing more than an entry which truly describes the objects for which it calls. Upon examining the North Carolina land law it will be found that nothing is said about notoriety. It has been introduced by the courts for the purpose of aiding an entry otherwise defective. The object of the legislature was that every entry should be so made as to afford to a subsequent locator a reasonable opportunity of finding the land first located. This, no doubt, was the point in view in which the legislature of North Carolina considered the subject. But it happened in a great many instances that the locator in describing the land used a defective description. This, of course, made the entry void, unless something else appeared to remedy the defect. Under the influence of these considerations the courts of justice have very properly determined that, in the case of a defective description, the entry will still be good if the objects called for in the entry were notorious, that is, generally known by persons conversant in that section of the country. Thus we see that the whole doctrine of notoriety has been introduced for the purpose of aiding an entry, and we ought to be cautious how we permit it to work a destruction.

When we speak of notoriety we do not thereby mean that the object is known to all the world. It is intended only to convey the idea that the object was known by the name specified in the entry, to persons generally who lived or were conversant in the section of the country where the object existed. Where notoriety becomes necessary to be proved, the material matter to establish is, was this object generally known by the name mentioned in the entry, to persons conversant in the part of the country where the land is supposed to lie? If this question is affirmatively ascertained the notoriety of the object is established. It seems not to be questioned but that Spring creek was sufficiently notorious before the commencement of the plaintiff's claim; and it has been argued that although the creek was not generally known at the time the defendant's entry was made, still the entry is good, if it acquired notoriety before the adversary claim originated. Upon this point I wish to be understood as giving no opinion. I determined against this argument in Kentucky, in the case of Liggett v. Marshall [Case No. 8,342], but the ground of that determination was that such was the settled doctrine in the state courts. If it had been a case res integra I am not prepared to say that a similar decision would have been made. In this state, so far as I know, the question is not

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

[2] [District not given.]

understood as settled either way; so that it may be taken up and decided upon principle. But I repeat that I do not wish to be understood as giving an opinion upon the point positively, though I confess that I am strongly inclined to the idea that if the object called for becomes notorious before the conflicting entry is made the purposes of the law are satisfied. Hardin, 71. As to the word "about," used in the grant, I am of opinion that it does not make the land uncertain. It has always been determined that the word "about" signifies in an entry or grant "at," unless something can be shown to evidence a contrary intention. If a grant calls to begin "about a mile from Nashville," giving the course, but giving no other description of the beginning, the beginning should be precisely at the end of the mile. Or suppose, as in this case, the grant calls to begin "on Duck river about three quarters of a mile below the mouth of the first creek above Spring creek, at a beech." Now if the beech can be found that must be the place of beginning; but if the beech cannot be found, then the beginning must be at the end of three quarters of a mile, meandering the river from the mouth of the creek. If two objects are called for in the grant as the means of identifying the land, one of them mutable, and the other immutable, viz., a tree and the mouth of a creek, and the tree can be found and identified, but the mouth of the creek cannot, yet the grant would be held sufficient, for the land is legally identified. Surely the principle upon which such adjudications have been made will operate at least as fully in a case where the mouth of the creek is established and identified, although the tree cannot be found. It is therefore my opinion that the beginning mentioned in the grant is well enough described. It may be also remarked that in the construction of the word "about" the decisions have not been single. The same rule has been applied to the expression "near"; and so a call to run eastwardly has been adjudged to mean due east, unless there be some object which can be found to control the course. Similar decisions have been made in relation to all such doubtful expressions.

As to the call for the tree I will barely add that perhaps one never was marked. If such be the fact the omission was the fault of the surveyor, and should not prejudice the grantee. It is sufficient if he can show enough of the objects called for in the grant to identify the land.

McNAIRY, District Judge, concurred with Judge TODD in the opinion which he delivered. Upon the subject of subsequent notoriety he added:

The whole object of either description or notoriety is to enable a subsequent locator who uses reasonable industry to find the land first located, and thereby prevent an interference. My opinion, decidedly, is that if the objects called for are notorious at the time the entry is made, or become so before any person else makes an entry, the object of the law is complied with. It is refining too much to say that the entry shall be void, although it acquires the qualities of a good entry before the creation of other rights. What right has the second enterer to complain? He cannot say that he has been deceived; he cannot say to the first locator, "Your entry is void, because the objects called for in it were not notorious; by which means I was deceived, and induced to make an entry which interferes with your claim." He cannot say this if the objects were notorious before he made his entry; because, in that case he could not be deceived or misled. Suppose an entry to have been made a great many years ago, calling for the French Lick, but before it was known to a sufficient number of people to give it notoriety. It is known that at this day no place in West Tennessee is more notorious. If an entry were now to be made so as to interfere with the first entry, will any person pretend to say that it would hold the land? The object of notoriety is to give notice; and if this notoriety is acquired before the making of the second or subsequent entry, every purpose for which notoriety has been deemed necessary is answered. In short, I am clearly of opinion that if an entry possesses the quality of a good entry before the creation of other rights, it is valid, although the objects called for were not notorious at the time the entry was made.

Verdict for the defendant.

Land—Effect of notoriety of objects called for in entry: See McMillan v. Claxton, 4 Hayw. [Tenn.] 279, citing above case.

SIMMS (HAMILTON v.). See Case No. 5,-990.

Case No. 12,869a.

SIMMS v. PULLMAN SOUTH. CAR CO.[1]

DELGADO v. SAME.

Circuit Court, E. D. Louisiana. May 4, 1878.

CARRIERS—CONTRACT OF SLEEPING-CAR COMPANY—PLEADINGS—EVIDENCE.

1. In an action against a sleeping-car company the petition averred the sale of a ticket from New Orleans to Philadelphia, and the consequent existence of a contract for the transportation of plaintiff, and of a common carrier's liability on the part of defendant for failure to transport beyond Washington. The answer admitted the sale of a ticket which entitled plaintiff to a berth in a sleeping car during the transit, and denied the violation of the contract which arose from the sale of ticket, and all other allegations of the petition. *Held*, that the pleadings presented a question of law, as to the legal effect of the contract, under which evidence was admissible on the part of defendant to show that the failure of the sleeping car to proceed beyond W. was caused by the refusal

1 [Not previously reported.]

of a connecting line to send forward a train, on account of riot.

2. In such case the court properly instructed the jury, in substance, that the contract for transportation was not with defendant, but with the various railroads over which passage tickets were purchased, and that the failure of a connecting line to send forward a train, on account of riot, was the result of no fault of defendant, if it had furnished a suitable car, with proper connections, for a continuous passage, and had such car in readiness to proceed over the connecting line.

[These were actions at law by Thomas Simms and by Samuel Delgado against the Pullman Southern Car Company for damages for failure of a sleeping car, in which they had engaged berths from New Orleans to Philadelphia, to proceed beyond Washington. Verdicts for defendants. Plaintiffs move for new trials.]

BILLINGS, District Judge. These cases were tried together, as the pleadings and the evidence were the same in both. They were tried before a jury, and the verdicts were for the defendants. They are now before me on motions for new trials. The undisputed facts in the cases were as follows: The defendants sold to the plaintiffs sleeping-car tickets from New Orleans to Philadelphia. The plaintiffs had the berths contracted for assigned to them, and they continued to occupy them until they reached Washington, when, on account of the disturbance occasioned by the riots of last summer, the Baltimore & Ohio Railroad Company did not send out any trains from Washington over their road. Accordingly, the car in which the plaintiffs had berths went no further than Washington, and the plaintiffs were compelled to take lodgings at a hotel, and incur other expenses, and for the failure of such car to proceed beyond Washington the suits were brought.

The principal grounds urged in the argument for new trials were—First, that the answers of the defendants did not allow them to show that the failure of the car to proceed beyond Washington was caused by the Baltimore & Ohio Railroad not sending trains beyond, on account of the riots; and, secondly, that the court erred in the construction which, in its charge to the jury, it gave to the contract, on the part of the defendants, arising from the sale of their sleeping-car tickets to the plaintiffs.

First, as to the admission of the evidence under the answer. These are actions under common law, and therefore, excepting so far as congress has made special provisions, such as that securing trial by jury of all issues of fact in the courts of the United States, are to be conducted according to the rules of practice prevailing in the highest tribunals of the state of Louisiana. The pleadings in our state courts, while not framed on the technical rules of the common law, are calculated, with great fairness, to reach the merits of a cause, and are quite similar to those prevailing at the present time in common-law states, where all that is valuable in the system of common-law pleading has been retained, and the artificial and arbitrary rules have been rejected. The petition in this case avers the sale of the tickets, and that there existed, in consequence thereof, a contract for the transportation of the plaintiffs from New Orleans to Philadelphia, and a liability on the part of the defendants, as that of common carriers. The answer admits the sale of the tickets which entitled the plaintiffs to berths in a sleeping car during their transit from New Orleans to Philadelphia, and denies that the defendants violated the contract which arose from the sale of these tickets, and denies all the other allegations in the petition. The pleadings, as thus made up, presented something more than that which, under our own practice, would be deemed a general denial. They present the question of law as to the legal effect of the contract which was entered into between the defendants and the plaintiffs through the sale of the tickets, and the question of fact as to whether the defendants had complied with the obligations which they had incurred by such contracts. There was another issue of fact, as to the alleged concealment on the part of the agents of the defendants, at the time of the sale of the tickets, of the fact that the trains at that time between Washington and Philadelphia had ceased to run for the period of 36 hours, but this question was submitted to the jury under such instructions as I think were satisfactory to the plaintiffs.

The tickets which the defendants sold the plaintiffs were produced before the jury. They were as follows: "Pullman Southern. Not transferable. Good for this day and car only, when accompanied by a first-class railroad ticket. New Orleans to Philadelphia. Car No. ——. M. train. Double lower berth, No. ——. $10." It was in evidence that the plaintiffs purchased tickets for passage or transportation from the various railroad companies from New Orleans to Philadelphia, over the line of roads indicated by the sleeping-car tickets sold by the defendants to them.

The court construed the contract into which the defendants entered by the sale of the sleeping-car tickets as follows: That, in the first place, they obligated themselves to have throughout the entire line, as indicated upon their tickets, suitable cars to allow an uninterrupted transit. Secondly, that they obligated themselves to have provided such connections between the railroads intervening between the termini and over the route indicated upon their tickets as, according to the regular trains running upon such roads, would permit a continuous transit. Thirdly, that they obligated themselves that these roads were so situated, manned, and run as, according to their regularly established

trains, admitted of a continuous passage over the route specified in the tickets which were sold. Fourthly, that they obligated themselves to furnish proper attendance on such cars, and that they would stop with sufficient frequency, and for a sufficient length of time, to allow passengers to take their meals. The court further instructed the jury that if defendants had shown that they performed these obligations; that they furnished suitable cars; that they had proper connections over roads which were operated so as, from day to day, to have allowed, according to their ordinary trains, a continuous passage, and that, notwithstanding all this, one of the roads, to wit, the Baltimore & Ohio road, refused or failed to send forward any train of cars from Washington to Philadelphia, on account of apprehensions of the riot, and that this refusal or failure was the result of no fault of the defendants, who had an adequate car in readiness to proceed,—in that case they had performed all the obligations which they had undertaken, so far as they were connected with the passage of the plaintiffs. The gist of these instructions was that the contract on the part of the defendants was not one for transportation; that that was a distinct contract for transportation, made between the plaintiffs and the various railroads whose tickets of passage they had purchased; and that the obligations on the part of the defendants, though connected with the transportation of the plaintiffs, were only such as have been enumerated. Viewing the case either with reference to the pleadings, or the principles of law which are to govern on the merits of the case, I see no reason, after further examination, to change the views which I entertained at the trial.

Let the motions for new trials be refused.

Case No. 12,870.

SIMMS v. READ.

[1 Brunner, Col. Cas. 219;[1] Cooke, 345.]

Circuit Court, Tennessee.[2] June Term, 1813.

DEED—REGISTRATION—WHERE REQUIRED.

Registration of a deed or conveyance of land lying in several counties is sufficient, under the statute of registration, if made in either of the counties.

[This was an action of ejectment by Simms' lessee against James Read.]

The land in controversy was granted in 1790 by the state of North Carolina to Stockley Donelson, and by him conveyed to David Allison. The plaintiff claimed under a deed executed by Joshua B. Bond, attorney in fact for Allison. The power of attorney under which Bond conveyed was acknowledged in 1797 before Hilary Baker, mayor of the city of Philadelphia. In 1810 it was proven in the court of common pleas for the county and city of Philadelphia, by the oath of one of the subscribing witnesses, and shortly afterwards registered in the county of Bedford. Part of the land authorized by the power of attorney to be conveyed lies in the county of Bedford; but the tract now in dispute lies in the county of Giles, where no registration ever was made.

Haywood, Balch & Cooke, objected to the power of attorney being admitted as evidence, unless other proof of its execution was produced. The acknowledgment before the mayor of Philadelphia could not authorize a registration, because at that time there was no law in force authorizing powers of attorney to be registered. The first law that passed on that subject was in 1805. Neither, they said, could the subsequent probate mend the matter because the proof had been by but one subscribing witness, when the general registration law passed in 1807 required all deeds, powers of attorney, etc., to be proved by two at least. The same act requires that it should be registered in the "county or counties" where the land lies. It is true a part of the land authorized to be conveyed lies in Bedford, but the particular tract now in dispute does not. It would seem to be a fair construction of this clause that the power of attorney should be registered in every county where any of the land lies.

Whiteside, Dickinson & Hayes, replied that the act of 1811 recognized the registration of powers of attorney, and other instruments of writing, where they had been before acknowledged before any judge, mayor, etc. It would, therefore, be unnecessary to say anything about the probate before the common pleas. The act of 1809 requires all deeds, powers of attorney, etc., to be registered in the county where the land, or a part thereof, lies. This is considered as clearly dispensing with the necessity of a registration in every county.

BY THE COURT. We do not think it necessary to give an opinion upon the question which has arisen out of the probate before the court of common pleas, because we are of opinion that the act of 1811 is sufficient to authorize the registration under the acknowledgment made before the mayor of Philadelphia in 1797. We do not conceive that there was any necessity to register the power of attorney in the county of Giles. The true object of the probate and registration is to show that there has been a due execution of the deed; this is as well done by a registration in any as all of the counties. Where a deed of conveyance is for several tracts of land lying in different counties we consider that it will be sufficient to register it in any one of them.

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

[2] [District not given.]

Case No. 12,871.

SIMMS v. SCOTT et al.

[5 Cranch, C. C. 644.] [1]

Circuit Court, District of Columbia. March Term, 1840.

HUSBAND AND WIFE—WIFE'S SEPARATE DEBTS—HOW PAYABLE.

A feme covert, having a separate estate in the hands of her trustee, may contract debts and bind her separate estate for the payment; and the court will appoint a receiver to collect the rents and profits.

Bill in equity [by Elexius Simms against Elizabeth Scott and Susan Ann Stretch] to charge the separate estate of a feme covert.

The defendant, Elizabeth Scott, was the wife of Alexander Scott, who was insolvent, and possessed no estate or property of any kind. A separate estate, however, had been vested in her daughter, the defendant, Susan Ann Stretch, "in trust, that Elizabeth Scott, wife of Alexander Scott, of the city of Washington, shall have, use, occupy, possess, enjoy, and receive, after the taxes and necessary repairs of said property shall have been paid, the rents, issues, and profits thereof, for and during her natural life, to and for her own separate and sole use, notwithstanding her coverture, and without being in anywise subject to the debts or control of her said husband, Alexander Scott, or any other with whom she may intermarry; and her separate receipt shall be, and be taken as, a full discharge for any sum or sums of money which shall or may become due and payable to her out of the said lands and premises; and she may appoint, in like manner, by her separate writing under seal, any other person or persons to receive the same for her as though she were sole; and, after the death of the said Elizabeth Scott, then to such person or persons as she shall or may, by writing, under her hand and seal, or by her last will and testament, direct and appoint; and in default of such appointment, to the right heirs of the said Elizabeth."

The bill states that the complainant, entirely upon the credit of her separate estate, supplied her from time to time with groceries for the use of her family, to the amount of $180; when, on the 10th of January, 1837, she, and her said trustee, executed the following paper, addressed to Dr. Causin: "$180. Washington City, January 10, 1837. Sir: You will please pay to Mr. Elexius Simms, or his order, the sum of one hundred and eighty dollars, in the event of the claim of the heirs of the late Col. Jonathan H. Stone's bill passing this session, on which there was a bill reported at the last session of congress; or, should it not pass, we hold ourselves bound for the above amount to the said Elexius Simms. Elizabeth Scott. Susan Ann Stretch, Trustee for Elizabeth Scott." "Should the claim alluded to above, pass, I will pay the above amount of one hundred and eighty dollars, as soon as the money is received by me. Nathaniel P. Causin. January 11, 1837." That the claim aforesaid never did pass; that the said Alexander Scott never was bound for the debt; and that the complainant's only remedy is against Mrs. Scott and her separate estate; and he prays for an account of that estate, and payment of his claim, &c.

The answer of the defendant, Elizabeth, admits all the material facts, but says that she continued to live with the said Alexander Scott until his death, and that the articles furnished were for the use of his family, which he was bound to support; and that they were obtained with his knowledge and approbation; she admits that she had the sole and absolute disposition of her separate personal property, but that she had only a life estate in the real.

The cause was set for hearing on the bill, answer, general replication, and depositions.

C. Cox, for complainant. An absolute power of selling includes the lesser power of mortgaging or pledging. An equitable disposition of the property will be supported in a court of equity, although it may not be in the form required by the trust. The order of the 10th of January, 1837, is a charge upon the estate. Price v. Bigham, 7 Har. & J. 296; Jaques v. Methodist Episcopal Church, 17 Johns. 548. A court of equity will regard a feme covert as a feme sole, so far as regards her separate property, and will hold it bound by her bond or note, although void by her legal incapacity thus to bind herself, and although there be no express charge of the debt upon her property. Price v. Bigham, 7 Har. & J. 296; Heatley v. Thomas, 15 Ves. 596; Bullpin v. Clarke, 17 Ves. 365.

Mr. Bradley, contra, contended that Mrs. Scott had no power to bind the estate but according to the form prescribed in the trust. That she had only a life estate in the real property, and could not incumber the fee. Clancy, Mar. Wom. c. 5, pp. 289, 292, 304, 306; Wilson v. Cheshire, 1 McCord, Eq. 241.

THE COURT (THRUSTON, Circuit Judge, absent) decreed that the complainant was entitled to be paid out of the separate estate of Mrs. Scott, in the hands of her trustee; and that unless the debt should be paid by a certain day, the separate estate should be placed in the hands of a receiver, to collect the rents, &c., and that Alexander Hunter be appointed receiver, who should give bond, &c. &c.

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

SIMMS (SLACUM v.). See Case No. 12,935.

Case No. 12,872.

SIMMS v. TEMPLEMAN.

[5 Cranch, C. C. 163.] [1]

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

NEW TRIAL—MISTAKE BY JURY IN TAKING PAPERS.

A new trial will not be granted because the jury, by mistake, took out with them the plaintiff's account, if it be withdrawn from them in a few minutes afterwards, by order of the court.

This was an attachment under the Maryland act of 1795 (chapter 56). The garnishee [Templeman] pleaded nulla bonâ, and non assumpsit by the defendant [McCleary]. The plaintiff's account, for work and labor, was annexed, by a wafer, to the warrant of the justice of the peace to the clerk to issue the attachment; and upon the back of the warrant was written the plaintiff's short note of his cause of action, which stands in the place of a declaration, and upon which the issue was joined upon the plea of non assumpsit. The jury took out with them the short note, to which were annexed the warrant and account, and an affidavit of the plaintiff, made in compliance with the act of 1795 (chapter 56). The account had been proved by a witness, and the amount had been stated to the jury, and was also stated in the short note.

A few minutes after the jury had retired, Mr. Marbury, for plaintiff, informed the court that the account had been thus, by mistake, taken out by the jury, and requested the court to send to the jury for the paper, which they did, and informed them that they had taken it by mistake; and it was thus withdrawn from them.

The verdict being for the plaintiff, Mr. C. Cox, for defendant, moved for a new trial, because the account had been thus taken out by the jury.

But THE COURT (MORSELL, Circuit Judge, absent) refused.

SIMMS (UNITED STATES v.). See Case No. 16,290.

Case No. 12,873.

SIMON et al. v. PAINE.

[4 Cranch, C. C. 99.] [1]

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

SLAVERY—SUIT FOR FREEDOM—WHERE ACTION MAY BE MAINTAINED.

Slaves escaping from Maryland and sueing here for their freedom, will not be delivered up to the person claiming to be their owner, upon security to return them to Maryland; their claim for freedom having arisen here, and their witnesses residing here.

This was a suit for freedom [by negroes Simon and Lewis against Paine's administrator], docketed this term by an order of the court made ex parte.

Mr. Taylor, for defendant, moved the court to rescind the order, upon bond and security to take the negroes back to Maryland, from whence they escaped into this district, and gave themselves up to the magistrate, and prayed leave to sue in forma pauperis.

Mr. Mason, contra. Their right to freedom arose under the laws here.

THE COURT (THRUSTON, Circuit Judge, absent,) refused to rescind the order.

The cause was tried, and the jury found a verdict for the plaintiffs, upon the ground that they had been brought here by their master and kept here more than a year.

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

SIMON (ROEMER v.). See Cases Nos. 11,997 and 11,998.

Case No. 12,874.

SIMONDS v. BLACK RIVER INS. CO.[1]

Circuit Court, D. Connecticut. July 19, 1877.

NEGOTIABLE INSTRUMENTS—CHECKS—DEMAND—NOTICE OF DISHONOR—LACHES.

[1. A drawee to whom a collecting agent mails a check for collection is a sub-agent, and the holder is chargeable with his sub-agent's negligence either in presenting to himself or in giving notice of dishonor.]

[2. Delay due wholly to the postal service does not charge a collecting agent with notice of the dishonor of a check which he has mailed to the drawee for collection. Bailey v. Bodenham, 16 C. B. (N. S.) 265, distinguished.]

[This was an action at law on a dishonored, check by Jehiel H. Simonds against Black River Insurance Company. Verdict was given for plaintiff.]

Henry C. Robinson, for plaintiff.

William Hamersley, for defendants.

SHIPMAN, District Judge. This is a motion by the defendants for a new trial, alleging that the court erred in the charge to the jury, and that the verdict was against the weight of the evidence. The case was as follows: The defendants, a fire insurance company located in Watertown, New York, were indebted to the plaintiff of Warehouse Point, Connecticut, upon a policy of insurance against loss by fire. In payment of this debt, they sent to the plaintiff their check to his order upon George F. Paddock & Co., bankers in Watertown, for the sum of $2,471.33 "payable in New York current funds." It was not denied that this phrase is equivalent to, payable in Paddock & Co.'s check upon a New York City bank or banker. This check was received by the plaintiff either at Warehouse Point, twelve miles from Hartford, on January 6th, or at Hartford on January 7th. On January 7th he endorsed and delivered the check to the Phœ-

1 [Not previously reported.]

nix National Bank of Hartford, for collection. The cashier of said bank testified that on the afternoon of January 7th he transmitted it by mail to George F. Paddock & Co., at Watertown, for payment, with request to remit to said bank. The cashier of Geo. F. Paddock & Co. testified that said firm received the check by mail on the 13th January, and on the same day on which it was received he returned to the Phœnix Bank by mail a check of Paddock & Co. upon their corresponding bank in New York City. There was no other evidence in regard to the time when the check was received at Watertown, or the time when payment was returned to the Phœnix Bank. Paddock & Co.'s check was received by the Phœnix Bank January 20th, and was forthwith sent to New York for collection. They failed on January 18th and did no business after January 16th. Their checks upon New York were paid until January 15, 1875. The check of Paddock & Co. was promptly returned from New York, protested, and due notice of dishonor was given to all the parties upon the insurance company's check. The defendants had at least $9,572 on deposit with Paddock & Co. continuously from January 1st to January 18th. If the check had been received by Paddock & Co. in due and regular course of mail after January 7, 1875, it would have been paid. Twenty four hours is the regular time of transit of the United States mail between Hartford and Watertown. The Phœnix Bank did not notify the insurance company or the plaintiff of the non-return of plaintiff's check, or the nonceipt of payment until the protested check was returned from New York. The bank between January 7th and January 20th wrote to Paddock & Co. asking if they had received the letter containing plaintiff's check. As a defense to an action of the plaintiff against the insurance company upon the original check, the defendants insisted that through the laches of the collecting agent of the plaintiff, the defendants suffered from the failure of said Paddock & Co. a loss equal to the amount of said check, and especially requested the court to charge the jury that the plaintiff was guilty of laches because his collecting agent did not notify the insurance company of the non-payment of the plaintiff's check, or the non-return of a New York check from Paddock & Co. at and after the time when the latter check should have been received by said bank in regular course of mail.

The court charged the jury that the Phœnix Bank was the agent of the plaintiff, and for any laches of the bank resulting in loss to the defendants, the plaintiff was responsible; and furthermore if the delay in the reception of the plaintiff's check at Watertown was due to a misdirection of the letter in which it was contained, or if the check was not put into the mail, as testified by the cashier, or if the delay was owing to any act of the bank, and by such delay a loss had occurred to the insurance company, the defendants were not liable. The court also charged that if the person at Watertown to whom the check was sent for collection, did not promptly make presentment and demand upon Paddock & Co. or if time was given for payment, or if the sub-agent delayed notifying the drawer in case of non-payment, such delay or extension of payment would discharge the defendants, a loss resulting from such laches having been proved, and it being admitted that the check was sent directly to Paddock & Co., if they kept it unpaid beyond the day on which it was received, without notification of dishonor, such laches (a loss having occurred in consequence of the delay) would release the maker.

The court submitted two questions of fact to the jury: 1st. Was the delay in the transmission of the plaintiff's check due to a cause other than any act or neglect of the Phœnix Bank? 2nd. Was the New York check returned by Paddock & Co. on the day of the receipt of the plaintiff's check? And instructed the jury if either question was answered in the negative to return a verdict for the defendants, and declined to charge as requested by the defendants that the bank in not notifying the defendants of the non-payment of the check when in due course of mail the New York check should have been returned was guilty of laches, to which refusal the defendants excepted. The jury returned a verdict for the plaintiff.

The drawer of a check is liable to the holder for the amount of the check, notwithstanding delay in its presentment for payment, unless loss has been sustained by the drawer in consequence of undue delay in the presentment. The holder is obliged to exercise due diligence so far as the drawer is concerned, simply to avoid the contingency of loss to him which may happen, if, pending the unreasonable delay, the bank should fail. It is therefore prudent for the holder to promptly present for payment either by himself or his agent. If a check upon a distant banker is promptly entrusted to a collecting agent for collection, and is forwarded by the agent by the mail of the same day, or of the next day,—Hare v. Henty, 10 C. B. (N. S.) 65; Richford v. Ridge, 2 Camp. 537,—properly directed, the holder is not liable for delays which may subsequently arise solely due to the postal service. But if the subagent to whom it is entrusted for collection is guilty on his part of laches in presentment, demand, or notice of non-payment, by reason of which laches the maker suffers loss, the holder is responsible for the laches of the sub-agent. When the collecting agent sends the check to the drawees, they are thereby constituted the agents of the holder to present to themselves, and if they are negligent in making presentment, or in giving notice of dishonor, the holder is respon-

sible. Here consists the danger of sending checks directly to the drawees, for the holder thereby puts himself in their power to cause undue delay. But if the drawees either promptly pay in accordance with the terms of the check, or promptly give notice of dishonor, no loss has happened to the drawers.

In this case, the jury found that the Phœnix Bank promptly remitted the check and that the drawees promptly paid it in accordance with the requirements of the check, as soon as it was received. The holder and his agents and the drawers alike performed the duties which were incumbent upon them of presentment and payment. That the fact of the delay in the receipt of the check at Watertown was evidence of laches was assumed throughout the trial, and in the charge, and the jury were instructed to find whether the delay was attributable to the collecting agent or to the mail.

But the defendants insist that although the delay was solely in the mail, the Phœnix Bank should have notified the defendant that no answer had been received from Paddock & Co. by due course of mail, and that the absence of an answer should have been considered as a dishonor, and notice of such dishonor should have been given; and reliance is placed upon Bailey v. Bodenham, 16 C. B. (N. S.) 265. In that case the collecting agent sent the check to the drawees on Saturday, May 9th, who received it on the 10th, kept it unpaid till the 15th and then (having stopped payment in the meantime) returned it to the collecting agent. Este, C. J., says: "Assume that the City Bank adopted a usual and proper course in sending the check by the post to the drawees, and I am rather inclined to think that that would be a good presentment. They thereby constituted them their agents to present to themselves. If so, and the check was dishonored, they clearly ought to have given notice of the non-payment in a reasonable time. Either, therefore, the transmission by post was no presentment at all; or, if a due presentment, then the check was presented and dishonored on Monday the 11th, and no notice of dishonor was given until Tuesday the 19th. In either view there was a want of due diligence. I do not mean to affirm that this was a good presentment. I incline to think it was. But, unless the money was remitted by return of post, the absence of an answer should have been considered as a dishonor, and notice of such dishonor should have been given promptly." The learned judge is here evidently speaking in reference to the facts of the case. The check had been received by the drawees on the 9th, had been retained unpaid until the 15th, and then had been returned without notice of dishonor. The check having been duly received, unless the money had been sent by return post, the absence of an answer should have been considered as a dishonor. The chief justice proceeds upon the assumption that the obligation to give notice to the drawer is based upon the fact of dishonor. But, in the absence of laches, until the check has been presented to solvent drawees, it is not dishonored. Inasmuch as the bank had placed themselves in the power of the drawees by sending directly to them, it would have been abundant caution to have assumed that the check was dishonored; but in this case the assumption would have been without foundation. The defendants themselves adopted the somewhat unusual course of sending from Watertown to a creditor in Connecticut their check upon their Watertown bankers which was payable in a check upon New York. They compelled the plaintiff to undergo the risks of delays of payment from the sundry necessary transmission of the checks by mail. They assumed also the same risks of loss to themselves by possible delays in mail transmission. If there were delays solely by mail, there is no obligation upon the plaintiff to inform him of such delay, though it might have been the part of prudence for him to do so.

In regard to the point that the verdict was against the weight of evidence, the questions were purely of fact, there was no serious conflict of testimony, and I think that the jury were justified in coming to the conclusions which they indicated by their verdict. The motion for new trial is denied.

Case No. 12,875.

SIMONDS v. UNION INS. CO.

[1 Wash. C. C. 382; [1] 4 Dall. 417.]

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

MARINE INSURANCE—RIGHT TO ABANDON—CARGO—FREIGHT.

1. Where an insurance is made upon goods and freight from New-York to Cape Francois, and, if prevented entering that port, to some other port mentioned in the policy; and the vessel is prevented by a blockading squadron from entering any one of the designated ports, and is obliged to end her voyage; it is a loss within one of the perils insured against, the voyage being completely broken up; and the insured has a right to abandon.

[Cited in Seton v. Delaware Ins. Co., Case No. 12,675.]

2. The same principles apply to an insurance on freight, although the owner of the vessel was also owner of the cargo.

On the 12th of September 1803, two policies of insurance were signed by this company; the one on goods, and the other on the freight of the schooner Diana, at and from New-York to Cape Francois, with liberty to proceed to one other port, should the cape be blockaded, and the vessel prevented from entering there, from that, or any other cause, and at and from thence back to New-York; the cargo

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

valued at 4,000 dollars, and the freight at 1,500 dollars.

The vessel sailed on the voyage on the 19th September 1803, with orders to the captain to proceed to Cape Francois; and if he could not enter that port, in consequence of its being blockaded, or from any other cause, he was then to go to Port au Prince, or to some other port within the bite of Leogan. On the 8th of October, the vessel arrived off the cape, when she was boarded by a British squadron, blockading that port; and the commodore, after perusing the captain's instructions, informed him, that he should not enter the cape, or any other port in the island of St. Domingo, but that he must go to Jamaica, under convoy of a frigate, which he should send to conduct her to Kingston, and that he was to keep within musket shot of the frigate, during the voyage, under pain of being fired into. The captain then requested leave to go to Cuba; but was refused; and he was informed that he should go to no other place but Jamaica. The vessel was accordingly carried in, by the frigate, to Kingston, where her cargo was unladen, under the care of a custom house officer, who had previously refused to permit the captain to clear out to any other, than a port in the island. The cargo was delivered by the captain into the custody of a merchant at Kingston, who advanced a part of its value, and the captain then returned to New-York. The cargo sold for 3,600 dollars. On notice of what had happened, the plaintiff abandoned to the underwriters, which was refused.

Mr. Dallas, for the defendants, contended, 1st, that the plaintiff could not abandon, from the terms stipulated in the order for effecting the insurance; which stated, that the plaintiff was not to abandon, if the vessel should be prevented from entering the port of Cape Francois, from blockade or other cause, but with liberty to proceed to some other port. Secondly. That on general principles, the plaintiff could not abandon. If he could not enter at the cape, he was at liberty to go to some other port. He did so. Kingston was that other port. If a vessel is prevented from entering a port, because it is blockaded, it is not a cause of abandonment. He cited the following cases: 1 Esp. 237; 2 Marsh. Ins. 434; 2 Burrows, 1198, 1212; 1 Term R. 107; 3 Bos. & P. 388; 5 Esp. 50; Miller, 305; 5 Term R. 388.

On the other side, it was contended by Mr. Rawle, for the plaintiff, that the other port to which the liberty of going was insured, was mentioned in the captain's instructions, viz.: Port au Prince, or some other port in the bite of Leogan. That being prevented by one of the perils insured against, from proceeding to any port in the island of St. Domingo, and compelled to go to Jamaica, was a total destruction of the voyage; and therefore, the plaintiff had a right to go for a total loss of cargo and freight, giving credit for what the cargo sold for.

WASHINGTON, Circuit Justice (charging jury). The voyage insured, is from New-York to Cape Francois; and if prevented from entering there, then to some other port, mentioned in the orders to the captain. If the jury should be of opinion, on the evidence, that the captain was prevented, by the British squadron, from entering any of the ports mentioned in the instructions, and was compelled to end his voyage at Jamaica; then it was within one of the perils insured against, and the voyage was completely broken up. If so, the insured was at liberty to abandon, and claim for a total loss. As to the freight, the same principle applies. The voyage being defeated, the freight was lost. This would certainly have been the case, had the vessel and cargo belonged to different persons; and there is no difference, where the owner of the one, is also owner of the other.

The jury found the whole sum for plaintiff.

[For hearing on motion for a new trial, see Case No. 12,876.]

Case No. 12,876.

SIMONDS v. UNION INS. CO.

[1 Wash. C. C. 443.] [1]

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

MARINE INSURANCE—CARGO ABANDONED—FREIGHT—RETURN VOYAGE.

1. Where the supra-cargo of a vessel which had been captured, the voyage broken up, and the cargo abandoned to the underwriters, has invested the proceeds of the outward shipment in another cargo, upon the sales of which a freight has been made; the underwriters are entitled to the profit.

2. When the outward voyage of a vessel is broken up, and the vessel insured earns freight on her return voyage; the underwriters upon her, on her outward voyage, have no claim to the freight earned after the voyage insured has been broken up.

[Cited in Hurtin v. Union Ins. Co., Case No. 6,942; Seton v. Delaware Ins. Co., Id. 12,675; King v. Same, Id. 7,788.]

[This was an action by Simonds against the Union Insurance Company on two policies of insurance. There was a verdict for plaintiff for the whole sum. Case No. 12,875.]

Rule for new trial.

Mr. Dallas, for the rule, argued, 1st, that the only ports to which this vessel could go, were Cape François, or some port in the bite of Leogan; and as the whole island was in a state of blockade, the underwriters would have been exonerated, if she had attempted to enter either of the ports to which she was destined; and consequently, that they could not be liable, if she was prevented from entering them. The proof relied upon, to establish the fact that the whole island was under blockade, was the captain's protest. 2d. That the proceeds of the cargo, were invested in another cargo, taken

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

in at Jamaica, to which the defendants were entitled, but it had not been allowed. 3d. That the return freight ought to have been allowed.

WASHINGTON, Circuit Justice. The deposition of the captain is positive, that only Cape François was blockaded; and there is reason to believe, from the whole evidence, that she was warned off from St. Domingo, in consequence of a suspicion that she had gunpowder on board. The protest of the captain was read, merely to impeach his deposition, and the jury believed, that only the cape was blockaded. The vessel was compelled by force to go to Jamaica, and there to end her voyage, which was a complete destruction of it. The plaintiff of course was entitled to claim for a total loss.

2. No evidence was given, of what were the proceeds of the homeward cargo, nor was it made a point on the trial. It is as likely that there was a loss, as a profit. If, however, the return cargo was purchased with the proceeds of the outward cargo, the underwriters should have credit for the proceeds of it, if there was any profit. As to the proceeds of the cargo, as it was sold at Jamaica, it was allowed. If more was made, the defendants should be credited for them. But this is no reason for setting aside the verdict, though it may be a reason for this court relieving in another way.

3. This claim is totally without foundation. The voyage was to have been out and home; but being broken up, it terminated at Jamaica; and the defendants might as well insist upon all the freights, which this vessel might have earned, if she had gone from Jamaica on a trading voyage to Europe, or the East Indies, until her return; as to the freight from Jamaica to the United States.

Rule discharged.

SIMONS (ALLEN v.). See Case No. 237.

SIMONS (HAMILTON v.). See Case No. 5,991.

SIMONS (UNITED STATES v.). See Case No. 16,291.

SIMONTON (BARRELL v.). See Cases Nos. 1,041 and 1,042.

Case No. 12,877.

SIMONTON v. BOUCHER et al.

[2 Wash. C. C. 473.] [1]

Circuit Court, D. Pennsylvania. Jan. Term, 1811.

PRINCIPAL AND SURETY—EVIDENCE—AWARD—BOOK ENTRIES—PARTNERSHIP.

1. S. and B. entered into a partnership, and it was agreed that the separate debts of B. should be assumed by the firm; and a bond was given by B. with sureties, to indemnify S. against loss by the said assumption.

2. In an action against the sureties by S., after the dissolution, an award given in favour of S., in a reference entered into between S. and B.; the award having been founded on the acknowledgments of B., and not confined to the assumed debts, cannot be given in evidence.

3. Entries made by S. or B. in the partnership books, after the dissolution, cannot be given in evidence against the sureties, but evidence of the confessions of B. may be given.

[Cited in Garland v. Agee, 7 Leigh, 364.]

4. Entries made after the dissolution, may be given in evidence against the party who made them.

Upon the formation of a partnership between Simonton & Boucher, in 1801, Simonton agreed that the separate debts of Boucher, then due by him, should be assumed and paid by the house of Simonton & Boucher; and for securing Simonton for such payments, a bond was executed by the defendants, in which Boucher was bound for the whole of such payments, and Smith and Wood, as his sureties, for one-half. After the dissolution of the partnership, Simonton & Boucher bound themselves to submit their accounts to arbitration, and an award was made, finding a balance due from Boucher to Simonton, of upwards of six thousand dollars. This award is founded on the acknowledgments of Boucher, and a view of the partnership books, but appears not to be confined altogether to the assumed debts, and is only made upon part of the accounts. This action is brought on the bond given by Boucher, Smith, and Wood. Smith and Wood were no parties to the submission, and did not attend the referees.

The plaintiff [assignee of Simonton] offered the award in evidence, and also the accounts annexed to it, and evidence of the confessions of Boucher, which were objected to.

BY THE COURT. The award cannot be read, either as prima facie, or as conclusive evidence in this action. But evidence of the confessions of Boucher may be given.

THE COURT also decided that entries made by Simonton or Boucher, made in the partnership books after the dissolution, might be given in evidence against the party who made them, but not otherwise.

SIMONTON (JACKSON v.). See Cases Nos. 7,146 and 7,147.

SIMONTON (RUGGLES v.). See Case No. 12,120.

SIMONTON (WINTER v.). See Cases Nos. 17,892–17,894.

SIMOON, The (REYNOLDS v.). See Case No. 11,733.

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

Case No. 12,878.

Ex parte SIMPSON.

[3 App. Com'r Pat. 453.]

Circuit Court, District of Columbia. April 1. 1861.

PATENTS—REVIEW OF DECISION BY COMMISSIONER—RENEWAL OF APPLICATION.

[1. The commissioner of patents cannot collaterally review and reverse a decision of his predecessor.]

[2. A rejected applicant, who has withdrawn his application, may renew it, provided the renewed application is made in a reasonable time after withdrawal, and return of the fee.]

[3. The reasonable time for the renewal of a rejected application is to be computed, not from the date of the perfected invention, but from the date of the withdrawal of the application; and under Act March 3, 1839, § 7 (5 Stat. 354), renewal must not be delayed more than two years. In any view of the case, eight years is an unreasonable delay.]

[4. The fact that the applicant was misled by the contradictory decisions and practice of the patent office as to the time allowed for a renewal of his application after its erroneous rejection, is no ground of relief by the court from the effect of his unreasonable delay.]

[Cited in Colgate v. W. U. Tel. Co., Case No. 2,995.]

[Appeal by George B. Simpson from the decision of the commissioner of patents refusing his application for a patent for insulating telegraph wire with gutta percha.]

DUNLOP, Chief Judge. Geo. B. Simpson, perfected his first application, to the office April 2, 1849. It was rejected September 7, 1849. No appeal was taken, the office notifying him he could appeal or withdraw his claim. It was withdrawn January 21, 1851, and no further steps taken till November 15, 1858. During this period the invention had gone into public use, with Mr. Simpson's knowledge, though, as he insists, against his protest, and without his consent or allowance. On November 15, 1858, he applied to Commissioner Holt for papers, etc., and renewed his application on December 24, 1858. It was rejected in the office by the examiner December 29, 1858; again rejected January 14, 1859, by the board of appeals; and by Mr. Holt, the commissioner, February 2, 1859. No appeal was taken from this decision of Mr. Holt. The last application was filed October 8, 1859, and was rejected by the board of appeals and Commissioner Thomas, on May 9, 1860, from which decision the present appeal to me is taken.

If any relief to Mr. Simpson, in his pursuit of a patent, could be given, his appeal should properly have been taken to the decision of Commissioner Holt, of February 2, 1859. While that decision was unappealed from and unreversed, and the application not withdrawn, the judgment of Commissioner Holt was binding on his successor, the late Commissioner Thomas. Mr. Thomas could not collaterally, review and reverse that decision for the reasons assigned by me in my judgment in Sarowe's Case, of date March 6, 1860 [Case No. 8,093]. Besides, if this was not the law, nothing would be settled, and there would be no end of litigation in the patent office. As this point was not raised by Commissioner Thomas in his decision of May 9 last, and so Mr. Simpson's counsel insists, the office permitted him to refile his case, and have it reconsidered; and for the purpose of ending the controversy I will consider the case as if the appeal was regularly before me on the judgment of Mr. Holt.

Both Mr. Holt and Mr. Thomas refused a patent to Mr. Simpson on the ground of abandonment, and relied on section 7 of the act of March 3, 1839. The case therefore turns on the true construction of that section. It is in these words: "That every person or corporation who has, or shall have, purchased or constructed any newly invented machine, manufacture or composition of matter, prior to the application by the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture or composition of matter so made or purchased, without liability therefor to the inventor, or any other person interested in such invention, and no patent shall be held to be invalid by reason of such purchase, sale, or use, prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public, or that such purchase, sale, or prior use, had been for more than two years prior to such application for a patent."

This act, and the seventh section of it, has been frequently before the courts of the United States and the judges of several of the circuits and my brother judges of this district. They all seem to agree that a rejected applicant, who has withdrawn his application, may renew it, provided the renewed application is made in a reasonable time after withdrawal and return of the fee. If the office has been in error in the rejection, this reasonable time is to be computed not from the date of the perfected invention, but from the date of the withdrawal. This puts the rejected applicant, as to time, on as good a footing as if the error had not been committed. Nobody contends the error of the office gives an unlimited license as to time. It would be unjust to the public if it did so. The legislature, in this 7th section, it appears to me, has determined what is a reasonable time within which to apply for a patent. It denies a patent to any inventor who permits his invention to go into public use more than two years before the date of his application. I can see no reason why a renewed application, should have more than two years allowed it, computing the time, as I have before said, from the date of the withdrawal. Both classes of applications, original and renewed, are applications for patents, and come within the letter of the statute, and they seem also to be within its spirit. This

act of 1839 is a remedial statute, and was passed, for the benefit of inventors. Before its passage, inventors, according to the course of judicial decisions, were bound at once to disclose their perfected inventions, to the patent office, or they forfeited their right to a monopoly. This act gives them two years, and I do not feel at liberty in any case to enlarge the time without a further impression of the legislative will.

In this case the applicant's nonaction, sleeping on his rights, has been nearly eight years, the withdrawal being on January 21, 1851, and the first renewal December 24, 1858, a delay which must be esteemed unreasonable, even if I am wrong in the views expressed, as to the time construction of section 7 of the act of 1839. Judge Merrick, I understand, has lately held five years an unreasonable delay. In Hite's Case [unreported], referred to by Mr. Dodge in his argument, Judge Mason, then commissioner of the patent office, said: "If it had appeared clearly from the evidence filed that Hite's invention had gone into public use, with the consent or allowance, more than two years previous to the filing of the present application, I should have refused the patent, and dismissed the case." Judge Mason further said: "The previous error of the office did not justify him in lying by for more than ten years before making his second application. At all events, it would not justify me in dispensing with an observance of the plain provisions of the law. None but the vigilant can ever claim such favors with success. Had it appeared that a single one of these carriages had been sold by Hite, or that it had then gone into public use with his consent or allowance, it would have been sufficient to justify a rejection of the present application." The judge seems to have rested his decision entirely on the invention not going into public use or sale more than two years after the withdrawal and before the renewed application, with the allowance of the inventor.

In Simpson's case he admits throughout he knew the invention was in public use, but that he never permitted or allowed it, or gave his consent, but that he protested against the use. No man can prevent the bar of limitations attaching in the courts of justice by outside continuous claims. He must assert his rights in court within the prescribed time. The policy of the law forbids the recovery of state claims. The debtor is not required interminably to keep the evidences of his discharge, or to provide against their loss or destruction. There are two parties whose rights are to be looked to and guarded. So under the patent laws the public have rights as well as the inventor. Congress intended, and have said in express terms, that when an invention was in public use or on sale more than two years, the inventor who failed to claim it should be barred. The public, after this lapse of time, were to presume the inventor had given it to the public. It might, and no doubt often would, work injustice to make that a monopoly afterwards which had been contracted for and dealt with as the property of all, and not the sole property of an individual.

Mr. Dodge relies on the fifth office rule, and construes it to mean positive proof of express consent and allowance of the inventor for more than two years. I do not think the rule admits of that construction. If it did, it would invade the rights of the public, and be against law, and void. But the rule does not say that assent and allowance may not be inferred and assumed from want of action on the part of the inventor. If an inventor knows his invention is used by the public, and does not take steps to prevent its use and assert his right, no other inference can be drawn by the public than that he assents to the use, and dedicates it to them. His protest to A. or B., if any avail could be given to it, which could not, would not compromise the rights of C. or D., who had never heard the protest. Besides, as I have before urged, on all the analogies of the law, as to bars and limitations, they can only be avoided, by the assertion of claim judicially, and in the prescribed tribunals, and within the prescribed time. Abandonment within two years would no doubt require a grade of proof higher, and more positive, because the inventor's right is protected within that time. He need not assert it sooner than then, and no inferences of surrender of right ought to be made within that time from mere nonaction. After that time, such inferences are perfectly lawful and natural, because the statute no longer favors delay; and he is, after two years, in default, and chargeable with laches.

It is also urged by Mr. Simpson's counsel that the office decisions have been contradictory, the earlier decisions and practice of the office being to allow an inventor whose application for a patent was wrongfully rejected eight or ten or more years after the erroneous rejection to renew his application and obtain a patent, if he had not sold or used or expressly permitted others to sell or use publicly his invention, and that Mr. Simpson had been misled by the course and practice of the office. I have felt the force of this argument, and have studied the case diligently to see if any legal grounds could be discovered upon which relief could be given to him. I have failed in this effort, and my duty restricts me to announcing what I believe to be the mere law of the case. If I have erred in this, the superior tribunals can be appealed to to correct the error, and no one, except Mr. Simpson, could be more gratified at such a correction than myself. Should the law and its tribunals in the last resort fail, the equitable circumstances of his case can be submitted to the legislature, who have the ability to reward him for the benefits he has conferred upon the public.

Upon the whole, I overrule all the reasons of appeal, and do this the 9th May, 1860.

I return, herewith, all the papers, drawings, and models, with this, my opinion and judgment, this 9th April, 1861. The argument of the appellant's counsel was not presented nor the case submitted to me till November 6, 1860. Since that time two sessions of the circuit court and many patent appeals have intervened, occupying my attention, and I have delayed the decision to enable me to search out and see the authorities bearing on this case.

Case No. 12,879.

In re SIMPSON.

[2 N. B. R. 47 (Quarto, 17).] [1]

District Court, N. D. Illinois. 1868.

BANKRUPTCY — DISCHARGE — RELEASE FROM IMPRISONMENT.

Where a judgment in trespass for malicious imprisonment and whipping was recovered against A., who afterwards was adjudged a bankrupt, *held*, that upon receiving his discharge he must be released from imprisonment.

The facts are, at the December term, 1866, of the superior court of Chicago, D. B. Carroll recovered a judgment in trespass (for a malicious imprisonment and whipping) for the sum of three thousand five hundred dollars. In January, 1867, a ca. sa. was issued, and March 25th, 1867, Simpson was lodged in jail. In July, 1867, he filed his petition in bankruptcy, and on January 7th, 1867, he received his discharge; Carroll paying no attention to the proceedings.

Upon the hearing on the motion for the writ of habeas corpus, Judge Drummond decided that the prisoner must be discharged, and upon the return of the sheriff to the writ the prisoner was duly discharged from custody. In reply to counsel the judge remarked that in order to have proved their judgment against the bankrupt, the judgment creditor should have had the prisoner discharged from custody upon the order of court, and then they could prove the debt. The question of jurisdiction was raised, but the judge remarked that though the state court would probably release the prisoner, it was the duty of the district court to see that he was released, and to protect him.

William H. Holden and Robert Hervey, for petitioner.

Francis Adams, for judgment creditor.

SIMPSON (BARR v.). See Case No. 1,038.

Case No. 12,880.

SIMPSON v. CAULKINS.

[1 Abb. Adm. 539.] [2]

District Court, S. D. New York. April, 1849.

ADMIRALTY—COSTS—CONSOLIDATED SUITS.

1. A libel was filed by each of two members of a ship's crew to recover damages for breach of a shipping contract; and subsequently eleven other libels were sworn to by eleven other members of the crew, upon the same state of facts and upon the same cause of action. Before answer was filed to either of these libels, and before the eleven libels were filed, a stipulation was entered into that the thirteen causes should be consolidated. An answer, presenting two issues, was then put in, and the cause having been brought on for hearing, the libellants prevailed upon the first issue, but the respondent succeeded upon the second. *Held*, on appeal from taxation of costs, that the costs of the two separate libellants and of the respondent were to be taxed in both the two suits first commenced, up to the date of the consolidation; but from that date libellants' costs were to be taxed only in the suit which was thereafter prosecuted.

2. Full costs of the issue on which the libellants prevailed should be taxed in their favor, and full costs of the issue on which the respondent succeeded should be taxed to him. These two bills should be set off the one against the other, and the balance paid by the party from whom it might be due.

[Cited in American Box Mach. Co. v. Crosman, 57 Fed. 1030.]

This was a libel in personam, by Thomas Simpson against Daniel Caulkins, master of the ship Sabrina, to recover damages for breach of a shipping contract. Twelve other causes were instituted on the same facts and for the same cause of action, by Simpson's fellow sailors in the voyage on the Sabrina, and were consolidated with the present. The cause now came before the court on appeals taken by both parties, from the taxation of costs by the clerk. The facts on which the appeal was based are sufficiently stated in the opinion.

Alanson Nash, for libellants.

E. C. Benedict, for respondent.

BETTS, District Judge. On January 15, 1848, the libel of Thomas Simpson in this case, was sworn to by the libellant. It was filed on the 17th, and the warrant of arrest was issued thereon the 18th, and served during January. Peter Williams filed his libel on the 18th of January, and the process was issued the same day. Eleven others of the same crew attested to libels on the 17th, and the same were filed the 19th of January.

These libellants were all members of the crew of the ship Sabrina, of which the respondent was master. They all shipped at this port, sailed out together, made the same voyage, and returned and left the ship at the same time. On the 18th of January, by written consent of the respondent's proctors, the thirteen causes were consolidated, and on the 8th of February an answer to the consolidated actions was filed.

The libel in the case of Simpson is special, and sets forth the case attempted to be maintained on the hearing. The others are the general printed forms, claiming wages, as upon an ordinary shipping contract. The special libel will, therefore, be regarded as being the one which has been adopted by the consolidation.

The libel alleged a contract for a voyage

[1] [Reprinted by permission.]

[2] [Reported by Abbott Brothers.]

from New York to St. Johns, and thence to one or more ports in Europe and back to a port of discharge in the United States; averring that the voyage was only made to Nova Scotia and then directly back to New York, where the libellants were discharged by the master, without their consent and to their great damage. The libel charges that the current wages for the voyage run were higher than those they agreed to receive, and they were retained on wages only two months, whilst the voyage contracted for was one of eight months, whereby a deceit and fraud was practised upon them, and they were subjected to great loss and expenses. Each libellant demands $40 for such special damages.

The answer denies the contract set up by the libellants, and avers that, at the option of the ship-owners, they shipped for a voyage from New York to St. Johns, Nova Scotia, thence to Pictou, and back to New York; or from St. Johns to one or more ports in Europe, and back to a port of discharge in the United States, and signed shipping articles therefor; that the voyage to Nova Scotia and back only was performed; and that the ship not being able to put into Pictou because of obstructions of the harbor by ice, returned directly from St. Johns to New York. It also alleges a tender to the libellants, in full of their wages for the voyage, of various sums amounting in the whole to $146.45.

The case went to hearing upon these pleadings. Two issues were involved in it: (1) Whether the tender was full satisfaction of the wages for the voyage performed. (2) Whether the contract entered into was actually for a voyage to Europe, and whether the respondent violated the agreement, to the damage of the libellants.

The decision of the court upon the hearing on the report of the commissioners, was in favor of the libellants upon the first issue, and in favor of the respondent on the other. And it was decreed that the libellants recover the difference between their wages reported due, and the sum tendered, with costs, including the costs of the reference and on exceptions; and that the costs of litigating the claim for damages for not performing the alleged voyage to Europe, be taxed against the libellants; and that the respective costs thus created, be set off, the one against the other, the balance, if any, to be collected of the party against whom it might be found.

Under this decree the libellants made up and claimed costs in the suit instituted by Simpson, at $70.87½, at which sum the bill was taxed; and in the case of Peter Williams alone, to the sum of $148.75, and in the other eleven causes subsequently united by consolidation with the two others, to about the sum of $23 each. These eleven bills the clerk refused to tax. From that decision the libellants appeal; and the respondent appeals from the taxations made of the other two bills, both in respect to the items admitted therein, and upon the principle that only one bill could be made up and referred.

The respondent presents, also, thirteen distinct bills of costs, and claims to have taxed in his favor $11 in eleven of them, $14.50 in one, and $143.30 in another. The clerk taxed one bill at $14.50, one at $97.43, and refused to tax the other eleven bills. From these taxations both parties, also, appealed.

Two general questions arise under these appeals: First. Can either party legally claim more than a single bill of costs in the causes? Second. What rule of distribution is to be observed in allotting the successful parties their proper portion of costs created in the progress of the litigation?

1. If it may be supposed that thirteen distinct suits might in these cases have been carried through to final decrees, each carrying full costs, unless the court or parties interposed to unite them, it would still be a question always open to inquiry, at what time any particular one of the number was commenced, and must be deemed in prosecution; because where a particular service enures to the common benefit of other parties, compensation therefor may be allotted to the one first performing it, at his instance, because of the insufficiency of the fund to satisfy his entire demand, or upon the equity of the party condemned in costs, not to be burdened with a repetition of payments for a single service.

At common law an action is deemed commenced on the issuing of the capias. 5 Cow. 514. The Revised Statutes of New York, however, require the actual arrest of the defendant on it, or that the capias be issued in good faith with intent to arrest him. 2 Rev. St. p. 299, § 38.

In admiralty, causes are initiated by arrest of the thing (2 Leol. Jenkins, 775; 1 Hagg. Adm. 124) or of the person (Hall, Adm. tit. 1) proceeded against.

At the time these thirteen cases were consolidated, no more than two suits had been instituted. The filing of libels the day subsequent to the consolidation, could not confer on them the character of pending actions, before process was served or even awarded by the court.

The two cases of Simpson and Williams must, under the proceedings as placed before the court, be regarded as in prosecution, separately and rightfully, up to the stipulation to consolidate them. No doubt the court might be compelled, under the act of congress of July 23, 1813 (3 Stat. 19), to deny several costs, if there was evidence that the actions had been unnecessarily multiplied; but as the libellants had no authority to unite in a common cause, it will not be presumed that any improper motive led to the commencement of suits by each, especially as the respondent might have defences to them severally, distinct and independent of each other.

Although the causes might not be of a character to admit a direct consolidation, yet on a proper application, the court would always apply the relief familiar to the English courts and our own, prior to any statutory regulations on the subject, and by order, compel the stay of all causes but one, and that the residue abide the award of the contestation of that. Colem. Cas. 62; 1 Johns. Cas. 28; Tidd, Prac. 645. Only the taxable costs incurred up to the period of such order would be allowable, with, perhaps, the addition of such as might become necessary subsequently to secure the parties the benefit of the rule of consolidation.

Accordingly the costs of the two separate libellants, and of the respondent in those two actions, should be taxed up to the 18th of January, the time of the consolidation. After that period, only one suit is to be recognized, and a single bill of costs to be allowed to either party as against the opposite one.

2. The rule of costs prescribed to the state courts by the Revised Statutes, in case of variant judgments upon multifarious issues in the same case, is recommended, both by its high authority and the reasonableness of its provisions, and was adopted by both as proper to be applied in the allowance of costs to their respective parties: that is, that the one who succeeds on the essential merits in the case shall obtain full costs, although he fails on incidental branches of it. 2 Rev. St. 511, §§ 17–21. The courts have interpreted and applied those provisions in various instances, so as to secure costs to a party who prevails upon a distinct and material cause of action in a suit, although judgment on the whole cause may be in favor of his opponent. No limitation is made to special forms of action. It has effect in actions of ejectment, replevin, tort, contracts, dower, &c. 12 Wend. 285; 19 Wend. 626; 20 Wend. 666; 1 Hill, 359; 6 Hill. 265, 267, 268; 1 Denio, 661; 2 Denio, 188. Similar principles govern the practice of other state courts. Meacham v. Jones, 10 N. H. 126; Nichols v. Hayes, 13 Conn. 155. The purport of the decision denotes that in these duplicated allowances of costs, each party taxes full costs, throwing out only those items palpably appertaining to the bill of his adversary.

In the United States courts, costs are not matters positively appointed by law, but are allowed in the exercise of a sound discretion by the courts, conformably to the usages governing their proceedings. Canter v. American & O. Ins. Co., 3 Pet. [28 U. S.] 319; U. S. v. Mabel, 2 How. [43 U. S.] 237. The statutory directions under which the state courts act, accordingly impart no higher authority to regulate the subject, than is possessed by the United States tribunals under their general powers. The difference is only that in the one case the rule is stringent and imperative, and in the other obtains and is enforced only because of its reasonableness and adaptation to the rights of the parties, in so far as these objects may be subserved by means of costs.

In these cases it is accordingly ordered, that the libellants and respondent have taxed in their respective bills, the proper taxable items, both in the suits by Simpson and that by Williams, up to the time of the consolidation; and that thereafter only one bill of costs be taxed in favor of the libellants and one to the respondent, each party being allowed full costs, with the exception of those particulars shown to the satisfaction of the taxing officer to belong with the items allowable to the opposite party.

Order accordingly.

NOTE. The act of congress of February 26, 1853 (10 Stat. 161), appointed specific costs to the officers of courts, in causes of admiralty and maritime jurisdiction. The items of allowance are no longer left to the discretion of the courts, and that subject of litigation has ceased to pervade the discussion and decision of causes; still the leading principles controlling the disposition of those costs between litigant parties, have application and force under the existing law, and it was, therefore, thought proper to report the above case as one still possessing general interest.

Case No. 12,881.

SIMPSON v. The CERES.

[36 Leg. Int. 339; 7 Wkly. Notes Cas. 576; 10 Cent. Law J. 113; 14 Phila. 523.][1]

District Court, E. D. Pennsylvania. Aug. 15, 1879.

ADMIRALTY—JURISDICTION—TORTS—LOCALITY.

Jurisdiction of admiralty of a collision between a steam tug and a floating dry dock lying in the river, moored to a wharf. As respects torts, the jurisdiction depends entirely on locality; the character of the object injured, or of the thing by which the injury is inflicted, is unimportant.

[Cited in Milwaukee v. The Curtis, 37 Fed. 706.]

In admiralty. Collision.

Henry R. Edmunds and J. H. Gendell, for libellant.

J. Warren Coulston, for respondent.

BUTLER, District Judge. The libellant's floating dry dock, while lying in the river Delaware, opposite Philadelphia, moored to a wharf, was run into and injured, by the steam tug, respondent. It rested, at the time, entirely upon the water; in which, alone, it was designed for use. It was capable of being navigated from place to place; and the only object of attachment to the wharf, (which was made by means of a cable,) was to avoid blowing away, or passing off with the current. That the injury was caused solely by negligence of the respondent, is not controverted, nor open to doubt. It was the respondent's duty to keep off. She did not; and is without excuse.

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[1] [Reprinted from 36 Leg. Int. 339, by permission. 10 Cent. Law J. 113, contains only a partial report.]

The only question raised is one of jurisdiction. The respondent denies the cognizance of the court. After a long period of vacillation and uncertainty, the jurisdiction of admiralty, (as a legal proposition,) is well defined. A discussion of the subject would be a useless expenditure of time, and might seem like an affectation of learning. The opinion of Judge Story in De Levio v. Boit [Case No. 3,776], covers the entire field, and exhausts the argument. As respects torts, (with which, alone, we have to do,) the jurisdiction depends, entirely, on locality. If committed on the high seas, or other navigable waters,—the act and its effects being there fully consummated,—the jurisdiction of admiralty is unquestionable. The character of the object injured, or of the thing by which injury is inflicted, is unimportant. As said in The Plymouth, 3 Wall. [70 U. S.] 36, jurisdiction does not depend on the wrong being done by a vessel, or those aboard of it; or against a vessel, or those connected with it; "but on the locality where it occurred. Every species of tort, however occurring, * * * if upon the high seas or navigable waters, is of admiralty cognizance." 2 Pars. Shipp. & Adm. 347; 2 Pars. Mar. Law, 652; Railroad Co. v. Towboat Co., 23 How. [64 U. S.] 209; The Commerce, 1 Black [66 U. S.] 574; The Agincourt, 1 Hagg. Adm. 271; The Lowther Castle, Id. 384; Brown v. Overton [Case No. 2,024]; Chamberlain v. Chandler [Id. 2,575]; West v. The Uncle Sam [Id. 17,427]; Sherwood v. Hall [Id. 12,777]; The Plymouth, 3 Wall. [70 U. S.] 34; Taber v. Jenny [Case No. 13,720]; The Sylph, L. R. 2 Adm. & Ecc. 24; Atlee v. Packet Co., 21 Wall. [88 U. S.] 289; Fretz v. Bull, 12 How. [53 U. S.] 249; The Maud Webster v. Howard [Case No. 9,302].

The Virginia Ehrman v. The Agnese, 97 U. S. 309, shows a recovery for injury to a steam dredge. Objection to the jurisdiction was not even suggested. A recovery was allowed in this court for a similar injury, against objection, in Albany Dredging Co. v. The Gladiolus [Case No. 132], No. 2, April Sess. 1878, and sustained on appeal by the circuit court. Although no case precisely similar to the one before me has been found, I feel no hesitation in determining the question raised against the respondent. Under the general principle stated, the court has jurisdiction. As before remarked, the dock was in the river, floating upon the water, when injured. That it was moored to the land is unimportant. So are all vessels, at anchor. That the attachment was at the water's side, instead of under, is immaterial.

As we have seen, the character of the structure injured does not enter into the question. If it did, the character of the structure here involved would not admit of objection, on this ground. It is essentially marine.

Decree for libellants.

SIMPSON (GARDNER v.). See Case No. 5,237.

Case No. 12,882.

SIMPSON v. LASSALLE et al.

[4 McLean, 352.][1]

Circuit Court, D. Indiana. May Term, 1848.

LIMITATIONS—JUDGMENT—HOW PLEADED.

Where the statute of limitations has run against a judgment, it may be pleaded to a sci. fa. to revive the judgment.

[This was an action at law by Simpson against Lassalle, Merrill, and others.]

Morrison & Major, for plaintiff.
Smith & Ketchum, for defendants.

OPINION OF THE COURT. This is a sci. fa. to revive a judgment. The first writ was returned served on one of the defendants, and not found as to the others. An alias was issued against defendants, which was not served, returned nihil. Merrill, one of the defendants, pleaded to the judgment the statute of limitations, to which the plaintiff demurred. And it appearing that the limitation of the judgment lien had expired as to Merrill, before the service of the writ, the demurrer is overruled, and the plea as to him is sustained. His real estate is, therefore, released from the judgment. The Revised Statutes of 1843, § 92, provides for an alias sci. fa., and authorizes a judgment on its being returned nihil. The judgment is revived, and execution against the lands may issue against the defendants, etc., except Merrill. 3 Blackf. 334; Walker v. Hood, 5 Blackf. 266.

Case No. 12,883.

SIMPSON v. LEGG.

[2 Cranch, C. C. 132.][2]

Circuit Court, District of Columbia. April Term, 1817.

JUDGMENT—MOTION—BOND TO SECURE RENT.

Judgment by motion, on notice, cannot be obtained on a bond given to secure rent upon an attachment on a suggestion that a tenant is about to remove.

Motion for judgment on a bond given to secure rent upon an attachment issued upon a suggestion that the tenant was about to remove. See St. Va. Nov. 29, 1792, p. 154, § 8.

Mr. Swann, for defendant. The act of assembly does not authorize summary judgment on such a bond.

And so it was decided by THE COURT (THRUSTON, Circuit Judge, absent).

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

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

Case No. 12,884.

SIMPSON v. LEIPER.

Circuit Court, E. D. Pennsylvania. May, 1848.

DAMAGES—VERDICT—WHAT EXCLUDED.

Expenses and counsel fees are not to be included in the verdict as actual damages.

Before GRIER, Circuit Justice.

[Cited in 2 Whart. Dig. 414, to the point as stated above. Nowhere reported; opinion not now accessible.]

Case No. 12,885.

SIMPSON v. MAD RIVER R. CO.

[6 McLean, 603.] [1]

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

PATENTS—UTILITY—DAMAGES.

1. A person who approves of an improvement of a patented right, but refuses to pay the price charged for it, is inexcusable for using it.

2. The fact of use is evidence of its utility, and should subject the defendant to damages.

[This was an action by Thomas D. Simpson against the Mad River Railroad Company for damages for the violation of letters patent No. 4,213, granted to plaintiff September 30, 1845.]

Curtis & Scribner, for plaintiffs.

OPINION OF THE COURT. This is an action for the violation of a patent right. On the 30th of September, 1845, the plaintiff obtained a patent for "an improvement in the mode of removing truck wheels, of locomotive and other engines." The agent of plaintiff was called on by the agent of defendant, who on examination was pleased with the improvement; and when the price of two hundred and fifty dollars was stated to him he refused to pay it. He had had the improvement in operation two weeks, as witness understood, and he said to the witness, he might bring suit.

There is no defence set up by the defendants, and the court instructed the jury that they could assess the damages, to which the plaintiff is entitled, for the violation of the patent. From the statement of the witness, it appears to be a very useful improvement in removing truck wheels of engines or cars, when they become defective and need repair. It saves much labor and expense, and also time. It is natural to conclude that from the time the improvement was first used by the defendants, nothing to the contrary appearing, it was continued in use, up to the time this suit was commenced. The case proved is evidence of the utility of the improvement.

The jury found a verdict of five hundred dollars, in damages. Judgment.

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

Case No. 12,886.

SIMPSON v. PACIFIC MUT. INS. CO.

[Holmes, 136.] [1]

Circuit Court, D. Massachusetts. March, 1872.

MARINE INSURANCE—TIME POLICY—ANCHORING.

A policy of insurance on a vessel for a voyage to a certain port and twenty-four hours after anchoring in safety, is not terminated by her arrival, and lying at anchor in safety more than twenty-four hours, at the anchorage ground outside the harbor of the port, and there, according to the custom of vessels of her draught bound for the port, discharging part of her cargo by lighters, in order to enable her to pass over a bar at the entrance to the harbor.

Action at law upon a policy of insurance [by William H. Simpson against the Pacific Mutual Insurance Company]. The case was submitted to the court on an agreed statement of facts, the material parts of which are stated in the opinion.

F. C. Loring, for plaintiff.

Oliver Prescott and George Marston, for defendant.

SHEPLEY, Circuit Judge. This suit is against the defendant as underwriter on a policy of insurance upon the ship Live Oak, for a voyage from Cardiff to New Zealand, Callao, Chincha Islands, and thence to Valencia, Spain. The policy was to terminate on the arrival of the ship at Valencia, in the kingdom of Spain, and being at anchor twenty-four hours in safety. Proofs of loss were exhibited to the defendant April 25, 1868. Payment is refused, on the ground that the risk had terminated before the ship was lost.

The ship arrived on the seventh day of December, 1867, at the anchorage ground, which is open and exposed outside of the artificial harbor of Valencia. At this anchorage ground vessels of large draught anchor and lie, until they are lightened sufficiently to pass the bar at the entrance of an outer artificial basin, formed by stone walls projected into the sea, where they are further lightened, until they can pass the bar at the entrance of the inner artificial basin or harbor, where the discharge of the cargo is completed by lighters. Vessels are never discharged completely at the anchorage ground.

On the eighth day of December lighters came and began to discharge, and continued to do so on the ninth, by which the vessel was lightened about one foot. On the morning of the tenth there were signs of a heavy gale, and the master received orders from the captain of the port to send down the top-gallant-yards and masts, and to have axes in readiness to cut away the masts.

Afterwards the master started for the shore, and was informed that the captain of the port had ordered the pilots to bring the ship into the outer harbor, and that a steam-tug was

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

coaling for the purpose. The master protested to the pilots and to the captain of the port, whose authority in such cases is supreme, against this being attempted, considering that, as the sea was very high, the danger of being driven ashore, if the ship remained at anchor, was much less than that of taking the bottom in crossing the bar. But the officers of the port insisted. The tug went to the ship, made fast, and attempted to tow her in. Near the end of the breakwater three heavy seas came in together: the first broke between the ship and the tug, throwing the latter ahead with such force as to cause the bitts to which the hawsers were fastened to give way. The ship immediately struck the bottom, her keel came up, in twenty minutes she had seventeen feet of water in her hold, soon filled, and began to break up, and was totally lost. None of the crew had been discharged.

The question presented for adjudication is, whether, on the facts which appear in this case, the ship is to be considered as having arrived at Valencia, and been at anchor twenty-four hours in safety before she was wrecked. If she had, the risk had terminated; if she had not, the defendant is liable.

A vessel arrives at a port of discharge when she comes, or is brought, to the place where it is intended to discharge her, and where is the usual and customary place of discharge. When a vessel is insured to one or two ports, and sails for one, the risk terminates on her arrival there.

If a vessel is insured to a particular port of discharge, and is destined to discharge cargo successively at two different wharves, docks, or places, within that port, each being a distinct place for the delivery of cargo, the risk ends when she has been moored twenty-four hours in safety at the first place. But if she is destined to one or more places for the delivery of cargo, and delivery or discharge of a portion of her cargo is necessary, not by reason of her having reached any destined place of delivery, but as a necessary and usual nautical measure, to enable her to reach such usual and destined place of delivery, she cannot properly be considered as having arrived at the usual and customary place of discharge, when she is at anchor for the purpose only of using such means as will better enable her to reach it.

If she cannot get to the destined and usual place of discharge in the port, because she is too deep and must be lightened to get there, and, to aid in prosecuting the voyage, cargo is thrown overboard or put into lighters, such discharge does not make that the place of arrival: it is only a stopping-place in the voyage.

When the vessel is insured to a particular port of discharge, arrival within the limits of the harbor does not terminate the risk, if the place is not one where vessels are discharged and voyages completed. The policy covers the vessel through the port navigation as well as on the open sea, until she reaches the destined place.

In Meigs v. Mutual M. Ins. Co., 2 Cush. 453, the court say, "Reaching the harbor, therefore, cannot be arriving, within the meaning of the policy; and if it do not mean that, it must mean that particular place or point in the harbor which is the ultimate destination of the ship. Until that point is reached, the voyage is not ended, and the ship has not arrived; though she may be obstructed and delayed in her progress through the harbor, and for want of water, or by adverse winds or other causes, be obliged to come to anchor, and remain at anchor twenty-four hours, and to take out some portion of her cargo. While she is properly pursuing her course to the place of her ultimate destination and of completed and final unlading, and until she reaches that place, and has been moored there in safety twenty-four hours, she is insured and protected by the policy."

In Brown v. Tierney, 1 Taunt. 517, a vessel bound for Pillaw had arrived at Pillaw Roads, where ships bound for Pillaw which draw much water usually bring to, and unload some part of their cargo to lighten them sufficiently for passing the bar. Although the ship had arrived at the place where she was to begin unloading, and had reached her port of discharge, yet inasmuch as it was not proved to be ever the practice wholly to discharge a ship in Pillaw Roads, but only to lighten her sufficiently to enable her to enter the harbor, it was decided that the ship was to be considered "as much at open sea as ever she had been."

In Samuel v. Royal Exch. Assur. Co., 8 Barn. & C. 119, a vessel insured from Sierra Leone to London, and upon which the insurance was to endure until she had been moored in good safety twenty-four hours, arrived on the 18th of February, and the captain, having orders to take her into the King's Dock at Deptford, moored her near the dock gates. On account of ice in the river, the ship could not enter the dock until the 27th; and then, in warping her towards the dock, a rope broke, she grounded, and was totally lost. Lord Tenterden held, that, the place where the vessel was moored not being the place of her ultimate destination, the policy did not expire when she had been there in safety twenty-four hours.

In the case of Brereton v. Chapman, 7 Bing. 559, it was held, that the lay-days allowed by a charter-party, for a ship's discharge, are to be reckoned from the time of her arrival at the usual place of discharge, though she should, for the purposes of navigation, discharge some of her cargo at the entrance of the port, before arriving at the usual place of discharge.

In the case of Whitwell v. Harrison, 2 Exch. 127, the vessel was chartered to take on board a cargo of timber at Quebec, and to proceed therewith to Wallasey Pool, in the river Mersey, or as near thereto as she could safely get, and there discharge her cargo. The vessel arrived as near to Wallasey Pool as she

could safely get, and did actually begin to discharge her cargo accordingly, discharging her crew altogether, and leaving none of them on board for the purpose of further navigation. It appeared in evidence that the captain always intended ultimately to carry the vessel into Wallasey Pool, with as much of the cargo on board as she could carry over the shallow part intervening between his original anchorage and the Pool. But it was also clearly established that the discharge of the cargo was going on in due course, and that, if the water were not sufficient, and no accident had occurred, the whole cargo would have been discharged in the place where the vessel was moored. The court decided, that, as the ship was bound either to Wallasey Pool, or as near thereto as she could safely get, that that was the intended place for the discharge of her cargo, and that therefore the vessel had clearly arrived at the port of her discharge. Alderson, B., in delivering the judgment of the court, distinguishes the case of Whitwell v. Harrison by saying, "The case of Brereton v. Chapman, 7 Bing. 559, does not appear to us at all to affect this question. There the vessel was still in progress to the ultimate place of the discharge of her whole cargo; and all that was done was to put on board lighters a portion of the cargo, in order that the vessel might be enabled thereby, without delay, to proceed with them to the usual place of discharge. There the whole crew remained on board, and the vessel was in all respects really continuing her voyage."

In the case of Whitwell v. Harrison, the case turned upon the facts that the vessel had arrived at one of the places of discharge specified in the charter-party, as the intended places for the discharge of the cargo, and that the discharge of the cargo was going on in due course, and not merely for the purpose of further navigation. Whitwell v. Harrison, therefore, differs in no degree from the earlier cases, which decide that the place at which a vessel unloads the whole or part of her cargo for the purpose of discharge will be the place of the termination of a risk to a port of discharge. But neither Whitwell v. Harrison, nor any other case which we have been able to find, decides that a place at which a vessel unloads part of her cargo, in order to lighten the vessel and enable her to proceed with the residue, would be the place of the termination of the risk to a port of discharge.

The recent case of Bramhall v. Sun Ins. Co., 104 Mass. 510, was decided upon the following state of facts, as stated in the opinion of Judge Gray (page 517): "It is clear that the George Washington had safely arrived at her port of discharge in Spain, and been there moored twenty-four hours in good safety before the loss sued for. She proceeded to Valencia to discharge, and anchored at that port in an open roadstead, exposed indeed on one side to the winds and seas, but with good anchorage and holding ground. She was fully entered at the custom-house; and the master lodged her papers with the consul of the United States, as required by law, notified the consignees of his readiness to discharge, dismissed part of her crew, retaining only enough to protect the ship, and himself left the ship and returned to the United States before the loss. The ship drew too much water to come into the basin; and the place of her anchorage is found to have been the place at which ships of her draught are usually discharged, by means of lighters furnished by the consignees at the expense of the ship, by stevedores from the shore, and without the assistance of the crew; although such vessels, 'discharging at the anchorage, generally, but not uniformly, come into the basin after sufficiently reducing their draught, for greater convenience of lightering and taking in ballast.' As soon as lighters were furnished by the consignees, three days after she reached her anchorage, the ship began to discharge, lay at anchor there for more than three weeks, and discharged one-third of her cargo."

The facts in the case before the court are clearly distinguishable from the facts agreed in Bramhall v. Sun Ins. Co. In that case, the place of the vessel's anchorage was found to have been the place at which ships of her draught are usually discharged. In this case, it is clearly proved that vessels are never completely discharged at the anchorage ground, but only lightened sufficiently to enable them to reach the inner harbor. In several other particulars, more or less important, the cases differ.

But the substantial difference in the two cases, as agreed by the parties and established by the proofs in the case, consists in this: that in Bramhall v. Sun Ins. Co., it was agreed by the parties, and found by the court, that the anchorage ground where the George Washington unladed a portion of her cargo; where the master dismissed part of the crew and himself left the ship to return home to the United States; where the ship lay at anchor for more than three weeks, and discharged a third of her cargo before the loss,—was a usual and destined place of discharge; while, in the case before the court, it most clearly appears from the facts agreed and proved in the case, that the lightering of the Live Oak at the anchorage ground was only to lighten her in order to enable her to get to her place of destination.

The question presented in this case, therefore, is the precise question stated by the court in the case of Meigs v. Mutual M. Ins. Co., 2 Cush. 452, 453, where they say, "The simple question, therefore, is, whether the ship, being destined to the wharf as the place of unlading, but being obliged to anchor after coming within the harbor, for the purpose of lightening, to enable her to get up to the wharf, there not being sufficient water for her to reach the wharf with the cargo all in, is to be considered as having arrived within the meaning of the policy, upon reaching the place of anchoring for the purpose of lightening."

Upon the facts as agreed in the case of Bramhall v. Sun Ins. Co., we would not undertake to decide, as contended for by the plaintiff's counsel, that the decision in that case is not in harmony with the authorities before referred to.

But, upon the facts as agreed and proved in this case, it seems to the court clear, both upon principle and authority, that the Live Oak cannot properly be considered as having arrived and been moored in good safety for twenty-four hours before the loss. Judgment for plaintiff.

SIMPSON (TALBOT v.). See Case No. 13,-730.

SIMPSON (WHEELER v.). See Case No. 17,500.

Case No. 12,887.

SIMPSON v. WIGGIN et al.

[3 Woodb. & M. 413.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1847.

USURY—WHO MAY TAKE ADVANTAGE OF—SALE—MISREPRESENTATION—CAVEAT EMPTOR—EQUITABLE RELIEF.

1. Where usury is averred to have taken place between A & Co. and B in a loan of money and sale of goods, if B afterwards sell the same goods to C, the latter cannot take advantage of such usury.

2. So if fraud or misrepresentation existed as to the goods in the sale between A & Co. and B, no recovery can be had by C for it, against A & Co., unless they were practiced on C also by A & Co., and in that last sale, if done by A alone, he must be prosecuted alone for what he did alone and wrongfully.

3. Averments by a vendor as to the price or value of an article, if exaggerated, are not so strong evidence of fraud as erroneous averments in relation to title or other material facts more exclusively within his own knowledge.

4. And if an article like tobacco in kegs is sold, and is partly opened for inspection, and more is offered to be opened, and the quality turns out to be worse than either party supposed, the vendor is not liable for fraud, nor can that sale or a subsequent sale of the article be rescinded on that ground.

5. If a vendee discovers articles so purchased to be of less value than he supposed, and wishes to rescind the contract on that account, or for fraud practiced in the sale, he should offer to return the articles, and not dispose of them at public auction, and proceed in equity for damages merely. The remedy for damages, in such a case, is full at law.

6. If B, in an exigency to obtain money, or suffer a large loss, agree to give more for an article on long credit than its market value, in order to sell it soon and raise a part of the money, the sale is not void for oppression, and probably not for usury, if nothing material was concealed, and the vendor was not the creditor of the purchaser, nor a money lender, but a dealer in goods like those sold.

This was a bill in equity upon the following allegations: One R. C. Otis, of Southport, Wisconsin, having a large amount of real estate, so situated that his title to it would be lost, and some $15,000 or $20,000 sacrificed, if he did not raise about $9,000 before the 5th of November, 1845, proceeded to Boston with a view, if possible, to borrow that amount in money. Upon his arrival there, he was unable to effect a loan, unless on such terms as seemed almost equally ruinous with the losses anticipated if he did not succeed. Afterwards he met with James S. Wiggin, one of the defendants, in October of that year, and attempted to obtain the money from him. Wiggin was unwilling to lend it on any security which Otis was able to give, but being a merchant in company with Copeland, the other defendant, agreed to sell Otis $13,009 worth of goods, as valued in the invoice, the prices to be agreed on between them, and the articles to be selected by Otis, except that a lot of tobacco, amounting to about 20,769 lbs., should constitute a part of the goods, at 25 cts. per lb., making $5,197.50. The title of the goods was to be secured to Wiggin & Co. till other satisfactory responsibility could be obtained by mortgages in Wisconsin, or by a sale of the goods. In the meantime Wiggin was to accompany Otis westward, and advance such other sum on like security as might be necessary to relieve Otis, not exceeding $9,000. The goods were packed and forwarded towards Detroit, and Wiggin and Otis started for Wisconsin. Having reached Detroit, and being unexpectedly detained there for a day about the 4th of November, Wiggin applied to Simpson, the complainant, to purchase the goods of Otis and pay or secure their value. He exhibited an invoice of them, and recommended their good quality. At length B. G. Simpson agreed to purchase them on a discount of $1,850 from the bill of sale to Otis by Wiggin & Co., but in that bill the tobacco had been invoiced, by Otis's request, at 30 cts. per lb., instead of 25, the actual price given. Simpson assigned the goods to C. Howard, as security for $6,000 which he borrowed of him and paid over to Otis, and gave his notes and draft to him for the balance, all of which were transferred to Wiggin & Co., and further security given by Otis when they reached Wisconsin, for the residue of the amount to be paid Wiggin for the goods, and the $9,-000 advanced by him in money. Things remained in this situation till the goods failed to reach Buffalo so early as was expected, and a portion of them were found to be much injured by accidents on their way thither. Other portions, including the tobacco, were found not to be in a merchantable condition and were stopped at Buffalo by the agents of the complainant. The tobacco was sent to New York City for sale, and the articles damaged on the canal were sold at public auction at Buffalo. The rest were forwarded by sailing vessels to Detroit, and injured by the long passage and accidents before arriving there. The whole realized, after being sold by Simpson's agents, but little more than

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

the $6,000 advanced by Howard. The tobacco was afterwards sold back to Wiggin & Co. at the rate of ten cents per lb., after an angry negotiation. The present bill was instituted, averring fraud and usury in Wiggin & Co. in the sale of the goods to Simpson, as well as to Otis, and asking that it be rescinded, and the notes of Simpson, which had been transferred by Otis to Wiggin & Co., be pronounced null and surrendered.

The answer of the respondents denied all usury and fraud, or misrepresentations at Boston or Detroit. It further denied any loan to be effected by the sale of the goods to Otis, and alleged that the goods were worth the price asked for them, considering the length of credit, risk of the security and distance. It further averred that Otis, and not Wiggin, made the bargain and sale to Simpson, and that accidents and bad management caused the losses sustained by Simpson, as without them the goods at Detroit uninjured by the voyage would have sold for more than the invoice. It also alleged that Simpson was requested to give up the bargain after Otis and Wiggin reached Wisconsin, but did not do it, though offered $200 if he would. Rec. p. 159. There was much testimony, the rsults of which will be given in the opinion of the court where material.

R. H. Dana, Jr., for complainant.

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

WOODBURY, Circuit Justice. The first question to be settled in this case is, with whom the respondents made their contract and sale. And if not with the plaintiff, whether the respondents did or said anything to the plaintiff falsely and fraudulently, so as to render them liable to him in this bill.

In respect to the first question, no contradictory evidence whatever exists that the original contract at Boston was made by Wiggin & Co. with Otis. He alone wanted the money, and came to Boston and participated in the purchase. Otis there acted, also, for himself, and not for Simpson, and, indeed, had then not seen Simpson or had any connection with him whatever in respect to the matter. The original usury, then, as well as fraud, and any original misrepresentations were all made to Otis, and hence he alone can prosecute for them, or rescind the sale, or avoid any securities given to Wiggin by him on account of it. The loss by any usury was Otis's loss, and not Simpson's, and it is well settled, that if usury exist in a sale from A to B, it is not open to a purchaser of the articles from B, to impeach the consideration as usurious between B and A in B's purchase of A. Leader v. Ahearne, 4 Dru. & War. 499.

Again, no other person like Simpson can obtain any right, by assignment of the goods, to sue Wiggin & Co. in his own name for any wrong done in that sale. Consequently Simpson, in this bill, if recovering at all against Wiggin & Co., must recover on some agreement made by them with him, or some deception practiced by them upon him personally. All the transactions and statements made at Boston with Otis, are, therefore, irrelevant and incompetent in this bill brought against Wiggin & Co. by Simpson for a wrong done at Detroit, except as they may be shown connected together, or as the former may throw some light and explanation on the latter.

What then took place at Detroit is to be next considered. The sale there to Simpson was both in form and substance by Otis, and not by Wiggin. The former was the real owner of the goods then, though they had been virtually pledged or mortgaged to Wiggin & Co. as security for the purchase money. The money was paid and the notes and drafts given for the goods were eo nomine to Otis, and not Wiggin & Co. The benefits of the sale then were to be reaped by Otis, as principal, and not by Wiggin & Co., though the latter, as having a lien on the goods, would not relinquish it till they received from Simpson the money and notes, as in part a substitute or equivalent. The large discount on the goods at Detroit was also made by Otis, and not by Wiggin & Co. The sale at Detroit, then, must be considered a sale by Otis. But at the same time, Wiggin may well be regarded as coöperating with Otis, on account of the pledge of the goods to him and his partner, and his interest in having a good and seasonable sale made of the merchandise, for his security and payment. Furthermore, for what he might, as agent for Otis, and aiding him, say which was false or fraudulent, he might in person be answerable in a suitable action or bill. But the proceeding must not be against him and his partner, as this is, nor against him as principal, or to rescind the contract at Detroit, as if it had been made with him, and return the securities as if executed to him & Co., and not to Otis, because that contract was in form and in law between Simpson and Otis alone, and the securities were given to Otis alone, and afterwards were negotiated to Wiggin by Otis towards payment of the original purchase by Otis from him and his partner. It does not alter the state of things at Detroit on the allegations in this bill, that Wiggin there gave some guarantee as to the goods in the name of the firm, because if he had power to bind the firm by such a guarantee, which is doubtful in some views, this bill is not instituted for a breach of that guarantee, but rather for usury, oppression and fraud.

For reasons like these, it seems to me there are insuperable difficulties in sustaining the present bill against Wiggin & Co., even if Wiggin conducted towards Otis at Boston in the original sale in the culpable manner al-

leged, as Simpson had no concern in that conduct or contract. So, if Wiggin conducted, as is alleged at Detroit, he did it, not as a contractor or vendor, but the agent of Otis, selling to Simpson; his liability is not on the contract, and as a party to that, but for his falsehoods and misrepresentations, as a third person interfering.

Under this view, too, it would be very difficult to hold Copeland, his partner, liable for such acts by Wiggin, as is attempted here, acts to aid Otis, rather than the firm, and hardly imputable to Copeland, or such as he ought to be responsible for. But as amendments in the bill, or a new one might be resorted to, if this view would clearly dispose of the case as it now stands, and as some question may remain, whether in one aspect Wiggin & Co., as the present possessors of the notes and drafts by Simpson, might not be liable under the bill in its present form to some extent, in connection with the notes, if he was guilty of fraud at Detroit in aiding Otis's sale, so as to vitiate the notes and sale, it seems proper to examine further into the case. Certainly, the transaction with Otis at Boston would look, at the first blush, like usury. On an analysis of it, however, Wiggin does not appear to have been a money lender, and desirous of securing an exorbitant interest by means of a sale of property at exaggerated or sham prices, as is frequently done by usurers. On the contrary, he was a merchant and anxious to sell his goods at a high profit. And the loan seems to have been made or promised, to enable Wiggin to sell his goods, rather than his goods having been sold to enable him to lend his money. He appears to have been looking for high prices, rather than usury. This might change entirely the aspect of the case in regard to usury, but still leave it open to the other objections,—of oppression and fraud. Certain it is, also, that, independent of usury, the bargain, as a contract which Wiggin made with Otis, was in some aspects a hard one, and the contract which he helped afterwards Otis make with Simpson, though much less rigorous surely was not free from representations, as testified to by some witnesses, (though not altogether sustained by the other evidence,) and according to them going much beyond the usual commendations bestowed and expected from those who are vendors. The law cannot in such cases tolerate the low standard of morals and veracity adopted in some places, or in some branches of business, though it may not punish as deception what both parties expect as mere praise or puffing, and what may not, therefore, operate as falsehood or fraud, but merely as a flattering view of the qualities and value of the property on sale.

As society and trade exist, the law does not regard statements as to the general value and prices of articles sold with so much jealousy and strictness, as those in respect to title and particular qualities or particular facts connected with the articles. Prices are uncertain and fluctuating from various causes, and a vendor should be expected to put the most favorable coloring on the general excellence and high value of what he sells. An intelligent vendee, justly anticipating this, is not deceived by it. But when the vendor goes further and states particular facts as to title or quality, and especially those more within his own knowledge, reliance should and will be often placed on such statements and he be held strictly answerable for their correctness. Mason v. Crosby [Case No. 9, 234]. In this instance, however, the testimony of Otis and Howard, which goes to support the misrepresentations, comes from persons so interested in the question, if not in the result of this case, as not likely to be free from some coloring, and the circumstances under which Otis made both contracts were so urgent and imperative, and such a boon or relief was derived from raising the money in connection with them, that no great effort was necessary to make him incur large sacrifices knowingly, and without the influence or deception practiced on him. There was a strong inducement for him to close the bargain, even if knowingly supposing his loss might equal several thousand dollars, because he would thus raise funds which he had found himself otherwise unable to raise, and which were necessary to prevent a forfeiture and loss in the West of $15,000 or $20,000. Beside this, the balance of the evidence appears to be, that he acted with his eyes open, rather than under willful concealment or deception practiced upon him by Wiggin at Boston.

The tobacco, which was much the largest and most questionable item, would seem to have been taken after a full opportunity afforded to inspect its quality. If he omitted that opportunity, and chose to run the risk without much critical examination, it was his own fault or neglect. Beside this, it appears that he knowingly was to give a price beyond the wholesale one for cash, or even for credit, unless it was a credit at very remote points and on security not entirely certain. And, indeed, according to some of the evidence, it was understood to be a price calculated to indemnify Wiggin & Co. for all risks in so large a sale, and for other advances of $9,000, if needed. Nothing is shown of fraud as to the prices or qualities of the other articles, and the actual sales of these other articles in the end, though at auction and some of them damaged, fortifies this view; especially when we consider that those sales were at an unfavorable season. Several of them were nearly as high as the price given by Otis, and most of them above that given by Simpson, if the discount to him is spread in an equal ratio over the whole.

But when we come to the second sale by Otis to Simpson at Detroit, it is true that Simpson had not the same means of judging of the quality of the tobacco, by inspection,

as Otis had enjoyed, the tobacco not being present there. Beside this, the price in the invoice or bill of sale had been put five cents per lb. too high by direction of Otis; and Wiggin, though not originating this exaggeration, is sworn to have represented the value of the tobacco to be equal to what was named. And Simpson, unlike Otis in the first sale, would be obliged to rely on the invoice price and what was stated by Otis and Wiggin concerning its quality, in forming an opinion as to its true value. The tobacco, also, was the great item, constituting from one-third to one-half of the whole invoice.

It is to be recollected, likewise, that Simpson had no such reason for knowingly giving a high price as Otis, not being under a necessitous pressure like him, nor asking a favor like him, through the goods to raise money, and that Wiggin should have appreciated and respected this difference in making his statements there. But some extenuation and obviating circumstances exist in respect to this view of the transaction at Detroit. The large reduction which was made there to Simpson from the prices that had just been given by Otis, which was $800, beside the over entry of $1,000 on the tobacco, and the really higher value of these goods at Detroit than at Boston, might be considered, in the absence of other evidence, quite a sufficient inducement for him to trade without presupposing any fraud or falsehood practiced on him on the part of Wiggin at Detroit. After this deduction, it is far from certain that Simpson actually gave much more for the goods than they would have been worth at Detroit, if arriving there in season and undamaged, and the tobacco in as good a state as all parties were justified in expecting. One of the plaintiff's witnesses testifies to this, independent of the tobacco, which he did not see. It does not appear that Wiggin himself supposed the tobacco to be essentially injured by mould or age, but it had been sold to him low to close up an old consignment, and after the form of the plugs had become unfashionable, and was in reality worth more than he gave, and had originally been limited by the consignor at much more, viz., 28 cts., and would probably sell high in the West, where in this matter, at least, fashion would be less regarded than substance. This misapprehension, apparently on all hands, as to the condition of the tobacco, has not had sufficient weight in the argument, nor a series of accidents and untoward events, for which neither party can be very blamable. Several of them seem to have combined together to render the proceeds of this sale at Detroit most unfortunate, and very different from the anticipations which might honestly and naturally have been formed in respect to them beforehand.

The goods arrived too late in the season at Buffalo, being not till November, and many of them never reached Detroit at all, and none till the next season. Parts were injured on the canal on their way to Buffalo, and others still were damaged while going thence to Detroit. Forced sales were also made of some at public auction, and at points short of Detroit, and where, if the market was glutted, they would not, of course, bring so much as farther west, nor so much after the forwarding season was over, and much less would they, when disposed of there on short notice, and for cash, and not as at retail, and partly on credit. The tobacco was never attempted to be sent forward to its destination, and sold there in the customary advantageous manner, but turned aside and hastened to New York City for disposal at auction prices, and at a loss similar to what might be sustained in sending coals to Newcastle. When the kegs were opened, likewise, and carefully examined, the effects of age and mould on the tobacco were found to be greater, probably, than the original owners before Wiggin, or Wiggin himself, or Otis had supposed. This difference would not seem to have been known to the respondents, or to have been concealed by any fraud, and its consequences must, therefore, fall on the possessor, as well as some of the evils from the other injurious acts which originated with the plaintiff's agents. These constitute the different aspects of the affair as connected with the sale at Detroit. They are not decisive as to the liability of Wiggin alone for what he did there, or if liable, not decisive as to any very large amount of damages caused alone by improper representations made by Wiggin. But the balance of the whole seems to give an unfavorable impression, to some extent, as to the correctness of his statements to Simpson, and his design by them to mislead him in the purchase.

There is, however, one other difficulty in a remedy for that in chancery, on the facts of the case as now presented, which is not to be overlooked. Instead of offering to return these articles at Detroit, where they had been sold and possessed the highest value, and then asking to have the contract rescinded, and the notes restored, which is the ordinary course in such cases, no offer was made to return any of them, except the tobacco, and that was at New York, and not Detroit.

Without holding that the neglect to offer a restoration of the property, or a restoration at a particular place, or that an inability to do it prevents this court from entertaining jurisdiction on its equity side, when the rescinding of a contract is asked, or other relief suitable to the case, it may, at least, be considered that such is the general rule, and any exceptions to it must be clearly made out before they can be sustained. 5 East, 451; Long, Sales, 242. Sometimes, when damages are a proper mode of relief, the party is sent to a court of law to recover them, when the remedy there is ample and

what has been received cannot be restored, so as to justify the equitable remedy of rescinding. At other times, if this court can, in a particular case, make an award of damages, as it sometimes does, it must be where part of the property can be restored, and damages allowed for the rest, or where a restoration is impossible through the wrong of the opposite side, or where jurisdiction exists, for other grounds and reasons, to proceed and give damages alone. Warner v. Daniels [Case No. 17,181]; 2 Story, Eq. Jur. § 794; 3 Merivale, 643. Whether damages alone could be given in equity, on the facts appearing here, or damages and a restoration of the drafts and notes, is very doubtful, if the bill was by Otis against both of these respondents. But it is quite certain that Simpson has no claim to such a decree, in a bill in the present form, and against both of them. His best chance for a recovery would seem, on the present evidence, to be in a bill against Wiggin alone, for his coöperation with Otis in representations in the sale at Detroit, as to the tobacco, which the plaintiff considers clearly exaggerated and untrue. But whether a recovery at all could then be had, or how much damages Simpson thus sustained, or what would be the true rule of damages then, and what the new evidence and principles to govern a recovery in such cases, different from those proper in a bill in form like this, and against Copeland, as well as Wiggin, cannot be properly decided now. But in order to leave the door entirely open for any other relief the complainant may be advised to attempt, I propose to let this bill be dismissed without prejudice.

An injunction now existing against the negotiation of the notes by Wiggin, it was allowed, on motion, that the decree of dismissal be not entered till the next term, in order, in the meantime, that new proceedings be instituted or the controversy arranged.

SIMPSON (WILSON v.). See Case No. 17,834.

SIMPSON, The LOUISA. See Case No. 8,533.

Case No. 12,888.

In re SIMS.

[16 N. B. R. (1878) 251.] [1]

District Court, E. D. Michigan.

BANKRUPTCY — MORTGAGE GIVEN AFTER COMMENCEMENT OF PROCEEDINGS—MOTION TO SET ASIDE.

An assignee may petition summarily to set aside a mortgage given after the commencement of proceedings in bankruptcy. Resort to a bill in equity is unnecessary.

On petition of assignee to set aside mortgage. A creditor's petition was filed against Stephen Sims July 11, 1876. On July 20th he gave a mortgage to Atkinson & Atkinson, to secure their pay for services to be rendered by them in resisting the creditor's petition. He was duly adjudicated a bankrupt October 23d.

Burt & Burritt, for assignee.

Mr. Atkinson, in pro. per.

BROWN, District Judge. Respondents defended solely upon the ground that this court has no jurisdiction to proceed, summarily, to set aside the mortgage, and claim that the assignee must be driven to a bill in equity. In support of this position, the cases of Smith v. Mason, 14 Wall. [81 U. S.] 419; Marshall v. Knox, 16 Wall. [83 U. S.] 551; and In re Marter [Case No. 9,143], decided by this court, are relied upon. I am clearly of the opinion that these cases have no application to a proceeding like the one under consideration, where it is sought to set aside a mortgage given by the bankrupt after proceedings in bankruptcy have been commenced. The rule, in the opinions above cited, has been confined to cases where the adverse party claims an absolute title and dominion over the property of the bankrupt acquired by him prior to the proceedings in bankruptcy. The title of the assignee relates back to the commencement of those proceedings, and a mortgage upon the estate taken after that, is virtually an incumbrance upon the property of the assignee. While the taking of such mortgage is not unlawful, and the same would constitute a valid incumbrance upon the property, if the petition were dismissed, of course the mortgagee must assume the risk of being required to release it, if the petition is sustained. Where the property affected by the lien is confessedly the property of the bankrupt, and has passed to the assignee, and it only remains to ascertain and liquidate the alleged lien, the summary jurisdiction of this court is entirely adequate. In re Clark [Id. 2,801]; In re Ulrich [Id. 14,328]; Ex parte Bryan [Id. 2,061]. An order will be entered requiring the mortgagees to release the mortgage.

[See Case No. 12,889.]

Case No. 12,889.

In re SIMS.

[19 N. B. R. 57.] [1]

District Court, E. D. Michigan. June 24, 1878.

BANKRUPTCY—MORTGAGE—GOOD FAITH—ACTUAL VALUE.

When a bankrupt, within two months prior to the commencement of proceedings, had mortgaged his stock of goods, it being understood before the mortgage was executed that the consideration he received from the mortgagee should be paid to and accepted by a creditor then pressing the payment of a debt past due, for the same sum at which he received it, the mortgagee and the creditor being present and active in the negotiation with the bankrupt, the

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onus of showing "good faith" and "actual value" within the meaning of section 5128, Rev. St., will be upon the mortgagee, before he will be allowed to enforce his mortgage.

This cause came before the court upon the petition of the assignee for direction as to the distribution of the proceeds of the sale of certain property belonging to the estate and claimed to be covered by a chattel mortgage held by James Monaghan. It was referred to the register in charge to take proofs to be certified into court with his opinion thereon. On the 24th day of June, 1876, [Stephen] Sims gave to Monaghan four notes of five hundred dollars each, payable at 6, 12, 18, and 24 months, to secure the payment of which Sims gave Monaghan two mortgages, one on four and four-tenths acres of land in New Boston, and the other on his entire stock of merchandise, fixtures, furniture, etc., then in the store occupied by him. The last mortgage gave the mortgagee the right to take all the mortgaged property into his possession at any time when he should deem himself insecure. The consideration of these four notes—to secure the payment of which the two mortgages were given—was four hundred shares of the stock of the New York Silver Co. These notes and mortgages were executed at New Boston, the place where Sims was carrying on business as a country merchant. The circumstances under which they were executed were these: Mr. McCarthy, of the firm of McCarthy, Roney & Giles, accompanied by Monaghan, had come on the day of their execution to New Boston for the purpose of collecting or securing a claim of over two thousand dollars, some time past due, which the firm of McCarthy, Roney & Giles held against Sims. McCarthy states that he regarded the claim as a "dubious" one, and that he invited Monaghan to accompany him because he was conversant with legal forms. The negotiations which followed at New Boston were participated in by McCarthy, Sims, and Monaghan; and it resulted in the transfer by Monaghan to Sims of four hundred shares of the stock of the New York Silver Co., for which Sims gave his four notes of five hundred dollars,—two thousand dollars,—secured by the mortgages above mentioned, and the taking by Mr. McCarthy of the silver stock in full payment of Sims' debt to McCarthy, Roney & Giles. The concurrence of all three—Sims, McCarthy, and Monaghan—was necessary to the completion of the transaction. The mortgaged property remained in the possession of Sims until, in consequence of the bankruptcy proceedings which were commenced on the 11th of July following, they came into the hands of the assignee, who was appointed on the 23d of November following, and, as stated in the petition of the assignee, which is the subject of this reference, was sold on the 13th, 14th, and 15th days of March, 1877.

[See Case No. 12,888.]

H. E. Burt, assignee, in pro. per.
John Atkinson, for Monaghan.

By HOVEY M. CLARKE, Register:
The question is whether the mortgage to Monaghan was executed to secure the payment of a "loan of actual value, made in good faith," or whether it was executed to secure the payment of an existing indebtedness owing by Sims to McCarthy, Roney & Giles, and in violation of the provisions of sections 5128, 5129—one or both—of the Revised Statutes. That Sims was insolvent on the 26th of June, 1876, and that this insolvency was known to McCarthy, is established by the testimony. If the mortgages which were given to Monaghan for nearly the full amount of the debt of Sims to McCarthy, Roney & Giles had been given directly to them, the transaction would have been so clearly in violation of the provisions of the bankrupt act [of 1867 (14 Stat. 517)] that it is not probable that any attempt would have been made to sustain it. It is the interpolation of a sale of silver stock for two thousand dollars for notes and mortgages having 6, 12, 18, and 24 months to run; Monaghan, a third party, being the vendor of the stock, and the mortgagee of the debtor's property, which is relied upon to take the transaction out of the provisions of the bankrupt act, and thus render valid in the hands of Monaghan that which would have been void in the hands of the creditors. But it seems to me that the negotiations conducted between these three parties were essentially one; that every fact which was known to McCarthy, and which, because known to him, would bring the transaction within the inhibition of the bankrupt act, was also known to Monaghan; that Monaghan was there in the service of McCarthy, employed by him with express reference to the exigencies of the occasion, where a creditor is seeking to collect or secure a debt due to him by an insolvent debtor; that nothing appeared at the time, or in the testimony taken on this reference, to establish the "good faith" required by section 5128 of the transaction between Monaghan and Sims, essential to which, as it seems to me, was "actual value" in the subject of the traffic between them. The circumstances, indeed, did not require any consideration by Sims of the value of the silver stock; for the taking of it by McCarthy at one thousand dollars was a part of the negotiations by which Sims was to take it of Monaghan. In short, it seems clear to me that this transaction was such that Monaghan cannot claim rights under it severed from or apart from the consideration of the purposes and liabilities of McCarthy in it. I deem it sufficient to rest my opinion on the principle that the onus of showing, within the meaning of section 5128, "good faith" and of the "actual value" of that which passed first from Monaghan to Sims and from Sims to McCarthy is upon any party who

seeks, upon such a transaction as this is shown to be, to take the bankrupt's property out of the fund for distribution to the general creditors; and that, so far from such good faith being shown, all the testimony in the case tends in the opposite direction, and to show that it was a scheme devised by McCarthy and Monaghan on their way to and while at New Boston to obtain a lien upon all of Sims' property to secure the debt due to McCarthy, Roney & Giles, and at the same time evade the inhibition of the bankrupt act. It is by no means necessary, in order to reach the conclusion that this transaction cannot be supported, to affirm that any such tripartite agreement, even when it is clear that each part depends upon the others, and that the payment of a past-due debt by an insolvent is the result attained, that such transaction is a violation of the bankrupt act; but I think it may properly be held that the good faith of it must be affirmatively shown, and that essential to such a showing is satisfactory evidence of value in that which passes from the third party to the debtor, and from him to the creditor; and it entirely begs the question here raised to say that the creditor's receipt is evidence of such value.

I am therefore of opinion that no part of the money in the hands of the assignee, derived from the sale of the mortgaged property, should be paid to Monaghan.

June 10, 1878. The certificate was argued, and on the 24th of June THE COURT (BROWN, District Judge) directed an order to be entered approving the opinion of the register and confirming his report.

SIMS (GRAY v.). See Case No. 5,729.

Case No. 12,890.

SIMS v. JACKSON.

[1 Wash. C. C. 414; [1] 1 Pet. Adm. 157.]

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

SEAMEN—WAGES—DEATH DURING VOYAGE—FULL WAGES.

1. A mariner, who shipped to perform a voyage from Philadelphia to Batavia, and back to Philadelphia, at a certain rate of wages per month, having performed the voyage to Batavia, died there, and the vessel returned to the port from which she sailed. It was *held*, that the voyage was entire from Philadelphia to Batavia, and back; and that the monthly rate was no more than a rule to adjust the quantum for the voyage.

2. The expression, "full wages," in the seventh article of the laws of Oleron, means the same wages which the mariner would have been entitled to, had he lived, and served out the whole voyage of the vessel to Batavia, and back to Philadelphia. It is the aggregate amount of the wages for the voyage; and, in this case, the administratrix of the deceased mariner, is entitled to the same wages the intestate would have received, had he lived and returned in the vessel, to the port from which he sailed.

[Cited in Natterstrom v. The Hazard, Case No. 10,055; Longstreet v. The R. R. Springer, 4 Fed. 672.]

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

This was an appeal from the district court; where, upon a libel by the appellee, the executrix of her husband, for the wages, as mate on board a vessel, belonging to the appellant, for his full wages from Philadelphia to Batavia, and back, although he died at Batavia; the court decree accordingly. [He was hired for the whole voyage, at the rate of $30 per month. He was paid up to the time of his death.] [2]

Mr. Moylan, for appellant, contended that, on common law principles, wages are the reward of services rendered; and, if not performed, they are not due. If a man is hired for a year, and die in the middle of it, only wages are due to the time of his death. 3 Vin. Abr. 5, 6, 13. If a mariner be impressed, wages are only payable, pro tanto. 2 Ld. Raym. 1211. That this is not a hiring for the voyage, but by the month; in the former case a gross sum is always stipulated. Abb. Shipp. 265, 273, 274. If this was a contract for the voyage, and not apportionate, nothing was due. Salk. 65. The true translation of the seventh article of the laws of Oleron, of what has been translated, "full wages," should be, "ready down." In 3 Bos. & P. 427, one judge was of opinion, that, if a sailor die on the voyage, his executors can only recover wages to the time of his death.

Mr. Milnor, for appellee.

WASHINGTON, Circuit Justice. As I entirely concur in the opinion given by the judge of the district court, upon this question, and for the reasons assigned by him, I deem it unnecessary to discuss the subject much at large. It is admitted, that no decision is to be met with in the English courts, precisely like the present; nor have we any municipal regulations, which govern the case. We must, therefore, resort to those marine laws, which have always been acknowledged as authority in England, as well as in most of the European commercial nations; unless, where they have been altered, or modified, by the laws of particular states; but which alterations are binding only on such states. The seventh article of the laws of Oleron declares; that, if a mariner be taken sick on the voyage, he ought to be put on shore, and care should be taken of him at the expense of the ship. When the vessel is ready to sail, she is not to wait for him; but, still, he is to be entitled to his full

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

[2] [From 1 Pet. Adm. 157.]

wages, if he recover; and if he does not, his wife, or next of kin, is to have them; deducting only such charges as the master has been at for him. Now, the only questions in this case are, first; did the mariner die on the voyage? and, second; does the expression, "full wages," in the above article, mean such as he had earned by his services, to the time of his death, or such as he would have earned, had he lived and served out the whole voyage to Philadelphia? Most unquestionably, the deceased was bound by his contract to perform the whole voyage, which is described in the articles to be, from Philadelphia to Batavia, and back again; and he would have forfeited the whole, had he deserted the ship, at any time previous to the vessel's return to Philadelphia. I agree with the judge of the district court, that the stipulation to pay wages by the month, does not break the entirety of the contract for the voyage, but only furnishes a rule to adjust the quantum for the voyage. It protects the owners against an overpayment in consequence of a short voyage; and the mariner against the risk of receiving too little, in case of a long one. It prevents either from speculating upon the other, by accommodating the reward to the length of service.

2d. Does the expression, "full wages," apply to what would have been due, if the mariner had served out the entire voyage; or, are we to limit it to such as have been earned by services performed? If a certain sum for the voyage be agreed upon, that sum would constitute the full wages, and is distinguishable from no wages at all [as in case of 6 Term R. 320, Cutter v. Powell],[2] as where they have been forfeited, by the misconduct of the mariner; or wages pro rata, where they have been partly earned, and are not forfeited. But, every doubt with respect to the meaning of these expressions, is cleared away by the decision in the case of Chandler v. Grieves, 2 H. Black. 606, note. A mariner was engaged on a voyage from London to Honduras, from thence to Philadelphia, and back to London. The articles were drawn in the usual form, and such I take to be the articles in the case now before us. The mariner being disabled, and totally disqualified from rendering any future service on the voyage, was left at Philadelphia, and the vessel returned to London. The court determined that he was entitled to his full wages, and he accordingly recovered the same wages to which he would have been entitled, had he proceeded with the vessel to London. This case not only determines a principle, which is, in all its parts, applicable to the present; but it decides, that full wages, mean the aggregate amounts of all the monthly sums, which would have accrued, upon the completion of the voyage. This decision is expressly founded upon the seventh article of the laws of Oleron, which entitles a sick sailor, who is left behind, to full wages; and the same article declares, that what such sick sailor would be entitled to, passes to his widow, or next of kin, in case of his death.

I am, therefore, of opinion, that the decree of the district court ought to be affirmed.

2 [From 1 Pet. Adm. 157.]

SIMS (JOHNSON v.). See Case No. 7,413.

Case No. 12,891.

SIMS v. LYLE.

[4 Wash. C. C. 301.][1]

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

PLEADING IN EQUITY—PLEA IN BAR—EQUITY—MISTAKE.

1. What are the requisites to constitute a good plea in bar in equity.

2. A mistake, which is nothing more than a misconception of the law, is no ground for relief in equity.

This case came on upon bill and plea. The former states that Nicklin and Griffith, being indebted to the plaintiff in the sum of $21,762, Griffith, the surviving partner, for the purpose of securing the said debt, did, by two instruments executed the 20th of April, 1807, covenant to convey to the plaintiff certain lands, to be disposed of at the end of five years if the debt should not then be paid, and also the interest of Nicklin and Griffith in the cargo of the Triton; in consideration whereof, the plaintiff covenanted that he had not, and would not, employ any legal process to affect the joint or separate interest of said Nicklin and Griffith, or the person of Griffith, and on breach of this covenant on the part of the plaintiff, the agreement to be void; and further, that the said agreement should not affect the claims of the plaintiff against the joint or separate property of Nicklin and Griffith, should the said lands, at the end of the five years, be found unequal to satisfy the debt then due to the plaintiff. The bill further states, that the plaintiff had fully complied with his part of the agreement, and that he had always considered himself restrained by his said covenant from bringing any suit to affect the joint or separate estate of Nicklin and Griffith, on account of the debt due him. That conveyances for the said lands were executed in July, 1807, by Griffith to the plaintiff; but that the same, for defect of title, and other causes, were of no value, and, as well as the cargo of the Triton, have been totally unproductive. That on the 7th of December, 1807, Griffith executed a general assignment of all the partnership effects of Nicklin and Griffith, and of his individual estate, to the defendants, in trust for such of the creditors of Nicklin and Griffith as should, within one year from the date of the

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

deed, execute a covenant not to proceed against the person of the said Griffith or his estate for any debt contracted before the death of said Nicklin, or since, with the said Griffith, as his surviving partner, or in his own right; that the trustees accepted the trust, and possessed themselves of the effects so assigned to them, and after turning them into money, have made a dividend thereof among many of the creditors, excluding the plaintiff altogether, and refuse to pay any part of his claim; that although the plaintiff has considered, and still considers himself bound by his agreement of April, 1807, not to prosecute any suit against Griffith, or the effects of Nicklin and Griffith, or of Griffith for his debt; still, to remove all objections, he did, in the year 1813, execute and deliver to the agent of the defendant a covenant not to proceed against the person or estate of the said Griffith, in the same terms as the other creditors had done; of which the defendants had notice. The prayer is for an account of the moneys received by the defendants under the assignment, and that the dividend to which the plaintiff is entitled, may be ascertained and paid to him.

Sims having died since filing the bill, it has been revived in the name of his executors, and the plea is put into both bills. It states that the bill seeks a discovery and relief from the defendants, as assignees of the said Griffith, of all the effects which have come to their hands under the assignment in the bill mentioned, claiming, as one of the creditors of Nicklin and Griffith, a dividend of the said effects; that in the said bill it is further stated, that, on the 7th of December, 1807, the said Griffith made an assignment of all the estate and effects of Nicklin and Griffith, and of Griffith, to the defendants, in trust for their creditors, with a proviso that no creditor, joint or separate, should be entitled to any part of the trust estate who should not, within one year from the date of the assignment, execute a covenant not to proceed against the person of the said Griffith, or his estate, for any claim contracted before the death of Nicklin, or since his death contracted with said Griffith, as his surviving partner, or on his own account. The plea then avers, that the said Sims, although he lived many years after the date of the said assignment, did not, within one year from the said 7th of December, 1807, execute a covenant not to proceed, &c. (following the proviso in the assignment), nor did he, within the said year, in any other manner release the said Griffith or his estate from any claim or demand contracted before the death of Nicklin, or afterwards with the said Griffith, according to the true intent and meaning of the said proviso; and further, that the said Sims had due notice of the said assignment and proviso, at or immediately after the execution of the said assignment, and within twelve months from the date thereof, viz. on the 1st of January, 1808; all which the defendants plead in bar of the said bill, and demand judgment if they shall further answer; &c.

The question, in this stage of the cause, arose upon a motion to overrule the plea, because it does not admit or deny all the facts stated in the bill, nor is it accompanied by an answer denying those facts. Cases cited, Coop. Ch. Prac. 225; 1 Har. Ch. Prac. 227, 305; 14 Ves. 65; 1 Atk. 52; 3 Atk. 558; 2 Brown, Ch. 142; Ferguson v. O'Harra [Case No. 4,740].

On the other side it was insisted, that an answer is not necessary, unless where it is required to support the plea. Mitf. Eq. Pl. 222.

Mr. Rawle, for plaintiff.
Mr. Tod, for defendant.

WASHINGTON, Circuit Justice. The ground of the present motion is, that the plea does not admit or deny all the allegations stated in the bill; and therefore an answer to that extent is so indispensable that the court must overrule the plea, whether the matter pleaded amount to a bar or not.

The court can by no means accede to this proposition. The practice of the courts of equity is quite otherwise. A plea, being nothing more than a special answer to the bill, setting forth and relying upon some one fact, or a number of facts, tending to one point, sufficient to bar, delay, or dismiss the suit, it would be a vice in the plea to cover any other parts of the bill than such as concern the particular subject of the bar, its office being to reduce the cause, or some part of it, to a single point, and thus to prevent the expense and trouble of an examination at large. It is true, that all facts essential to render the plea a complete defence to the bill, so far as the plea extends, must be averred in it, or it will be no defence at all. If the plea be to the whole of the bill, it must cover the whole; that is, it must cover the whole subject to which the plea applies, and which it professes to cover, or it will be bad: as if the bill respect a house and so many acres of land; and the plea, professing to cover that charge, pleads only in bar as to the house; but if it cover the whole subject, and contains a full defence in relation to it, there is no necessity, nor would it be proper to notice other parts of the bill not involved in the subject to which the plea applies. If the plea be only to a part of the bill, the rest of the bill ought to be answered, or else the court would consider the parts not embraced by the plea, or answered, as true. But there is no instance where the plea contains in itself a full defence to the bill, that an answer is necessary, unless it is rendered so, in order to negative some equitable ground stated in the bill for avoiding the effect of the anticipated bar; as where fraud, combination, facts intended to

avow the force of the statute of fraud, or to bring the plaintiff within some of the exceptions to the act of limitations, as the one or the other of these defences may be expected; and in those and similar cases, the defendant is bound not only to deny those charges in his plea, but to support his plea by an answer, also denying them fully and clearly. If every plea required an answer to accompany it, there would be no use for the twentieth rule lately established by the supreme court (which is conformable to the English practice), which declares, that if the plea be overruled, the defendant shall proceed to answer the bill; since the argument supposes that the bill has already been answered.

In this case, the plea professes to go to the whole bill, and does in fact cover the whole subject to which the plea applies; and if the matter of it be a full defence to the suit, it is unnecessary to answer other parts of the bill, not involved in the subject which forms the ground of the defence.

The plaintiff's counsel will be at liberty to argue the plea on its merits, or to reply to it, as he may think proper.

[NOTE. This cause was again argued on the validity of the bar relied on in the plea. It was held that the plaintiff was barred of the relief prayed for, and the plea was allowed. The bill was therefore dismissed. Case No. 12,892.]

Case No. 12,892.

SIMS v. LYLE et al.

[4 Wash. C. C. 320.][1]

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

EQUITY—MISTAKE—MISCONCEPTION OF LAW.

A mistake, which is nothing more than a misconception of the law, is no ground for relief in equity.

[Cited in Sawyer v. Gill, Case No. 12,399.]

This cause was now argued on the validity of the bar relied on in the plea. See [Case No. 12,891]. It was contended for the plaintiff: (1) That the covenant contained in the agreement of the 20th of April, 1807, was substantially a performance of the condition in the deed of assignment, not to sue the said Griffith, or to proceed against the joint or separate property of Nicklin and Griffith; and if so, equity will dispense with a literal compliance. (2) If not so, then the plaintiff is entitled to relief upon the ground of mistake. (3) By the covenant in the agreement of the 20th of April, 1807, that that agreement should not affect the claim of the plaintiff against the joint or separate property of Nicklin and Griffith, should the property to be conveyed be inadequate to its discharge, a lien upon all the property of Nicklin and Griffith, was created, which followed it into the hands of the assignee. Cases cited, 1 Fonbl. Bankr. Cas. 36; 3 Atk. 342; 1 Vern. 32; 2 Vern. 243, 166, 122, 286, 482; 3 P. Wms. 320; 1 Madd. 40, 41, 30, 312, 34; Co. Bank. 265, 267; 1 Ves. Jr. 331; 1 Atk. 158; [D'Utricht v. Melchor] 1 Dall. [1 U. S.] 430; 1 Brown, Ch. 269; 2 Cox. Ch. 12.

On the other side it was answered: (1) That the plaintiff is not prevented, by his covenant of the 20th of April, 1807, from suing Mr. Griffith, or to pursue his estate in the event that has happened of the property to be conveyed proving inadequate to the payment of the debt due to him from Nicklin and Griffith. (2) That here was no mistake, nor is that made the ground of the relief sought by the bill. (3) The reservation of the plaintiff's claims against Nicklin and Griffith gave him no new rights, and created no lien on the general estate of Nicklin and Griffith.

Mr. Rawle, for plaintiff.
Mr. Tod, for defendant.

WASHINGTON, Circuit Justice. The relief sought by this bill is against the assignees of R. E. Griffith, to be let in, pari passu, with the other creditors of Nicklin and Griffith, to a dividend of the proceeds of the property assigned. In answer to the objection stated in the plea, that the plaintiff had not complied with the condition contained in the deed of assignment, by binding himself within one year from the date of the deed not to proceed against the person of the said Griffith, or the joint or separate estate of Nichlin and Griffith, it is insisted: (1) That the condition has been substantially performed. If not, then (2) that the omission to do so proceeded from mistake. And (3) that the agreement of the 20th of April, 1807, created, in favour of the plaintiff, a lien on all the property of Nicklin and Griffith, which followed it into the hands of the assignees.

The first answer to the objection is founded upon a misconception of the nature of the obligation imposed upon the plaintiff by the agreement of the 20th of April. The covenant not to proceed against the property of Nicklin and Griffith, was made to depend upon the event of the security provided for the plaintiff by that agreement proving adequate to the discharge of the debt for which it was pledged; for the right of the plaintiff to proceed against the general property of Nicklin and Griffith, in case the security should at the end of five years prove inadequate, was reserved to the plaintiff in the most express terms. The bill states that the property, so agreed to be conveyed, proved altogether worthless, and this is made the ground of the relief sought by the bill. The covenant, therefore, by the plaintiff's own showing, was temporary and contingent; and has, by the event, become

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

totally inoperative. This then cannot be considered as a substantial compliance with a covenant not to sue at all, which it was correctly insisted by the defendants' counsel is equivalent to a release.

2. It is a complete answer to the argument which has been urged on the ground of mistake, that it is not even pretended by the bill to have taken place, nor is it that upon which the relief is sought. There is no doubt but that where an instrument is drawn contrary to the manifest intention of the parties, the allegation and proof of the mistake will be considered by the court as a ground of relief. But I hold it to be indispensable to the relief, that the mistake should have arisen from some cause distinct from the sense of the instrument. It is not pretended that the plaintiff intended by the agreement of the 20th of April to enter into a covenant which would be equivalent to a release, or in any respect different from what the covenant itself purports. Such a covenant as the deed of assignment requires, would have been manifestly contrary to the intention of the parties, as is proved by the reservation of the plaintiff's rights in the event which has taken place. If the mistake be nothing more than a misconception of the law, which led the plaintiff to suppose that he had in effect complied with the proviso in the deed of assignment, which could hardly be the case, or that the stipulated covenant might be given after the expiration of the twelve months from the date of the deed, I can only say that such a mistake is not a ground of relief. For ignorance is not mistake; and equity will not grant relief upon a mere supposition that the party was ignorant of the legal effect of his acts, or of his omission to act. Were this the doctrine of the court of chancery, there are few cases which might not find access to that forum.

3. If this ground of relief be a sound one, the plaintiff has greatly mistaken his rights in asking for a dividend only of the assigned property, whereas he would be entitled to claim the whole; for there can be no doubt, and so are the cases cited by the plaintiff, that the assignees take the property subject to all the equity which attended it in the hands of the assignor. But the covenant upon which this argument is built will not bear the construction which is put upon it by the plaintiff's counsel. The reservation of the plaintiff's rights was intended to counteract the effect of the covenant not to proceed against the property of Nicklin and Griffith, in case the security to be assigned to the plaintiff should prove defective, or inadequate to its object. But it granted no new right to the plaintiff; most clearly it did not substitute another security upon the whole of the property of Nicklin and Griffith for that stipulated for by the agreement, in case it should be insufficient to satisfy the plaintiff's claim.

Upon the whole we are of opinion that the plaintiff is barred of the relief prayed for, and we therefore allow the plea; the consequence of which will be a dismission of the bill, as we consider the truth of the plea as not intended to be questioned.

Case No. 12,893.

SIMS v. MARINERS.

[2 Pet. Adm. 393.] [1]

District Court, D. Pennsylvania. 1807.

SEAMEN—DESERTION—CONFINEMENT AT INSTANCE OF MASTER—VOYAGE BROKEN UP.

1. The mariners had deserted from a ship on shore and in a perilous situation, and were confined at the instance of the master. The judge considered the voyage broken up by the misfortunes of the ship, and discharged the mariners from imprisonment.

[Cited in The Dawn, Case No. 3,666.]

2. Seamen deserting a vessel under circumstances of distress or danger [are] answerable for the damages which may be sustained in consequence of their dereliction of duty, and lose their wages.

PETERS, District Judge. Ten mariners, of the ship Woodrop Sims, were committed by the mayor of the city of Philadelphia, on the oath of the owner of that vessel [Joseph Sims], charged with deserting the ship on her out passage and being absent without leave. The act of congress for the government of seamen in the merchants' service, directs, that this shall be done "upon the complaint of the master," which did not appear to have been made directly, though a letter from the master was produced, requesting the owner to have the seamen apprehended as deserters. It was conceded by the owner, that the vessel was cast on shore in the Bay of Delaware; and lay in a doubtful and perilous situation; though hopes were entertained at some times, and doubts at others, that she would be got off. The latest accounts were very unfavorable. Bail was offered for one of the seamen. Another mariner, though involved in the general charge of desertion, was admitted to prove a permission to the one tendering bail from the master, to leave the ship. The witness was so admitted, because, though involved in the same charge, cases of individuals might differ in their circumstances, and the testimony given could have no operation to excuse the witness, though it might acquit the other: and it did not follow, that every individual would be admitted to be a witness. No such combination would be countenanced.

It was contended, that a commitment of seamen for desertion, was in the nature of an execution; and not of process for trial or examination. That the justice had the power to decide, and the commitment was final, and precluded any discharge, either on

[1] [Reported by Richard Peters, Jr., Esq.]

bail, or liberation from confinement entirely, except when the master required the discharge; and then, only for the purpose of delivery to the master.

The seamen had signed the articles or "contract;" and the voyage agreed for was "not finished," but was interrupted, by the casualty and misfortune which had befallen the ship.

Bail was not taken; because there appeared some reason to doubt the permission to the mariner, as stated by the witness; whose testimony aimed at proving a general discharge of the whole, the seaman requiring his release on bail included.

The judge conceived, that in cases of such commitments, where special circumstances warranted exceptions, bail might be admitted; although the words of the law appeared strict and peremptory. He agreed that, in ordinary cases, where vessels were in capacity to "proceed on the voyage," a strict construction might be justified. So that no discharge, under common circumstances, should be granted, but for the purpose directed in the mariners' act. Yet, in a case where a fatal interruption of the voyage could be proved, testimony might be admitted, under the words "or the contract otherwise dissolved," to shew that the voyage "was dissolved" by the wreck of the vessel, which had occasioned a total incapacity to proceed to sea. Proof was also admissible that the vessel was, when the seamen abandoned her, in a dangerous and hopeless situation; so that necessity (which in extreme cases supersedes the common operations of law) compelled a dereliction of service, for the safety of life.

The commitment is not indefinite. The words of the law are, "shall commit him to the house of correction, or common gaol of the city, town or place, there to remain, until the said ship or vessel shall be ready to proceed on her voyage, or till the master shall require his discharge, and then to be delivered to the said master." But if the vessel shall be so disabled as not to be "ready to proceed on her voyage," or likely so to be, it can never be presumed that the confinement must endure, until the pleasure of the master induces him to "require the discharge."

It is the duty of seamen to abide by the vessel, as long as reasonable hope remains. If they abandon their duty, so that it can be proved that this dereliction occasioned a final loss, or temporary damage, where their exertions would have prevented the latter, or ultimately restored the ship to safety, the seamen lose their wages, and are answerable in damages. Yet their confinement under the commitment must cease, with the capacity of the vessel to "proceed on her voyage;" their amenability to answer in damages notwithstanding.

There being no legal or decisive proof of the present state of the vessel, and that she was incapacitated to proceed on her voyage, the seamen were remanded; that such proof, if practicable, should be adduced, as well as testimony to shew the state of the ship when the seamen left her; or permission to them, or any of them, to depart. Afterwards testimony was produced, proving that the ship was totally disabled, and not in a capacity to proceed on her voyage. The mariners were discharged.

NOTE. The Woodrop Sims was originally destined to Canton, but after the misfortune mentioned in this case and before the confinement of the seamen, she was abandoned to the underwriters by her owner, and thus the intended voyage was by him completely terminated. To the owner, every opportunity was offered to produce evidence of the actual situation of his ship at the time she was left by the mariners, as well as of every circumstance attending this transaction, but no testimony was adduced, nor was any further time to obtain it requested, when the case was heard after the adjournment. A considerable time after the discharge of the mariners, and with much expense and difficulty the ship was got off the shoals on which she had been wrecked and brought up to Philadelphia. These circumstances are stated in consequence of the case of The Woodrop Sims having been much misconceived, and the decision of the district judge greatly misrepresented.

Case No. 12,894.

SIMS v. SIMS.

[17 Blatchf. 369.] [1]

Circuit Court, S. D. New York. Dec. 23, 1879.

REMOVAL OF CAUSES—ACTS OF CONGRESS—FINAL HEARING.

1. Subdivision 3 of section 639 of the Revised Statutes, in regard to the removal of causes, is not repealed by Act March 3, 1875 (18 Stat. 471).

[Cited in Johnson v. Johnson, 13 Fed. 193; Melendy v. Currier, 22 Fed. 129.]

2. Where a suit has been tried in the state court, and a judgment had for the plaintiff, and such adjustment has been reversed on appeal, and a new trial ordered, and proceedings, by the defendant, to remove the cause into this court, are taken before the new trial is had, the application for removal is made before "the trial or final hearing of the suit," and in time, under said subdivision 3.

[Cited in Melendy v. Currier, 22 Fed. 130.]

[This was an action at law by Thomas Sims against Elias Sims to recover damages for breach of contract.]

James C. Strong, for plaintiff.

A. G. Rice, for defendant.

BLATCHFORD, Circuit Judge. The petition for removal in this suit makes out a case falling strictly within the provisions of subdivision 3 of section 639 of the Revised Statutes of the United States, and the affidavit required by that subdivision was filed. The petition and affidavit were filed before "the trial or final hearing of the suit.". The proper bond

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

was given. The state court accepted and approved the bond and made an order of removal.

This suit is an action at law, sounding in damages, for breach of a contract. It was tried in the state court, and the plaintiff had a money judgment, in April, 1875. That judgment was reversed by the court of appeals of New York, and a new trial was ordered. The remittitur or mandate from the court of appeals was filed in the supreme court, where the suit was pending, and an order was entered by that court, December 30, 1878, ordering a new trial. The proceedings for removal were taken before any new trial was had. The petition for removal alleges that the cause "is now at issue and pending for trial" in the state court. This, in connection with the other allegation in the petition, as to the history of the case, is a substantial allegation that the new trial has not been had. Under these circumstances, the application for removal was made in time, under said subdivision 3. See the authorities collected in Dill. Rem. Causes (2d Ed.) p. 54, note 82.

The petition for removal refers to Act March 2, 1867 (14 Stat. 558), now subdivision 3 of section 639 of the Revised Statutes, and to the Revised Statutes, as being the provision of law under which the removal is sought. It only remains, therefore, to consider whether subdivision 3 of section 639 is still in force, not repealed by Act March 3, 1875 (18 Stat. 471). I do not deem it necessary to go into a full discussion of the question, as that was done by the late Judge Ballard in Cooke v. Ford [Case No. 3,173]. He came to the conclusion that that subdivision is not repealed by the act of 1875. No binding or satisfactory decision to the contrary is cited, and I concur in that conclusion. This is the view of Judge Dillon (Rem. Causes, 2d Ed., pp. 28, 29), and he there states that it had been so decided "in the Eighth circuit, by Mr. Justice Miller, and generally in the courts of that circuit, and, so far as we are advised, by the circuit courts elsewhere."

I have considered the other points urged as grounds for remanding the cause, and do not deem it necessary to comment on them particularly. They are overruled. The motion to remand is denied.

Case No. 12,895.

In re SINCLAIR.

[8 Am. Law Reg. 206.]

District Court, E. D. South Carolina. 1860.

ADMIRALTY—SURRENDER BY CLAIMANT OF INTEREST—EFFECT OF SUIT IN PERSONAM—BREACH OF CONTRACT.

1. Where a libel was filed in rem and in personam for damages sustained by a consignee in consequence of the schooner's springing a leak by reason of her unseaworthiness, it was *held*, that the owner could not protect himself against the in personam proceeding by surrendering his interest in the schooner and claiming exemption under Act Cong. March 3, 1851, c. 43 (9 Stat. 635).

[Cited in Barnes v. Steamship Co., Case No. 1,021.]

2. This act is not to be confined to torts alone; but there being a representation of seaworthiness proceeding from the owner or his agent, there may be a breach of the contract arising from such representation, for which the owner will be liable in personam, under the true construction of the act of 1851.

In admiralty. Christobal Bravo, and others, consignees of merchandise shipped on board of the schooner Ella, filed their libel in rem and in personam, to recover damages sustained by them in consequence of the vessel, immediately after her departure, springing a leak. The water gained upon her so rapidly, that she was run ashore. The goods on board of her were greatly damaged. The pleadings in the case having been made up, and the evidence taken, the cause was heard, and a decree made on the 9th June, 1858. By the decree the vessel was condemned and ordered to be sold. Daniel Sinclair, one of the owners of the Ella, against whom process of foreign attachment had issued, and under which process, certain property belonging to him had been attached, filed his petition to be allowed to surrender his interest as part owner of the schooner Ella, and her freight, in discharge of all further personal liability on his part; and contended that such was his right under the act of congress, passed the 3d March, 1851 (chapter 43). The following opinion of the court, upon the question made in the petition, was pronounced by

MAGRATH, District Judge. The petitioner has applied to this court for the benefit, to which he claims to be entitled under the act of congress of the 3d of March, 1851 (chapter 43). A libel has been filed against the schooner Ella, and process in personam has also been asked against the petitioner as one of the part owners. The principal case has been heard; and the decree of this court establishes the unseaworthiness of the vessel as the cause of the damage to the goods. The vessel has therefore been condemned. The amount of the damage claimed by the shippers is much more than the value of the vessel; and the application now is to limit the liability of the petitioner to the value of the vessel and her freight; and upon the surrender of his interest in the same, to cause all proceedings against him to be stayed. The application has been resisted with zeal and ability; and I will consider the various objections which were presented, in the examination which I am about to make. The question involved is of great practical importance; and the conclusion at which I have arrived, as to the true construction of the act referred to, is the result of the most careful consideration I could afford.

The leading principles which in the United States are applied in cases of the liability of a carrier, have been derived from Great Brit-

ain. Here and there, modifications, involving qualifications of their application, have been introduced; but the leading tests laid down are still regarded as the canons of construction. To the transportation of property by water, the rule applicable to a common carrier is referred. And in contracts made by the master in pursuance of any express direction, or by virtue of the authority confided to him, and in the proper execution of his duty, the owner is held liable without limitation of that responsibility. 2 Kent, Comm. 609. The rule of the civil law, in regard to the obligations of the owner, resulting from the contracts or torts of the master, is similar to the rule of the common law. 3 Kent, Comm. 258. But the general maritime law recognized a different rule; and by it, the liability of the owner was not enforced beyond his share or interest in the vessel and the freight which was due. Id. 217; 1 Boulay-Paty, 273. The rule of the common law in Great Britain was modified in 1734 by the passage of the 7 Geo. II. c. 18; the consequence of a petition of merchants, who, alarmed by the case of Boucher v. Lawson [cited in 1 Durn. & E. 78], in which the owner was sued for coin embezzled by the master, sought protection by an act of parliament. The act recites the evil, as it has just been stated, and then declares that the liability of the owner shall not extend beyond the value of the ship and freight. Abb. Shipp. 488. Soon after the case of Sutton v. Mitchell, 1 Term R. 18, was tried; where the question arose as to the right of the owner to this limitation of his liability, when the act was the act of a stranger, and not of the master or mariner. And this was followed by the 26 Geo. III. c. 86 (1786), in which the 7 Geo. II. c. 18, was amended. Without referring here to other statutes, which, in certain cases to which they refer, have modified the liability of the owner, I may come directly, in connection with the question before me, to the 53 Geo. III. c. 159, in which material modifications were further made; and the 17 & 18 Vict. c. 194, in which all acts in reference to this question have been included, and which is now the law of Great Britain. In the United States, a statute was passed in Massachusetts; one of the same import in Maine; and the act of congress of 1851, are the only legislative exceptions to the general liability. In cases to which these are not applicable; or in which the owner has not limited his obligations by a special contract, excluding his liability in certain enumerated cases; the rule of the common law, as it was in Great Britain and in the United States before these statutes, is still enforced. 3 Kent, Comm. 217. The third section of the act of 1851 provides, that the liability of the owner of a vessel for the embezzlement, loss or destruction by the master, officers, mariners, passengers, or any other person or persons; of any property goods or merchandise, shipped or put on board such vessel; or for any loss, damage, or injury by collision: or for any act, matter or thing, loss, damage, or forfeiture, done, occasioned or incurred without the privity or knowledge of such owner: shall not exceed the value of the interest of such owner in the ship or freight. 9 Stat. 635. The act passed by the state of Massachusetts is very similar to the act of 1851. And in Pope v. Nickerson [Case No. 11,274], Judge Story says: "It admits of most serious doubt whether the statute of Massachusetts was designed to apply to any cases of contract, strictly within the scope of the authority of the master, and in respect to which he not only had the right to bind the owner, but his acts were justifiable and proper, and, indeed, throughout, a part of his duty under the circumstances." In Stinson v. Wyman [Id. 13,460], Judge Ware held, that the statute of Maine applied not only in cases of the fault or negligence of the master, but also in cases of his direct and wilful fraud. And in The Rebecca [Id. 11,619], Judge Ware, in a note appended to his decree, enters upon a learned examination of the question, concurring in a great measure with Judge Story; and to his opinion I shall have occasion again to refer.

As far as I know, the case before me is among the first which has made it necessary to consider the scope and operation of the act of 1851. It is proper, therefore, to bear in mind the words of the act, for the question is one of construction. The section which refers to this case is divided into three parts: first, the embezzlement, loss or destruction by the master, officers, mariners, passengers, or any other person or persons, of property shipped or put on board: next, the loss, damage, or injury by collision: next, any act, matter or thing, loss, damage or forfeiture done, occasioned, or incurred without the privity or knowledge of the owner. These words, "without the privity or knowledge of the owner," necessarily first arrest our attention, and are really the key to the question of the application of this section to cases of contracts: for. as it excludes cases in which the "privity or knowledge" of the owner occur, it must, unless otherwise explained, exclude contracts; inasmuch as every valid contract includes the idea of the "knowledge" of the parties, and implies a "privity" between them. This "knowledge" and this "privity" equally arise, whether the contract is made by an agent in the exercise of sufficient authority; or by the principal in person; or by an agent not authorized at the time of making the contract; but whose act the principal has made binding, either by express adoption, or any other mode of ratification. And this argument of the exclusion of contracts, and therefore the exclusion of any limitation of the obligation of the owner in such cases, is strengthened as we proceed in the analysis of the section. The first part of it relates to embezzlement, loss or destruction. Embezzlement, of course, excludes the idea of contract; the liability which it induced upon the owner is ex delicto. Do the general terms which follow, "loss," or "de-

struction," include any acts except such as are ex delicto? That they do not, is clear, from the class of persons to whose agency they are referred. The "loss" or "destruction," is that of the master, officers, mariners, passengers, or any other person. But the officers, mariners, passengers, or any other person or persons, have no authority by which they can bind the owner to any contract they, or either of them, may make. The Anne [Case No. 412]. For their wrongful act the owner is liable; and against loss or damage resulting thereby, he is an insurer. The exclusion or limitation of his liability must then manifestly be referred to cases, in which by law the owner might have been made liable, cases of tort and not of contract. It is true the authority of the master to bind the owner in certain cases by contract, is undoubted; but where the master, who might affect the owner either in contract or tort, is joined with a number of persons who could only affect the owner in tort; the rule of construction requires us, in the application of a general rule of exemption, to confine it to cases in which all of these persons are capable of affecting the owner. The next part of the section relates to loss, damage or injury by collision; this is so clearly tortious that it requires no examination. The last part of the section is, any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of the owner. I have already shown that the exclusion of matters which involve the knowledge or privity of the owner, necessarily excludes the idea of this limitation of responsibility being applied to cases of contract, which imply the existence and presence of both.

The exemption which is claimed in this case, if it arises at all, is under this last part of the section. It is a liability arising, however, from a contract; and I think enough has been said of the import and effect of the terms, without the "knowledge" or "privity" of the owner, to show that contracts are excluded from the section. If, indeed, the words in this part of the section were added, which are found in the first part of the section; and the several things set forth in the last part of the section be connected, with masters, officers, mariners, passengers, or other person or persons, as the persons by whom they are to be done; then the argument for the exclusion of contracts, from the limitation of responsibility, declared by the act, would be made, if possible, still stronger. But although these are not named as the persons whose acts create the liability, yet they are not only to be considered, as if specially named, by the proper rule of construction; but if not considered as named, the last clause is without meaning, and cannot be made applicable to any case. For if it is denied that the master, officers, mariners, passengers, or other person or persons, are to be considered as included in this part of the section; and if the statute excludes the owner and owners; it will be seen that the argument on the one side, and the statute on the other, exclude all human agencies by which the several acts, matters and things could be done. And as the statute excludes the owner or owners; and includes a class of persons whose acts, it is proposed, should not affect the owners except to a certain extent: a subsequent enumeration of other acts, in the same section, with no reference to any other class of persons, and relating also to the same exemption, will be held to refer to the same persons who have been already named. These so named, being persons who cannot bind the owner by contract, but may by tort; necessarily make the liability from which the owner is excused, that liability only which they could impose. The fourth section of the act, makes the exclusion of any liability arising from contract, still more plain. In it the mode of proceeding is regulated: and the subject matter is "such embezzlement, loss or destruction," which in the first part of the third section is occasioned by the master, officers, mariners, passengers, or other person or persons. It is clear that in the fourth section, all of the divisions or parts of the third section are considered as ejusdem generis. They must be so considered to participate in the mode of proceeding there established. If they are not so considered; if they do not fall under the head of embezzlement, loss or destruction by the persons named in the section; or if they are not connected with these acts by a rule of construction; then are they not provided for in the distribution.

I am not ignorant of the fact, that the conclusion which I have already foreshadowed of the exclusion of contracts from this act, is perhaps in opposition to the view which has been taken of the act, by others who have had it under consideration. In the case of Watson v. Marks [Case No. 17,296], Judge Kane does not refer to the distinction taken here; perhaps it was not necessary; for the loss in that case he considered the result of a tortious taking. But his opinion evidently was, that the act embraced cases of contract; and he refers to the examination by Emerigon of the provisions of the ordinance of Louis 14th, as illustrating the policy of this law. Whatever may be our opinion of the construction by Emerig. Mar. Loans, c. 4, § 11, it must be remembered that his opinion is but his construction of that law; and that others equally eminent have insisted upon a different construction. Valin adopts the conclusion, that the ordinance referred to does not exempt the owner from a liability in cases of contracts by the master. Pothier concurs with Emerigon. Oeuv. de Pothier, 4, p. 348. Pardessus adopts the opinion of Valin; and Boulay-Paty, in a brief but ad mirable summary of the discussion, earnestly advocates the conclusion of Emerigon. Boulay-Paty, 2, p. 263. In our language also, Judge Ware, in The Rebecca [supra], a refer-

ence to which I have already made, has examined the subject with great care and ability, and has adopted the conclusion of Valin, as that most consistent with the various relations which at this time the owner occupies to the vessel, the master, and those to whom the owner is affected with the obligations of a contract.

But if all the commentators to whom I have referred, agreed as to the policy of the law, and its construction, it could not properly be said to carry with it, a conclusion in the matter which is before me. In the ordinance of Louis 14th, as in the Code de Commerce of France, the rule is stated as a simple proposition; not embarrassed by any context, or circumstances operating to involve it. The doubt in its construction has been really more the doubt of what the law should be, than of what it was. The opinions, therefore, of the commentators, are more applicable to the question of policy, than strictly of construction. Before the ordinance of Louis the 14th, which is said to have embodied the wisdom of the maritime world, the liability of the owner for the acts of the master, of either ex contractu, or ex delicto, was limited to his interest in the vessel and freight. And when by the clause of the ordinance which limits the liability of the owner, it is claimed—contrary as must be admitted, to the ancient maritime code—that such an exemption did not extend to, or embrace the obligation arising from contracts, it is in fact a departure from the old rule of the maritime law, and the substitution of the rule of the common law. The limitation of the obligation of the owner in cases of tort, but not in contracts, although rejected by Boulay-Paty, is admitted by him to have been adopted by the court at Rouen.

It is manifest that the question of construction here really involves another of great importance. It is whether the act of 1851 is to be regarded as a modification of the rule of the common law affecting the contract of a carrier; or the commencement of a system of maritime legislation; the construction and application of which must be considered in connection with that great body of maritime laws, which by the labors of Pardessus, have been collected in one work; and furnish us with all the knowledge which exists, in regard to the maritime law of the world.

In Salmons Falls Manuf'g Co. v. The Tangier [Case No. 12,265], the act of 1851 was involved, and came before Judge Curtis. The liability there arose from contract. The learned judge, it is true, held that the case was not within the terms of the act: yet he did not intimate any doubt of the application of the act to a liability arising from contract. He refers to the case of Morewood v. Pollok, 18 Eng. Law & Eq. 342, in which case a question arose under the second section of the 26 Geo. III. c. 86. That case was strictly confined to the particular section in which the exception of fire was introduced, and nothing was said of the general construction of the statute.

But in Sutton v. Mitchell, already referred to, the object of the 7 Geo. II., of which the 26 Geo. III. was an amendment, is thus explained: "The act," says Buller, J., "was meant to protect the owner against all treachery in the master or mariners, as appears from the clause in question; (referring to a general clause corresponding to the last part of the third section of the act of 1851.) It meant to relieve the owners from hardship, and to encourage them; at the same time saying, that so far as you have trusted the master and mariners yourself, so far you shall be answerable; which is to the value of the ship and freight." This protection of the owner from the negligence or delicts of others; so stated in Rodrigues v. Melhuish, 28 Eng. Law & Eq. 475; in Sutton v. Mitchell, 1 Term R. 18; is again affirmed with great force in Lyon v. Mells, 5 East, 428: although that case did not relate to a statutory exception, but an exception claimed as an agreement of parties. Lord Ellenborough declared that the object of the notice "was to limit the responsibility of the owners in those cases where the law would have made them answer for the neglect of others, and for accident which it might not be within the scope of ordinary caution to provide against."

Since the 26 Geo. III., various amendments have been made in succeeding statutes, until in the statute of Victoria, already referred to, all have been consolidated in one general act. It is, however, from this statute of 26 Geo. III. that our act of 1851, is taken. And it must be remembered that after the 26 Geo. III. was passed, the 53 Geo. III., and the 14 & 15 Vict. were passed; and in both of these statutes material alterations have been made in the act of 26 Geo. III. By the 53 Geo. III. c. 159, an owner is not liable for loss or damage arising or taking place by reason of any act, neglect, matter, or thing done, omitted, or occasioned, without the fault or privity of the owner. It will be seen at once how much more comprehensive is the exemption than that under the former statute. The mode in which the exemption it set forth in the 17 & 18 Vict. is nearly similar: fault or privity being substituted for knowledge or privity in the earlier statutes. But another important modification was made in the 17 & 18 Vict.: the same liability is preserved for loss or damage arising on each of several distinct occasions, as if no other loss, damage, or injury, had arisen; and the value of the ship is estimated at the time of the loss or damage. A contrary rule, however, has been laid down by Judge Kane in Watson v. Marks [supra], who holds that the value of the vessel is to be ascertained at the time of suit brought; and if the vessel has been wholly lost, there can be no recovery.

It seems to me clear, that if we consider

the act of 1851, as anything more than a legislative exception of the liability of the carrier, as the same is enforced at the common law; and especially if we regard it as a rule to be construed by a reference to the general maritime law instead of the common law, much confusion and uncertainty must arise in its application. I have nothing to say as to the wisdom with which in a maritime court, the rule of the common law, originally was introduced. But it has been introduced; is constantly enforced; and is, in cases like this to all purposes, the rule of the maritime law of this country. If we should recur to the rule of the maritime law, it is now a matter of doubt with the ablest commentators how far the liability of the owner for the contracts of the master, is affected by the marine ordinance of France. And the argument which they use, who favor a general application of the exemption, is precisely that which may be urged here against the extended construction of the statute. The rule of the ancient maritime law, which is their guide, is not more clear than the common law rule which these courts have adopted. And surely no proposition can be more bold than that of considering the act of 1851, as repealing the rule altogether of the common law, and substituting that of the general maritime law. If we regard this act, then, of 1851, as being the declaration of certain exceptions to the liability of the owner at common law, we find ourselves, by reason and authority, assisted in its proper construction. We know that the liability of the owner was general and unlimited, that the application for relief was not suggested by the apprehended consequences of contracts, but delicts—that it was asked as a protection from tortious acts, that its application was not liberally made, that it was amended without adding anything to it in the way of contracts; and from the law in this condition we framed our act; that against the application of the exemption to contracts Judge Story has given the weight of his name; that all the cases in the books which have been reported under the 26 Geo. III., are cases of delicts; that Judge Ware has given the weight of his argument to the authority of Judge Story, and has conclusively shown that the relative position of master and owner in former times, out of which grew the limitations of the responsibility of the owner under the ancient maritime law, is wholly changed; and, that although for delicts the limitation of responsibility may be maintained, for contracts made directly by the owner, or by the master with the authority of the owner, there should be no limitation of responsibility.

We have no opinion from the supreme court as to the proper construction of this statute; but we have its judgment of the rule of law applicable to the liability of the carrier, where that liability is modified by the operation of a special agreement restrictive of liability. And the rule laid down in 6 How. 344, can scarcely be supposed to indicate the willingness of that court to condemn the former rule, unless the obligation to do so is plainly manifested by the legislature. In this act of 1851, I cannot find such manifestation. Indeed, this fact is plainly in opposition to such a conclusion; that the 26 Geo. III. was adopted as the model of the act of 1851, instead of the 53 Geo. III.; and that the general words of the French code, although, of course, familiar to congress; were passed over; and those words adopted which were found in a statute, the judicial construction of which we have seen was, that it was intended to protect the owner from the treachery of the master and mariners. I believe that the 53 Geo. III. did increase the exemption of the owner, perhaps even to contracts, but that the 7 Geo. II. and 26 Geo. III. certainly did not. The Mary Caroline, 3 W. Rob. Adm. 104. See Wilson v. Dickson, 2 Barn. & Ald. 2; Brown v. Wilkinson, 15 Mees. & W. 391; Dobree v. Schroder, 2 Mylne & C. 489. In Pope v. Nickerson [Case No. 11,274], Judge Story says, he has looked into the English statutes, from which the statute of Massachusetts was borrowed, referring to 7 Geo. II. and 26 Geo. III., and finds them applicable to torts and malfeasance of the master and mariners. The Dundee, 1 Hagg. Adm. 109; Gale v. Laurie, 5 Barn. & C. 156; Wilson v. Dickson, 2 Barn. & A. 2; Morris v. Robinson, 3 Barn. & C. 196. In The Dundee, 1 Hagg. Adm. 109, the language of Lord Stowell is explicit, in considering the 7 Geo. II. and 26 Geo. III. as applicable to cases of torts, and the 54 Geo. III. as extending the operation of the exemption. How far in itself it extends the exemption, or how much further still it has been extended by the 17 & 18 Vict., need not be discussed; the construction of the 26 Geo. III., the statute after which the act of 1851 was framed, being only material for us.

But, if in this construction of the statute I should have erred, there is another ground upon which it seems to me that the owner is not entitled to the benefit of the act. The rule of law admits a limitation of liability by special exceptions, which, when made, constitute the contract. To this, however, the assent of the parties must be matter of evidence. A notice is not an exemption of the carrier unless the other party assents to it. No law of which I have any knowledge, has declared that in regard to all contracts which the owner makes himself, he shall be bound thereby only to a limited responsibility. And no exemption arising from any legislative declaration can be stronger, than if agreed to by both parties as a special contract, which, when it exists, is said to be the law of that case. In this case the contract was with the master, but it was strictly within the limits of his authority; and became the contract of the owner, as complete and binding upon him, as if he had personally made it. The law connects with this contract a representation, presumed to have been given; inserts in it a

covenant presumed to have been made; and that representation the law declares shall proceed from the owner; and that covenant be considered as made by him. It has ever been the policy of the law to refer the liability for seaworthiness directly to the owner, and hold him liable for it. A loss from that cause is held to be a loss proceeding from a failure in a representation of the owner, a breach in his covenant. If under the general words of the act of 1851, this limitation of liability is inferred in contracts of affreightment, it must include other contracts also; but how can it exclude any liability resulting from the contract of the owner when the exemption does not extend to anything done with his "privity" or "knowledge?" How can you affirm a want of knowledge of a representation, which by a presumption of law the owner is held to have made; or a want of privity in a matter of contract, which by a like presumption, he is held to have executed? Even if it were so, that congress would consider it proper to limit the owner's liability for the contracts of the master; upon what principle would it be urged that the liability of the owner for his own contracts should be limited? To say that the owner is not liable for the breach of his contract, by his agent, if the breach is without privity or knowledge of the owner, is to reverse the universal rule that the act of the agent in the execution of a certain duty is the act of the principal who employs him; and to hold, that a principal can discharge himself of the obligation resulting from his contract, by committing to the agency of another that for which he bound himself. Indeed, I consider the true principle in an analogous case well laid down in Rodrigues v. Melhuish, 28 Eng. Law & Eq. 475, in which the question was agitated concerning the liability of the owner when a pilot was in charge. The court then said: "The law now is, not that the owners are exonerated from the consequences of an act of negligence, but that they are bound to show that the negligence was the act of the pilot." Although by positive enactment, when the pilot was in charge, the owner was declared not liable, still, with the pilot on board, and in charge, the owner was held bound to prove that the negligence was the act of the pilot. Failing to do so, the owner would be liable. And so it is here: Their liability for others is limited in cases which may be without their privity or knowledge; and it is for those who in such cases seek to change them, to show on their part privity or knowledge. But where the fact of privity and knowledge is a presumption of law, as is the case in every valid contract of the owner, the operation of the act of 1851 is excluded by its own language.

I have not adverted to the considerations of policy or inconvenience urged in the argument, because these I consider fallacious aids generally in the construction of a written law. I have preferred to rest this judgment upon the cotemporaneous exposition of the statute of Great Britain, from which the act of 1851 has been taken; (15 Mees. & W. 391; 3 W. Rob. Adm. 101; 2 Mylne & C. 489,) the acquiescence in that construction ever since; and the congruity of that construction with the rules which are applied in cases of this kind as the rules of the maritime law. Rules which, although derived from the common law, are enforced in maritime contracts without regard to their source; and are now so interwoven with that jurisdiction in this court, that nothing less than their special abrogation would authorize this court in regarding them as superceded, however they may be modified by agreement of parties or legislation.

With these views I must refuse the prayer of the petitioner.

NOTE. The parties appealed from this decree, and the question raised was argued before Judge Wayne, of the supreme court. A doubt was expressed upon the point how far the case admitted of an appeal, as no final decree had been made in the principal case. Judge Wayne therefore delivered no final opinion in the case. The appeal was never afterwards prosecuted, and the opinion herein given was acquiesced in.

Case No. 12,895a.

SINCLAIR v. McELMURRY.

[Hempst. 28.] [1]

Superior Court, Territory of Arkansas. April. 1825.

APPEAL—NOTICE—DEFAULT.

Where an appeal is not taken on the day of trial, the opposite party is entitled to notice thereof, before a default can be taken against him.

Error to the Pulaski circuit court.

Before JOHNSON, SCOTT, and TRIMBLE, JJ.

OPINION OF THE COURT. [Abraham] Sinclair, the plaintiff in error, sued out a warrant from a justice of the peace against McElmurry, the defendant in error, on an account amounting to twenty-eight dollars, and judgment was rendered by the justice in favor of Sinclair for that amount. Nine days after the rendition of the judgment, David McElmurry appealed to the circuit court, and it does not appear that notice of the appeal was ever served on Sinclair. At the succeeding term of the circuit court, Sinclair was called, and not appearing, judgment of nonsuit was entered against him, and to reverse which he prosecutes this writ of error.

We have no doubt that the court erred in entering judgment against Sinclair. The appeal was taken by McElmurry after the day of trial, and in such cases the law required that the appealing party should notify the opposite party of the appeal at least ten days before the next court authorized to try

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

the same. Geyer, Dig. 391. Here, notice of the appeal was not given to Sinclair, and without it he was not bound to appear. A judgment for a default can never be entered against a person who is not in default, and how could Sinclair be so considered until he was regularly and legally notified of the pendency of the appeal in the appellate court. As no notice was given, McElmurry, and not Sinclair, was in default. We are clearly of opinion that the judgment of the circuit court is erroneous, and must be reversed. Reversed.

SINCLAIR (MIDDLETON v.). See Case No. 9,534.

Case No. 12,896.

SINCLAIR v. PHOENIX MUT. LIFE INS. CO.

[9 Ins Law J. 523.][1]

Circuit Court, D. Minnesota. May 2, 1879.

INSURANCE—ANSWERS TO QUESTIONS IN APPLICATION—BURDEN OF PROOF—MISREPRESENTATION.

1. The application contained the following question: "Have the parents or brothers or sisters of the party been affected with insanity, or with pulmonary, scrofulous, or any other constitutional disease, hereditary in its character?" The answer was, "No." Applicant also answered he did not know cause of death of certain members of the family. The application stipulated that the answers were fair and true, and that it should be the basis of the contract, and any untrue or fraudulent answers should render the policy void, and the policy contained a like stipulation. *Held*, that the answers were declarations and representations, and the burden of proof was on the company to show them untrue.

2. The cause of death must have been hereditary to render the answer "No" untrue.

3. The fact that insured was 14 years of age, and was at home at the time of death of certain members, does not prove that he knew the cause.

At law.

O. R. Cowfert and Smith & Hale, for plaintiff.

Allis & Allis, for defendant.

NELSON, District Judge. This suit is brought to recover on a policy of insurance on the life of the plaintiff's intestate. A jury is waived by a stipulation on file. The policy contains this provision: "* * * If any of the declarations or statements made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, * * * this policy shall be null and void." In the application signed by the deceased, containing questions to be answered, is this stipulation: "It is hereby declared that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned that this application shall form the basis of the contract for insurance, * * * and that any untrue or fraudulent answers, any suppression of facts, * * * shall render this policy null and void," etc. The following question (No. 22): "Have the parents or brothers or sisters of the party been affected with insanity, or with pulmonary, scrofulous, or any other constitutional disease, hereditary in its character?" was answered, "No." The following questions and answers also appear in the application· Q. "Are the parents of the party dead?" A. "Father, yes." Q. "Cause of death?" A. "Do not know." Q. "How many sisters?" A. "Two." Q. "Of what disease did they die?" A. "Do not know." The family and attending physician testified that both the father and sister died "from lung disease,—inflammation and ulceration of the lungs, ending in consumption,"—and that he did not know "whether the disease was of a hereditary character or not." "From appearances," he says, "I should think not." It is in evidence that the deceased was at home when his father and sister died, and from the more reliable testimony it appears that he was 14 years old at the date of his father's death, and that his sister's occurred a year or two later.

It is urged as a defense that the answers to all the above specified questions are untrue, and were known to be so when the application was signed. These answers are declarations and representations, and the burden of proof is on the defendant to establish this defense. The testimony fails to satisfy me that the answers are untrue in fact. The defendant insists that question No. 22 is not confined to hereditary diseases. Such, in my opinion, is not its true construction. The last clause qualifies and controls the rest. The undoubted object of that question was to procure information as to whether insanity, scrofulous and pulmonary diseases, had developed in an hereditary form among the relatives of the applicant. Gridley v. Northwestern Mut. Life Ins. Co. [Case No. 5,808]. This question, then, having reference to hereditary diseases, it must be proved not only that the father and sister of the deceased died of one of the specified diseases, but that it was hereditary. The evidence of the attending and other physicians shows that the disease which caused the death of the father and sister, though generally, is not in all cases, hereditary. To prove that the assured knew of the cause of the death of his father and sister, the defendant relies upon his presence at home when they died, and that other members of the family knew it. This is strong moral evidence, undoubtedly, but it is mere conjecture, and cannot overcome the statement that he did not know in the application.

The material allegations of the complaint being admitted or proved, and the defend-

[1] [Reprinted by permission.]

ant failing to sustain its defense, judgment is ordered for the plaintiff for the amount claimed, with costs.

SINCLAIR (WILLIAMS v.). See Case No. 17,737.

Case No. 12,897.

SINGER et al. v. BRAUNSDORF et al.

[7 Blatchf. 521.] [1]

Circuit Court, S. D. New York. Sept. 20, 1870.

PATENTS—DATE OF APPLICATION—ABANDONMENT—SPECIFICATION—AMENDMENT—SEWING MACHINES.

1. Where the model and drawings filed with an application for a patent fully represented the improvements claimed in a patent subsequently granted to the applicant, it was *held*, on the facts in this case, that he had not abandoned his application, and that he was entitled, in respect to the question whether such improvements were in public use or on sale, with his consent and allowance, for more than two years prior to his application for a patent therefor, to have the date of the making of such application regarded as the date of his application for the patent so granted.

[Cited in Goodyear Dental Vulcanite Co. v. Willis, Case No. 5,603; Weston v. White, Id. 17,459; Lindsay v. Stein, 10 Fed. 913.]

2. A specification accompanying an application for a patent is always open to amendment of its description and claims, and to the addition of new matters of description and new claims, where the drawings and model exhibit the matters involved in the amendments and additions; and this privilege continues until the matter of the application is finally disposed of, by the granting of a patent, or otherwise.

[Cited in Westinghouse v. New York Air-Brake Co., 59 Fed. 602.]

3. Where the improvements claimed in a patent are shown in the model and drawings which were filed with an application for a patent previously made by the patentee, he is, in respect of the patent so granted, to be regarded as having applied, by such application, for a patent for everything found in such model and drawings, for which he could, at the time of making such application, have obtained a valid patent.

4. Forfeitures and abandonments are not favored, and must be clearly made out.

5. The letters patent granted to Isaac M. Singer, November 4th, 1856, for an "improvement in sewing machines," are valid.

6. The third claim of that patent, in claiming the use of a griping lever, "substantially as described," to impart a feeding motion, claims such use to impart such motion automatically, by machinery, and not by hand, and is not defeated by the prior existence of a griping-pawl, actuated by hand, to gripe a feed-wheel.

7. A patent is not invalidated by the fact that the invention claimed in it was described, but not claimed, in a patent granted subsequently to the making of the application for the patent secondly issued, but before it was granted.

[This was a bill in equity by Isaac M. Singer and Edward Clark against Julius E. Braunsdorf and Henry Weil for the infringement of letters patent No. 16,030, granted to plaintiff Isaac M. Singer November 4, 1856.]

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

George Gifford and Edwin W. Stoughton, for plaintiffs.

Frederic H. Betts, for defendants.

BLATCHFORD, District Judge. This suit is brought to recover for the alleged infringement of letters patent granted to Isaac M. Singer, November 4th, 1856, for an "improvement in sewing machines." The plaintiffs claim that the defendants have, by the manufacture and sale of a sewing machine called the Aetna machine, infringed all the claims of the patent, which are four in number: (1) "Operating the needle, to give it the required reciprocating motions, substantially such as described, by a crank-pin, or roller, on a rotating shaft, acting in a cam-groove, substantially such as herein described, whereby the required motions are imparted to the needle with much less extent of motion of the crank-pin, or roller, in the cam-groove, and, consequently, less friction, than if the cam-groove were on the shaft, and the pin, or roller, on the needle-carrier, as described;" (2) "projecting the operating part of the surface of the feeding apparatus through the surface of the table, substantially as described, so that such feeding surface may act on a portion of the under surface of the material to be sewed, to give the required feeding motion to space the stitches, while the other portions of the said material slide on the table, which answers the purpose of stripping the said material from the feeding surface, and to cover and protect the mechanism which operates the feeder, as set forth;" (3) "imparting the feeding motion to the feeder, to present the material to be sewed to the action of the needle, for spacing the stitches, by griping the periphery thereof, or any equivalent therefor, by a griping lever, substantially as described, in contradistinction to the action of a pawl or hand catching on to ratchet teeth, whereby the extent of feeding motion may be adjusted and varied to any degree, instead of being restricted by the size of ratchet teeth, and whereby, also, I avoid the wear and liability to derangement incident to the use of a ratchet motion, as set forth;" (4) "In combination with the feeder, attaching the presser, for controlling the material to be sewed, and holding it to the surface of the feeder, to a slide, or equivalent therefor, substantially as described, so that the plane of its under surface shall always bear the same relations to the plane of the table, in a line at or nearly at right angles to the line of the seam, whether the material to be sewed be thick or thin, and for the purpose set forth."

One of the defences set up in the answer is, that the improvements claimed in the patent had been in public use and on sale, with the consent and allowance of Singer, the inventor, for more than two years prior to his application for a patent therefor. It is not disputed, that sewing machines constructed by Singer, and containing the arrangements of mechanism claimed in all four of the

claims in question, were put on sale by him in the market about the 1st of January, 1851, and were sold in that year at the rate of about twenty per week. The plaintiffs contend, that the patent sued on was applied for by Singer on the 12th of December, 1850, and, therefore, before any public use or sale of the improvements claimed. The defendants contend that the patent sued on was not applied for by Singer until the 14th of March, 1853, and, therefore, more than two years after the improvements in question were first put on sale by Singer. This question is to be determined by a reference to the records from the patent office, which have been put in evidence.

On the 18th of October, 1850, Singer made oath to a specification, accompanying a petition signed by him, praying for a patent for improvements in a sewing machine. The petition, oath, specification, and accompanying drawings were filed in the patent office on the 12th of December, 1850. On the 14th of December, 1850, the model on the application was filed, and the certificate of the payment of the required fee of thirty dollars was received at the patent office. The drawings consisted of five figures, and are five of the six figures of drawings forming part of the patent sued on, the sixth figure having been subsequently added, and exhibiting a side view of the feed-motion. The model thus filed is the one on which the patent sued on was issued. The drawings represented fully all the improvements patented. The specification filed December 12th, 1850, contained a satisfactory description of three of the four improvements which are claimed in the patent of 1856, namely, those covered by the first, second and third claims of that patent. It did not contain any description of the mechanism covered by the fourth claim of that patent. It did not claim, as the invention of Singer, any of the improvements which are covered by any of the claims in the patent of 1856, except the first claim. In respect to that it claimed, as an invention, operating the needle by a crank-pin working in a cam-groove attached to or making part of the needle-carrier. That was its third claim. Its other four claims, there having been in it five claims in all, related to matters which are not embraced in the four claims of the patent of 1856. Before any action was taken by the patent office on the application, the applicant erased the second claim. The other four were rejected on the 6th of March, 1851. On the 24th of July, 1851, Singer presented to the patent office a new specification and oath on the same application, and asked that the case might be considered anew. The papers and drawings had been returned to the applicant on the 24th of March, 1851, and it was on this occasion that the sixth figure was added to the drawings, as this specification of July, 1851, refers to figure six as being a side view of the feed-motion. The other five figures of drawings were the same as before, and there was no new model and no new fee. This specification of July, 1851, contained a description of the improvements which are covered by the first, second, and third claims of the patent of 1856, but did not contain any description of the mechanism which is covered by the fourth claim of that patent. It did not claim any of the improvements which are claimed by any of the four claims in the patent of 1856. It contained, as originally presented, only two claims: (1) The combination of a straight needle, carried by a carrier sliding in ways perpendicular to the material, with a shuttle; (2) the application of the driving force to the needle at a point in a line with its motion. Such first claim was substantially the same as the first claim in the specification filed in December, 1850. On the 29th of October, 1851, the patent office rejected the two claims of the specification of July, 1851. The papers having been returned to the applicant, he erased the second claim, and altered the language of the first, leaving its substance the same as before. On the 19th of January, 1852, it was rejected. On the 21st of January, 1852, the specification was returned to the applicant. He made some alterations in the description and claim, and, on the 22d of January, 1852, asked for a reconsideration of the case, urging, in an argument, the granting of the claim for the combination of the straight needle with the shuttle. On the 12th of February, 1852, the application was again rejected. The papers were returned to the applicant on the 14th of April, 1852. A new form of claim was drawn, and, on the 21st of April, 1852, presented to the patent office, accompanied by an argument in its favor. This claim claimed the employment of a straight needle working in a permanent frame, perpendicular to an unyielding bed, through which the needle works, and is guided to receive the thread from the shuttle below. On the 22d of May, 1852, the patent office rejected this claim. In its letter of that date to the applicant, it said: "This office has heretofore carefully examined and rejected four sets of claims, which have been successively presented and abandoned by you, and now, having found the fifth unpatentable, further action on this application is positively declined. Mr. Singer can withdraw, or appeal." The papers and drawings were returned to the applicant in December, 1852. On the 6th of January, 1853, he made oath to a new specification. On the 10th of January, 1853, the papers and drawings, and the new specification, were transmitted to the patent office, as a part of the case in which the application had been rejected, with a request for action on the new specification. A letter on the subject was addressed by the office to the applicant on the 11th of February, 1853, but it is not produced, and its contents are not made known. The specification was returned to the applicant on the

19th of February, 1853. On the 14th of March, 1853, there were received at the patent office, a petition of Singer for a patent, accompanied by a specification, and an oath made January 6th, 1853, and a certificate of the deposit of thirty dollars as a fee. These were accompanied by a letter from the attorney for Singer, of the 11th of March, 1853, saying: "In the matter of the application of Isaac M. Singer, for letters patent for improvement in sewing machines, which has been several times rejected under the late commissioner of patents, I have the honor to submit the enclosed new specification, and to request a reconsideration of the case, and, in conformity with the practice of the patent office in such cases, I enclose a certificate of deposit for another fee of thirty dollars." The office addressed a letter to the attorney, on the 14th of March, 1853, but it is not produced. In a reply to it, on the 16th of March, 1853, the attorney said: "In the matter of the renewed application of Isaac M. Singer, for patent for improvements in sewing machines, I have to acknowledge the receipt of your communication of the 14th inst. The present application of Mr. S. is identical with the former, and I am glad, therefore, that the same model may be used." The office permitted the former model to be used. The necessary drawings were filed on the 1st of April, 1853. The only claim which was contained in the specification so filed on the 14th of March, 1853, was rejected on the 14th of April, 1854. That claim was a claim to the combination of the straight needle with the shuttle, and was substantially the same as the claim on that subject which had been before rejected. On the 22d of August, 1855, the specification was returned to the applicant. On the 23d of September, 1856, the applicant made oath to a new specification, and requested a re-examination of the case upon that. The drawings accompanying this specification were the same six figures of drawings before referred to. The descriptive parts of this specification were the same as in that of the patent sued on. It contained six claims, four of them being the four claims contained in that patent, and being numbered in such specification as claims two, four, five, and six. The claim respecting the combination of the straight needle with the shuttle was entirely dropped, claims one and three relating to other points. On the 24th of September, 1856, the patent office acted on the application. It rejected claim one for want of novelty, and allowed claim three. In regard to claim two (which is claim one of the patent sued on) it said: "To the second clause of the claim the office at present will not object, although substantially the same device is found in your patent of the 12th of August, 1851; but, as it is not claimed in that patent, and as the present application was dated within two years of the patent, the office deems you now entitled to a claim to the specific devices the second clause involves." It rejected claims four and six (which are respectively claims two and four of the patent sued on) on the ground that they were claimed in Singer's reissued patent of October 3d, 1854. It rejected claim five (which is claim three of the patent sued on) on the ground that it was claimed in Singer's patent of the 13th of April, 1852. On the 11th of October, 1856, the applicant erased the first claim, and his attorney addressed to the patent office a letter, saying: "I observe that the department appears to be under the impression that this application was first filed in January, 1853. Such is not the fact. It was originally filed on the 14th of December, 1850; rejected March 6th, 1851; refiled, on an amended specification, January 10th, 1853; again rejected April 14th, 1854; and again filed, in the present form, September 24th, 1856." In this view, a reconsideration was asked of the decision as to claims four, five, and six. The office, on the 16th of October, 1856, on a re-examination, rejected claim three for want of novelty. In regard to the other claims it said, in a letter of that date: "In the examination of your application for letters patent for alleged improvements in sewing machines, at the close of the past month, the original application was overlooked by the examiner, but your letter of the 11th instant brings it to his notice. * * * The objection made to the fourth clause of the claim will no longer be insisted upon, but will, in consequence of the existence of the device it covers in the original model, be allowed; nor, as at present advised, will any objection be urged to the fifth and sixth clauses of the claim." The applicant then erased the third claim, and the patent was issued in its present shape.

On the foregoing facts, it is contended, on the part of the defendants, that the application for a patent for the improvements which are covered by the claims of the patent sued on was not made until the 14th of March, 1853; that the application of the 12th of December, 1850, was abandoned; and that, consequently, it is established that the improvements in question were on sale, with the consent and allowance of Singer, for more than two years before he applied for a patent for them. There can be no doubt whatever, that the model and drawings filed in December, 1850, fully represented the four improvements claimed in the patent sued on; that the specification then filed fully described the improvements claimed in the first, second and third claims of that patent; and that such specification claimed, in substance, what is covered by the first claim of such patent. Such claim to the operation of the needle by a crank-pin working in a cam-groove attached to or making part of the needle-carrier, disappeared from the specification in July, 1851. The only material invention which the applicant claimed to patent by the specification of July, 1851, was the combination of the straight needle with the shut-

tle, there being only one other claim in that specification, namely, one respecting the application of the driving force to the needle. Both of these claims were rejected, in October, 1851, and the one last named was then erased. The other claim, the combination of the straight needle with the shuttle, remained as the only claim sought. It was rejected again in January, 1852, rejected again in February, 1852, and rejected again in May, 1852. The applicant was then advised, by the official letter of the patent office, to withdraw his application or to take an appeal from the decision of the office. He did not do either, but transmitted to the office, in January, 1853, a new specification, with a new oath then taken. What that specification contained does not appear, though the fair presumption is, that it was the same specification which was again filed on the 14th of March, 1853, and that, therefore, it claimed nothing more than the combination of the straight needle with the shuttle. It does not appear that that specification was then passed upon by the office. It was returned to the applicant in February, 1853. Up to that time, there can be no doubt that the proceedings in the case had all of them taken place under the application of December, 1850. Only one fee of thirty dollars had been paid. At this stage the controversy in the case arises. The patent office received the petition, specification, oath, and certificate of the payment of thirty dollars fee, which were filed on the 14th of March, 1853, and the drawings which were filed April 1st, 1853, and the former model, which had been originally filed in December, 1850, as constituting a new application. The applicant paid a new fee of thirty dollars, in addition to the one which he had paid in December, 1850. The records of the patent office show that the patent sued on is regarded there as having been issued on an application filed March 14th, 1853, and that that application is there regarded as a new and different application from the one filed in December, 1850. The specification filed in March, 1853, presented no claim to any feature except the combination of the straight needle with the shuttle, and no claim to any one of the four improvements covered by the patent in suit. The claims to the improvements covered by claims two, three and four of that patent appear for the first time, as claims, in the specification of September, 1856; and the claim to operating the needle by a crank-pin or roller on a rotating shaft acting in a cam-groove, which claim appeared in the specification filed in December, 1850, but was dropped after July, 1851, was revived, for the first time after the latter date, in this specification of September, 1856.

If what has been recited as having taken place prior to March, 1853, in respect to Singer's application, had never taken place, there can be no doubt that it could not have been urged as a valid objection to the patent sued on, that the inventor did not, until September, 1856, ask for a patent for any one of the four claims covered by that patent; and, even though it had been shown that the improvements covered by those four claims were in public use and on sale, with the consent and allowance of the inventor, as early as March, 1853, the inventor would have been regarded as having applied, in March, 1853, for a patent for such improvements, they having been satisfactorily represented in the drawings and model then presented with the specification, although not claimed until September, 1856, as inventions. This is familiar law, in regard to applications for patents. The specification is always open to amendment of its description and claims, and to the addition of new matters of description and new claims, where the drawings and model exhibit the matters involved in the amendments and additions; and this privilege continues until the matter of the application is finally disposed of, by the granting of a patent, or otherwise. So, also, if a patent had been granted to Singer, on any of his specifications prior to that of September, 1856, with claims not containing any of the improvements covered by the claims in the patent sued on, he might have obtained a reissue of such patent, on an application for such reissue made in September, 1856, with the claims found in the patent sued on, and it would have been no objection to the validity of any claim in such reissue, that machines containing the improvement covered by it were in public use and on sale, with the consent and allowance of Singer, for more than two years before September, 1856, even though the granting of such claim had never been asked for prior to September, 1856. So, also, if the patent sued on had been issued prior to March 14th, 1853, with no one of the four claims now found in it, it would have been no objection to the validity of any claim found in a reissue of it made after that date, that machines containing the improvement covered by such claim had been in public use and on sale, with the consent and allowance of Singer, for more than two years prior to the application for the reissue, and that the granting of such claim had not been asked for before the making of such application for reissue. Moreover, if, in March, 1853, only the new specification and oath then furnished had been presented, and there had been no new petition, and no payment of a new fee, and there had been no technical refiling of the former drawings and model, it could not be doubted, that the patent issued in November, 1856, would have relation to the application of December, 1850, and that the claims found in it would be considered as having been applied for in December, 1850, even though the granting of no one of them had been asked for, in any specification, prior to September, 1856. In analogy to these views, I do not think that Singer can be regarded as having, by anything he or the patent office is shown to have done, abandoned his application of December, 1850. The inventions claimed in his patent of 1856 having been shown in his model and drawings filed in December, 1850, he is, in view of the set-

tled law in regard to applications for patents, and in regard to reissues of patents, to be regarded as having applied in December, 1850, for a patent for every thing found in such model and drawings, for which he could then have obtained a valid patent. He could have withdrawn his application of December, 1850. In such case he would have abandoned it. But he did not withdraw it, nor did he ever appeal from any decision made by the patent office in regard to it. On the contrary, he persisted in asking for a patent for some one or more of the features found in it, until he was successful. The only circumstance which gives any plausibility to the view, that the application of December, 1850, was in such wise abandoned that it cannot be regarded as an application for the patent issued in 1856, is the fact of the payment of the new fee, in March, 1853. But forfeitures and abandonments are not favored. They must be clearly made out. Singer clearly had a right, on his application of 1850, to obtain the patent which he did obtain in 1856, for the claims found therein. He was endeavoring to obtain, on that application, a patent for something. He had failed. In connection with his omission and refusal to withdraw his application, even though advised by the patent office to do so in May, 1852, after a fifth rejection, the payment of the new fee in March, 1853, ought, rather, to be regarded as indicating an intention not to abandon his application of 1850. The specification which he sent in in March, 1853, persisted in claiming nothing but the combination of the straight needle with the shuttle—a claim which had been the only claim asked for from July, 1851, down, and had been, since that date, rejected four times. The letter of his attorney, of March 11th, 1853, transmitting the new specification, speaks of the application as one that had been several times rejected, and states that the new specification is submitted in the matter of such application, and asks for a reconsideration of the case. The letter of his attorney, of March 16th, 1853, states that the two applications are identical, and that he is glad, therefore, that the same model may be used. It is, also, apparent, from the letter of his attorney, of October 11th, 1856, that the applicant regarded the proceedings which took place after March 14th, 1853, as a part of the application of December, 1850, although the date of January, 1853, instead of March, 1853, is erroneously given in that letter. No action of the patent office, in regarding the application of 1850 as abandoned, or in regarding the patent of 1856 as issued under an application made in 1853, and not under the application of 1850, can vary or affect or prejudice the rights of Singer. So long as he did not abandon, voluntarily, his application of 1850, there is no reason, on the facts in this case, why the patent of 1856 should not, in respect to the question under consideration, be held to have been issued on the application of 1850, even though, as between himself and the government, what took place in March, 1853, should be regarded as constituting a second application. It did not invalidate or destroy the first application, or work an abandonment of it by Singer. Nothing could do that but the voluntary act of Singer, or a positive provision of the statute. The mere fact of his making the second application cannot be regarded as an abandonment by him of the first one, so as to work a constructive abandonment of his inventions to the public. I must, therefore, hold, that, in view of the objection that the patent sued on is void, for the reason that the improvements covered by its claims were in public use and on sale, with the consent and allowance of Singer, for more than two years prior to his application for a patent for such improvements, the patent must be regarded as having been issued on the application of December, 1850, and that such objection is not well taken.

A defence, insisted on to the second claim of the patent, is, that the improvement covered by it was previously invented by one William Wickersham. That claim is a claim to "projecting the operative part of the surface of the feeding apparatus through the surface of the table, substantially as described, so that such feeding surface may act on a portion of the under surface of the material to be sewed, to give the required feeding motion to space the stitches, while the other portions of the said material slide on the table, which answers the purpose of stripping the said material from the feeding surface, and to cover and protect the mechanism which operates the feeder, as set forth." The table referred to is a horizontal table. The material to be sewed rests upon it in a horizontal position. The feeding apparatus is a vertical wheel, revolving on a horizontal axis, below the table. The periphery of the wheel projects upward through a hole in the table, to a short distance above the upper surface of the table, and, in feeding, the wheel, as it revolves, acts on a portion of the under surface of the material to be sewed, while the residue of such material slides horizontally on the table. The second claim is limited to this apparatus, or any substantially the same. The feed-wheel of Wickersham rotated horizontally, on a vertical axis, within the shuttle-race of the machine, and was armed with small points on its periphery, such periphery projecting out of the shuttle-race far enough to allow of sufficient engagement of the points with the material outside of the shuttle-race, to feed such material. A spring pressed the material against the feed-wheel. But there was, in Wickersham's apparatus, no horizontal table, which supported the material to be sewed. Such material was held in suspension between the pressure-spring and the periphery of the feed-wheel. It is sufficient to say, that the use of this arrangement of Wickersham's would be no infringement of Singer's patent, and the defendants are free to use it, so far as that patent is

concerned. They have not established, by satisfactory evidence, that the apparatus of Wickersham is a full equivalent for that of Singer, covered by his second claim, or that the use of a horizontal table by Singer does not make his apparatus essentially different from that of Wickersham. The burden is on them to establish this, and they have failed to do so.

What is called the Lafetra machine, set up as containing the improvement claimed in the second claim of the patent, was, on the evidence, an abortive experiment.

It is set up, as a defence to the third claim of the patent, that a griping-pawl, actuated by the hand of the operator, had been before used, to gripe the feed-wheel, in an engraver's ruling machine, for the purpose of regulating the distance between the lines, instead of using a pawl and ratchet. It is a sufficient answer to this defence to say, that the third claim of the patent, in claiming the use of a griping lever, "substantially as described,". to impart the feeding motion to the feeder, claims such use to impart such motion automatically, and as a part of automatic organized mechanism, and not by hand. The motion is described as being imparted by the griping lever automatically, and not otherwise. To so impart it automatically is a patentable invention, notwithstanding the prior use of the hand griping-pawl, in the engraver's machine.

It is also set up, as a defence, that some or all of the improvements covered by the patent sued on were described and represented, though not claimed, in a patent granted to Singer August 12th, 1851, and in a reissue thereof, granted to him October 3d, 1854, and in a patent granted to him April 13th, 1852. It is a sufficient answer to this defence to say, that it is disposed of by the determination already arrived at, that the application made by Singer in December, 1850, remained in force, as a continuing application, until the granting of the patent in 1856, and that the patent is to be regarded as having been issued on that application. Such determination is as applicable to the defence thus raised, as to the defence of constructive abandonment. A patent is never invalidated by the fact, that the invention claimed in it was described, but not claimed, in a patent granted subsequently to the making of the application for the patent secondly issued, but before it was granted.

The remaining defence set up is, that the improvements covered by the patent sued on were either invented by one Orson C. Phelps, and communicated by him to Singer, or were invented by Phelps and Singer jointly, and not by Singer alone. Without discussing at length the evidence taken on this question on both sides, it is sufficient to say, that it is established, by overwhelming testimony, that Singer was the sole inventor of those improvements, and that Phelps was not the inventor of them, either alone or in conjunction with Singer. The testimony of Phelps himself is counterbalanced by the oath of Singer to his specification, the conduct of Phelps was wholly inconsistent with his having been connected at all, as inventor, with a machine which, from the very start, and as early as January, 1851, proved itself to be a success, and the testimony adduced on the part of the plaintiffs establishes that the story of Phelps, as to his connection with the invention, is a pure fabrication.

This disposes of all the questions raised in the case. The infringement of all the claims of the patent is not disputed, and the defendants' machine manifestly embodies all of them.

There must be the usual decree for an injunction, and an account of profits, with costs to the plaintiffs.

SINGER (HALL v.). See Case No. 5,946.

Case No. 12,898.

SINGER v. SLOAN et al.

[3 Dill. 110; [1] 12 N. B. R. 208; 7 Chi. Leg. News, 231; 2 Cent. Law J. 218.]

Circuit Court, E. D. Missouri. March Term, 1875.[2]

BANKRUPTCY — AMENDED ACT — SECTION 35 — "KNOWING"—"HAVING REASONABLE CAUSE."

1. Section 11 of the amendatory bankrupt act of June 22d, 1874 [18 Stat. 180], amending section 35 of the original act [14 Stat. 522], by inserting "knowing," applies to cases brought after the time when the amendatory act took effect, although the instrument creating the alleged illegal preference was executed before June 22, 1874.

[Disapproved in Tinker v. Van Dyke, Case No. 14,058; Barnewall v. Jones, Id. 1,027; Warren v. Garber, Id. 17,196.]

2. The amendment above referred to, made by section 11 of the amendatory act, works a substantial change in section 35, and within the meaning of section 11 of the amendatory act "knowing" and "having reasonable cause to believe" that a fraud on the act was intended, are not legal equivalents.

[Cited in Crump v. Chapman, Case No. 3,455.]
[Cited in Lincoln v. Wilbur, 125 Mass. 252.]

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

On the 21st day of January, 1874, a petition in bankruptcy was filed against Towle by some of his creditors, and the following 3d of February he was adjudged a bankrupt. The plaintiff [B. Singer], appellant herein, is his assignee. On the 18th day of December, 1873, said Towle and wife executed a deed of trust to secure the defendant [O. C. Sloan], appellee herein, for alleged antecedent indebtedness. The bill was filed December 9, 1874, to have said deed

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

[2] [Affirming Case No. 12,899.]

set aside, as in contravention of the bankrupt act, on the ground that Towle, at the date of the execution and delivery, was insolvent, and that Sloan had reasonable cause to believe, etc. The defendant demurred to the bill, on the ground that it should allege, in conformity with section 11 of the amendatory act of June 22, 1874, that the defendant knew that a fraud on the act was intended. The demurrer was sustained, and the bill dismissed. The opinion of the district judge is published in [Case No. 12,899]. The complainant appeals against the decree dismissing the bill.

A. Binswanger, for complainant.
Geo. D. Reynolds, for defendant.

DILLON, Circuit Judge. This bill was filed after the amendatory bankrupt act of June 22, 1874, went into effect. It seeks to avoid as fraudulent under the bankrupt act, an instrument made by the bankrupt, December 18, 1873. The question presented by the demurrer to the bill requires a construction of section 11 of the amendatory act. It is contended by the counsel for the assignee: 1. That section 11 does not apply to any transaction which took place before June 22, 1874, but only to transactions subquent to that time. 2. That, if it does apply in cases brought after June 22, 1874, to transactions before, the insertion of the word "knowing" in section 35 is verbal only, and wrought no change in the legal effect of that section; and hence the bill of complaint was good, although it did not charge that the defendant knew a fraud on the act was intended, but only charged that he had reasonable cause so to believe.

However it may be as to cases like the present, brought under section 35, pending at the time the amended act of June 22d went into operation, I am very clear in the opinion that the provisions of section 11, amending section 35, apply to all cases of this character commenced after that time, although relating to transactions which occurred before. I do not wish, however, to be understood as conceding that section 11 does not apply to cases pending and undetermined when the amended act went into effect. It is unnecessary to examine that question, and I give no opinion upon it. It is to be borne in mind that this suit is one to enforce a right of action which was wholly given by statute, and to invalidate a security which was good on the general principles of law, and only bad because of an express provision of the statute.

If the change in section 35 made by the new section 11 is remedial, then the general rule undoubtedly is as expressed by Mr. Justice Miller, in Re King [Case No. 7,781], that its provisions do apply to pending cases (and a fortiori to future cases), unless there is something to show that the legislature intended to exclude them. And even if an action resting upon section 35 be considered a right, as distinguished from a remedy, still the general rule is that rights wholly given by a statute are taken away by its unconditional repeal, and particularly as to cases not commenced when the repealing statute took effect. Sedg. St. Const. Law, 129 et seq. There is much in the known history of the amendatory act to fortify the legal presumption above mentioned as to the effect of repealing statutes. The counsel for the assignee makes the further point, that "having reasonable cause to believe" and "knowing" are, in contemplation of law, identical, and the averment of the former is legally equivalent to the averment of the latter. In other words, that congress, by carefully requiring the word "knowing" to be three times inserted in section 35, and by changing section 39 in this respect to conform to the change made in section 35, meant nothing and accomplished nothing. I cannot agree to that view. The intention of congress is to be sought, and this is best done by looking at the original section 35 and the decisions construing it, and then at the amendment made by congress.

The courts had generally, I think I may say universally, held that section 35 was contravened if the creditor or other person had reasonable cause to believe a fraud on the act was intended, although he did not know it, that the inquiry was not what he actually knew, but what he had reasonable ground to believe. Many of the cases on this point are cited in the opinion of the district judge, and I need not refer to them at length.

Now, the main scope of the act of June 22d is to relieve the severe features and rigorous operation of the original act, and the amendment of section 35 was one of the changes of that character. Where reasonable cause to believe that a fraud on the act was intended was before sufficient, knowledge of that fact is now required. A change was made, undoubtedly, but how extensive that change is, or what is necessary to prove the requisite knowledge on the part of the defendant, are questions not arising on the record, and not necessary to be determined. Affirmed.

See In re King [Case No. 7,781], and cases cited in note.

Case No. 12,899.

SINGER v. SLOAN et al.

[11 N. B. R. 433; [1] 2 Cent. Law J. 141.]

District Court, E. D. Missouri. Feb., 1875.[2]

BANKRUPTCY — AMENDED ACT — MALA FIDES — "REASONABLE CAUSE TO BELIEVE."

1. In cases of compulsory bankruptcy actually commenced, though not determined, prior to

[1] [Reprinted from 11 N. B. R. 433, by permission.]

[2] [Affirmed in Case No. 12,898.]

December 1, 1873, the amendments of June 22, 1874 [18 Stat. 178], do not apply.

[Cited in Thomas v. Woodbury, Case No. 13,-916.]

2. The broad distinction between "knowledge" and "reasonable cause to believe" has been too well recognized to be ignored, and congress intended, by the amendments of June 22, 1874, to affect only such transactions as are evidently mala fide, i. e., those tainted with actual knowledge. Although all compulsory cases are, by the express terms of the act, as amended June 22, 1874, if instituted after December 1, 1873, subject to its provisions, yet they are not so subject as to adjudications had thereon prior to the date of the said amendatory act.

[Cited in Crump v. Chapman, Case No. 3,455.]

3. In voluntary cases undetermined, as well as in compulsory cases, section 9 of the amendatory act governs.

4. In reducing the time within which conveyances, preferences, etc., are to be invalidated, and in giving section 10, of the amended act, no force until after the respective two and three months had expired, congress designed that past transactions, in cases under section 35 of the former act [14 Stat. 522], should not be interfered with so far as time was an element.

[Cited in Bradbury v. Galloway, Case No. 1,-764.]

5. Section 11 of said amendatory act is also amendatory of section 35 of the former act, and is designed to change the rule as to reasonable cause to believe, but cases previously brought, or acts previously done, are not affected by this section.

[Cited in Re Montgomery, Case No. 9,732; Warren v. Garber, Id. 17,196; Barnewall v. Jones, Id. 1,027.]

6. Section 12 of said amendatory act imports the element of guilty knowledge into compulsory cases of bankruptcy, and the whole section is made applicable to all cases commenced since December 1, 1873; hence, any construction put upon section 11 of the said amendatory act which leaves section 35 of the former act unamended as to such cases, would render the amendatory act inconsistent with itself.

[This was a proceeding by B. Singer, assignee of Towle, against O. C. Sloan and others, to have a certain deed set aside. Heard on demurrer to the bill.]

Binswanger & Jones, for assignee.

Geo. D. Reynolds, for defendant Sloan.

TREAT, District Judge. On the 21st day of January, 1874, a petition in bankruptcy was filed against Towle by some of his creditors, and on the following 3d of February he was adjudged a bankrupt. The plaintiff is his assignee. On the 18th of December, 1873, said Towle and wife executed a deed of trust to secure the defendant, Sloan, for alleged antecedent indebtedness. This bill was filed December 9, 1874, to have said deed set aside as in contravention of the bankrupt act, on the ground that Towle, at the date of its execution and delivery, was insolvent, and that Sloan had reasonable cause to believe, etc. The defendant demurs to the bill on the theory that the allegations should conform to the amendatory act of June 22, 1874, and charge that the defendant knew a fraud on the act was intended. Whether the construction put upon the latter act in the case of Hamlin v. Pettibone [Case No. 5,-995], be correct or not, it evidently does not cover this case; although the views of Judge Deady, in Brooke v. McCracken [Id. 1,932], go far enough, if sustained, to defeat this demurrer. In both of those cases it was asserted, or at least very strongly intimated, that the insertion of the words "know," etc., in sections 35 and 39, does not vary the requirements or force of the statute as it previously stood; for those learned judges intimate that a man is to be presumed in law to know what he had reasonable cause to believe.

The broad distinction, however, between "knowledge" and "reasonable cause to believe," if not apparent on a simple repetition of the terms, has been too well recognized by many decisions, even of the United States supreme court, to be ignored. See Foster v. Hackley [Case No. 4,971]; Graham v. Stark [Id. 5,676]; In re Wright [Id. 18,071]; In re Arnold [Id. 551]; In re McDonough [Id. 8,775]; Merchants' Nat. Bank v. Truax [Id. 9,451]; Forbes v. Howe, 102 Mass. 427; Scammon v. Cole [Case No. 12,433]; Darby v. Lucas [Id. 3,573]; Id., 15 Wall. [82 U. S.] 410; Buchanan v. Smith, 16 Wall. [83 U. S.] 277; Walbrun v. Babbit, Id. 577; Toof v. Martin, 13 Wall. [80 U. S.] 40. Indeed, the marked distinction runs through nearly every case; and generally has been the point on which the case turned. Besides, the amendment is supposed to effect a needed change, and in the light of the then existing decisions, the change made is serious and important. It will, in cases at law, devolve on the jurors the duty to find that knowledge existed, and not merely reasonable cause to believe a fact to be ascertained by them. It cannot be held that a man knows a fact, when there exists only suspicious or surrounding circumstances, which, if thoroughly investigated, might discover the truth. Courts have repeatedly held, concerning the phrase "reasonable cause to believe," that the preferred creditor could not escape by willfully shutting his eyes to what would have been discovered had he made the inquiry which a prudent man would have done —that the mere existence of such suspicious circumstances as should have induced inquiry, would, if seen, or called to the attention of the creditor, bring him within the force of the statute. It is apprehended that far more is now required. The rule, as it previously stood, was somewhat vague and uncertain. Often it occurred that, on precisely the same testimony, two jurors would reach directly opposite conclusions, even when the court carefully defined the meaning of the phrase. Congress, being aware of the stringency of the legal construction given, and desiring to remove so stringent and somewhat arbitrary a rule, amended the law in order to affect only such transactions as

are evidently mala fide—that is, such as are tainted with actual knowledge.

The next important question presented by the demurrer, is, what class of cases is affected by the amendments of June 22, 1874? In compulsory cases, actually commenced, though not determined, prior to December 1, 1873, Judge Hopkins held—Hamlin v. Pettibone [supra]—that the amendments do not apply. The amended section, 39, by its terms, covers all compulsory cases from December 1, 1873, and in that opinion, although the point is not decided, perhaps, yet it is strongly intimated that a distinction exists between two cases brought by assignees of voluntary and involuntary bankrupts. The case before him required for this decision this important point, viz.: whether, in an involuntary case, where an adjudication had been had, and a suit by the assignee was pending against a preferred creditor, prior to December 1, 1873, the amendment had any application. That point he decided in the negative. The opinion of Judge Deady, however, is, that the amendments of section 35 are entirely prospective, so that no case brought before, or act done before, June 22, 1874, is within the purview of the latter act, but is to be considered as falling within the provisions of section 35, as it previously stood. If the opinions in those two cases are correctly understood, such seems to be their scope. It is evident that the terms of the act of June 22, 1874, leave many questions open to judicial construction. Section 9 embraces both compulsory and voluntary cases, and does not in terms state when that section shall take effect—whether it shall be retroactive or prospective, whether it shall apply to pending cases, or, if to pending cases, to what classes. At the last term of the United States circuit court, Justice Miller held that the first clause of said section applied to all pending, as well as to all future cases. In re King [Case No. 7,781]. Hence, if a compulsory bankrupt is to be discharged of his indebtedness, irrespective of the percentage paid, or of the assent of any of his creditors, whether the petition was filed before or after the said act of June 22, it is obvious that glaring frauds upon the whole system might be perpetrated, unless some mode of practice is adopted to prevent such mischief. If a debtor, adjudicated a bankrupt—say in 1868, on the petition of a creditor, can now—some six years after the meeting of his creditors, called to show cause why he should not be discharged, at which meeting no one appeared to make opposition, receive his discharge on the simple ground that, no opposition having been made, and said act of June 22 being retroactive, he is entitled to his certificate; then, despite the most glaring frauds, he can have the benefits intended by the act solely for the benefit of honest debtors.

It follows by no means that when a meeting in a compulsory case was called to show cause, prior to June 22, 1874, and no opposition was formally interposed to the discharge, that the bankrupt was entitled to the same. It might be that the creditors knew full well that his estate had not been equal to the percentage then required, and that he had not, and could not, obtain the assent of the then requisite number of his creditors. So knowing, none of his creditors interposed on the ground of fraud; because all creditors knew, that, under the law as it then was, the bankrupt could not be discharged, whether a fraud on the act had been perpetrated or not. If the ninth section of the amendatory act is retroactive in compulsory cases, as Justice Miller holds, shall an adjudicated bankrupt in 1868 receive his certificate of discharge now, because no creditor entered opposition thereto in 1868, at the meeting then held pursuant to the statute as it then existed? As the bankrupt could not, in 1868, procure his discharge without the prescribed percentage or assent, even if no fraud was alleged, the creditors did not undertake the unnecessary labor of appearing and averring fraud.

The embarrassments thus arising this court has often suggested, and, to give full force to the act as amended, has, whenever an application for discharge has been made in a compulsory case adjudicated prior to June 22, 1874, and the meeting had been held prior thereto, caused another meeting of creditors to show cause to be held, and notice thereof to be given. A meeting held previously, where no opposition was interposed, did not show that no fraud had existed, or that the fact thereof would not have been presented if the bankrupt had not been, on other grounds, as shown by the record itself, unable to procure his certificate. The amendatory statute, like all others of a similar character, which in some of its provisions is retroactive, involves necessarily many doubtful and complicated questions. It has been held, and must in this circuit be considered as settled, that although all compulsory cases are, by the express terms of the act, if instituted after December 1, 1873, subject to its provisions, yet they are not so subject as to adjudications had therein prior to the date of the amendatory act. Those decisions extend no further than that previous adjudications are valid. As to the many other and incidental questions arising, there are no authoritative expositions or decisions.

In the matters now before the court, questions are raised as to the retroactive effect of the amendatory act—first, as to transactions after December 1, 1873, and, second, as to cases based on such transactions brought after the passage of said act. Does the amendatory act, in compulsory cases, cover all transactions since December 1, 1873? If so, then, unless the preferred creditor had knowledge of the intended fraud, the preference obtained cannot be invalidated. If said amendatory act does not

cover such transactions, but relates only to cases brought after its passage, are all fraudulent preferences before December 1, 1873, and all after that date, and prior to the passage of the act, to be governed by the rule of "reasonable cause to believe," as contradistinguished from actual knowledge?

If the first clause of section 9 of the amendatory act, which relates to compulsory bankruptcy, operates on all such cases, no matter when brought, whether past or future, why should not the second clause, as to voluntary cases, have the same effect? The first clause declares that previous provisions, as to compulsory cases, shall not apply; and the second, after laying down a new rule as to voluntary cases, repeals in express terms the provisions of the act of 1867. Some United States district courts have held that the repealing clause must be construed not to affect the prior statutes on that subject, amendatory of the act of 1867; and consequently the needed percentage of fifty per cent. remains as to prior cases; while other of those courts hold that as the act of 1867 is expressly repealed, the intermediate amendments thereof fall with it, and, therefore, as to all voluntary cases prior to June 22, 1874, the bankrupts are entitled to their discharge irrespective of any percentage of their estates or the assent of any of their creditors. The reasons for dissent to those decisions must readily occur to every one who carefully analyzes the various acts. As the law stood before June 22, 1874, in both compulsory and voluntary cases, the same requisites for a discharge obtained. The amendatory act, section 9, as interpreted by Justice Miller, applies, so far as compulsory cases are concerned, to all past as well as all future cases; and why not the provisions as to voluntary cases included in the same section, especially as with regard to the latter, in order to make the intention of congress more emphatic, an express clause of repeal was added? If all compulsory cases undetermined are included within the terms of that section, so are all voluntary cases. The manifest purpose was to subject all such cases, compulsory and voluntary, to the new statutory rule. If the rule as to one class of cases retroacted, so does it as to the other, a fortiori. Hence, in voluntary cases undetermined, as well as in compulsory cases, section 9 of the amendatory act must control. The established doctrine here must be, that said section 9 controls in all pending cases—whether voluntary or involuntary—and no matter when instituted.

Section 10 of the act of 1874 provides, expressly, when its provisions shall take effect, viz.: in two and three months, respectively, thereafter. In reducing the time within which conveyances, preferences, etc., were to be invalidated, and in giving the amendatory section no force until after the respective two and three months had expired, it is obvious that congress designed not to interfere with past transactions or with cases under section 35, which were then pending, so far as time was an element. Thus, where four months was the prescribed time under the unamended section 35, the amendment provides that thereafter two months should be the rule, but that the amendment should not take effect for two months; thus leaving as they were all pending cases, and also all acts done under the four months' provision. So in a similar manner as to the six months' clause. Section 11 of the act of 1874 is also amendatory of section 35 of the act of 1867, and is designed to change the rule as to "reasonable cause to believe," but it does not state to what cases the new rule shall apply. Governed by ordinary rules of interpretation, no cases previously brought, and no act previously done, would be affected, unless the court construes the provisions of section 35, in the act of 1867, and of section 11, in the act of 1874, as falling within the principles applicable to remedies alone. This court cannot hold that those provisions are merely of the latter character.

The remedy was changed by section 10, whereby the time was altered, and the legal character or quality of the act was changed by section 11. But section 11, not stating on what, or when, it should go into operation, would unquestionably be entirely prospective, unless the other provisions of the amendatory act, taken in pari materia, compel a different construction. By that section guilty knowledge is an essential element. Section 9 acts on past transactions and pending cases; section 10 is, by its express terms, not to take effect until the times therein named; and section 12 is declared to apply to all past and pending cases mentioned in it which arose after December 1, 1873—thus retroacting for many months. Section 12 enacts, among many other changes, that conveyances, preferences, etc., shall be invalid when the person receiving the same had reasonable cause to believe the debtor was insolvent, "and knew that a fraud on this act was intended; and such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt; and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy." Here are marked changes, not in the former section 39 alone, but necessarily in section 23 also; for guilty knowledge takes the place of "reasonable cause to believe," and a creditor, in cases of actual fraud, impliedly is permitted to prove a moiety of the debt. The law, as it was previously (section 39), provided that when the person, whether a creditor or purchaser, received payment or a conveyance, having reasonable cause to believe, etc., the assignee might rcover back, and that the creditor should not be allowed to prove his debt—that is, any part of his debt. Now, although a

creditor, even in the case of actual fraud, is permitted to prove not exceeding a moiety, section 23 did not permit a preferred creditor, even though innocent of actual fraud, to prove his debt before he had surrendered all advantage sought to be gained. Under that provision the courts have generally held that the surrender contemplated must be voluntary; and that when the preferred creditor resisted the demand of the assignee, and made the surrender only when forced to do so by litigation and under judgment obtained against him, he was not entitled to prove his debt, or any portion thereof. The amended section 39, by its terms, changes section 23 in the respects stated above. It, therefore, cannot be considered a correct mode of construction to look only to the language of the special amendatory section; for though it may purport to amend only one of the many former sections of the act of 1867, it may by its provisions work an important change in many other sections.

The amended section 39 says: "And the provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy commenced since the 1st day of December, 1873, as well as to those commenced hereafter." Resting there, no voluntary cases would be included; but as quoted above, the same section provides that the "limitation on proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy." To what cases?—those commenced after December 1, 1873, or to those commenced after the passage of the amendment, or to all cases? In every suit to recover back, the questions on which the right of recovery must rest will necessarily be adjudicated; and if actual fraud is found, then, by the amended section 39, the creditor is limited in his proof of debt to a moiety of his demand. Hence, if that provision as to voluntary cases covers all commenced since December 1, 1873, and guilty knowledge is an essential element, how is it possible to recover under section 35, without proof of such guilty knowledge? True, the limitation is in terms as to proof of debt; but the ascertainment of the fact whereby the limitation operates, must necessarily be involved in the suit to recover back. It may be, that, under section 23, when a voluntary surrender is made, the inquiry as to actual fraud will arise only on the attempt to prove the debt; yet the distinction as to actual and constructive fraud will have to be observed. If guilty knowledge exists, the actual fraud must also exist. The former section 35 presented cases of constructive fraud, independent of any actual knowledge; but if now, in passing upon the creditor's rights—at least in all cases since December 1, 1873—it is necessary to inquire into actual fraud, or guilty knowledge, how can it be fairly urged that the statute was not intended in that respect to apply to all cases arising under section 35, as well as under section 39?

This extended review of the amendatory act has been made in order to reach a right conclusion as to section 11 of the act of 1874. It imports into the former section 35 the element of guilty knowledge; and so does section 12 import the same element into compulsory cases. Section 12 is declared in the particulars above stated to apply also to voluntary cases; and the whole section is made applicable, to say the least, to all cases commenced since December 1, 1873. Hence, any construction put upon section 11 which leaves section 35 unamended as to cases since December 1, 1873, would render the amendatory act inconsistent with itself.

It is not necessary, for the purposes of this demurrer, to decide whether cases brought or acts done prior to said December, are to be controlled by the amendment; to avoid all doubt as to the views of the court, it is now held that said section 11 of the act of 1874 controls all cases brought since December 1, 1873. There are many difficulties in reaching a satisfactory interpretation of the different amendatory sections; but when they are fully considered and analyzed, it seems clear that congress intended to modify and mitigate the rigid rules previously adopted. Where it has done so, unless some provision to the contrary appears in the specified section, the amendments should be considered as applicable to all pending cases; otherwise the rulings in the circuit court at the last term, on section 9, could not stand. Certainly the same reasoning which produced those rulings would exact the construction now given.

At the first reading of the opinions given in the Wisconsin and Oregon districts, their conclusions seemed satisfactory, except as to the force of the amendment concerning guilty knowledge; and hence, this court has heretofore intimated its assent thereto, except as to knowledge. The question has now, for the first time, been presented for formal determination here; and, in passing on it, the well-known learning and research of the judges who decided those cases demanded a careful and painstaking review of the whole subject, in the light of the rulings made in this circuit. Those rulings here have necessarily, whether in accord with the views of this court or not, had a controlling influence on the decision of the case submitted.

The demurrer is sustained, with leave to amend.

[On appeal to the circuit court, the decree of this court was affirmed. Case No. 12,898.]

SINGER (UNITED STATES v.). See Case No. 16,292.

Case No. 12,900.

SINGER et al. v. WALMSLEY.

[1 Fish. Pat. Cas. 558.] [1]

Circuit Court, D. Maryland. Feb., 1860.

PATENTS — EQUIVALENTS — EXPERIMENTS — DISCLAIMER—REISSUE—SEWING MACHINES.

1. Patents are not monopolies, because a monopoly is that which segregates that which was common before, and gives it to one person or class, for use or profit; a patent brings out from the realm of mind something that never existed before, and gives it to the country.

2. When a party has discovered a result, as well as the machinery that produces it, he has a right to invoke the doctrine of equivalents in reference to infringers.

3. But where he is only the original inventor of a device, he can only recover against an infringer, if he shows that he has substantially copied his invention. In other words, being an improver himself, he can not invoke the doctrine of equivalents to help him.

4. It does not matter how many experiments have been tried by different inventors, if they failed, if they were never perfected, if they were never brought into use, if they rested in experiment alone.

5. If the feeding of the cloth and tightening of the stitch, were necessities in automatic sewing machines, which have been provided for by various devices before the inventions of Singer, then, if the defendants, in the construction of their machines, have provided for said necessities by mechanism or combinations of mechanism substantially different from the mechanism described in the patents of Singer, there is no infringement.

[Cited in Johnson v. McCabe, 37 Ind. 538.]

6. If the defendants use only one or two of the mechanical devices described by the plaintiff, or two combined with a third which is substantially different in form or in the manner of its arrangement and connection with the others, then there is no infringement.

7. If, from the specifications and drawings taken as a whole, any person skilled in the art could construct the sewing machine therein described, without invention of his own, the patent is good, although there may be a mistake in describing the action of some part of the machinery, which could be easily discovered by the mechanic in making the machine.

8. It is not necessary that the jury should find that the defendants have infringed all the claims, if there be more than one in a particular patent.

9. If inventions, not new or original with the patentee, are included in the specification by mistake, accident, or inadvertence, and without willful default or intent to defraud or mislead the public, the patent is good and valid for so much of the invention or discovery as is truly and bona fide the invention of the patentee.

10. But if no disclaimer be entered in the patent office before suit is brought, the plaintiff can not recover costs against the defendant, although infringement of the valid claims be proved.

11. But, if, when the patentee applied for a reissue of his original patent, he well knew he was not the first inventor of the invention mentioned in any of his claims, then his patent is void, and no recovery can be had thereon.

[Cited in Office Specialty Manuf'g Co. v. Globe Co., 65 Fed. 605.]

12. If the result of the mechanism, used by the defendants, is greatly superior to that described and claimed by the patentee, this fact may be considered, by a jury, as tending to prove that the mechanism of the defendants is a new invention, substantially different from that described by plaintiff.

[Cited in Smith v. Woodruff, Case No. 13,128a.]

13. If the patented improvement had been previously described by another, in a written deposition, in terms sufficient to enable a mechanic skilled in the art to construct the improvement; and such description was known to the patentee when he applied for his patent, said patent is void.

This was an action on the case tried by Judge Giles and a jury, to recover damages [from William H. Walmsley] for alleged infringements of certain patents owned by the plaintiffs for improvements in sewing machines. The declaration contained six counts, and alleged infringement of six different patents. It may be added, that the case was on trial for six weeks, or one week for each count and patent.

The first count was upon letters patent [No. 6,099] granted to Charles Morey and Joseph B. Johnson February 6, 1849, reissued to Isaac M. Singer and Edward Clark, plaintiffs, as assignees, June 27, 1854, and again reissued to them, in two parts, January 12, 1858 [No. 518]. No evidence was offered by the plaintiffs to sustain this count, and the court directed a verdict to be entered thereon for the defendants.

The second count was upon letters patent [No. 8,294] granted to Isaac M. Singer August 12, 1851, and reissued to him October 3, 1854 [No. 278]. The claims of the reissued patent were as follows: "What I claim is, giving to the shuttle an additional forward movement after it has been stopped to close the loop, as described, for the purpose of drawing the stitch tight, when such an additional movement is given at and in combination with the feed motion of the cloth in the reverse direction; and the final upward motion of the needle, as described, so that the two threads shall be drawn tight at the same time, as described. I also claim controlling the thread, by what I have termed the friction-pad, between the seam and the bobbin, or any equivalent therefor, substantially as described, and for any or for all of the purposes specified. I also claim placing the bobbin from which the needle is supplied with thread, on an adjustable arm attached to the frame, substantially as described; when this is combined with the carrying of the said thread through an eye or guide, attached to and moving with the needle-carrier, as described, or the equivalent therefor, whereby any desired length of thread can be given for the formation of the loop, without varying the range of motion of the needle, as described. And I also claim in a sewing machine, feeding the cloth, or other substance, to determine the space between the stitches, by the friction of the surface of the periphery of the feed wheel, or any equivalent

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

feeding surface, substantially as specified, in combination with a spring pressure pad, which gripes the cloth, or other substance, against such feeding surface, substantially as specified, and for the purpose set forth."

The third count was upon letters patent granted to Isaac M. Singer April 13, 1852 [No. 8,876]. The claims of this patent were as follows: "First. The cut-off friction pad, constructed and operating substantially in the manner and for the purpose set forth. I also claim the construction and arrangement of the feeding apparatus, as above described."

The fourth count was upon letters patent granted to Isaac M. Singer May 30, 1854, No. 10,975. The claims of this patent are as follows: "The method of imparting the feed motion to the feed-wheel a, by means of the cord connected at one end with the adjustable arm of the rock shaft j, and the other, with the reaction spring o, substantially as specified, when this is combined with the friction brake, operating substantially as specified and for the purpose set forth. Also, governing and regulating the tension of the needle thread by means of the wire g, with its eyes or guides, substantially as specified, in combination with the turning wing h, by which the coiling or winding of the thread around wire can be increased or decreased at pleasure, substantially as specified. Also, in the sewing of leather, causing the needle thread, on its way to the needle, to pass through linseed oil, or its equivalent; mixed with a dryer, substantially as and for the purpose specified."

The fifth count was upon letters patent granted to Isaac M. Singer, May 30, 1854, No. 10,974. The claims of this patent were as follows: "The method of forming a seam with one thread, by carrying the thread through the cloth or material with the needle, and forming the thread into a loop, and at the next passage of the needle forming another loop, which is drawn through the first, or previously-formed loop. Also, the employment of lateral pressure, whether by a cam, a lever, or their equivalents, to act against and in combination with the needle, at or near the end of its perforating motion, and to insure the proper position of the needle, as described. Also, in combination with a needle for perforating the substance to be sewed or stitched, and carrying the thread through it; a looping apparatus to form a loop at each perforation of the needle, and consecutively liberating the previously-formed loop over the one last formed, to effect the concatenation of the stitches, as described. Also, the looping apparatus, with a recess into which the thread is drawn to form a loop, or its equivalent, in combination with the lever, or its equivalent, for alternately opening the recess to receive the thread to form the loop, and closing it to shut in the last-formed loop, and discharging the previously-formed loop over the one last-formed. Also, giving a positive motion to the spring-arm guide, through which the thread passes from the tension apparatus to the needle, by combining therewith the two bridles, or their equivalents, and needle carrier, or some equivalent moving part of the machine, substantially as specified; the carrier forcing up the said spring-arm guide, to the limit governed by the fixed bridle, and the movable bridle forcing it down to make the slack as described. Also, the method of feeding the cloth, or other substance, to the needle for the progress of the seam, by means of the foot or pad, which holds it on the table, substantially as specified; by means of which the cloth, or other substance, can be turned on the needle as its axis while the needle is in it, and the foot or pad is lifted up preparatory to the feed motion, as set forth."

The sixth count was upon letters patent granted to Isaac M. Singer, November 4, 1856 [No. 16,030]. The claims of this patent were as follows: "I claim operating the needle to give it the required reciprocating motions, substantially such as described, by a crank pin or a roller on a rotating shaft, acting in a cam groove, substantially such as described, whereby the required motions are imparted to the needle with much less extent of motion of the crank pin, or roller, in the cam groove, and consequently less friction, than if the cam groove were on the shaft, and the pin, or roller, on the needle carrier, as described."

W. J. O'Brien and J. H. B. Latrobe, for plaintiffs.

Brown & Brune, A. C. Washburn, and William Whiting, for defendant.

GILES, District Judge (charging jury). Probably of all species of property, this property in patent rights should be most carefully guarded and protected, because it is so easily assailed. If a man invades my farm, the act is patent and open; if he assails my person, it is an open act; if he assails my personal or real property, it is an act easily capable of proof; but the most difficult thing in the world is to prove an invasion of property of this character—property protected by patents. It is equally entitled to the protection of courts and juries with all other property of the citizen; it should be most carefully protected, from the difficulty of proving the invasion. Now, patents are not monopolies, as the counsel have all said, because a monopoly is that which segregates that which was common before, and gives it to one person or to a class, for use or profit; a patent is that which brings out from the realm of mind something that never existed before, and gives it to the country. And when we consider the priceless blessings which have accrued to our land, by the intellect and ingenuity of the country in this department, we feel almost lost in wonder at the vastness of the interests which have been created by the ingenuity of the coun-

try, and the immense amount now invested, in this department of property.

But, gentlemen, when we come to the question of what is patentable and what is not, we go to the act of 1836 [5 Stat. 117]. The words of that act are: "Any person or persons having discovered or invented any new and useful art, machine, manufacture, or composition of matter—not known or used by others before his or their discovery or invention thereof, and not, at the time of his application for a patent, in public use or on sale, with his consent or allowance, as the inventor or discoverer, and who shall desire to obtain an exclusive property therein, may make application," etc. It seems, then, that whatever may be the extent of the terms of the grant under the constitution, the only power that congress has exercised is the power to give a patent for a "new and useful art, machine, manufacture, or composition of matter." I suppose we have here to do with a machine or manufacture, more properly with a machine, in this case. The law of England uses, I believe, the sole word, "manufacture"—"any new manufacture." We have, therefore, "machine or manufacture." I consider them tantamount, however; the English law is probably as broad as ours, and intended to be so. Now, my learned friend who argued that point very ably for the plaintiffs here, contended that, while he admitted a principle could not be patented, you could yet patent it indirectly—that is, that the principle was patented in the machine in which it was embodied. That is a very refined idea, and it requires a great deal of thought for us to comprehend it, and then to see it really and truly, and reconcile it with the decisions in this country upon this subject, and to see if even the decisions in the English courts, to which that learned counsel has referred, do carry out that idea of his, or whether they do not all go back to what I believe to be the true doctrine—that you can not patent a principle; you can not patent a result; you can not patent the function of an instrument; but you can patent a machine or manufacture; and when you come to test the question of infringement, the question of principle comes up in this light—what is the mode of operation of the machine you have invented? Because if you find in the machine, which is alleged to be an infringement, the same mode of operation, it is substantially the same; and therefore, if the learned counsel uses the word "principle" to signify "mode of operation," I can understand him. Now, the first case was the celebrated English case of the Househill Coal & Iron Co. v. Neilson, Webst. Pat. Cas. 685, and in that case, the learned judge says: "I state to you the law to be, that you may obtain a patent for a mode of carrying a principle into effect." That is it. A principle is not patentable; but if you discover a principle, and discover a mode of operation, you have a right to have your patent for the mode of carrying the principle into effect; and if anybody afterward comes along and takes your principle, and takes your mode of operation, substantially, although he varies the form, he is an infringer. That is what I understand to be the law.

The learned counsel referred to another case in the same book (pages 130 and 134). On page 130, the judge says: "The essence of the claim to invention, and undoubtedly his claim, is the application of a self-adjusting leverage to the chair, and if it could be shown that any self-adjusting leverage had been, before the plaintiff's patent, applied to a chair, the patent would be void, because the priority of the specification given by him would claim every species of the application of a self-adjusting leverage to the back and seat of a chair (the claim was not for any particular form of self-adjusting leverage); he would have claimed, not the particular way of accomplishing the particular purpose by the particular engine, but he would have claimed too much, because he would have claimed the application of such self-adjusting leverage to the back and seat of a chair. Now it is for you to say, whether you are satisfied that the species of self-adjusting leverage has ever been applied to the back and seat of a chair before." In other words, the court called upon the jury there to say whether this principle was new; because, if it was, then the party had a right to a patent for his self-adjusting leverage, no matter in what form, provided it was a self-adjusting leverage, performing that function.

The next case, I believe, was the leading case of Neilson v. Harford, on pages 342 and 371 of the same book. This is the case in which the learned counsel read from Baron Alderson's opinion; and on page 371, I understand the court to decide that this patent was a patent for a machine. The court say: "It is very difficult to distinguish it from the specification of a patent for a principle, and this at first created in the minds of the court much difficulty; but after full consideration, we think that the plaintiff does not merely claim a principle, but a machine embodying a principle, and a very valuable one." We think the case must be considered as if, the principle being well known, the plaintiff had first invented a mode of applying it by a mechanical apparatus to furnaces; and his invention then consists in this: by interposing a receptacle for heated air between the blowing apparatus and the furnace. In this receptacle, he directs the air to be heated by the application of heat externally to the receptacle, and thus he accomplishes the object of applying the blast, which was before of cold air, in a heated state to the furnace.

It was on the ground, then, that the patent was for the invention of a mechanism, that the court maintained the patent; other-

wise they would have declared the patent void. If the claim had been for the principle that hot air would fuse iron quicker than cold air blown into the oven and there heated, without any claim for machinery, the patent would have been declared void. But they admitted it to be valid, because they construed it to be a patent for a machine. You will find that doctrine all gone over very elaborately, in the case of Boulton v. Bull, 2 H. Bl. 463. You will find there the same doctrine laid down, that you can not patent a principle, but you can patent a machine which, in its mode of operation, carries out and embodies a principle; and when you come to test the question of infringement, if the principle is new, and the mode of operation by a certain machinery is new, then you have a right to be protected thus far; that is, any one who makes a machine which embodies that principle, and operates in the same mode that you do, although the form may be different, is an infringer.

The learned counsel referred also to Norman on Patents. I read one passage from that work in support of the view I take upon the subject. The author, on page 134, says: "When the principle of operation is public, a patent for a particular machine is not necessarily infringed by the adoption of instruments operating on the same principle, but varying in detail from those employed in the patented machine. In such case, the similarity of effect produced does not necessarily show that one instrument is merely an equivalent for the other."

I read this to show, that if a party is not the original inventor of the principle, as well as of the machine, he has no right to invoke the doctrine of equivalents, for it does not belong to him; but if he is the inventor of the principle which he embodies in his machine. as well as the first inventor of the machine which carries it out, he has a right to invoke the doctrine of equivalents. Now, what is the view of the American authorities upon this subject? And in this view of the English authorities, I reconcile them with the American authorities. The first one is the case of Leroy v. Tatham, 14 How. [55 U. S. 156]. I commence on the bottom of page 174:

"The word 'principle' is used by elementary writers on patent subjects, and sometimes in adjudications of courts with such a want of precision in its application as to mislead. A principle in the abstract is a fundamental truth; an original cause; a motive; these can not be patented, as no one can claim in either of them an exclusive right. Nor can an exclusive right exist to a new power, should one be discovered to exist in addition to those already known. That is the doctrine of O'Reilly v. Morse [15 How. (56 U. S.) 62]. Through the agency of machinery, a new steam power may be said to have been generated. But no one can appropriate this power exclusively to himself under the patent law. The same may be said of electricity, and of any other power in nature, which is alike open to all, and may be applied to useful purposes by the use of machinery.

"In all such cases, the processes used to extract, modify, and concentrate natural agencies, constitute the invention. The elements of the power exist; the invention is not in discovering them, but in applying them to useful objects. Whether the machinery used be novel, or consist of a new combination of parts known, the right of the inventor is secured against all those who use the same mechanical power, or one that shall be substantially the same. A patent is not good for an effect, or the result of a certain process, as that would prohibit all other persons from making the same thing. by any means whatever. This, by creating monopolies, would discourage arts and manufactures against the avowed policy of the patent laws.

"A new property discovered in matter, when practically applied in the construction of a useful article of commerce or manufacture, is patentable; but the process through which the new property is developed and applied must be stated with such precision as to enable an ordinary mechanic to construct, and apply the necessary process. This is required by the patent laws of England and of the United States."

Then we go to the case of O'Reilly v. Morse, 15 How. [56 U. S.] 62. What was the eighth claim of the patentee which the court was called upon to construe, and which the court declared to be void? It was as follows: "I do not propose to limit myself to the specific machinery or parts of machinery described in my foregoing specification and claims; the essence of my invention being the use of the motive power of the electric or galvanic current, which I call electro-magnetism, however developed, for marking or printing intelligible characters, signs, or letters, at any distances, being a new application of that power of which I claim to be the first inventor or discoverer." Id. 112.

"It is impossible," says the court, "to misunderstand the extent of this claim. He claims the exclusive right to every improvement where the entire power is the electric or galvanic current, and the result is the marking or printing intelligible characters, signs, or letters at a distance."

"If this claim can be maintained, it matters not by what process or machinery the result is accomplished. For aught that we know now, some future inventor in the march of science, may discover a mode of writing or printing at a distance, by means of the electric or galvanic current, without using any part of the process or combination, set forth in the plaintiff's specification. His invention may be less complicated—less liable to get out of order—less expensive in construction and in its operation; but yet, if it is covered by this patent, the inventor could

not use it, nor the public have the benefit of it without the permission of this patentee.

"Nor is this all; while he shuts the door against the inventions of other persons, the patentee would be able to avail himself of new discoveries, in the properties and powers of electro-magnetism, which scientific men might bring to light. For he says he does not confine his claim to the machinery or parts of machinery which he specifies, but claims for himself a monopoly in its use, however developed, for the purpose of printing at a distance."

Then the court go on to argue the question, coming to the conclusion that the claim can not, of course, be allowed; and then refer to the case of Neilson v. Harford [supra], quoting the opinion of Baron Parke, already referred to, and to the case of Leroy v. Tatham [supra], as confirming their opinion. The court say in [O'Reilly v. Morse] 15 How. [56 U. S.] 119, at the bottom:

"If the eighth claim of the patentee can be maintained, there was no necessity for any specification, further than to say that he had discovered that, by using the motive power of electro-magnetism, he could print intelligible characters at any distances. We presume it will be admitted on all hands that no patent could have issued on such a specification. Yet this claim can derive no aid from the specification filed. It is outside of it, and the patentee claims beyond it. And if it stands, it must stand simply on the ground that the broad terms above mentioned, were a sufficient description, and entitled him to a patent in terms equally broad. In our judgment, the act of congress can not be so construed.

"The patent, then, being illegal and void, so far as respects the eighth claim, the question arises whether the whole patent is void" —and then the case is discussed upon another point.

Now, that case has never been overruled, but I think that its principles have been again and again recognized and confirmed. I can find no case that has been decided by the supreme court where they have ever carried the doctrine of inventions beyond the point I have indicated.

The next case referred to is the case of Corning v. Burden, 15 How. [56 U. S.] 268. In that case, a question was raised in regard to the construction of the specification; and there the court announce the doctrine, which I may as well incidentally notice here, that the courts should liberally construe patents, and they have always done so. They have always adopted the construction most favorable to the patentee, "Ut res magis valeat, quam pereat."

Where there was anything inconsistent either in the specification, or in the claim, and yet the patent claimed in substance that which was patentable, the courts have always decided that that was the meaning of the claim. As, for instance, in one case where a party described a machine, and yet claimed a function, the court decided there, that the patent was good for a machine. But, the courts have never gone so far, I think, upon that principle of the liberal construction of patents, nor could they have done so, as to say that a party having claimed that which was not patentable, his patent could stand. The court say, in this case of Corning v. Burden, at the bottom of page 269:

"The party can not describe a machine which will perform a certain function, and then claim the function itself and all other machines that may be invented to perform the same function." There is another case in this same book, the celebrated case of Winans v. Denmead, 15 How. [56 U. S.] 330, upon which great reliance has been placed by the learned counsel for the plaintiff. Now, it is necessary to look at this case of Winans v. Denmead, very attentively, to see what was decided, or meant to be decided by the supreme court. As I understand that case, it does not at all conflict with the principles laid down in O'Reilly v. Morse, Corning v. Burden [supra], or any of the previous decisions in the circuit courts, of which I have examined a great many, but which I will not take the time to read. They are Blanchard v. Sprague [Case No. 1,518]; Whittemore v. Cutter [Id. 17,601]; Odiorm v. Winkley [Id. 10,432]; Stone v. Sprague [Id. 13,487]; McCormick v. Manny [Id. 8,724].

I do not understand it as overruling the doctrine in the case of O'Reilly v. Morse, but the court are declaring the rules by which you are to be guided on the question of infringement: and they say at the bottom of page 338: "In this, as in most patent cases, founded on alleged improvements in machines, in order to determine what is the thing patented, it is necessary to inquire: First. What is the structure or device, described by the patentee as embodying his invention? Second. What mode of operation is introduced or employed by the structure or device? Third. What result is attained by means of this mode of operation? Fourth. Does the specification of claim cover the described mode of operation by which the result is attained?"

Now in that patent, Winans claimed that by making his car of a conical shape, with a sliding drop, he made the car sustain itself, and got rid of all the heavy trestle-work around the square-bodied car and therefore by getting rid of probably one-half the weight of the ordinary square car, supported by a square frame, he was enabled to carry, with the same motive power, twice as large a load. Let us see what his claim was.

"What I claim as my invention, and desire to secure by letters patent, is making the body of a car for the transportation of coal, etc., in the form of a frustrum of a cone, substantially as herein described, whereby the force exerted by the weight of the load presses equally in all directions, and does not tend to change the form thereof. so that every part thereof resists its equal propor-

tion, and by which also the lower part is so reduced."

Well, the supreme court say: "The court ruled below, that the claim was limited to the particular geometrical form mentioned in the specification; and as the defendants had not made cars in that particular form, there could be no infringement, even if the cars made by defendants attained the same result by employing what was in fact the same mode of operation, as that described by the patentee. We think this ruling was erroneous. * * * Merely to change the form of a machine is the work of a constructor, not of an inventor; nor does the plaintiff's patent rest upon such a change. To change the form of an existing machine, and by means of such a change to introduce and employ other mechanical principles or natural powers, or as it is termed, a new mode of operation, and thus attain a new and useful result, is the subject of a patent."

Recollect that the court are dealing here, in this opinion, with Winans' invention, which, by a new form of machinery, attained a new and useful result. They were both new: the result was new, and the form in which he embodied his machinery was new. "Its substance," the court go on to say, "is a new mode of operation, by means of which a new result is obtained. It is this new mode of operation which gives it the character of an invention, and entitles the inventor to a patent; and this new mode of operation is, in view of the patent law, the thing entitled to protection. The patentee may, and should, so frame his specification of claim as to cover this new mode of operation which he has invented, and the only question in this case is whether he has done so; or whether he has restricted his claim to one particular geometrical form. There being evidence in the case to show that other forms do in fact embody the plaintiff's mode of operation, and, by means of it, produce the same new and useful results, the question is whether the patentee has limited his claim to one out of the several forms which thus embody his invention."

Now, while it is undoubtedly true, that the patentee may so restrict his claim as to cover less than what he invented, or may limit it to one particular form of machine, excluding all other forms, though they also embody his invention, yet such an interpretation should not be put upon his claim, if it can fairly be construed otherwise, and this for two reasons: "1st. Because the reasonable presumption is, that, having a just right to cover and protect his whole invention, he intended to do so. 2d. Because specifications are to be construed liberally, in accordance with the design of the constitution, and the patent laws of the United States, to promote the progress of the useful arts, and to allow inventors to retain to their own use, not anything which is matter of common right, but what they themselves have created."

The court say at the top of page 343, after reasoning upon the subject-matter of infringement: "The answer is, my improvement did not consist in a change of form, but in the new employment of principles or powers, in a new mode of operation, embodied in a form by means of which a new or better result is produced; it was this which constituted my invention; this you have copied, changing only the form; and that answer is justly applicable to this patent."

I understand, therefore, in that case, the court to give the opinion, that where a party has discovered a result, as well as the machinery which produces it, he has a right to invoke the doctrine of equivalents in reference to infringers. Where he discovered a function that is new, for the first time, and discovers a machine that is new, too, he has a right to invoke the doctrine of equivalents to protect himself. And that reconciles that case with the case of McCormick v. Talcott, 20 How. [61 U. S.] 402. McCormick was the inventor of a certain divider, which was attached to a reaping machine. But he was not the first, for dividers had been used before; and he therefore made nothing but an improvement in the divider. Its functions had been performed, in some way or other (not so well) by devices before invented by others; and Many, who came after him, invents an improvement upon McCormick, adopting very much one of the previous inventions, and was sued by McCormick, who undertook to bring to his aid the doctrine of equivalents. Now, what did the court say? "If he be the original inventor of the device or machine called the divider, he will have a right to treat as infringers all who make dividers operating on the same principle, and performing the same functions by analogous means, or equivalent combinations, even though the infringing machine may be an improvement of the original, and patentable as such. But if the invention claimed be itself but an improvement on a known machine, by a mere change of form, or combination of parts, the patentee can not treat another as an infringer who has improved the original machine by use of a different form or combination performing the same functions. The inventor of the first improvement can not invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable invasions of the first."

There they are carrying out and sustaining the idea which they announce in Winans v. Denmead [supra], that where the party is the first inventor of a divider, he has a right to treat all as infringers who make dividers operating upon the same principle, and performing the same function, even although he may use mechanical equivalents; but where he is only the original inventor of a device, he can only recover against an infringer, if he shows that he has substantially copied his invention. In other words, being an improv-

er himself, he can not invoke the doctrine of equivalents to protect him. I will not go over the cases in the circuit courts.

These are the views which I hold, gentlemen, in reference to the question of the doctrine of equivalents.

The next question that comes up here is the question of the infringement of a combination of mechanism. I suppose there can be no difference between counsel upon that subject. In Prouty v. Ruggles, 16 Pet. [41 U. S.] 336, the views of the court were very clearly announced upon that subject in the celebrated center-draft plow case.

"The patent is for a combination," says the chief justice, on page 341, "and the improvement consists in arranging different portions of the plow, and combining them together in the manner stated in the specification, for the purpose of producing a certain effect. None of the parts referred to are new, and none are claimed as new; nor is any portion of the combination, less than the whole, claimed as new, or stated to produce any given result. The end in view is proposed to be accomplished by the union of all, arranged and combined together in the manner described. And this combination, composed of all the parts mentioned in the specification, and arranged with reference to each other, and to other parts of the plow in the manner therein described, is stated to be the improvement, and is the thing patented." (As it is here in four of these patents.) "The use of any two of these parts only, or of two combined with a third, which is substantially different, in form or in the manner of its arrangement and connection with the others, is therefore not the thing patented."

Now there is import and meaning in every sentence here. If the three elements are the same, but are not connected and arranged the same, it is no infringement; or if there are two of the three elements, and the third element is new, it is not the same combination; it is not the same combination if it is substantially different from it in any of its parts, and that case of Prouty v. Ruggles [supra], you will find sustained in [Stimpson v. Baltimore & S. R. Co.] 10 How. [51 U. S.] 329.

It is the case which has been referred to here several times of Stimpson v. Baltimore & S. R. Co., in which the court quote from Prouty v. Ruggles, and sustain the doctrine laid down in that case. You will find the opinion of the court on this subject on page 345, in reference to turning the corners of a street with a railroad.

Now another question comes up here in regard to the fourth and fifth claims in the first patent; for, although these claims have not been relied upon in the suit as the foundation of this action, or any part of it, yet, as they come before the court upon the prayers, and affect the validity of the patent, it will be necessary to consider them.

The proposition on the part of the counsel for the defendants is, that if these claims should be found to be for inventions that were not new, and as no disclaimer has been filed, they render void the whole patent. That is the proposition. Now, I do not understand the law to be so. A party may take out a patent for three or four claims, and, as I understand the law, if he acts in perfect good faith, if he believes himself to be the inventor, and inadvertently, by accident or mistake, without any willful intent to defraud, he embraces in his claim more than he is entitled to, in other words, claims things which are not new, it does not render his patent void; he is enabled to bring his suit under sections 7 and 9 of the statute of 1837 [5 Stat. 191], without first making any disclaimer. His patent is good for what is new and original.

Section 9 is as follows: "That whenever by mistake, accident, or inadvertence, and without any willful default, or intent to defraud or mislead the public, any patentee shall have, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the first and original inventor, and shall have no legal or just right to claim the same, in every such case the patent shall be deemed good and valid for just so much of the discovery as shall be truly and bona fide his own; provided, it shall be a material and substantial part of the thing patented, and be definitely distinguishable from the other parts so claimed, without right as aforesaid. But in every such case in which a judgment or verdict shall be rendered for the plaintiff, he shall not be entitled to recover costs against the defendant, unless he shall have entered at the patent office, prior to the commencement of the suit, a disclaimer of all that part of the thing patented which was so claimed without right; provided, however, that no person bringing any such suit shall be entitled to the benefits of the provision contained in this section, who shall have unreasonably neglected or delayed to enter at the patent office a disclaimer as aforesaid."

"What is unreasonable delay," is a question to be settled by the court,—and not for the jury. The court can not, therefore, say, that without the party knew that this claim was false, if he believed (and we take his oath as prima facie evidence of that), if he believed that he was the sole inventor of that which he claimed (because the law never makes so harsh a presumption as that a man perjures himself—the presumption is that a man respects his oath), the court will find that the time, in reference to the question of delay, commences when the knowledge was brought home to the party that he was not the first inventor, or when it is declared by a court, of competent jurisdiction to settle the question, that he was not the first inventor; then it is that the time commences to run, and not until then. [O'Reilly

v. Morse] 15 How. [56 U. S.] 121; [Seymour v. McCormick] 19 How. [60 U. S.] 96; [Silsby v. Foote] 20 How. [61 U. S.] 388.

The only other point to which I shall refer, for I am taking up more time than I intended, is the question of prior invention. What is the character of a prior invention which is to defeat a subsequent patent? This case came before one of the circuit courts in the case of Alden v. Dewey [Case No. 153]; also in Goodyear v. Day [Id. 5,569], a case, I suppose, that occupied as much attention, and was as ably argued as any patent case that has ever been tried in this or any other country. I will read from this last case:

"The testimony shows that many persons had made experiments, that they had used sulphur, lead, and heat, before Goodyear's patent, and probably before his discovery. But to what purpose? Their experiments ended in discovering nothing, except, perhaps, that they had ruined themselves. The great difference between them and Goodyear is, that he persisted in his experiments, and finally succeeded in perfecting a valuable discovery, and they failed.

"It is usually the case, when any valuable discovery is made, or any new machine of great utility has been invented, that the attention of the public has been turned to that subject previously; and that many persons have been making researches and experiments. Philosophers and mechanicians may have, in some measure, anticipated, in their speculations, the possibility or probability of such discovery or invention; many experiments may have been unsuccessfully tried, coming very near, yet falling short of the desired result. They have produced nothing beneficial. The invention, when perfected, may truly be said to be the culminating of many experiments, not only by the inventor, but by many others, and he may have profited indirectly by the unsuccessful experiments and failures of others; but it gives them no right to claim a share of the honor or the profit of the successful inventor. It is when speculation has been reduced to practice, when experiment has resulted in discovery, and when that discovery has been perfected by patient and cautious experiments—when some new compound, art, manufacture, or machine has been thus produced, which is useful to the public, that the party making it becomes a public benefactor, and entitled to a patent."

So I say in reference to this case, it does not matter how many experiments have been tried by different inventors, if they failed, if their experiments were never perfected, if they were never brought into use—and by that, I do not mean general use, but to perform the functions of the plaintiff's machine, or any of the perfected machines of this day—if they rested in experiment alone, they were not of such a character as to deprive subsequent inventors of the benefit of their inventions, if they brought them into use. The man who brings his invention before the country, and into actual use, is the one to be protected, for he is the one who confers a benefit upon the country.

Judge Grier says in the case last referred to: "Yet when genius and patient perseverance have at length succeeded, in spite of sneers and scoffs, in perfecting some valuable invention or discovery, how seldom is it followed by reward! Envy robs him of the honor, while speculators, swindlers, and pirates rob him of the profits. Every unsuccessful experimenter, who did, or did not, come very near making the discovery, now claims it. Every one who can invent an improvement, or vary its form, claims a right to pirate the original discovery. We need not summon Morse, or Blanchard, or Woodworth, to prove that this is the usual history of every grand discovery or invention."

And another point comes up in connection with use. What is meant by use? "Has been in use before," "has been known and in use before." Such is the language of the patent law in reference to machines.

In Treadwell v. Bladen [Case No. 14,154], the objection to the patent was, that Treadwell was not the original inventor of the machine, but that it was invented by one Christian, anterior to the patent of Treadwell. In this case, Judge Washington says:

"But the point mainly relied upon by the plaintiff's counsel is, that no evidence is given that Christian's machine was ever used within the true meaning of that expression in the patent act. It is admitted that an experiment was made with it, but this, it is urged, was not such a using as the act intends. It surely can not be denied that the act of making crackers with it amounted to a using of it according to the common and accepted meaning of that phrase; and I am quite at a loss to imagine how this meaning can be varied by the particular motive which induced the inventor so to employ the machine. I can discover nothing in the patent act which will authorize the court to depart from the ordinary meaning of this expression, and to declare that a machine that is put into operation for the sole purpose, if such be the case, of trying its practical utility, is not within the meaning and intent of the sixth section of that act. The plaintiff's counsel relied in some measure upon certain expressions of the judges in the two cases of Boulton v. Bull, 2 H. Bl. 463, and Bedford v. Hunt [Case No. 1,217]. But so far as any satisfactory inference can be drawn from those expressions, in its application to the particular point under consideration, it strikes me to be unfavorable to the construction contended for. They manifestly contrast the confining of the invention to the closet of the inventor, and a mere speculative invention, with putting it into use, practice, or operation, and not the putting of it in practice for the purpose of experiment, with any

other purpose whatever. Upon the whole, I am of opinion that the experiment of this machine made by Christian, in the year 1807, amounted to a using of it within the true meaning of the sixth section of the patent act."

I read also from the case in another connection, to show that if the plaintiff in this case took the same idea that he found embodied in a ruling machine, he is not entitled to a patent, because, if the principle of griping the material along the surface was known and in use, though motion was given by the hand, the change to automatic machines makes no difference. The same learned judge says, on page 582: "That Christian's machine was invented many years prior to Treadwell's, is proved by uncontradicted testimony, and is not denied by the plaintiffs' counsel. That it possesses all the essential parts and principles of Treadwell's machine, the cutters, piercers, and clearers, is manifest by comparing the two together; besides which, the fact is proved by all the witnesses. Used with no other than hand power, it is proved, and admitted not to answer the purpose of a labor-saving machine." Christian made this machine, used it for a short time, and then threw it away.

So too, these sewing machines may be used, and be thrown away afterward; but if they are perfected so as to accomplish the functions claimed for them, they have been in use, within the meaning of the patent act.

One other point, and I shall pass to my instructions. The learned counsel for the plaintiffs relied upon a case in Story's Reports, in reference to the oath on the application of the plaintiff here—to this oath of originality, and the testimony of Mr. O. C. Phelps. He said that as you had oath against oath, the patent stood, and was conclusive in favor of the patentee, and cited Alden v. Dewey [Case No. 153]. All that Judge Story decided there, is what I have decided here upon the plaintiffs' patents—that they are prima facie evidence to go before the jury; the jury are to judge what weight they will give to them. Judge Story instructed the jury "that the original patentee had sworn that he was the true and first inventor of the improvement for which he had taken out letters patent; that this oath was required by law, prior to the issue of letters patent," nothing further; and he left the question of the oath, and its force, to the jury. It was prima facie evidence, and the jury were to judge of its effect, in connection with other evidence in the case.

The plaintiff's patent of October 3, 1854, claims four inventions. In the first claim, as I construe it, I understand the patentee to claim the invention of a combination of certain mechanism which he describes, by which a slight additional forward movement is given to the shuttle, after the needle has been drawn out of the cloth, with the feed motion of the cloth, in the reverse direction, and the final upward movement of the needle; by means of which three pulls are given simultaneously to tighten the stitch. It is not a patent for the result obtained, because that is not patentable, but for the particular combination of mechanism which produces that result.

The second claim in said patent of October 3, 1854, is for the invention of a friction-pad placed between the seam and the bobbin, which makes a slight pressure on the thread, so that as the needle descends, to prevent the formation of a loop above the cloth, liable to be caught or cut by the needle, while at the same time, the pressure is not sufficient to prevent the needle from drawing the thread through the cloth, to make the loop below it, nor is there any tendency when the needle rises, to draw out such loop.

In the third claim, which is not relied upon by the plaintiffs in this suit, but which comes into consideration in reference to the validity of the patent, I understand the patentee to claim the invention of a combination of an adjustable arm, on which the bobbin is placed, and which is attached to the frame, with an eye or guide, attached to and moving with the needle-carrier, through which eye the thread passes from the bobbin to the needle, so that by changing the angle of the said arm, any desired length of thread can be given to the formation of the loop; and in the fourth claim, I understand the patentee to claim the invention of the combination (for feeding the cloth) of the friction of the surface of the periphery of the feed-wheel with spring pressure plate or pad, which grips the cloth or substance to be sewed, against the feeding surface; the surface of the said feed-wheel having a fine thread or parallel groove cut thereon, to enable it to perform its office in combination with the pressure-plate, instead of being armed with pins.

In the patent of April 13, 1852, the patentee claims the invention of an improvement in the friction-pad, whereby the thread is saved from the chafing it would otherwise be liable to, by substituting for it what he terms a cut-off friction-pad, which alternately seizes and releases the thread at proper intervals; so as to cause the pad to press upon the thread when required, and then to be released while the needle is passing through the cloth.

In his patent of May 30, 1854, the patentee claims the invention of a wire with eyes or guides, in combination with a turning-wing, to regulate the tension of the needle-thread.

In his fourth patent of the same date as the last one, to wit, May 30, 1854, the patentee claims the invention of the combination of the following mechanical devices, viz.: First: A spring-arm guide, through which the thread passes from the tension apparatus to the needle. Second: The nee-

dle carrier, forcing up the spring-arm guide to the limit fixed for it. Third: A fixed bridle, limiting the upward movement of the spring-arm guide; and Fourth: A movable bridle attached to the needle-carrier, or some other part of the machine having an equivalent motion to act on, to force down the said guide, to give the required amount of slack thread for the formation of the loop; the carrier forcing up the said spring-arm guide to the limit governed by the fixed bridle, and the movable bridle forcing it down again, to make the slack thread, when required; these motions being claimed to be independent of the thread, or any contingency affecting it.

In the last patent, dated November 4, 1856, I understand the patentee to claim, in his second claim, the invention of the combination of a horizontal table, with the apparatus for feeding the cloth; the operative part of the feed-wheel, projecting through the table, and the surface of the table surrounding that part of the feeding surface which is active for the time being, so that such feeding surface may act on a portion of the under surface of the material to be sewed, to give the required feeding motion to space the stitches, while the table answers the purpose of stripping the said material from the surface of the feed-wheel, and to cover and protect the mechanism which operates the feeder.

In the third claim, I understand the patentee to claim the invention of imparting the feeding motion to the feed-wheel for spacing the stitches by griping the periphery thereof by a griping lever, in contradistinction to the action of a pawl or hand catching on to ratchet teeth, whereby the extent of feeding motion may be adjusted and varied to any degree, instead of being restricted by the size of the ratchet teeth.

And in the fourth claim, I understand him to claim the invention of a combination of a feeder with a presser, attached to a slide, which keeps the plane of its under surface always in the same relation to the plane of the table, whether the material to be sewed be thick or thin, thereby avoiding the inequality of pressure which takes place when the presser is on an arm connected with the table or with the frame by a fulcrum or hinge-joint.

First. Having briefly stated what I understand to be the inventions claimed by Mr. Singer, in these patents, the first duty of the jury will be to inquire if the defendants in the construction of their sewing machines, have used substantially the same mechanism or combination of mechanism, to produce the same results; or, in other words, whether the machines of the defendants are substantially the same in principle and mode of operation with the plaintiff's sewing machines, in these particulars; for, if they shall find, that the controlling the thread, that is, the keeping it tight until the needle was about to enter the cloth, and then releasing is so that a loop might be formed for the shuttle to pass through, the feeding of the cloth and the tightening of the stitch, were necessities in automatic sewing machines, which have been provided for by various devices before the said inventions of the said plaintiff Singer, then if the jury shall find that the said defendants, in the construction of their machines, have provided for said necessities by mechanism or combinations of mechanism, substantially different from the mechanism or combination of mechanism described in the patent or patents of the said Singer, then there is no infringement of the said patent or patents.

Second. Or, if the jury shall find that in reference to the plaintiffs' first, third, fourth and fifth patents, which claim the invention of combinations of certain mechanism to produce certain results, the defendants use only one or two of the mechanical devices described by the plaintiffs, or two combined with a third, which is substantially different in form or in the manner of its arrangement or connection with the others, there is then no infringement of plaintiffs' said patents; for the two combinations are not the same if they substantially differ from each other in any of their parts.

Third. Or, if the jury shall find that in any or all of the patents of the said plaintiffs, the specifications are not in such full, clear and exact terms as to enable any one skilled in the art of making sewing machines to construct and use the sewing machine, or device therein described, without experiments of his own, then such patent or patents, so far as that specification and claim is concerned, is or are void, and no recovery can be had thereon.

In examining the question the jury are to look at the drawings as well as to the specifications, for they are a part of the description of the thing patented; also to the state of the art at the time of the invention, and the knowledge of previous improvements in sewing machines which were then in general use.

But if, from the specifications and drawings taken as a whole, any person skilled as aforesaid, could construct and use the sewing machine or device therein described, without invention of his own, which would attain the result claimed for it in the said patent, then the said patent is good, although there may be a mistake in describing the action of some part of the machinery, but which mistake could be easily discovered by the mechanic when he came to examine the same.

Fourth. Or if the jury shall find that the invention or inventions claimed by the said plaintiff (Singer) in any or all of said patents, as new and original with himself, had been known and used in this country before their discovery by the said plaintiff, to accomplish the same results, or that before such discovery by plaintiff, the same had

been patented in Great Britain, then the said patent or patents is or are void, and no recovery can be had thereon.

And in examining this question, the jury, in order to ascertain what had been previously invented, have the right to look, not only to the machines offered in evidence by the defendants, but to the specifications in the patent office, to drawings and models filed to describe and illustrate the invention claimed in the several prior patents, and in determining whether there has been a prior invention sufficient to invalidate any one of the said patents of the plaintiffs, it is not enough that another person should have conceived the idea of effecting what the patentee actually accomplished; for the law is, that whoever first perfects a machine and brings it into useful operation, is entitled to the patent and is the real inventor, although others may previously have had the idea, and made some experiments toward putting it in practice.

Fifth. But if the jury shall find that the results attained by the mechanism or combinations of mechanism described in the patent or patents of the said plaintiffs were new and useful, and that the said Singer was the first and original inventor of the said mechanical devices or combination of mechanism which produced the same; and shall further find that the defendants, in the construction of their sewing machines, use a mechanism or combination of mechanism substantially the same as that described in all or any of the said patents of the said plaintiffs, and to accomplish the same results; and that the mechanism or combination of mechanism used by defendants varies from that described in plaintiffs' patents only in immaterial respects, or by the substitution of other known equivalent mechanical powers for those mentioned in plaintiffs' specification, then the defendants have infringed the patent or patents of the said plaintiffs, if the jury shall find them to have used the same without the license or consent of the said plaintiffs—and that in comparing the machines of the defendants with the inventions of the plaintiff, the mere change in the form of machinery, or an alteration of some one of its unessential parts, or in the use of known equivalent powers, not varying essentially, the machine or device, or its mode of operation or organization, will not make the defendant's machine or device a new invention.

Sixth. And if the jury shall find that any or all of the inventions claimed by the said plaintiffs in the said patents was or were new and original with them; and that the specifications in the said patent or patents are in such full, clear, and exact terms as to enable any one skilled in such machinery to make and use the sewing machine or device therein described, without invention of his own; and shall further find that any or all of the same have been substantially used by the said defendants in the construction of their sewing machines, without the license or consent of the said plaintiffs, then the said plaintiffs are entitled to recover in this action—on the patent or patents that the jury may find to have been infringed.

And that the jury, under this instruction, in examining the question of infringement by the defendants by the construction of their sewing machines, will be guided by the rules which I have stated in the fifth instruction.

And in order to find for the plaintiffs, in any one of the patents that have been offered in evidence, it is not necessary that the jury should find that the defendants have infringed all the claims, if there be more than one in the particular patent, but it is sufficient if any one of such claims have been infringed by them.

Seventh. The patents offered in evidence by the plaintiffs, are prima facie evidence that Isaac M. Singer was the first and original inventor of the various improvements described in the specifications attached to and forming part of said patents; and the burden of proving the contrary is upon the defendants; and that in reference to the patent of November 4, 1856, the date of the application for such patent must be taken to be the 18th of October, 1850, the date of the original application, because it appears from the record from the patent office, that the same never was withdrawn, and abandoned by the said Singer, by a written notice to that effect, filed in the patent office, or in any other way.

Eighth. If the jury shall find, that the said third and fourth claims made by the patentee, Singer, in his patent of October 3, 1854, were for inventions not new and original with him, yet, if they shall find that they were included in the specification of said patent by mistake, accident, or inadvertence, and without any willful default or intent to defraud or mislead the public; in this case the said patent is good and valid for so much of the invention or discovery described in the specification as the jury shall find to be truly and bona fide the invention or discovery of the said patentee.

But as no disclaimer has been entered in the patent office before this suit was brought, if the jury shall find for the plaintiffs on this instruction, and for the reasons therein set forth, they can not recover costs against the defendants on this count, although the infringement should be proved.

But if the jury find, that when Singer applied for his reissued patent of October 3, 1854, he well knew that he was not the first inventor of the invention mentioned in the third and fourth claims in said patent, or either of them, then the said patent is void, and no recovery can be had thereon.

Ninth. If the jury find that the devices used by the defendants in the construction

of their sewing machines, are the same which have been patented to William C. Hicks, by letters patent, dated November 8, 1859, and no interference was declared by the patent office between said Hicks and Singer; or that the result of the mechanism used by the defendants is greatly superior to that described and claimed in the patent or patents of the plaintiffs, these facts may be considered by the jury as tending to prove that the mechanism or device used by the defendants is a new invention, substantially different from that described in the patent or patents of the plaintiffs; to be considered, however, in connection with all the other evidence upon the subject of infringement.

Tenth. If the jury shall find that the plaintiff, Singer, had surreptitiously or unjustly obtained a patent for that which was in fact invented or discovered by another, who was using reasonable diligence in adapting and perfecting the same, such patent is void—or if the jury shall find that prior to the alleged invention by Singer, of the combination of the spring-arm guide with the two bridles and the needle-carrier, the same combination, or substantially the same, had been invented and described by Walter Hunt, in a written deposition, in terms sufficient to enable a mechanic skilled in making sewing machines, at that time, to construct the said improvement without invention of his own; and that such invention and description was well known to the said Singer when he applied for the said patent, the said patent is void, and no recovery can be had thereon.

The jury found a verdict for the defendant.

SINGER (WICKERSHAM v.). See Case No. 17,610.

Case No. 12,901.

SINGER v. WILSON.

PATENTS—PRACTICE—OYER.

Oyer of letters patent referred to in the declaration is not demandable as of right; being matter of record, the defendant can obtain them if he desires them.

[Cited in Law, Pat. Dig. 590, to the point stated above. Nowhere reported; opinion not now accessible.]

Case No. 12,901a.

SINGER et al. v. WOOSTER et al.

[N. Y. Times, Sept. 17, 1857.]

Circuit Court, S. D. New York. Sept. 12, 1857.

INFRINGEMENT OF PATENTS—PRELIMINARY INJUNCTION—SEWING MACHINES.

[A preliminary injunction against alleged infringement of the Singer patent, No. 10,974, for an improvement in sewing machines, denied upon the ground that, upon the facts shown, infringement was doubtful.]

[This was a bill in equity by Singer & Clark against G. H. Wooster and others to enjoin the infringement of letters patent No. 10,974, granted to Isaac M. Singer May 30, 1854.]

NELSON, Circuit Justice. This is a motion for an injunction for an alleged infringement of a patent granted to I. M. Singer for a new and useful improvement in sewing machines, on the 30th May, 1854. Among other improvements, the patentee claims an arrangement for the employment of lateral pressure, by means of a cam or lever, or the equivalent, to act against, and in combination with, the needle, at or near the end of its perforating motion, to insure the proper position of the needle, however flexible, that the looping apparatus (one hook) may enter properly between the needle and its thread. A peculiar description of the arrangement is given by the patentee, and it is not denied but that it is new and useful, and especially so in the working of the machine of the patentee.

The only question raised upon the motion on the part of the defendants is as to the fact of infringement. The affidavits are contradictory upon this part of the case, the defendants' disclaiming the use of the cam, or its equivalent, for the purposes specified in the complainants' patent. It is admitted that in the old machines, the needle, as it passed through the cloth, entered a groove for the purpose of supporting it in a vertical position, so that the hook or crossing apparatus would not draw it out of line; and it is claimed that this is the only use of the cam or breast-plate in the defendants' machine. The groove on the cam of the complainants' machine is rounded at the entrance, so as to deflect the needle and place it firmly in a position so as to insure the action of the hook in the loop and prevent the failure of the stitch. It is this arrangement which the defendants deny was used in their machine. They allege that it is unimportant to have the needle touch the bottom of the groove, and that the only use of it is to prevent its being drawn out of line laterally. This is prevented by the sides of the groove. Several of the defendants' machines were produced in court, but it is difficult to determine the question on mere inspection. It is certain that the cam or groove-plate in the defendants' machine is so constructed that a slight change would give to the machine the benefit of the complainants' arrangement. Whether it is necessary or not to the working of it, I am unable at present to say, or whether it is worked with the change so as to use this arrangement is not clear upon the affidavits.

We shall, for the present, deny the motion for the injunction, but with liberty to the complainants to renew it upon further evidence, if in the manufacture of the machines of defendants the arrangement in question is found or used. Motion for injunction denied.

SINGER MANUF'G CO. (FLORENCE SEWING-MACH. CO. v.). See Cases Nos. 4,884 and 4,885.

Case No. 12,902.

SINGER MANUF'G CO. v. LARSEN.

[3 Ban. & A. 246;[1] 8 Biss. 151; 13 Chi. Leg. News, 59.]

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

TRADE NAME—DESIGNATING MECHANISM—INTENT TO DECEIVE.

1. If a sewing-machine has acquired a name which designates a mechanism or a peculiar construction, parts of which are protected by patents, other persons, after the expiration of the patents, have the right to construct the machine and call it by that name, because that only expresses the kind and quality of the machine.

[Cited in Singer Manuf'g Co. v. June Manuf'g Co., 41 Fed. 212.]

2. There can be no trade-mark for the name "Singer Sewing-Machine."

[Cited in Brill v. Singer Manuf'g Co., 41 Ohio St. 131.]

3. Although a person not connected with the Singer Manufacturing Company would have the right, after the patents have expired, to make a Singer sewing-machine and call it by that name, still, he would not be permitted to do any act, the necessary effect of which would be to intimate, or make any one believe, that the machine which he constructs and sells is manufactured by that company.

[Cited in Waterman v. Shipman, 130 N. Y. 311, 29 N. E. 111.]

[This was a bill in equity by the Singer Manufacturing Company against Nels Larsen.]

William H. King, for complainant.

W. B. Scates, for defendant.

DRUMMOND, Circuit Judge. Under the evidence in this case, I think there can be no doubt that the plaintiff cannot claim the exclusive right to manufacture the "Singer Sewing-Machine." All that it can claim is to make a machine of its own peculiar manufacture, with a device in the nature of a trade-mark. Otherwise, after a patent has expired which has established the nomenclature of a sewing-machine, as the Howe patent, or the Wilson patent, the patentee might go on and have the benefit of the patent indefinitely.

On a machine called the "Singer Sewing-Machine," there were various patents. These patents have all expired, and nothing can, therefore, be claimed under them. Other persons cannot be prevented from manufacturing a machine like the Singer sewing-machine, and which may be called, to distinguish it from other machines, "Singer's Sewing-Machine." If a sewing-machine has acquired a name which designates a mechanism or a peculiar construction, parts of which are protected by patents, other persons, after the expiration of the patents, have the right to construct the machine and call it by that name, because that only expresses the kind and quality of the machine. I have read the reports of the case of the Singer Manuf'g Co. v. Wilson [Case No. 12,901], originally decided by the master of the rolls in England. and afterward on appeal, in the chancery division of the high court of justice, and again, on appeal from the latter court to the house of lords, and I do not think it is necessary to controvert the general rule there laid down—that there must be something to indicate that the thing manufactured is not the same as that of the complainant, in other words, to show it is not manufactured by the plaintiff. That is, it is a question of manufacture, not of name. A person could not claim a right to construct a peculiar form of barrel as to dimensions and capacity merely, irrespective of any marks or brands impressed upon it. That of itself could not be a lawful trade-mark. The same rule would be applicable to the construction of a wagon or carriage, which, owing to some peculiarity, might possess a particular name, as that of the manufacturer. A man might construct a wagon or carriage precisely like it, and he would not be liable if he did not claim in some form that it was constructed by the manufacturer. The only principle upon which an action can be sustained under such circumstances, as I understand, is through a trade-mark. If there were a valid trade-mark called a "Singer Machine," then there would be some force in the plaintiff's claim. Here the plaintiff and the defendant have a trade-mark somewhat similar, and if there is on the machine manufactured by the plaintiff a valid trade-mark to indicate that it is of the plaintiff's manufacture, no one else ought to be permitted to put anything on his machine to show that it has been manufactured by the plaintiff; that is, to use the same trade-mark. It may be the defendant has made his machine to imitate the plaintiff's, and to induce people to believe that it is the same. But, as I have said, I do not think, under the circumstances of this case, there can be a trade-mark for the name "Singer Sewing-Machine."

An illustration is furnished in the opinion of the lord chancellor in the house of lords, in the case already referred to. A carriage called a "brougham" had been in very general use for many years. If that were devised by a man of the same name, so that, from its peculiarity of construction, it was generally known by that name, it certainly cannot be claimed that the man who devised it, or his assignees, would have a sole right to construct a "brougham" for all time to come. If no patent existed upon it or any of its parts, any one who has the requisite skill could construct just such a "brougham" as was originally constructed. There could in such a case be no trade-mark which the law would protect in the name "brougham;" and I therefore do not think that the opinion of the house of lords can be construed to mean what is claimed by the counsel of the plaintiff in this case. So that, while I hold that the defendant is not

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

prevented from constructing a "Singer Sewing-Machine," still, he cannot be permitted to do any act, the necessary effect of which will be to intimate, or to make any one believe, that the machine which he constructs and sells is manufactured by the plaintiff. Neither has he the right to use any device which may be properly considered a trade-mark, so as to induce the public to believe that his machine has been manufactured by the plaintiff, and, therefore, I shall modify the injunction in this case by simply requiring the defendant to refrain from selling any Singer sewing-machines manufactured by any person or company other than the plaintiff, without indicating in some distinct manner that the said machines were not manufactured by the Singer Manufacturing Company.

Case No. 12,903.

SINGER MANUF'G CO. v. MASON.

[5 Dill. 488.] [1]

Circuit Court, D. Kansas. 1879.

ATTACHMENT — BOND — RESIDENT SURETIES — REVISED STATUTES, SECTION 915—AMENDMENT—NEW BOND.

A plaintiff in an attachment suit in the federal court must furnish security in the same manner as to amount and the qualification and residence of the sureties that the laws of the state require to be furnished if he were proceeding in the courts of the state. Rev. St. § 915.

Motion by defendant [Washington Mason] to discharge the property attached.

Ruggles, Hentig & Sperry, for the motion.
Johnson & Davis, opposed.

DILLON, Circuit Judge. The statute of Kansas provides that no order for the attachment of property shall be issued by the clerk until an undertaking is filed, with one or more sufficient sureties (Code, § 192), and such "surety must be a resident of the state of Kansas" (Id. § 724). An order of attachment was issued by the clerk of this court on an undertaking signed by a single surety, who was and is a resident of the state of Missouri. For this reason the defendant moves to discharge the attachment.

The Revised Statutes of the United States provide that the plaintiff "shall be entitled to similar remedies, by attachment or other process, against the property of the defendant provided by the laws of the states; * * provided, that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment." Rev. St. § 915.

It is our judgment that the plaintiff seeking an attachment in this court against the property of the defendant is required by this section to furnish security in the same manner as to amount and the qualification and residence of the sureties that he would have to furnish if he were proceeding in the state court. This result is not inconsistent with the point ruled in the case referred to in Woolworth's Reports, decided by Justice Miller.[2]

The motion to discharge the property attached will be sustained, unless the plaintiff will substitute a sufficient undertaking, with resident sureties, within a reasonable time—say fifteen days. There is no statute in Kansas which prohibits such an order, and the statute of amendments, federal and state, is sufficiently liberal to warrant the making of such an order.

Ordered accordingly.

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

[2] [See Souter v. La Crosse R. Co., Case No. 13,180.]

Case No. 12,904.

SINGER SEWING-MACH. CO. v. UNION BUTTON-HOLE & EMBROIDERY CO. et al.

[Holmes, 253; [1] 4 O. G. 553; 6 Fish. Pat. Cas. 480.]

Circuit Court, D. Massachusetts. Sept., 1873.

INJUNCTION — TO RESTRAIN DISSOLUTION OF CORPORATION—CONTRACT.

1. An injunction may be granted to restrain acts in violation of a lawful contract, although the nature of the contract is such that specific performance cannot be enforced.

[Cited, contra, in Bickford v. Davis, 11 Fed. 550. Cited in Goddard v. Wilde, 17 Fed. 846; Chicago & A. Ry. Co. v. New York, L. E. & W. R. Co., 24 Fed. 522; Gally v. Colt's Patent Fire Arms Manuf'g Co., 30 Fed. 122; Brush-Swan Electric L. Co. of New England v. Brush Electric Co., 41 Fed. 169.]

[Cited in Steinan v. Gas Co., 48 Ohio St. 333, 27 N. E. 545.]

2. A court of equity may restrain by injunction, acts in violation of an existing lawful contract, although it is terminable at the option of one of the parties only; unless the contract is of such a nature that the reservation of the right so to terminate makes the whole contract inequitable.

3. A corporation, the owner of certain patents, granted an exclusive license to the complainant to sell machines containing the patented inventions, and agreed to furnish the machines at a certain price. After furnishing many machines, the corporation, without fault of complainant, refused to deliver more; assigned the patent to one having knowledge of the contract, in trust for another association; and took measures for its own dissolution. On bill in equity by the licensee, a preliminary injunction was granted restraining the corporation from dissolving its organization, and the assignee in trust of the patents from transferring them.

[Cited in Goddard v. Wilde, 17 Fed. 846.]

[Cited in Wm. Rogers Manuf'g Co. v. Rogers, 58 Conn. 364, 20 Atl. 468.]

The bill alleged that the defendant company was, in 1866, the owner of certain patented inventions embodied in a machine for making button-holes, and owned a factory,

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

&c., for making the machines; and that, being desirous to bring the same into notice and to secure a market, they made a contract with the complainant, then a corporation of established reputation and large business in this country and in foreign countries, by which the complainant was to be the sole and exclusive agent for the sale of these machines, excepting in France and the city of Boston, and was to supply the market and to use certain means and facilities at its command for this purpose; and the defendant company was to furnish the complainant with machines, as called for, up to the full capacity of the factory, at a certain agreed price to be paid monthly in cash. It further charged that the complainant had bought and paid for one thousand machines, and had succeeded, with much labor and expense, exceeding the profit obtained, in selling these machines; and that a market had been made mainly, if not wholly, by its exertions; that the defendant company now neglected and refused to deliver any more machines, though requested; and were taking measures to dissolve their association for the purpose of avoiding their contract with the complainant, and in pursuance of that intent had conveyed the patents to the defendant Wood, as trustee for a voluntary and unincorporated body of persons unknown, called the Button-Hole Sewing-Machine Company; that said Wood had been the treasurer of the defendant company, and was fully informed of the complainant's rights. The prayer of the bill was for a decree for specific performance; and an injunction against the transfer of the patents by Wood, and against the dissolution of the defendant company, and the manufacture and sale of the machines excepting in conformity with the contract.

The agreement between the complainant and defendant companies contained this clause: "That the agency aforesaid shall continue so long as the patent or patents for said machine have been or may be granted or extended, provided that the Singer Manufacturing Company shall fairly and reasonably conduct such agency, and shall continue to supply the market with machines as aforesaid, and shall not engage in selling any other button-hole machines than those manufactured by the Union Button-Hole and Embroidery Machine Company; but in case the Singer Manufacturing Company shall fail to carry out their agreements as herein expressed, the forfeiture of such agency shall be considered the only penalty for such failure."

E. Merwin, for complainant.

H. G. Parker and E. S. Mansfield, for defendants.

The contract is not one that the court can enforce from the nature of the business. Garrett v. Banstead & E. D. Ry. Co., 11 Jur. (N. S.) 591; Munro v. Wivenhoe & B. R. Co., 13 Wkly. Rep. 880. It will not be enforced, because it is without mutuality. Geiger v. Green, 4 Gill, 472; Duvall v. Myers, 2 Md. Ch. 401; Bronson v. Cahill [Case No. 1,926]; Benedict v. Lynch, 1 Johns. Ch. 373; Rogers v. Saunders, 16 Me. 92; Woodward v. Harris, 2 Barb. 439; Phillips v. Berger, 8 Barb. 527; Marble Co. v. Ripley, 10 Wall. [77 U. S.] 339.

LOWELL, District Judge. There is no dispute that the two companies, complainant and defendant, made the contract, A, annexed to the bill, by which the former is to have the exclusive right of selling the patented machines, excepting in two excepted localities; that the defendant Wood had full knowledge of the contract, and that the defendants are about to carry out a course of action which will have a strong tendency, to say the least, to defeat the contract. In such a state of things a court of equity readily grants an injunction until the merits of the case can be inquired into, because, if it refuses to interfere at first, rights may be acquired and innocent third persons may become interested in the property in a way that will embarrass the final action of the court, and perhaps work injustice to those innocent persons. It is the direct opposite of a case in which the court is asked to interfere with existing rights upon the strength of some supposed paramount title, and to break up an established order of things. Here the defendants are breaking the established order, and are the actors in fact, and the court is asked to keep things as they are and were agreed to be, until the full evidence is taken. "It is certain," said a learned lord chancellor, speaking of a case of this kind, "that the court will in many cases interfere and preserve property in statu quo during the pendency of a suit in which the rights to it are to be decided, and that without expressing, and often without having the means to form, any opinion as to such rights." He then cites several authorities, and continues: "It is true that the court will not so interfere if it thinks there is no real question between the parties; but, seeing there is a substantial question to be decided, it will preserve the property until the question can be disposed of. In order to support an injunction for such a purpose, it is not necessary for the court to decide upon the merits in favor of the plaintiff." Great Western Ry. Co. v. Birmingham & O. J. Ry. Co., 2 Phil. Ch. 602. The decision of this motion, then, depends upon whether the complainant has made such a reasonable prima facie case for the relief, or some substantial part of the relief, which it seeks, that it is fairly entitled to maintain the status quo. Upon the matters of fact I find that they have such a case.

The two points of law are not without difficulty. The relief asked is specific performance and injunction. It is argued with great ability by the defendants, that the complainant is not entitled to specific performance, and that, therefore, it cannot have an injunction which is merely auxiliary. Granting the premises, I am not prepared to concede the

conclusion. If the court cannot order a contract for the making of button-hole machines to be specifically performed by reason of the impossibility of superintending the details of such a business, it does not follow that the bill may not be retained as an injunction bill. It was formerly thought that an injunction would not be granted to restrain the breach of any contract, unless the contract were of such a character that the court could fully enforce the performance of it on both sides. Upon this ground there were many decisions refusing to interfere with contracts for personal services, however flagrant might be the breach of them. Kemble v. Kean, 6 Sim. 333; Kimberley v. Jennings, Id. 340; Baldwin v. Society for Diffusion of Knowledge, 9 Sim. 393, in which the courts refused to restrain actors and authors from violating their engagements, because they could not oblige them specifically to keep them. But all these cases were overruled by one of the ablest chancellors who has adorned the woolsack, in Lumley v. Wagner, 1 De Gex, M. & G. 616. In that case a singer had agreed to sing at the plaintiff's theatre for three months, and not to sing at any other, and the court enjoined her from performing at a rival establishment, though it was clear and was admitted that the court could not oblige her to sing for the plaintiff. This case was fully in accord with Morris v. Colman, 18 Ves. 437, which had been disregarded or explained away in many of the intervening cases. It is now firmly established that the court will often interfere by injunction when it cannot decree performance. Thus it is said that the writ may issue to restrain the use of a ship contrary to an agreement for charter, though the agreement was not personally binding on the defendant, who was a mortgagee. De Mattos v. Gibson, 4 De Gex & J. 276; that a tenant may be restrained from doing any thing which will prevent the demised premises being used as an inn, though he cannot be forced to keep the inn as he had covenanted to do. Hooper v. Brodrick, 11 Sim. 47; that where two railway companies had made an agreement for the use by each of the road of the other, the court might enjoin the obstruction of such use by one of the parties, though it could not enforce full performance of the whole agreement. Great Northern Ry. Co. v. Manchester, S. & L. Ry. Co., 5 De Gex & S. 138. The case of Lumley v. Wagner, 1 De Gex, M. & G. 604, has been followed in numerous cases concerning actors, authors, and publishers. Webster v. Dillon, 5 Wkly. Rep. 867; Stiff v. Cassell, 2 Jur. (N. S.) 348. The case of Fechter v. Montgomery, 33 Beav. 22, sometimes cited as opposed to these decisions, is not so at all; the decision there was, that the actor had the right to renounce his engagement because the manager had not fulfilled his part of the contract. See, also, Slee v. Bradford, 4 Giff. 262; Rolfe v. Rolfe, 15 Sim. 88. Dietrichsen v. Cabburn, 2 Phil. Ch. 52, has much resemblance to the case at bar. The defendant owned a patent medicine, and appointed the plaintiff his wholesale agent for the sale of it, and agreed to supply him with all the medicine he should order at forty per cent discount from the current retail price, and covenanted not to sell to any one else at a greater discount than twenty-five per cent above that current price. On demurrer, the lord chancellor, overruling the vice-chancellor, sustained the bill which sought to enjoin the defendant from selling to any one else at less than the agreed discount, and for an account. It is plain, I think, that the decision would have been the same if the defendant had agreed not to sell to any one else on any terms. This case virtually overruled Hills v. Croll, Id. 60, decided a year earlier. See the able note of the reporter at the end of the last-mentioned case. These are but a few of the decisions, though they are among the most important of them.

This is certainly a subject upon which it is almost impossible to reconcile the decisions, and of such inherent difficulty, that I know of no other in which the appellate courts have so often reversed the decisions below. I have examined a great many of the cases, and some apparent contradictions may be understood by recollecting that the granting or refusing an injunction is scarcely ever a matter of strict right, and that any attempt to lay down precise and invariable rules on the subject must necessarily fail. There are many cases in which injunctions have been refused in behalf of the employed, when, upon the precedent of Lumley v. Wagner, and that class of cases, they would have been granted to the employers. This seems unequal. The explanation, such as it is, appears to be, partly, that courts of equity are unwilling to force upon any one an agent or servant who is personally disagreeable, if the relation between the parties is at all a personal or confidential one; and partly, that, on the part of the agent or servant, the remedy at law is usually adequate, both from the nature of the contract and the standing of the parties. See Mair v. Himalaya Tea Co., L. R. 1 Eq. 411; Johnson v. Shrewsbury & B. Ry. Co., 3 De Gex, M. & G. 914. There are other cases which I can reconcile with those I have above cited, only on this ground, that where the subject-matter or business is of public importance, such as the management of a railway, the courts will not risk a total stoppage of the business by injunction when they cannot go forward and regulate the whole matter by a decree for specific performance. Peto v. Brighton, U. & T. W. Ry. Co., 11 Wkly. Rep. 874; Johnson v. Shrewsbury & B. Ry. Co., 3 De Gex, M. & G. 914.

I think the fair result of the later cases may be thus expressed: If the case is one in which the negative remedy of injunction will do substantial justice between the parties, by obliging the defendant either to car-

ry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it. It seems to me that this case comes easily within this rule. The court cannot, perhaps, superintend the performance of a contract to manufacture machines, but it can restrain the defendants from selling in violation of their agreement.

The case may also be looked at in another view, which was presented in the complainant's argument. This is not only an agreement between the parties, that certain things shall be done by them, but it is also the grant of an exclusive license (excepting for France and Boston) to the complainant to sell the patented machines. And it has never yet been doubted that the court could restrain all persons, whether they were acting with or without notice, and whether bound by contract or not, from trespassing on such a title.

But it is said to be fatal to the complainant's case that the contract is not a mutual one. This want of mutuality is found in the article which limits the penalty for a forfeiture on the complainant's part to a mere loss of the agency. This is said to be equivalent to an agreement that the complainant may renounce at any time; and so it is argued that only one party is bound to this agreement. It is no doubt true, in general, that where only one side is bound to an agreement which remains wholly executory, a court of equity will not usually interfere to enforce the agreement against the party who is bound. The simplest case of this kind is where an infant is one party to a contract for the sale of land. The reason given is, that the party who is not bound would enforce the contract if for his advantage, and repudiate it if the contrary. Lawrenson v. Butler, 1 Schoales & L. 13. The doctrine is often invoked in that class of cases. But there are innumerable cases where the party seeking performance is no longer bound to any thing, having paid the consideration in the outset, or performed his part, or where the plaintiff does not rest on a contract wholly executory, to which this doctrine does not apply. I have some doubt of its application to this case. Supposing the stipulation to mean, what the defendants contend it does, that the complainant may renounce at any time, which may be doubted, still, if the defendants, for valuable considerations, have given the complainant an exclusive license until it forfeits it, I do not see why a court of equity should not protect that license by its injunction, as usual, so long as it is not forfeited. A very strong case was cited from [Marble Co. v. Ripley] 10 Wall. [77 U. S. 339], in which the supreme court refused to decree the specific performance of a contract for quarrying marble, &c., on the ground, among several others, that the plaintiff had the right to give up the arrangement on a year's notice. I cannot think that the court intended to announce any general proposition that they would never enforce a contract which one party had a right to put an end to in a year. Every thing must depend upon the nature and circumstances of the business. In many of the cases that I have cited, the plaintiff had it in his power to end the contract. It is certainly competent to the parties to make a contract which will be equitable and reasonable, and in which their rights ought to be protected while they last, though it may be terminable by various circumstances, and though one party may have the sole right to terminate it, provided their stipulation is not one that makes the whole contract inequitable. In the note which I have above referred to in the case of Hills v. Croll, the learned reporter thinks it quite clear that a contract by the defendant to buy all his acid of the plaintiff, so long as the plaintiff chose to deal with him, would be valid, and would be enforced by injunction. In Rolfe v. Rolfe, 15 Sim. 88, the vice-chancellor notices the fact, that the plaintiff could stop his own business when he chose, and thereby deprive the defendant of the employment agreed on, yet he restrained the defendant in the mean time from working for a stranger.

The remedy by injunction is a very elastic and adaptable one, and there is no sort of difficulty in granting it, until, by a change of circumstances, it shall appear that it ought to be dissolved. A bill may be retained for that purpose for any number of years that may be requisite. The argument, to be sound, must go this length, that, after the complainant has ordered a thousand machines, and paid for them, and is selling them in all the countries of the world excepting France, there is no adequate remedy against the defendants' underselling in all those markets. I do not mean to be understood that this point would not apply to an injunction bill as well as to one for specific performance, nor that it is not a doubtful one. But the contract contains in itself, as we have seen, not only executory agreements on both sides, but a present grant, for value, of the exclusive right to sell; and my present impression is, that such a grant is good, and is to be enforced, so long as it lasts, whether the remainder of the contract is mutual or not, provided the whole contract, including the grant, is not so unequal as to be void in a court of equity, which, as at present advised of the facts, I see no reason to hold.

It seems to me, therefore, that the complainant's case has a sufficient appearance of justice to require the court to keep things as they are, by restraining all conduct which will put it out of the power of the defendants to fulfil their contract, until the facts and law can be fully ascertained.

Injunction ordered.

SINGER MANUF'G CO. (WILSON v.). See Case No. 17,836.

SINGLETON (UNITED STATES v.). See Case No. 16,293.

Case No. 12,905.

SINGSTROM et al. v. The HAZARD.

[2 Pet. Adm. 384.] [1]

District Court, D. Pennsylvania. 1807.[2]

SEAMEN—WAGES—CAPTURE—RELEASE.

The mariners were taken from on board the Hazard by a French privateer, and the vessel sent into Cumana, and afterwards liberated. The seamen escaped from the privateer, and returned to the port of Philadelphia, some of them earning wages, others working their passages home. The Hazard performed her voyage, and returned to Philadelphia. The district court decreed wages to the seamen for the voyage, deducting whatever they had earned, after their separation from the Hazard.

"The libel of Erick Singstrom, Francis Summers, Cato Lewis and James Dyer humbly showeth, that your libellants shipped on board the schooner Hazard, N. D. Gardner, master, on the thirteenth day of April, in the year one thousand eight hundred and six, to perform a voyage from the port of Philadelphia to the island of St. Jago de Cuba in the West Indies, at the monthly wages of twenty-two dollars. That while they were proceeding on their said voyage, to wit, on the eighth day of May in the year aforesaid, the said schooner was captured by a French privateer, called the Superb, and your libellants were made prisoners, and taken on board the said privateer. That they remained on board the said privateer a considerable time, and until an opportunity offered of effecting their escape therefrom. That your libellants Francis Summers, and James Dyer, after incurring many hardships got a passage to New York on board the brig Thetis. That your libellant got on board the sloop Hannah, bound to New York, to which place he worked his passage. That your libellant Erick Singstrom was kept on board the said privateer until she went to the port of Cumana, where he found the said schooner Hazard, she having been liberated by the French, after being carried into Cumana. That as soon as he the said Erick found the said schooner in the said port of Cumana, he made his escape from the said privateer, and went on board the said schooner Hazard, and returned therein to the port of Philadelphia. That your libellants lost all their clothes, and received no wages whatever, except your libellant Erick Singstrom received four doubloons from the captain of the said privateer for repairing his mast, there being no person on board capable of doing it. That your libellants were forced from on board the said schooner by a superior power, and greatly contrary to their will; and they are therefore entitled, by the maritime law and the customs and usages of nations to their wages, as if they had been actually on board the said schooner. That the said schooner arrived at the port of Philadelphia after performing her destined voyage, on the thirteenth day of November in the year aforesaid. That there are due to your libellants Francis Summers, Cato Lewis and James Dyer respectively, the sums of one hundred and thirty-two dollars; and your libellant Erick Singstrom, deducting the four doubloons, (or sixty-four dollars) the sum of sixty-eight dollars. That the said schooner is now lying in the port of Philadelphia, and within the jurisdiction of this honourable court. Wherefore, your libellants pray, that she may be attached, condemned and sold, together with her tackle, apparel and furniture, for the payment of the aforesaid wages, according to the laws of the United States, and the usages and customs of maritime courts; and they will ever pray, &c.

"Jno. L. Leib,

"Proctor for the Libellants."

Answer:

"The answer of Callender and Shipley, owners of the schooner Hazard, to the bill and libel filed of Erick Singstrom, Francis Summers, Cato Lewis and James Dyer who have attached the said schooner by process from this court.

"Your respondents reserving to themselves now and at all times hereafter, all manner of advantage and benefit of exceptions that may be had and taken to the many untruths, uncertainties, insufficiencies and imperfections in the said complainants' libel, for a full and perfect answer thereto, or to such parts thereof, as it materially concerns the respondents to make answer, they answer and say, That true it is the libellants shipped as stated in the libel, on board the schooner Hazard, on the thirteenth day of April, one thousand eight hundred and six, at the rate of twenty-two dollars per month, to perform a voyage from the port of Philadelphia to the island of St. Jago de Cuba, in the West Indies, and home. That while they were proceeding on the voyage aforesaid, to wit, on the eighth day of May in the year aforesaid, the schooner aforesaid with the libellants were captured by a French privateer, called the Superb, and the libellants were carried as prisoners in the first instance, on board the privateer aforesaid, and continued on board during a cruize the privateer made, on which cruize the privateer captured and made a prize. That the libellants severally did duty on board the privateer aforesaid, more especially and particularly Erick Singstrom, who remained on board the aforesaid privateer until she arrived at Barracoa, in Cuba, at which place the schooner aforesaid, owned by your respondents, was then lying under the com-

[1] [Reported by Richard Peters, Jr., Esq.]

[2] [Affirmed by circuit court; case unreported.]

mand of N. D. Gardner, when and where the aforesaid Erick Singstrom returned to the schooner aforesaid, and solicited and requested of the said captain N. D. Gardner, the commander of the said schooner, to carry him the said Erick as a passenger to work his passage back to Philadelphia, on board the said schooner, to which proposition the said captain N. D. Gardner agreed, and brought back the said Erick in the capacity aforesaid. The respondents give the honourable court to understand and be informed, that the said Erick Singstrom, one of the libellants, acknowledged the captain of the privateer aforesaid had given him several doubloons, to wit, the number of four, (or sixty-four dollars,) for work, labour and service done as a ship carpenter, in fishing or mending a mast that had been shattered or splintered in an engagement. And that he the said Erick had actually received two shares of prize-money from the proceeds of the capture made by the Superb, during the time the said Erick, one of the libellants, had been on board the privateer aforesaid called the Superb. The said Erick, one of the libellants, further acknowledged and declared, that the commander of the privateer aforesaid called the Superb, offered him the said Erick one of the libellants aforesaid, three shares of prize-money of such vessels as they should capture, if he would again go on board the privateer aforesaid upon another cruize, but the said Erick the libellant aforesaid refused. Your respondents also inform the honourable court that the other libellants, to wit, Francis Summers, Cato Lewis and James Dyer received and divided a share of prize-money of the prize or prizes so captured by the privateer Superb aforesaid. All which matters and things these respondents are ready to aver, maintain and prove to this honourable court.

"Your respondents therefore pray the honourable court that the said schooner Hazard, her tackle apparel and furniture may be discharged with reasonable costs and charges in this behalf by these respondents wrongfully sustained. Samson Levy,

"Proctor for the Respondents."

Replication:

"And the said libellants reply and say, that by any thing in the said respondents' answer to these complainants' libel, they ought not to be prevented from the recovery of their wages in their said libel demanded, because they say, that all and singular the matters and things by them in their libel aforesaid set forth are just and true, and this they are ready to verify. Wherefore they pray as before they have prayed.

"Jno. L. Leib,

"Proctor for the Libellants."

Before PETERS, District Judge.

The district court ordered the payment of wages to the seamen until the return of the Hazard to Philadelphia, deducting the sums they had earned or received after they were taken from the Hazard and until their return to Philadelphia. From this decree the respondents appealed to the circuit court of the United States for the district of Pennsylvania, and the appeal was heard by the Honourable Judge WASHINGTON, at the April sessions, 1807. The decree of the district court was affirmed. [Case unreported.]

NOTE. By the result of the case of Singstrom et al. v. The Hazard, it must be perceived, that the allegations in the respondent's answer were not satisfactorily proved. One of the mariners (I think rather the carpenter) acknowledged the receipt of a sum of money, while he was a prisoner, for work in the way of his trade, which was credited to the owners of the Hazard. A conduct so unneutral and base as that of entering on board a privateer, would have met with the discouragement with which such misdemeanors of our seamen have always been treated. Few instances of this kind have ever appeared in proof. I have constantly denied wages, where the facts have, in any reasonable degree, been made out. In one or two cases it has appeared, that seamen of belligerents have been concealed in American ships, and opportunity afforded of escaping from their duty. I have deemed it incumbent on me to discountenance such illegal and improper acts, though they have not often occurred. In one case, I would not decree wages to such deserters; holding the contract, under such circumstances illegal; and not entitled to the aid of the court for its execution. If it were attended (as in the same case it was) with additional misconduct of unlawfully discharging the articled seamen, for the purpose of admitting the deserters at low wages, I have decreed wages for the voyage, to the seamen thus unlawfully discharged. No such practices, evidently reprehensible, ought to receive the support or countenance of a neutral court; whose duty it is, so far as it has power, to compel, by all the means it possesses, fair and impartial conduct in the citizens of a neutral country. Those who preserve a candid and irreproachable neutrality, have the stronger claims on belligerents for justice. It is no argument against doing right, that others do wrong. But it is an old maxim, both of law and reason, that he who seeks justice, should do it. It is often attempted to defeat the effect, and legal intent of the rule, that "mariners unlawfully discharged, or taken away by the vis major shall be paid full wages," by insisting, that mariners so discharged, or taken away, shall be bound to earn wages, and seek opportunities of so doing. This has never been considered as any legal objection to that rule. In the first instance, the payment of full wages is not only enjoined, by the maritime laws, as due by the contract, but it operates as a mulct, to punish the act of unlawful discharge; and to deter others from the like breaches of contract. It also proves the rule, that "equality is equity." The sailor forfeits by his desertion or malfeazance, and the master or merchant pays for his violations of the agreement. He who does the first wrong, is, on every principle, answerable for all consequences. In the latter case (seamen taken away) it is not often that those who are by force abstracted from their service, can obtain opportunities of profitably employing themselves. It is enough that they account for their earnings, if they obtain wages. If enquiries were permitted, to shew that they might have earned wages, controversies would be both perplexing, and endless. However severe it may seem, to those who seek for principles, only in individual gains or losses, the maritime laws view these subjects not only as they relate to contracts of individuals, but as they affect the general interests

of commerce, and the policy of maritime states. If neutral seamen, particularly, when carried off by belligerents, did not look to a recovery of wages when liberated, it would be a great temptation to many of them to indemnify themselves by entering on board privateers, or other belligerent ships. This offence they should not be incited to commit, by a privation of what their contracts entitle them to, when their ceasing to serve is not occasioned by their own, but by the act of another, whose power they could not resist. Seamen thus compelled by necessity, and elicited by hopes of gain, would assist (as do all renegades) the more willingly, in depredations on their own countrymen. Deprived of motives to return home, or deterred by fear of punishment, they would remain in foreign service; and thus commerce would also suffer, by a diminution of the numbers required for its prosperity. The national defence, too, might be enfeebled by their absence, if naval operations were required; and it is for this, quite as much as for commercial advantages, that the policy of maritime states encourages and protects seamen. The laws of such states, and the policy of their governments, by every means and inducement, invite mariners, whose erratic life weakens or extinguishes local attachments, to return to their country, and remain in its service; in peace, for its commercial wealth and prosperity; in war and danger, for its surest defence and protection.

Case No. 12,906.

SINN et al. v. UNITED STATES.

[14 Blatchf. 550.] [1]

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

CUSTOMS DUTIES — FAIR MARKET VALUE — MANUFACTURER.

S., through his agent, K., purchased, in England, unfinished goods, and, through K., had them dyed there by one man and made up by another. In each case S. paid the cost of the work. K. then invoiced the goods to S., at New York, at a price equal to the cost of purchase, dyeing and making up, with K.'s commissions added. Entry of the goods was made on such invoice, on the ordinary purchaser's oath, provided for by section 4 of the act of March 1, 1823 (3 Stat. 730; now section 2841 of the Revised Statutes). The valuation in the invoice was below the fair market value: *Held*, that the invoice and the oath ought to have been such as the statute requires from a manufacturer.

[Cited in U. S. v. Two Hundred and Eight Bags of Kainit, 37 Fed. 327.]

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

[This was an action by the United States against Samuel Sinn and others. From a verdict in the district court in favor of the United States (case unreported), error was brought.]

Sigismund Kaufmann, for plaintiffs in error.

Sutherland Tenney, Asst. Dist. Atty.

WAITE, Circuit Justice. Section 2841 of the Revised Statutes, which was in force when the seizure in this case was made, as section 4 of the act of March 1, 1823 (3 Stat. 730), provides, that, whenever merchandise imported into the United States is entered by invoice, one of three prescribed oaths, according to the nature of the case, shall be administered by the collector of the port, at the time of the entry, to the owner, importer, consignee, or agent. The first is the oath of a consignee, importer, or agent; the second, that of an owner, in cases where merchandise has been actually purchased; and the third, that of a manufacturer, or owner, in cases where merchandise has not been actually purchased. The last oath applies to all cases where the merchandise had not been purchased by the owner, or his agent, in the ordinary mode of bargain and sale. The oath, when goods had been actually purchased, was to the effect, that the invoice produced contained a just and faithful account of the actual cost of the goods, * * * of all charges thereon, "including charges of purchasing, carriages, bleaching, dyeing, dressing, finishing, putting up and packing," &c., while that when the goods had not been actually purchased was, that the invoice contained "a just and faithful valuation of the same, at their fair market value, including charges of purchasing, carriages," &c., (as in the other case.) On the arrival in New York of the goods now in question, they were entered by the claimants by invoice, and the ordinary purchaser's oath was taken. They were seized under the customs laws, as forfeited to the United States, and the information alleges, as cause of forfeiture: (1) That they were not invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties, &c. (2.) That the "invoice was made up with intent, by a false valuation, to evade and defraud the revenue, in this, that the goods, &c., mentioned therein, being subject to an ad valorem duty, and obtained by purchase, were falsely valued in the invoice, and were charged therein at a less price than the actual cost thereof," &c. (3.) That the invoice was also made up with like intent, in this, that the goods, &c., mentioned therein, having been obtained otherwise than by purchase, were falsely valued in said invoice, and were charged therein at a less price than the actual market value thereof at the time and place when and where the same were procured or manufactured, &c.

The case was tried before section 16 of the act of June 22, 1874 (18 Stat. 189), came into effect, which made actual intention to defraud an essential question in suits to enforce forfeitures under the customs laws. Upon the trial, the evidence introduced by the claimants showed, that the claimants, through their agent, M. Kaufman, purchased the goods, at Bradford, England, in an unfinished state, known to dealers as "in the grey." They then, through the same agent, had them dyed by one man and made up by another, in each case paying the cost of the work. Kaufman then invoiced the goods to

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

them at a price equal to the cost of purchase, dyeing and making up, with his commissions added. The entry was made upon this invoice. Testimony was offered by the government, clearly showing that the valuation in the invoice was below the fair market value. At the close of the testimony, the claimants asked the court to instruct the jury to find in their favor. This was refused, and the court did charge, that the question for the jury "to determine was, whether the actual cost of the goods was correctly stated in the invoices; that, if they did not believe, from the testimony, that the claimants made a bona fide purchase of the said goods from M. Kaufman, at the prices testified to, then the government was entitled to a verdict; that, if the claimants purchased the goods in the grey, and had them dyed at their own expense, and put up at their own expense, and did not buy them in a finished state, they were, in law, manufacturers, and not purchasers; that, in such event, the invoices should have stated the actual market value; and that there was no pretence that said invoices stated the actual market value." To this charge and refusal to charge exception was taken. A verdict having been rendered against the claimants, and judgment duly entered thereon, the case is here upon error. The errors assigned are: (1) That the court refused to charge the jury to bring in a verdict for the claimants. (2) That the court charged, that, if the claimants purchased the goods in the grey, and had them dyed at their own expense and put up at their own expense, and did not buy them in a finished state, they were, in law, manufacturers and not purchasers. (3) That the court charged, that there was no pretence that said invoices stated the actual market value.

Clearly, the claimants did not buy the goods "in the ordinary mode of bargain and sale." Kaufman was their agent to buy the unfinished article and have it dyed and made up. When he invoiced the goods, it was not as a sale, but as a statement of the result of his agency in purchasing the goods and causing them to be manufactured. The goods, when imported, were not in the same condition as when bought. Their value had been materially increased by what had been done by the manufacturers. For the purposes of entry, this increase is not to be measured by its cost, but by its effect upon the price of the article in the market.

The claimants are in no better condition than they would be if they had themselves bought the unfinished article in Bradford, and procured personally to be done just what Kaufman did. He was their agent, and his acts were their acts. The case is in no different position from what it would have been if the dyer or the finisher had made the original purchase, and had, by his own labor and skill, completed the work to be done. In such a case it could not seriously be claimed that he might enter the goods upon an invoice which fixed the valuation at the actual cost to himself, if that cost was below the actual market value of the finished article at the time.

It seems to be clear, therefore, that the invoice to be furnished, and the oath to be taken, were such as the law requires from the manufacturer. By section 2864 of the Revised Statutes, a re-enactment of section 1 of the act of March 3, 1863 (12 Stat. 738), if any owner, &c., of merchandise, knowingly makes an entry thereof by means of a false invoice, "or of any invoice which does not contain a true statement of all the particulars" by law required, the merchandise is subject to forfeiture. Every importer is presumed to know the law under which he makes his importations. In contemplation of law, therefore, when he makes an entry upon an invoice which does not state truly what the law requires, he knowingly does it. At the time of this seizure and trial, no question of actual fraudulent intent need be considered. Knowledge, actual or presumptive, was all that the courts need inquire into. If the forfeiture was incurred without wilful negligence, or any intention to defraud on the part of the owner, a remission of the forfeiture, or a restoration of the proceeds of the sale, might be obtained on timely application to the secretary of the treasury. Section 5292 of the Revised Statutes, and the several statutes from which that section was taken. In this condition of the law the charge as given was undoubtedly correct. If there was no wilful negligence in the case, or actual intention to defraud, the secretary of the treasury alone has power to relieve from the consequences of the apparent violation of the law.

This makes it unnecessary to consider the first assignment of error. As to the third, it is sufficient to say, that, if there was, in fact a pretence that the goods were invoiced at their market value, the preponderance of testimony is so decidedly the other way, that the judgment ought not to be reversed on that account. The testimony is all set forth in the bill of exceptions, and, if this part of the charge had not been given, and a verdict had been rendered in favor of the claimants, the court should promptly have set it aside. Under such circumstances, the judgment ought not to be reversed, even though, in fact, it was insisted that the evidence justified a contrary conclusion.

The judgment is affirmed.

Case No. 12,907.

In re SINNETT.

[4 Sawy. 250.][1]

District Court, D. Nevada. May 10, 1877.

BANKRUPTCY — HOMESTEAD — CREDITORS' LIEN — RIGHT TO ENFORCE.

1. The homestead of the bankrupt never comes within the jurisdiction of the bankruptcy court, and a creditor may enforce his lien thereon while the bankruptcy proceedings are pending.

2. The assignee should include the homestead in his report of exempt property.

[Cited in Re McKenna, 9 Fed. 36.]

[In the matter of Matthew Sinnett, a bankrupt.]

Lewis & Deal, for petitioner.

M. A. Kelton, for respondent.

HILLYER, District Judge. In this matter Lonkey & Smith, who claim to have a lien on the homestead of the bankrupt, have petitioned for leave to sue in one of the state courts for the purpose of enforcing their alleged lien. They also ask an order restraining the assignee from designating the premises as a homestead in his report of exempt property.

It is admitted that the premises in question are the homestead of the bankrupt. Being a homestead, no interest in it passes to the assignee by the assignment, nor is the title of the bankrupt thereto impaired or affected by any of the provisions of the bankrupt act. Rev. St. § 5045. Such exempt property never comes within the jurisdiction of the bankruptcy court.

I do not think that section 5106 of the bankrupt act should be so construed as to prohibit a suit against the bankrupt to enforce a lien on property of that description either in the state courts or elsewhere. Where a creditor claims a lien on property which passes to the assignee, the proper place to enforce it is the court of bankruptcy. Where, however, the lien is claimed on property which does not so pass, it would seem that no provision of the bankrupt act is violated by leaving the parties interested to prosecute their suit at any time. Such suits are wholly without the operation of section 5106, which must be held to prohibit only those suits against the bankrupt which relate to property, or rights of property, within the jurisdiction of the bankruptcy court. Leave to sue, in a case like the present, is perhaps unnecessary; but as the creditors have seen fit to ask it, no objection is seen to granting their petition in this respect. Upon the other point although there seems to be a want of uniformity in practice, I conclude that it is better, and fairly within the requirements of general order 19, and section 5045 of the bankrupt act, that the assignee should include in his report of exemptions the homestead as well as the other articles and necessaries. The same reason exists for the one as the other.

Ordered accordingly.

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

Case No. 12,908.

SINNOTT v. The DRESDEN.

[Newb. 474.][1]

District Court, E. D. Louisiana. March, 1854. April 18, 1854.

COLLISION— NAVIGATION ON MISSISSIPPI—NARROW CHANNEL—DESCENDING AND ASCENDING STEAMERS.

1. There is no general rule of navigation on the Mississippi more uniformly observed by pilots of steamboats than that which requires the descending boat to run down the bend where she finds the strongest current and the deepest water, and the ascending boat to hug the bar as close as she can with safety, in order to avoid the resistance of the current.

[Cited in Shirley v. The Richmond, Case No. 12,795.]

[See Bates v. The Natchez, Case No. 1,102.]

2. Where it appears that two steamboats were meeting on the Mississippi river and the pilot of the ascending boat gave the signal of two taps of his bell, thereby indicating his determination to steer to the larboard in order to take the bar shore, and his signal was answered by the pilot of the descending boat also with two taps, thereby indicating his acquiescence in the propriety of the signal, it was the duty of the latter promptly to steer to the larboard in order to avoid a collision.

3. Rule 3 of the rules and regulations adopted by the board of supervising inspectors in compliance with the requisitions of the act of congress approved 30th of August, 1852, purports to be a rule to regulate the movements of steamboats meeting in fogs and narrow channels. The term "narrow channel" is absurd when applied to that of the Mississippi river at any stage of water or at any point below the mouth of the Ohio, and the term as used in the rule doubtless refers to the channels of the shoots, so called by river-men, which running off from the main river form islands by falling into it again.

4. When two steamboats are meeting on the Mississippi river, and there is danger of collision, it is the duty of the descending boat as a general rule, to ring her bell and shut off her steam; and it is the duty of the ascending boat to do the maneuvering.

5. On application for a rehearing, *held*, further, that declarations of witnesses as to distance in the night time must be received with many grains of allowance. Conclusions drawn by witnesses as to objects discerned at a distance, are uncertain.

[This was a libel by J. C. Sinnott, owner of the steamboat Georgia, against the steamboat Dresden, for damages sustained by collision.]

Mr. Finney, for libelants.

Mr. Reese, for respondents.

McCALEB, District Judge. In this case, it appears from the evidence that the steamboat Georgia, of which the libelant was owner, came into collision with the steamboat Dresden in the Mississippi river, at a point about four miles below the mouth of the

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

Ohio. The Georgia was descending and the Dresden ascending at the time of the occurrence which happened at about 11 o'clock at night on the 3d of August last. The proper position for descending boats at the place of collision is from one hundred and fifty to two hundred yards from the Kentucky shore. The distance is increased by the testimony of some of the pilots to from two hundred to two hundred and fifty yards, which they say boats descending may with propriety run. Ostrander, the pilot of the Georgia, who was at the wheel at the time of the collision, says that his boat was about two hundred and fifty yards from the Kentucky shore when he first tapped his bell upon discovering the lights of the Dresden. The other pilot of the Georgia, by the name also of Ostrander, who came out upon deck upon the ringing of the bell, says the Georgia was about one hundred and fifty yards from the Kentucky shore, and that this is the usual and proper place for descending boats. A large majority of the witnesses testify in favor of this distance, which is one hundred yards less than the pilot at the wheel declares his boat was running at the time of the occurrence. The witnesses on the part of the Dresden, generally testify that the collision occurred from two hundred and fifty to three hundred yards from the Kentucky shore. The pilots who have been examined, vary in their opinions as to the proper course of descending boats. Some of them are of opinion that it is best to run the bend, except in high water, while others, and those, I think, the most experienced, and therefore most to be relied on, are decidely in favor of running up along the bar or Missouri shore. Among these last is Reuben Miller, who has been a pilot for thirty years. His opinion certainly is in accordance with the general rule of navigation on the Mississippi river, for there is perhaps no general rule on this subject which is more uniformly followed by pilots, than that which requires the descending boat to run down the bend where she finds the strongest current and the deepest water, and the ascending boat to hug the bar as close as she can with safety, in order to avoid the resistance of the current. I am satisfied that the pilot of the Dresden was acting in accordance with this general rule when he tapped his bell twice to indicate his determination to run up the bar shore. He seems to be a man of great experience in his business, having followed it for seventeen years. The same cannot, I think, with propriety be said of the pilot of the Georgia. According to the testimony of his brother he is only twenty-four or twenty-five years of age, and has been piloting as a regular pilot only four years. He seems to have been deficient in the coolness and skill necessary for the emergency in which he was suddenly called to act. There seems to have been no necessity for excitement or confusion. He admits that a descending boat could be seen on the river near the place of collision at the distance of five miles, and that he saw the lights of the Dresden at the distance of four miles. He declares that he gave the first signal of one tap, indicating his determination to steer to the right, when the Dresden was at the distance of four hundred yards. It is doubtless true that he gave the first signal, but I am satisfied from the testimony of those on board the Dresden, that it was not heard by the pilot of the latter boat. It was not even heard by the engineer of the Georgia. There was, therefore, no error committed by the pilot of the Dresden in giving two taps to indicate his determination to take the bar shore, and it was clearly the duty of the descending boat to go to the larboard after this last signal of two taps was answered by her. It seems to have been given in time to have avoided the collision. The determination of the ascending boat must have been apparent even before the signal was given, by the very fact that she was from two hundred and fifty to three hundred yards from the Kentucky shore, and was steering for the Missouri shore. There seems to be no difference of opinion among the pilots who were examined, in relation to the duty which devolved upon the pilot of the Georgia to steer to the larboard as soon as he responded to the signal in a manner to denote his acquiescence in its propriety. The duty of doing the maneuvering, as usual, devolved upon the ascending boat, and there is a fair ground for believing that his duty would have been successfully performed, if proper precautions had been taken by the descending boat to shut off steam and keep to the larboard. I am by no means satisfied that the headway of the Georgia was stopped at the time of the collision. The pilot declares that he is not sure that the starboard engine was not in motion, though he testifies that he rang the bell to stop it. I am by no means satisfied, therefore, that the libelant's boat was not in fault; and so far from having made out his case so clear as to place the justice of his demand beyond a reasonable doubt, my opinion, after a thorough examination of the evidence, is decidedly in favor of the course pursued by the officers of the Dresden.

My attention has been particularly directed to rule 3 of the rules and regulations adopted by the board of supervising inspectors in compliance with the provisions of the twenty-ninth section of the act of congress, entitled "An act to amend an act entitled an act to provide for the better security of lives of passengers on board of vessels propelled in whole or in part by steam, and for other purposes," approved the 30th of August, 1852. These rules and regulations were adopted on the 29th of October, 1852. By rule 3, to which reference has been made, the pilot of the descending boat is required to keep the channel and check his engine, using only sufficient steam to give her steerage, until the following signals are given and answered:

"It shall be the duty of the pilot of the ascending boat, as soon as the other shall be in sight and hearing, to sound his bell once if he shall wish to keep his boat to the right; and it shall be the duty of the pilot of the descending boat to answer the same promptly by one stroke of the bell; if not answered, the pilot of the ascending boat shall strike his bell again and again, at short intervals, until heard and answered by the pilot of the other boat. But if the pilot of the ascending boat shall wish to keep his boat to the left, he shall strike his bell twice, and it shall be the duty of the pilot of the descending boat to answer the same by two strokes of his bell, and both boats shall be steered accordingly. The first signal shall be given by the pilot of the ascending boat, and it shall be the duty of the other to answer promptly; but in case the pilot of the ascending boat does not make the signal in proper time, the pilot of the descending boat shall make the signal, and the other shall answer promptly."

The rule is evidently intended, by the language employed, to apply to the navigation of "narrow channels or in fogs." It is, in my judgment, quite absurd to speak of the channel of the Mississippi river at any stage of water as a narrow channel at any point below the mouth of the Ohio; and we are told by the old and experienced pilot, Reuben Miller, who was examined in this case, that on that part of the river where the collision occurred he would run an ascending boat four hundred yards from the Kentucky shore, and that there is that width of what he terms good water. There was no fog on the river at the time of the collision. It had been raining, but that had ceased and the night was clear. The witness Miller also states that "descending boats come down near the Kentucky shore. Boats going up very frequently keep in the bend, but if there is a boat coming down, they keep near the bar."

The rule adopted by the supervising inspectors refers, doubtless, to the channels of the narrow shoots as they are technically termed by the river-men, which running off from the main channel form islands, and fall again into it. These in a high stage of water are frequently navigated by steamboats, because they greatly abridge the distance. A channel of four hundred yards cannot reasonably be regarded as a narrow channel, and no difficulty could possibly arise in navigating such a channel on a clear night if pilots understand their duty, and are familiar with the customs of the river. But I do not understand that the rule invoked, even if applied to the main channel of the Mississippi, as well as to its tributaries and narrow shoots, was designed to change the rule of navigation already well recognized. In the first place, has the libelant in this case shown beyond a reasonable doubt, that he kept the channel and checked his engine, using only sufficient steam to give her steerage, until the signals were given and answered? In this case she gave the first signal which was not heard by the ascending boat; but it does not appear that when she gave the signal she at once checked her engine, and used only sufficient steam to give her steerage. Her own pilot testifies that he did not ring to stop the engines until the signal of two taps was given by the pilot of the ascending boat, and it is extremely doubtful whether or not the starboard engine of the Georgia was stopped at all. If those of the witnesses on the part of the Dresden, who speak of this alleged fact, are to be believed, it is certain that it was not. So far as it relates to the conduct of the pilot of the Dresden, the rule seems to have been substantially complied with. He did not answer the first signal of the Georgia, because he did not hear it. He gave his signal of two taps, not indeed as soon as the Georgia was in sight and hearing, but when she was between three and four hundred yards off; and this was amply sufficient to enable the descending boat to avoid the collision if she had taken all necessary precautions. It must be remembered that the ascending boat is always required to do the maneuvering. She is not by the general rule of navigation, to stop her engine. In the case before the court, however, the Dresden seems to have done so to break the force of the collision, when it was apparently unavoidable.

I am of opinion that the libelant has not presented such a case by the evidence on the record, as should entitle him to a decree for the damages he has sustained. I consider those damages to be the result of the negligence and want of skill on the part of the pilot of his own boat; and his libel must therefore be dismissed, with costs.

Subsequently on the part of the libelants, application was made for a rehearing.

McCALEB, District Judge, delivered the following additional opinion:

I have again examined the evidence in this case, and after mature consideration must adhere to the opinion already given. The declarations of witnesses in reference to distances must be received with many grains of allowance. We know how difficult it must be to determine the precise position of boats in the night time, and how uncertain must be conclusions drawn by witnesses who speak of objects discerned at a distance. In giving my opinion, therefore, I do not pretend that the distance of the Dresden from the Kentucky shore was precisely that which the witnesses say it was. It may have been one hundred or one hundred and fifty yards less. But what I designed to convey in the opinion already rendered, is, that she had proceeded sufficiently far to

indicate her determination to take the bar shore even before she rang her bell, and that she was making the proper exertions to accomplish her object when the collision occurred.

The new trial is refused.

SIOUX CITY & P. R. CO. (STOUT v.). See Cases Nos. 13,503 and 13,504.

Case No. 12,909.

SIOUX CITY & P. R. CO. v. UNION PAC. R. CO.

[4 Dill. 307.] [1]

Circuit Court, D. Nebraska. 1876.

PUBLIC LANDS — GRANTS TO UNION PACIFIC AND SIOUX CITY RAILROADS—OVERLAPPING —TENANTS IN COMMON.

Where the land grant of congress to the Union Pacific Railroad Company and the Sioux City branch (12 Stat. 489; 13 Stat. 356) conflict, and the limits of the respective grants overlap each other, and lands in the common territory were patented to the two companies jointly, as tenants in common: *held*, upon a construction of the legislation of congress in this regard, that the patent was rightly issued and that neither company was the exclusive owner of the said lands, and a partition was decreed.

[Cited in Chicago, M. & St. P. Ry. Co. v. Sioux City & St. P. R. Co., 10 Fed. 442.]

In execution of the legislation of congress, whereby the complainant and defendant were granted public lands in aid of the construction of their respective roads, a joint patent was granted on the 25th of March, 1873, of thirty thousand seven hundred and ninety and forty one-hundredths acres of land lying between the ten and twenty-mile limit of the land grant of the defendant, to complainant and defendant. There were also patented jointly to the two companies twenty thousand nine hundred and four acres within the ten-mile limit of the defendant company. This bill is filed to compel the Union Pacific to convey to the Sioux City & Pacific the one-half of such lands, the latter company claiming all the land embraced in said patents. The cross-bill asks a decree awarding the whole of said lands to the Union Pacific, and that the complainant be compelled to convey accordingly. It is stipulated that the original and cross suits shall be heard as one; that the admissions of the answers in each shall be taken as true in both, and some further facts are agreed upon as evidence in both causes.

The legislation out of which this controversy springs, are the acts of 1862 and 1864. Section 1, Act 1862 (12 Stat. 489), empowered the Union Pacific to build a railroad from a point on the one-hundredth meridian of west longitude to the western boundary of Nevada territory. Section 3 granted land in aid of the construction of said road, "to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road." Section 14 authorized the construction of the so-called Sioux City and Iowa branches, "upon the same terms and conditions, in all respects, as are contained in this act for the construction of the railroad and telegraph mentioned." Section 9 contains the grant of bonds and lands to the Leavenworth, Pawnee & Western Railroad Company, of Kansas, now known as the Kansas Pacific, and to the Central Pacific, of California. The grants are made in the exact language employed in the grants to the Iowa and Sioux City branches, viz.: they are authorized to build "upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned." Section 13 places the Hannibal & St. Joseph Railroad Company, of Missouri, in the same position. Section 4, Act 1864 (13 Stat. 356), amends section 3, Act 1862, by doubling the land grant contained in the latter act. Section 17 relieves the Union Pacific from the obligation to build the Sioux City branch, and authorizes its construction by a company to be designated by the president of the United States, "on the same terms and conditions as are provided in this act and the act to which this is an amendment, for the construction of the Union Pacific railroad and telegraph line and branches," except that it shall receive no more bonds than the Union Pacific would have received if it had built the Sioux City branch under the former legislation, but that it should receive alternate sections of land for ten miles in width on each side of the same, along the whole length of said branch.

The pleadings and stipulation of facts show that the Union Pacific Company filed their assent to the act of July, 1862, as required by the 7th section of the act. No other assent or acceptance of that act or the act of July 2d, 1864, was required. The location for one hundred miles westward from the Missouri river was made by actually surveying and staking the line, as built upon, in the month of November, 1863, and a map of the location at the time was filed in the interior department, October 24th, 1864, and one hundred miles built in 1865. This map referred to the acts of 1862 and 1864, and contained the statement therein, indorsed by the officers of the Union Pacific Railroad Company, that the "red line on said map is hereby (October 19, 1864) designated as the permanent location of the route of the road for one hundred miles west of its eastern terminus." A partial change of the line was made by the company, and approved by the department, in 1865. The Sioux City and Pacific Railroad Company commenced its corporate existence August 1st, 1864. It was designated by the president to build the Sioux City branch, December 24th, 1864, and it designated the general route of the road, July 24th, 1865, and built it in 1869. The lands in controversy lie within one hundred miles of the eastern terminus of the Union Pacific Railroad.

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

E. S. Bailey and N. M. Hubbard, for Sioux City R. Co.

A. J. Poppleton, for Union Pac. R. Co.

DILLON, Circuit Judge. One of these suits relates to lands within the ten-mile limit of the land grant of the Union Pacific Railroad Company, and the other to lands outside of the ten-mile and within the twenty-mile limit, The lands are patended to the contesting companies, jointly, as tenants in common. Each company claims for itself the sole and absolute ownership of all the lands. If any portion of the lands is decided to belong to the complainant, it asks a decree to that effect and that partition be made.

1. It is insisted by the Sioux City Company that the Union Pacific Railroad Company has no title outside of the ten-mile limit of its land grant.

The ground of this claim is that, inasmuch as said lands lie east of the one-hundredth meridian. and along the Iowa branch, the land grant was not, as to said branch, enlarged by the act of 1864, which extended the lateral limits of the grant from ten miles to twenty miles. I am of opinion that the act of 1864, as to bonds and lands, applied as well to the branches (including the Iowa branch) as to the main line, or stem of the road. No reason appears for excluding the branches. All were parts of the common scheme or system of roads to connect the Pacific coast with the states at different points on the Missouri river. Such has been the uniform construction of the executive department of the government, and lands have been patented to the Central Pacific, the Kansas Pacific, and other branches of the Pacific system of roads, according to this construction. This construction is right, as the acts of 1862 and 1864, as to the extent of the grant, are to be read and taken together. This court has always acted upon this view, and such would seem to be also the opinion of the supreme court. Prescott v. Railroad Co., 16 Wall. [83 U. S.] 607. Besides, the 17th section of the act of 1864, in referring to the "terms and conditions" upon which the Sioux City road is to be built, speaks of them as those "provided in this act (1864), and the act to which this is an amendment, for the construction of the Union Pacific Railroad and telegraph line and branches." If the act of 1864 made no change as to branches in respect to the "terms and conditions" of the grant, why were branches mentioned in that act in this regard?

2. The next ground of exclusive ownership in the Sioux City Company, against the Union Pacific Company, is based upon the words of the proviso in the 17th section of the act of 1864 (this being the section relating to the Sioux City Company), that "said company shall be entitled to receive alternate sections of land, for ten miles in width, along the whole length of said branch."

In this connection we may refer also to the claim of the Union Pacific Railroad to the exclusive ownership of the same lands. This claim is based upon two main grounds. The first is, that the grant to the Sioux City Company is provisional and contingent, depending upon the designation by the president of a grantee, etc., whereas its grant is present and certain. Second, it claims that as its line was definitely located before the line of the Sioux City Company, and as its road was actually constructed first, it thereby became entitled to the lands within the limits of the common territory. These conflicting claims depend for their solution upon the construction of section 17 of the act of 1864, amending section 14 of the act of 1862. The act of 1862 required the Sioux City branch to be built by the Union Pacific Company whenever Sioux City should have a completed line of railway to the East. It was to be constructed on the "same terms and conditions" as the Union Pacific Company was to construct its other lines. It was to connect with the Iowa branch, or with the main line not farther west than the one-hundredth meridian. The point of junction was to be fixed by the president. The act of 1864 released the Union Pacific Company from the obligation to construct the Sioux City branch. It empowered the president to designate the state corporation to construct the branch. The line of road was to be the same as before, with the important exception that the company, instead of the president, was allowed to "select" the point of junction with the Union Pacific road, and might fix it hundreds of miles west of the one-hundredth meridian, if it chose. This important power, if not limited, might be exercised so as to involve the government in a subsidy greatly in excess of that needed to perfect and secure its scheme of roads. To guard against abuse in this respect, the congress had the wisdom to enact, in the form of a proviso to restrain the grant, the following: "And the said company constructing said branch shall not be entitled to receive in bonds an amount larger than the said Union Pacific Railroad Company would be entitled to receive if it had constructed the branch under this act and the act to which this is an amendment; but said company shall be entitled to receive alternate sections of land, for ten miles in width, on each side of the same, along the whole length of said branch." Now, it is plain that, while the Sioux City branch was constructed under the 17th section of the act of 1864, yet that section is an amendment of the 14th section of the act of 1862, in this respect, and is to be construed accordingly; and the Sioux City Company has the same rights as if this branch had been constructed by the Union Pacific Company under the same legislative provisions.

The inception of the grants to both these contesting companies is the same. They are contemporaneous in their origin. They both spring from the same legislation. The right of the one company, as respects the other, does

not depend upon priority of location or construction. The special provisions of the proviso limit the subsidy to the Sioux City Company. It might build its road west of the one-hundredth meridian, but it could not get bonds for any greater distance, but it was entitled to receive land for the distance actually built, within lateral limits of ten, instead of twenty miles, on each side of the road. So, by the contemporaneous legislation, the Union Pacific Company was, within the designated lateral limits, entitled to receive land for all the line of road it constructed. It is evident that, as these roads must unite, these limits will conflict, and lands granted will lie in the common territory. This controversy relates to such lands. As the grants are the same in their origin and purpose, and both companies have complied with the conditions, the case is peculiarly one in which equality is equity. Such was the view of the land department, and it is the judgment of this court, that neither company is entitled to the exclusive ownership as against the other.

The Sioux City Company bases its claim to exclusive ownership on the words of the proviso—"along the whole length of said branch." The purpose for which these words were used was not to give priority over the main company where the grants might conflict. The whole proviso, taken together, in connection with the other portion of the section, shows that when congress allowed the company to fix its own point of junction, it in effect said: "Yes, you may do this, but only on condition that, if you go west of the one-hundredth meridian, you shall not get any extra bonds, but you may have lands as far as you go, but must take them within lateral limits of ten, instead of twenty miles."

A decree will be entered that the parties are tenants in common as respects the lands jointly patented, and for a partition if the companies cannot agree upon a division.

Decree accordingly.

NOTE. This decree was acquiesced in by the parties, who subsequently effected an amicable partition of the lands.

Construction of land grant to the Burlington & Missouri River Railroad Company in Nebraska (13 Stat. 356, § 19), see U. S. v. Burlington & M. R. Co. [Case No. 14,688].

SIOUX COUNTY (GROSS v.). See Case No. 5,842.

Case No. 12,910.

The SIREN.

[9 Ben. 194.] [1]

District Court, E. D. New York. July, 1877.

ADMIRALTY—COSTS—FINAL RECORD—NOTICE OF TRIAL.

Fees in an admiralty suit for various services performed by the clerk, considered.

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

In admiralty.

J. J. Allen, for libellant.

Huntley & Adams, for claimant.

BENEDICT, District Judge. The charge for making final record is correct. The legality of the charge was decided by Blatchford, J., in the case of The Alice Tainter [Case No. 196]. The charge for filing the record, making the docket and indexes, for the order to cancel stipulations, for taxing the costs, for receiving and paying out the money, entering order check, entries in ledger and for filing clerk's costs are all in accordance with the statute, if the services have been or must be performed, as to which there has been no dispute.

The charge of $2 for notices of trial is for the services of the clerk in making up the calendar and in sending notice to the proctor of the fact that the cause is upon the calendar, and its number. This service is required by rule 83 of this court, and by the practice the proctors are saved the labor of noticing causes for trial or preparing notes of issue, and are always informed as to the locality of a cause upon the calendar. The practice has met with favor, and this is the first time that objection has been made to the charge of two dollars for the services rendered.

The fact that the charge has gone unquestioned for twelve years is evidence that it is reasonable. It therefore falls within the principle of the case of the charge for making calendars considered by Judge Blatchford in The Alice Tainter [supra], and must be allowed.

Case No. 12,911.

The SIREN.

[1 Lowell, 280.] [1]

District Court, D. Massachusetts. 1868. [2]

PRIZE—CAPTORS—ACT OF CONGRESS—ABANDONED VESSEL—SALVAGE.

1. The prize act of 1864 [13 Stat. 306], does not exhaust the subject of prize or no prize. There may still be captures which go to the United States only and not to the captors, and there may be prize without captors.

2. On the day that Charleston surrendered to our joint forces, but after the surrender, a commissioned cruiser found and took possession of an abandoned merchant vessel, and saved her from imminent loss by fire. *Held*, that neither that cruiser nor the fleet generally were captors, but that the vessel was prize to the United States.

3. The surrender of Charleston operated the capture of all the prize or booty in the town and harbor.

4. Salvage was decreed to the finders of the prize, for putting out the fire.

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

[2] [Affirmed in 13 Wall. (80 U. S.) 389.]

On the 18th of February, 1865, at noon after Charleston had surrendered to the United States forces, the Gladiolus, a steam-tug commissioned as part of our fleet, discovered the Siren, which was a blockade-runner, on fire in the Ashley river, about one hundred yards below the first bridge. She was unarmed, had been abandoned, and set on fire, and her pipes cut. At the same time that the boat from the Gladiolus came near the prize, a boat from the Commodore McDonough, another naval vessel, undertook to board her, but turned back on finding that the Gladiolus was nearer. The whole fleet was then under way, moving up the harbor, and many vessels were within signal distance of the prize at the time of the capture. About ten or a dozen colored men, civilians, in Charleston, assisted with buckets in putting out the fire.

C. Cowley, Lothrop & Bishop, C. W. Tuttle, S. B. Allen, J. P. Woodbury, and C. L. Woodbury, for the several vessels of the fleet.

R. H. Dana, Jr., Dist. Atty., submitted the case without argument.

LOWELL, District Judge. The rebel army evacuated the forts in the harbor of Charleston and the town itself, on the night of February 17, 1865, and on the next morning our fleet and army took possession. Who first raised the flag of the United States within the town, and at what precise time, does not distinctly appear in evidence; but whatever was done was by consent of the citizens, represented by their municipal officers, though certainly that consent was not very important in a military point of view. At about eleven o'clock in the forenoon the steam-tug Gladiolus, a commissioned vessel of the navy, was proceeding up the harbor, and her officers were informed that a steamer was lying near one of the bridges abandoned; they went to her at once and found the blockade-runner, Siren, on fire, with her steam pipes cut, so that she was in great danger of instant destruction. A boat from the Commodore McDonough, another naval vessel, had been making for the Siren, but turned back on learning that the steam-tug was bound on the same errand and would arrive sooner. The officers and crew of the tug put out the fire and turned the Siren down the harbor towards the fleet, where, with the aid of some persons from other cruisers, the vessel was kept afloat, and so far repaired as to be navigable. The Siren has been condemned as prize and sold, and the questions left for decision relate to the distribution of the proceeds.

The prize act of 1864, c. 174 (13 Stat. 306), treats the subject chiefly as it concerns naval captors, and does not profess to deal with the subject of prize generally and fully. It cannot be doubted that there may be a seizing or taking jure belli of enemy property within the ebb and flow of the tide which is neither by public nor private armed ships, as, for instance, by a direct surrender to civil officers, &c. The celebrated order in council in England, passed March 6, 1665–66, reported, among other places, in Hay & M. 50, which declares the rights of the lord high admiral, mentions many instances of prize which are droits of the admiralty, such as "enemy's ships and goods casually met at sea and seized by any vessel not commissioned," &c. Now, in England, during the colonial period, these several droits of the admiralty were not prize to the captors, because the king's several grants to the takers of prizes were made in each war as the occasion arose, and were subsequent in date to the general grant to the lord high admiral. So that the English cases are very numerous in which prizes are condemned to the admiral, or, in later times, to the king in his office of lord high admiral, and not to the captors. It may well be conceded that the United States have succeeded to the rights in prize, both of the crown and of the lord high admiral, and that congress has the right to grant prize-money to whomsoever it pleases, without regard to these ancient distinctions. Still, in construing the prize acts, it is useful to recollect that by the English law the grants of prize-money had their well understood limitations, and that a condemnation in prize was not necessarily a condemnation to captors; and that there were prizes which were not granted to either the admiral or the captors, such as vessels voluntarily brought in on revolt by their own crews, and vessels seized in port before declaration of hostilities; so that there were three different kinds of condemnation,—to the king, to the admiral, and to the captors. I have no doubt that some of the same distinctions and limitations hold good in this country to-day. Whatever is prize of war by international law in the several countries which acknowledge that law, is so here, and our prize acts do not undertake to limit or define the boundaries of prize or of prize jurisdiction. Accordingly, I have held, in a case of cotton picked up at sea, that it was properly proceeded against as prize, and I have no doubt of the propriety of that decision. Seventy-Eight Bales of Cotton [Case No. 12,679]. It necessarily follows that there may be prize when there is no one who is a captor under the prize act. Thus, if a person or a vessel having no existing commission makes a prize, the condemnation goes to the United States. The Dos Hermanos, 10 Wheat. [23 U. S.] 306. So if there be no captor at all, as of vessels voluntarily brought into port by their crews, or driven in by stress of weather. The old grant of droits of the admiralty was of prizes of this character, but it did not include all of this kind; the distinction, therefore, is older than the grant of droits, and the principle remains good in our law, that there may be seizers or takers in a certain sense who are not entitled to prize-money

as technical captors, though the goods seized may be prize.

Upon the best consideration I have been able to give the subject, my opinion is that the Gladiolus was not the captor of this prize within the true intent of our statute, nor was the fleet as a whole.

All seizures of this character are made for the benefit of the government, in the first instance, and are under its control, and the captors have no vested rights until after a decree has been rendered, even if they have any before actual distribution made. This is a well-settled doctrine in prize law, and is necessary to the freedom of action of the government in its dealings with neutral nations. One consequence of this general rule is that grants of prize money are to be construed strictly, and the burden is on the grantee to bring his case within the grant. Our prize act is the grant; for, though not exhaustive of the subject of prize or no prize, it is exhaustive of the subject of distribution. The prize act relates to captures by commissioned vessels. It does not in terms deal with captures by the army and navy jointly, nor with several other classes of entirely legitimate takings. The law of England was established by a decision of the lords of appeal, as long ago as 1785, that capture by conjoint expeditions of land and sea forces were not distributable in the admiralty to the naval part of the captors, and, therefore, not distributable at all (The Hoogskarpel, cited 2 Dods. 446); and the former practice of giving a proportion to the navy, upon some notion of an equitable division, was declared to be unsound.

This matter was soon afterwards and is still regulated by acts of parliament, but those acts do not set aside the principle of the decision, but provide with care for the proper distribution of the prize-money to the army and navy in a manner calculated to do justice to both, and not merely to the navy alone. The principle on which the original decision was made is applicable to this case. Here a fortified town, besieged by land and sea, is evacuated by the enemy, and surrendered by the civil authorities. The evacuation may be presumed to be caused by the pressure of both the naval and the military forces. If the fact were carefully examined, it might appear that the reasons for the abandonment were rather military than naval, but that is not important. It is fair to assume that they were both.

Now, in equity, the capture of all the property thus abandoned and surrendered must be credited to both army and navy; but as this court has not been invested with power to deal with such captures in the way of distribution, the remedy must be sought from congress. It is said that there were several war vessels of the rebels in the harbor, which were found and sent home, and which the navy department at first declared its intention of bringing before a prize court, but that this purpose was abandoned, and the vessels have been taken by the government without any adjudication. This seems to show that the department considered that a different course was proper to be pursued with vessels of war and mere merchant ships, or else that after the Siren was sent in, it reconsidered its action, and assumed that the court would necessarily condemn for the benefit of the United States only. If the latter was the view, I consider the principle to be sound, though the practice may be of doubtful propriety. If either an international question or one of salvage could arise, it would have been not only fitting, but necessary for the due ordering of the matter and its final adjustment, that a prize court should pass upon it. But the assumption was right that the property which, whether afloat or on shore, was liable to seizure, and was in fact abandoned and surrendered, was in law captured at the moment of the capture or surrender of the town, and that the chance finder of such property within the abandoned lines, whether a commissioned officer or not, and whether belonging to one or the other service, was bound to seize for the government, and not for himself. The argument was pressed with much force, that all the fleet must share in such a prize as this, because there was no actual chase or capture by the Gladiolus, but a virtual taking by the whole. I admit the argument, but give it a wider application, and say there was a virtual surrender to the United States forces generally, and the army as well as the fleet are captors. If a file of soldiers had happened to go on board first, the right of the fleet would have been no greater or less than it now is. But, as the prize act does not meet such a case, I am obliged to say that the remedy must be sought elsewhere. It is undoubtedly true, that if the navy had not been present, this prize might have escaped to sea; but if the army had not been present the town might not have been surrendered when it was surrendered, and if not, the capture might equally have failed.

In the case of the cotton found floating at sea, I not only condemned the proceeds as prize, but as prize to the captors. This I did on the ground that we have applied the principle of droits of the admiralty only so far as reason and justice require, and that the grant of our prize act may well extend to any taking at sea by a commissioned cruiser, whether there be any resistance or not. The point argued in that case was, whether the goods were prize at all, or were derelict. I had no doubt they were both. Whether they were prize to the captor was not argued independently of the main question of prize or no prize, and I did not think it very important, because, under the circumstances of that case, I should probably have had no difficulty in giving as salvage the moiety

which the act grants as prize-money, and so it was merely a question of the form of the decree. But the distinction between that case and this is, that there the taking was clearly and only effected by the commissioned cruiser, and there was no evidence how, when, or why the goods had been abandoned, but only that they were enemies' property, while here we know or must presume that the abandonment was caused by the presence of the joint forces, and the capture may fairly be said to have been complete before the tug came up. If a commissioned ship had come into the port that night and found one of these abandoned vessels in a corner of the harbor out of signal distance of any of the fleet, it would shock our sense of justice to say that the prize should be condemned to that vessel as sole captor; but the only grounds on which the fleet can claim here are either that the tug was sole captor by virtue of such a casual finding, and that the others were in signal distance, or else that there was a constructive capture by the whole fleet. If a constructive capture, it was by army and fleet. We cannot resort to constructive capture to let in the whole fleet, and to actual capture at the same time to shut out the army.

The Gladiolus herself stands differently. By the elastic practice in prize, a vessel failing in a demand for prize-money may be admitted to receive salvage. Theoretically this reward is given for the preservation and care of the property, and not for its capture, though, in fact, in most cases, the meritorious service is chiefly in the capture. But in the present case there were services of a strictly salvage character, by which the prize was saved from imminent danger of great damage or destruction.

But as this point has not been argued, and as there may be questions upon which the several parties may desire to be heard, not only as to quantum, but even the general question of whether these naval persons can be salvors, in such a case, I will hear counsel upon this at an early day, if requested.

At a subsequent day the court awarded salvage to the Gladiolus.

[NOTE. The court allowed the claim for salvage, and ordered that the residue of the fund, less the sums decreed for damages arising from a collision referred to below, should be paid over to the United States. An appeal was then taken to the supreme court, where the decree of the district court was affirmed. 13 Wall. (80 U. S.) 389.

The Gladiolus, while on her way to Boston for adjudication, collided with and sank the sloop Harper while off Long Island Sound. Upon the arrival of the steamer at Boston, she was condemned as prize and sold. Pending these proceedings the owners of the Harper intervened by petition, claiming damages out of the proceeds. The district court held that the intervention could not be allowed, and dismissed the petition. Case unreported. Upon an appeal by claimants to the supreme court, damages were allowed. 7 Wall. (74 U. S.) 152.]

Case No. 12,912.

SISSON et al. v. GILBERT et al.

[9 Blatchf. 185; 5 Fish. Pat. Cas. 109.] [1]

Circuit Court, N. D. New York. Oct. 10, 1871.

PATENTS—PUBLIC USE FOR TWO YEARS—CONSENT AND ALLOWANCE—EXPERIMENTAL USE—COSTS.

1. The fact that an invention was in public use and on sale, with the consent and allowance of the inventor, more than two years before his application for a patent, renders the patent invalid, however great the hindrances to the application, and whether caused by the want of pecuniary means, or other misfortune.

[Cited in Manning v. Cape Ann Isinglass & Glue Co., Case No. 9,041.]

2. The public use, in this case, *held* not to have been experimental, the inventor having himself manufactured and sold machines containing the invention, through several years, and having allowed such machines to be used thence onward, for six more years, before applying for his patent.

3. A merely experimental use, made in good faith, and not in such wise as to amount to a fraud upon the public, misleading them into a use, in the belief that it is free, does not destroy the exclusive right of an inventor.

4. What constitutes an "allowance," by an inventor, of a public use of his invention, although there are no words of consent, his consent and allowance being inferred from acquiescence.

5. A defence, that the patent was invalid, because of such consent and allowance, being sustained, the bill was dismissed, but, under the circumstances, without costs.

This was a final hearing, on pleadings and proofs, on a bill [by William Sisson and others against David Gilbert and others] to restrain the alleged infringement of letters patent granted September 24th, 1861, to the complainant Sisson, for an "improvement in machine for making staves from bolts," for which application was made in November, 1859, and of which patent the complainants were owners. The bill sought, also, an account and damages.

J. H. Townsend, for complainants.

F. A. Macomber, for defendants.

WOODRUFF, Circuit Judge. The claim of the patentee, in his specification, is confined to two particulars: 1st. Certain rib guides, projecting from the guide-bar, against the narrow surfaces of which the stave bolt rests, arranged in combination with the vibratory bed, in form and position concentric therewith, through the open spaces between which ribs the chips and splinters, cut off by the knife, fall, without clogging the machine; 2d. The employment of a strip of wood with the ends of the grain upwards, inserted in a groove in the bed, along the line where the bed comes in contact with the edge of the knife, and having, at the bottom of the groove, a supporting plate, or bar of iron, or other strong material, made adjustable by means of set screws, or equivalent means, to sustain it firmly along its entire length, to raise or

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

lower the supporting bar, by which, when the surface end of the strip of wood is cut away, it may be raised in the groove, pared off, and so present an unimpaired surface to the knife. Nothing else described in the specification of the patentee is secured to him by the patent.

As to both of these devices, I am constrained to say, that, in my judgment, the proof shows, that both were in public use and on sale, with the consent and allowance of the patentee, more than two years before his application for a patent. If this be so, then, however great the hindrances to such application, and whether caused by the want of pecuniary means, or other misfortune, the right to the future exclusive use was lost. This may be a great hardship, and so may properly induce a court to require very clear proof, and dispose them to give full weight to the prima facie evidence which the granting of the patent itself imports, in support of the patentee's title; but, if such use and sale be, nevertheless, established, there is no alternative—the court has no discretion. The right claimed depends upon express statute, and exists only by its force and according to its terms; and, by that statute, such sale and use are a full defence to the inventor's claim. Act July 4, 1836, §§ 6, 15 (5 Stat. 119, 123); Act March 3, 1839, § 7 (5 Stat. 354).

My conclusion rests mainly upon the testimony of Sisson, the patentee, himself, and of the witnesses called by the complainants, from which, I think, it appears, that, in 1845, Sisson was employed by Crossett, the patentee of a stave machine, to do work for him, in the manufacture of his machines, at Fulton, N. Y., and that Sisson then suggested to Crossett's partner the improvement first claimed in the above named specification, and then placed rib-guides, or projections upon the wooden guide by them theretofore used, and, soon after, and in the same year, replaced the wooden guide or gauge with an iron one, and "manufactured the stave machine after that with those improvements;" and that, after Crossett left Fulton, in August, 1845, the present patentee continued to manufacture and sell to parties who held town rights under Crossett's patent. He varied the extent of the projection, and varied the number of such projecting rib guides, from three to four, and finally to five, which last number, he says, he settled upon, although his model, deposited in the patent office, by which, if the number constitutes a material part of his invention, he is bound, contains but four. He thinks he made these ribs substantially as they are now prior to May 1st, 1853, and the last machine he made he made in April, 1853, and he made them for the parties who owned territorial rights to Crossett's patent.

There seems to me little room to say, upon this evidence—without recurring to the testimony of other witnesses, or to the testimony of the making and sale by others of machines having such ribs, of which he had knowledge—that this improvement was not on sale or in use with the consent and allowance of the inventor.

In like manner, he made an improvement, in 1845, in Crossett's machine, by a groove in the bed, and the insertion of wood having the grain endwise, to receive the blow of the knife when it struck through the bolt; and this he, thereafter, used and sold in the machines made by him, down to and including the last machine made, as he says, in April, 1853. He does not give the precise date when the bar in the grooves, with set screws to raise the strips of wood, when partially cut away by the knife, was introduced; but the complainants' witness, who worked for the patentee as millwright and pattern maker, testified, distinctly, that it was put in many machines before 1851.

True, the patentee says, in his testimony, that the last machine which he made was the only one that had the complete improvement; but, on examination of his own evidence, it appears that no changes were made, except the variation in the number and extent of projections of the guide bars, and in the thickness or weight of the bar placed in the groove. These were not of the substance of the invention. The patentee would hardly claim that any third party may use six guide bars instead of four, or a bar in the groove half an inch thick instead of a quarter, and not infringe his patent. All this was done before the 1st of May, 1853, and the machines had gone into the use for which this patentee made them.

It seems to me that this is, as matter of law, within the statute, and a defence. The patentee calls this seven years, making and selling machines with the improvements, experimental, for the purpose of ascertaining and developing their utility; and he estimates the number of machines that he made between 1845 and 1853, as not more than twelve. It is settled, that a merely experimental use, made in good faith, and not in such wise as to amount to a fraud upon the public, misleading them into a use, in the belief that it is free, does not destroy the exclusive right of an inventor; but, in the face of the evidence of continued manufacture and sale through several years, and the allowance of such use thence onward, for six more years, before the patent was applied for, I think that statement will not avail the complainants.

It is, also, difficult to say, that the information which the inventor had of the manufacture and sale of machines with his improvements by Dutton & Co., within three hundred yards of his shop, of their surreptitious procurement of his patterns to be copied for the purpose, and his information of the manufacture and sale of his improvements at Rochester, not followed up or even investigated by him, the former, especially, continuing for eight or ten years before the application for the patent was made, were not such a permitting of the public use and sale of the improvements, as constitutes an allowance thereof, within the meaning of the law, al-

though there were no words of consent. Consent and allowance may be inferred from acquiescence.

It is not without regret that I am compelled to conclude, that, either through ignorance of the law, or want of means or aid in procuring the patent for a meritorious invention, the patentee placed himself in a situation in which this action cannot be sustained.

The bill must, therefore, be dismissed, but, under the circumstances, without costs.

SISSON (GREENE v.). See Case No. 5,768.

Case No. 12,913.

SISSON et al. v. SEABURY.

[1 Sumn. 235.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1832.

WILLS—DEVISE—NATURE OF ESTATE—REMAINDERS—COLLATERAL WARRANTY.

1. A devise to "A. and to his male children, lawfully begotten of his body, and their heirs for ever, to be equally divided amongst them and their heirs for ever," passes a life estate to A., with a contingent remainder in fee to his children he having, at the making of the will, no children.

[Cited in Doe v. Considine, 6 Wall. (73 U. S.) 477.]

[Cited in Biggs v. McCarty, 86 Ind. 357; Burges v. Thompson, 13 R. I. 719; Canedy v. Haskins, 13 Metc. (Mass.) 401; Hunt v. Hall, 37 Me. 366; Malcolm v. Malcolm, 3 Cush. 482. Cited in brief in Moon v. Stone, 19 Grat. (Va.) 205; Richardson v. Paige, 54 Vt. 375.]

2. The statute of 4 & 5 Anne, c. 16, respecting collateral warranty, &c., has been adopted in Rhode Island.

[Cited in Russ v. Alpaugh, 118 Mass. 373.]

Ejectment [by Philip Sisson and others against Cornelius Seabury] for land in Tiverton, Rhode Island. Plea, general issue.

The parties agreed to a special statement of facts as follows: "On the 20th day of August, A. D. 1775, Thomas Sisson, then of Tiverton, Rhode Island, being of sound mind and competent to make a will, made and duly executed his last will and testament, in the words and figures, as set out in the certified copy thereof marked A, herewith filed as part of this agreement, and admitted as sufficient evidence of the said will, and the probate thereof; and the said Thomas died between the day last named and the 20th day of January, A. D. 1777, on which day the said will was duly proved, approved, and ordered to be recorded by the court of probate of the said town of Tiverton, as and for the last will and testament of the said Thomas, then deceased, and took effect as such; and the said will and probate are in all respects valid and effectual. Philip Sisson, the grandson of said Thomas, named as a devisee in said will, was at the time of the execution of said will, under the age of twenty-one years, and, at that time and also at the time of the probate of said will, had had no children, and had never been married; but after the decease of said Thomas, the said Philip went into possession of the lands, tenements, and appurtenances devised to him in and by said will, under and according to said will, and the terms of the devise and devises to him therein; the same lands so devised to him including the premises demanded in this suit, as well as other lands lying in Massachusetts; and remained in possession of the premises demanded in this suit (being part of the lands so devised as aforesaid to him), under and by virtue of said will and devise, until the 29th day of March, A. D. 1814, on which day he duly made, executed, and delivered to the defendant the deed marked B, herewith filed, and agreed to be a part of this statement, and duly and legally acknowledged the same in manner as appears thereon, under which deed the defendant went into possession of the demanded premises, and has remained ever since, and still is, in possession thereof. The said Philip Sisson, in January, A. D. 1785, was lawfully married to Susannah Bowen, now Susannah Sisson, by whom he had the following named children, male and female, of his body lawfully begotten in wedlock, namely: Elizabeth, a daughter, since married to Jabez Howland; Hannah, a daughter, since married to Peleg Taber; Thomas, a son; Holden, a son; Susan, a daughter, since married to John Tripp; Abraham, a son; Nathan, a son; Cook, a son; Henry Wilbur, a son; Lydia, a daughter, since married to Timothy Ingersoll; Abigail, a daughter, since married to Jacob Lyons; Pamela A., a daughter, since married to Asa M. Lucas; Philip, a son; and Phebe, a daughter, since married to Ezekiel S. Russell; all which said children of said Philip and Susannah, excepting the said son Nathan, and all which said husbands of said female children, are the plaintiffs in this suit, and now living. The said Nathan died in August, A. D. 1818, intestate and without issue, leaving his said brothers and sisters his heirs at law. The said plaintiffs and the defendant are citizens of the several states, and reside in the several places, as stated in the plaintiffs' declaration; and the said children of the said Philip Sisson were born at the several times mentioned in the deposition of said Susannah, marked C, which is admitted, and is to be taken, as part of this statement, and all the matters stated therein are agreed to be true. The said deed to the defendant comprises, not only the land demanded in this suit, but a part also of the lands so devised to said Philip, lying in Massachusetts. The said Philip Sisson, named in said will, and father of the

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

children and plaintiffs aforesaid, died in Indiana, in September, A. D. 1817; and since his decease, the said premises were demanded of said defendant, by Thomas Sisson, one of the plaintiffs in this suit, on the ground, that the said Philip, deceased, had but a life estate therein, and claiming title by way of remainder, under said will." [2]

Tillinghast & Whipple, for plaintiffs.
Mr. Hunter and R. W. Greene, for defendant.[3]

[Before STORY, Circuit Justice, and PITMAN, District Judge.]

STORY, Circuit Justice. The principal question in this case turns upon a devise in the will of Thomas Sisson, made in 1775. It is in the following words: "Item, I give and bequeath to my loving grandson, Philip Sisson, all my homestead farm and housing thereon standing, lying part in said Tiverton, and part in the township of Dartmouth, in the province of Massachusetts Bay, with all my other lands, and salt meadows, and sedge flats in said Dartmouth, to him, my said grandson Philip Sisson, and to his male children lawfully begotten of his body, and their heirs for ever, to be equally divided amongst them and their heirs for ever." The testator died in 1777, leaving the said Philip Sisson a minor under age (the argument says eleven years old only), without children, not then having been married. The question is, what estate he took under the will. If he took an estate tail, it has been docked by a conveyance duly made by him according to the statute of Rhode Island for barring estates tail. If he took an estate for life only, and his children, afterwards born, took a fee in remainder, then the plaintiffs are entitled to recover the premises, unless they are barred by the warranty of their ancestor in the conveyance, by which he docked the entail.

The case has been very thoroughly argued; and is certainly not without its difficulties, when viewed in connexion with the authorities. The general rule is, that, in construing wills, the intention of the testator is the pole star to guide and govern the court. But this rule carries us but a very little way; for the inquiry still remains, what that intention is, and how it is to be ascertained. Now, the intention is to be sought for, not only by consulting the words of the will, and the posture of the facts, which must have had an influence, when it was framed, and constituting, if one may so say, a part of the res gestæ; but also by the rules of interpretation, in some measure artificial, which have been from time to time adopted by courts of law for the ascertainment of the intention. Where such rules have long prevailed, it would produce infinite mischiefs to depart from them; for it would necessarily loosen the whole foundation of the titles to real estate, and unsettle all that constitutes safety or security in the administration of the law; I mean, the adherence to precedents. And then, again, not only rules of interpretation, but expositions of certain phrases, found in certain connexions in wills, are entitled to great influence in deciding other cases similarly circumstanced. In short, precedents constitute the material basis of this department of the law, as well as of others, in regard to the mode of searching out, and fixing the intention of the testator. So that it may be truly affirmed, though it seems, at first view, somewhat paradoxical, that the intention, as expounded by courts of law, is, or may be, very often quite different from the private intention and understanding of the testator.

The difficulty of construing wills in any satisfactory manner, renders this one of the most perplexing branches of the law. The cases almost overwhelm us at every step of our progress; and any attempts even to classify them, much less to harmonize them, is full of the most perilous labor. Lord Eldon has observed, that the mind is overpowered by their multitudes, and the subtilty of the distinctions between them. Jesson v. Wright, 2 Bligh, 50. To lay down any positive and definite rules of universal application in the interpretation of wills, must continue to be, as it has been, a task, if not utterly hopeless, at least of extraordinary difficulty. The unavoidable imperfections of human language, the obscure and often inconsistent expressions of intention, and the utter inability of the human mind to foresee the possible combinations of events, must for ever afford an ample field for doubt and discussion, so long as testators are at liberty to frame their wills in their own way, without being tied down to any technical and formal language. It ought not, therefore, to surprise us, that in this branch of the law the words used should present an infinite variety of combinations, and thus involve an infinite variety of shades of meaning, as well as of decision.

In considering the present case, it may be well, first, to look at the words of the devise, and ascertain, if we can, what is their natural and appropriate meaning. Having done so, we may then endeavor to ascertain, if the authorities present any solid ground for a different construction. If they fortify, rather than repel the natural import of the

[2] The papers herein referred to, marked A, B, C, are omitted, they not being important to the true understanding of the decision.

[3] The very learned arguments in this case were in writing, and the reporter was desirous of presenting an abstract of them; but, residing at a distance from the counsel, he was unable to procure, probably on account of some miscarriage, the arguments on one side, though those on the other side were politely forwarded to him. The great fullness, with which the court has gone into the consideration of the authorities, will make this necessary omission, perhaps, less regretted.

words, then they may afford strong reasons for adhering to it. If, on the other hand, they are opposed to it, then it is to be considered, whether they are so exactly in point, as to justify us in surrendering it, and following the conclusions, which they indicate. I shall confine my remarks chiefly to the direct devise; for although the other clauses in the will may furnish some illustrative lights, they do not seem to me strong enough to lead to any decisive conclusion. Two facts, however, are important to be mentioned; one is, that the testator professes an intention in the introductory part of his will, to dispose of all his worldly estate; and there is no residuary clause. So that he must have supposed himself to have made a final disposal of all his estate, in the specific devises. Another fact is, that the devisee, Philip Sisson, was a minor, unmarried and without children, at the time of making the will, and at the death of the testator.

Let us then proceed to the words of the will. The first part of the clause is, "I give and bequeath unto my loving grandson, Philip Sisson, &c., and to his male children, lawfully begotten of his body," &c. If the will had stopped here, there could not have been a doubt, either upon principle or authority, that it was the intention of the testator to create an estate in tail male in the devisee. In the first place, the words import a devise in presenti, and as the devisee had no children at the time of the will, if we construe the words, "his heirs male," &c., as words of purchase, and a "designatio personarum, in presenti," the devise becomes utterly void, from the want of proper objects in esse to take; so that the intention of the testator is defeated. On the other hand, if they are construed, as words of limitation, designating the succession of heirs to the estate, full effect is given to the words of the will, and the intention of the testator is accomplished. "Ut res magis valeat, quam pereat," the latter construction ought to be adopted. This is exactly in conformity to one of the resolutions in Wild's Case, 6 Coke, 17, which was decided by all the judges in England. "This difference," says my Lord Coke, "was resolved for good law; that if A. devises his land to B., and to his children or issues, and he hath not any issue at the time of the devise, that the same is an estate tail; for the intent of the devisor is manifest and certain, that his children or issues should take; and as immediate devisees they cannot take, because they are not 'in rerum naturâ'; and by way of remainder they cannot take; for that was not his intent, for the gift is immediate. Therefore, these such words shall be taken as words of limitation, scilicet, as much as children or issues of his body." Now, Wild's Case has constantly been admitted to be good law; and relied on in many subsequent cases. See Ginger v. White, Willes, 348; Seale v. Barter, 2 Bos. & P. 485, 494. The present case is even stronger than the resolution in Wild's Case; for the words implied there, "lawfully begotten of his body," are here expressed. The whole difficulty is upon the succeeding part of the clause, "his male children, &c., and their heirs for ever, to be equally divided among them and their heirs for ever." Now, certainly, in construing the words of the devise, we must take the whole together; and as the former words may be enlarged by the latter, so they may also be restrained and qualified, or explained, by the latter. We are not bound to give an absolute technical sense to one part of the language, and then reject all other parts, as inconsistent with it. Lord Chief Justice Willes (and he was a very great judge), remarked with great force and sagacity, that "a mistaken notion has prevailed, that particular words in a will are as much technical words, as others are in a deed; and as necessarily pass such an estate in a will, as others do in a deed; as, for instance, that the words issue or children, where there are none at the time of the devise, do as necessarily create an estate tail in a will, as 'heirs of the body' do in a deed;" and he then added, that much confusion, in respect to the construction of wills, had been occasioned by this mistake. Id.

Now, the obvious sense of these words of the devise, taken in connexion, is, that all the male children of the devisee, Philip Sisson, are to have equal shares in the devised premises in fee simple. The devise is "to the male children and their heirs for ever," the very words, which are expressive of a fee simple; and the premises are to be equally divided among them (that is, among the male children and their heirs, which are equally expressive of an equality of shares in the inheritance. If this be the obvious sense of the words, and the intention of the testator, the next inquiry is, whether it can be carried into effect by the rules of law. Certainly it can be, if we construe the whole clause to be a devise to Philip Sisson for life, with a contingent remainder in fee simple to his children, as purchasers, share and share alike. And it can be accomplished in no other manner. Upon this construction, the remainder would be contingent, until the devisee should have a male child born. It would then vest in him in fee, and open to let in any after-born children in the life of the father. See Right v. Creber, 5 Barn. & C. 866; Doe v. Perryn, 3 Term R. 484. In this way the inheritance would go exactly in the line, and in the shares, marked out by the testator.

Why, then, should not this construction be given to the clause? It is repugnant to no words in the will. It conforms to the apparent intention of the testator. It satisfies the rules of law. If, on the other hand, we construe the devise, as giving a fee tail to Philip Sisson, the whole of the words, succeeding the first part of the clause, are to be struck out of the will. They are repugnant to an estate tail in Philip Sisson. His male children cannot, if he takes an estate tail.

have a fee simple, and they cannot take equally. On the contrary, the eldest son and his issue are to take the whole. The only possible objection to it is, that if Philip Sisson should have children, all of whom should die in his life-time, leaving issue, the issue could not take under the will. But this is no more than what may occur in every other case of a lapsed devise.

But it may be said, that, in order to give this construction to the devise, the court is compelled to insert the words, "for life," after the words of devise to Philip Sisson; or, in other words, the court is compelled to introduce a qualification not found in the text. If this be admitted, still the posture of the case is not changed; for by the general rules of law, where the estate is indefinite, the party takes for life only, unless a different intention be clearly indicated. The testator has not said in terms, that Philip Sisson shall have an estate tail. If the court is to give such a construction to the devise, it must depart from the words used, and substitute for "male children," the words "heirs male of his body." In either case the court is compelled to ascertain, what is not expressed, that is to imply a qualification or limitation upon language absolutely indefinite. Now, there is no rule of construction better founded in common sense, as well as in law, than the rule, that effect is to be given to all the words used, if they are sensible in the place, in which they occur, and if no apparent intention of the testator is thereby violated. Where words of devise are used, giving an estate to A., and then to B., no one would doubt, that the estate to A. was a mere life estate, although not so expressly limited. It results from a general rule of law. If the testator, instead of designating the second devisee by name, uses words, which are commonly a mere "descriptio personarum," the conclusion is equally natural, that the estate to A. is for life only. We are at liberty to abandon this conclusion only when there is an apparent intent to use the words, as words of limitation, and not as words of description. "Male children" are not, technically speaking, words of limitation, but of description of persons. The court ought, then, clearly to see, that they are used as words of limitation, before it abandons their common meaning.

On the other hand, the construction, that the will gives an estate tail to Philip Sisson, compels us to reject the whole of the superadded words, and to deprive them, not only of their ordinary meaning, but of all meaning. Now, it may be admitted, that where the testator has expressed two intentions, which are incompatible with each other, the general intention ought to prevail over the particular intention; otherwise, there would be a total failure of the devise from uncertainty or repugnancy. And, notwithstanding this rule, giving effect to a general over a particular intent, has been sometimes objected to, it seems to me plainly founded in common sense; and it is certainly fully borne out by the authorities. Thus, an express devise for life has often, from the accompanying words, been held to carry a fee tail.[4]

If, then, looking solely to the terms of the will, we should be naturally, nay, necessarily led to the conclusion, that to give effect to all the words of the will, the devise ought to be construed, as an estate to Philip Sisson for life only, with a contingent remainder in fee to his male children; and in point of law, such a devise would be good and effectual; let us see, in the next place, whether the case is so bound up by authority, as to forbid a resort to this mode of interpreting it.

Now, it appears to me, that a careful survey of the authorities will demonstrate, not only that the court may, but ought to give this very interpretation to the devise. The authorities, which are apparently the other way, are all distinguishable, and leave the present case wholly unaffected in principle; or at least, if this be not universally true, the great mass of these authorities are consistent with it.

In the first place, as to the authorities in favor of the interpretation. I do not pretend to go over all of them; but I will mention some of those most directly in point, premising only, that some of them go to show, that where the first estate is given indefinitely, it may be restrained to a life estate; and others, to show the controlling effect of the superadded words. Indeed, where an estate is given indefinitely, the rule of law is (as I have already suggested) that it is to be deemed a life estate only, unless that construction be repelled by the context. In Luddington v. Kime, 1 Ld. Raym. 203, the words of the devise were, to A. for life, and in case he should have any issue male, then to such issue male and his heirs for ever, and if he should die without issue male, then to B., and his heirs for ever. And it was held, that A. took an estate for life only, with a contingent remainder in fee to his issue male. Here, indeed, the words for life were inserted; but as there was a devise over, those words alone would not have prevented A. from taking an estate tail. See Robinson v. Robinson, 1 Burrows, 38; Doe v. Laming, 2 Burrows, 1100, 1107; Pierson v. Vickars, 5 East, 548. The effective ground of the determination was upon the superadded words, "issue male and his heirs for ever." Lord Raymond says, that the judges held, that the testator designed the words, issue male, to be a description of the person, "because (he added) of the farther limitation to the issue, namely, and to the heirs of such issue for ever." In Ginger v. White, Willes, 348, the devise was

[4] See Burnet v. Coby, 1 Barnard. 367; Luddington v. Kime, 1 Ld. Raym. 203; Goodright v. Pullyn, 2 Ld. Raym. 1437, 2 Strange, 729; Wright v. Pearson, 1 Eden, 119; Measure v. Gee, 5 Barn. & Ald. 910; Robinson v. Robinson, 1 Burrows, 38; Doe v. Smith, 7 Term R. 531; Doe v. Cooper, 1 East, 229; Doe v. Featherstone, 1 Barn. & Adol. 944; Jesson v. Wright, 2 Bligh, 1, 51; Pierson v. Vickars, 5 East, 548; Seaward v. Willock, Id. 198.

to his son A. for life, and to his daughter S. for life, in case she lived unmarried, in common between them; but if the said S. shall marry, or die before A., then A. to have the sole use for life, and from and after the decease of the said A. and S., or other determination of their estate therein, to the male children of A. successively, one after another, as they are in priority of age, and to their heirs; and, in default of such male children, to the female children of A., and their heirs; and in case A. should die without issue, to W. in fee. It was held, that A. took an estate for life only, and the children, by reason of the devise over, an estate tail general by purchase. In Doe v. Laming, 2 Burrows, 1100, the devise was to A., and the heirs of his body lawfully to be begotten, as well females as males, and to their heirs and assigns for ever, to be divided equally, share and share alike, as tenants in common, and not as joint tenants. It was held that A. took an estate for life only, and that the heirs of her body were entitled to a fee as purchasers. The court relied upon the superadded words, as unequivocal, to show the intention of the testator. That case is as directly in point with the present, as can well be imagined. There were no words limiting the estate to A. for life. In one respect it was stronger; for the testator had used the words, "heirs of her body," which are peculiarly appropriate to an estate tail; and yet, upon the plain force of the superadded words, those words were withdrawn from their natural meaning, as words of limitation. In the present case, the words are "male children," which, as contradistinguished from "heirs of the body," naturally import words of description, and not words of limitation. See Doe v. Perryn, 3 Term R. 484. Unless, indeed, this case of Doe v. Laming, can be overturned, and it has never yet been overturned, I for one do not see, how the present case can be differently decided. In Doe v. Perryn, 3 Term R. 484, the devise was to A., the wife of B., for life, remainder to trustees, to preserve contingent remainders, remainder to the children of A. and B., and their heirs for ever, to be divided among them equally, and if but one child, to such child only and his heirs for ever; and for default of such issue, remainder over. A. and B., at the death of the devisor, had no child. It was held, that the estate was a contingent remainder in fee to the children, which on the birth of a child would vest in that child, subject to open in favor of after-born children. In Doe v. Collis, 4 Term R. 294, the devise was to the testator's two daughters, to be equally divided between them, namely, one moiety to one and her heirs, and the other moiety to the other for life, and after her decease to the issue of her body, and their heirs for ever. It was held, that the second daughter took an estate for life, with remainder to her children as purchasers in fee. In Burnsall v. Davy, 1 Bos. & P. 215, the devise was to A. and the issue of her body, as tenants in common, but in default of such issue, or if all die under twenty-one years, without leaving issue, remainder over. A. never had any issue. It was held, that A. took for life with a contingent remainder to the issue as purchasers. In Crump v. Norwood, 7 Taunt. 362, the devise of gavelkind lands, stripped of unimportant circumstances, was to A. for life, and after his decease to the heirs of his body, and, if more than one, equally to be divided, and to take as tenants in common, and if but one, to such one only, and to his, her, or their heirs; and if A. dies without issue, or, leaving such, they should all die without attaining twenty-one years, remainder over. It was held, that A. took for life, with remainder to his children, as tenants in common in fee. In Doe v. Burnsall, 6 Term R. 30, the devise was to A., and to the issue of her body lawfully to be begotten, as tenants in common, if more than one, and, in default of such issue, &c., devise over. It was held, that A. took an estate for life only, and the limitation to her children was a contingent remainder to them as purchasers. In Gretton v. Haward, 6 Taunt. 94, the devise was to A., she paying my just debts, and after her decease to the heirs of her body, share and share alike, if more than one, and in default of issue to her own disposal. It was held, that A. took for life only, with a remainder in fee to all her children. In Doe v. Elvey, 4 East, 313, the devise was to A., and to the issue of his body lawfully begotten or to be begotten, his, her, or their heirs, equally to be divided if more than one; and in default of issue, &c., a devise over. It was strongly intimated by the court, that A. took an estate for life only; but it was unnecessary to decide the point. In Doe v. Jesson, 5 Maule & S. 95, the devise was to A. for life, and after his decease unto the heirs of his body, in such shares and proportions as A. should appoint, &c., and for want thereof to the heirs of the body of A., share and share alike, as tenants in common, and if but one child, the whole to such child only; and for want of such issue, to the testator's own heirs. It was held by the court of King's bench, that A. took an estate for life, and his children took an estate for life. We shall presently see, that this decision has been overturned by the house of lords upon its own circumstances, and principally because the plain import of the words heirs of body, was not overcome by the other superadded words, taking into consideration the devise over. Jesson v. Wright, 2 Bligh, 1. In Doe v. Goff, 11 East, 668, the devise was to A., and the heirs of her body, begotten or to be begotten, as tenants in common, and not as joint tenants; but if such issue should die before twenty-one, then to B. in fee. It was held that A. took an estate for life only, with remainder to all her children equally, as purchasers. This decision also has been overturned upon the same ground as the preceding. 2 Bligh, 1, 55, 57. In Right v. Creber, 5 Barn. & C. 866, the devise was to trustees, in trust to permit A. to receive rents for life, and from and after her death unto

the heirs of her body, share and share alike, their heirs and assigns for ever. It was held, that A. took an estate for life, and her children took as purchasers in fee; the estate to open to let in children born after the testator's death. In Jeffery v. Honywood, 4 Madd. 398, the devise was to A., and to all and every the children, whether male or female, of her body lawfully issuing, and unto his, her, and their heirs as tenants in common. It was held, that A. took for life only, with remainder to her children as tenants in common in fee. This case also is as nearly in point as can well be imagined. The estate to A. is indefinite; the remainder is to the children in fee, as tenants in common, and there is no devise over; which are precisely the leading circumstances in the present case.

Now, I believe, that no case whatsoever will be found to have decided, that where the devise has been in terms to children and their heirs, without any devise over, the parent shall take an estate tail. Where the words of the devise have been to "issue," or "issue of the body," and their heirs, or heirs of their bodies, it has often been held, that the parent took an estate for life only. In addition to the cases already cited on this point, are Backhouse v. Wells, 1 Eq. Cas. Abr. 184, 2 Strange, 731, 800; Mandeville v. Lackey, 3 Ridg. App. 352; Merest v. James, 1 Brod. & B. 484, 4 Moore, 327. The great struggle has been, where the words have been "heirs of the body," with superadded words. The constant argument has been, that these words have a technical, appropriate meaning, as words of limitation, to designate heirs in succession, and that, therefore, they are to be construed as such, unless the context clearly establishes, that they are used in a different sense, and as synonymous with children. Words inconsistent with the technical meaning are not, (it has been said,) sufficient to overthrow it; but there must be a clear expression of intention by the testator to use them as descriptive of particular persons, and not merely as descriptive of a succession of heirs.

Let us now proceed to examine some of the most important cases, which are favorable to the defendant; and it will be found, that they turn upon the same ground of reasoning. The first, and indeed that, which may now be deemed the great leading authority on this head, is Jesson v. Wright, 2 Bligh, 1. There, as we have seen, the devise was to A for life, and after his decease to the heirs of his body, in such proportions as he should by deed appoint; and, for want of such appointment, to the heirs of the body of A., share and share alike, as tenants in common; and if but one child, the whole to such child, and for want of such issue, to the heirs of the testator. The house of lords held, that under this devise A. took an estate tail. Lord Eldon founded his judgment upon the ground, that the words, to A. for life, followed by the words, heirs of his body, would give a fee tail, if the will had stopped there. He argued, that the words might yield to a clear particular intent, that the estate should be for life only; and that such may be the effect of superadded words, or any expressions showing the particular intent of the testator; but it must be clearly intelligible and unequivocal. And he thought, that no such intent was clearly and unequivocally shown in the superadded words. On the contrary, he thought, that the words, "for want of such issue," showed, that the issue were to take in succession, that is, as heirs of the body, and not as a mere description of the persons, who were children; and that children alone were not the objects of the testator's bounty, but other issue. Notwithstanding, therefore, the other superadded words, "as tenants in common," &c., the general intent must prevail over the particular intent. Lord Redesdale put this judgment upon the ground, that the technical words, "heirs of the body," should have their legal effect, unless, from subsequent inconsistent words, it is very clear the testator meant otherwise. He thought by heirs of the body, the testator did not mean exclusively children, but that there were other objects of his bounty.

Now, it is material to state, that in this case the devise to the "heirs of the body," had no superadded words of limitation to them in fee; so that, if it meant children, they would take for life only. And Patteson, J., in Doe v. Featherstone, 1 Barn. & Adol. 944, which was decided expressly upon the authority of Jesson v. Wright, and as not distinguishable from it, took notice of the difference between it and Right v. Creber, 5 Barn. & C. 866, where there were superadded words of fee, to the words, "the heirs of the body," which led to a different view of the intention. In Doe v. Featherstone, the devise was to the testator's son-in-law A., and B. his wife, for their lives and that of the survivor, and immediately after the survivor's decease, then to the heirs of the body of B. by A., to be equally divided among them, share and share alike. It was held, that B. took an estate tail, although there was no devise over in default of issue, as in Jesson v. Wright, the court thinking, that the general intention was not displaced by the inconsistent words. In Franklin v. Lay, 6 Madd. & Gel. 258, the devise was to A., and the issue of his body lawfully to be begotten, and to the heirs of such issue for ever; but if A. should die without leaving any issue, then remainder in fee over. It was held by the vice-chancellor, that A. took an estate tail, for the words, "leaving issue," could not be restrained to mean issue living at A.'s death, but meant an indefinite failure of issue, which would clearly indicate an estate tail in A. Now, it may be added, that "issue" is generally construed to include descendants, unless the contrary be the testator's intention. Sir William Grant recognised this, as the settled rule in

Leigh v. Norbury, 13 Ves. 339.[5] But the reverse is the rule ,as to the word "children," for they are construed as descriptive of persons, or words of purchase, unless the contrary clearly appears to be the intention of the testator. The same remarks are applicable to King v. Melling, 1 Vent. 225, 232, 2 Lev. 58; Roe v. Grew, 2 Wils. 322; Shaw v. Weigh, 1 Eq. Cas. Abr. 184; King v. Burchell, 1 Eden, 424, 1 Amb. 379; Denn v. Puckey, 5 Term R. 299; Frank v. Stovin, 3 East, 548; Doe v. Applin, 4 Term R. 82; Attorney General v. Sutton, 1 P. Wms. 754; Stanley v. Lennard, 1 Eden, 87; and Doe v. Halley, 8 Term R. 5. In all of them there was a devise to A. generally, or for life, and to his "issue," with superadded words, and in default of issue, a devise over. The devise over is not always decisive, as we have seen; but it often has had a most material influence. In Goodright v. Pullyn, 2 Ld. Raym. 1437, 2 Strange, 729, the devise was to A. for life, and after his decease to the heirs male of the body of A., lawfully to be begotten, and his heirs for ever; but if A. should die without such heir male, then remainder over. It was held, that A. took an estate tail. The court mainly relied upon the ground, that the words heirs male are nomina collectiva, words of limitation, and not of purchase, and that the word "his" referred, not to heirs male, but to A. Wright v. Pearson, 1 Eden, 119, 1 Amb. 358, is precisely to the same effect. In Morris v. Ward, cited 8 Term R. 518, the devise was to A. for life, and after her decease to the heirs of her body, begotten or to be begotten, and to his or her heirs for ever, and for want of such heirs of the body to the testator's next heirs and their heirs for ever. It was held an estate tail in A. This case also turned upon the force of the words, "heirs of the body," in a technical sense. Measure v. Gee, 5 Barn. & Ald. 910, is precisely to the same effect. In Doe v. Smith, 7 Term R. 531, the devise was to A., and the heirs of her body, lawfully to be begotten, as tenants in common, and not as joint tenants; and in case A. shall happen to die before twenty-one, or without leaving issue, then devise over. It was held, that A. took an estate tail, upon the ground of effectuating the general against a particular intent, the general intent being, that the issue of A. should take in succession, evinced by the words, "heirs of the body," and also by the language leading to the devise over. Lord Kenyon, on that occasion, distinguished the case from Doe v. Laming by remarking, that there were no words of limitation superadded to the "heirs of the body" of A. Now, such words are in the case at bar. Doe v. Cooper, 1 East, 229, where the words were "issue of A.," turned upon precisely the same considerations; as also did Pierson v. Vickars, 5 East, 548. In Bennett v. Tankerville, 19 Ves. 170, the devise was to A. for life without inpeachment of waste, and from and after his decease to the heirs of his body, to take as tenants in common, and not as joint tenants; and in case of his decease without issue, devise over. It was held an estate tail in A. Here, again, the technical words, "heirs of the body," occurred without any superadded words, "to their heirs," and there was a devise over on a failure of issue. In Doe v. Goldsmith, 7 Taunt. 209, 2 Marshall, 517, the devise was to A. for life, and immediately after his decease to the heirs of his body lawfully to be begotten, in such parts, shares, and proportions, &c., as A. should appoint, and in default of such heirs of his body, devise over. It was held a fee tail in A., upon the same general grounds, as the preceding cases. Here, there was a devise over in default of issue; and there were no superadded words to the words, "heirs of the body" of A. In Doe v. Harvey, 4 Barn. & C. 610, the devise (of gavelkind land) was to A. for life, and from and after the determination of that estate to trustees to preserve contingent remainders, and from and after the decease of A. to and amongst all and every the heirs of the body of A., as well female as male, such heirs, as well female as male, to take as tenants in common; and for default of such issue, devise over. It was held a fee tail in A. The ground of the decision was the same as in the preceding cases, upon the technical force of the words, "heirs of the body," and the general intention, namely, that the intention was, that the estate should remain in the family of A., as long as the family should exist. This could be effected only by construing the words, "heirs of the body," to be words of limitation. If construed to be words of purchase, and all the children of A. should die in his life-time, leaving issue, the latter could not take. And besides: there being no superadded words of limitation to the words, "heirs of the body," it would be difficult to say, that the children of A. could take more than an estate for life. The decision of Jesson v. Wright had also manifestly great weight in this decision.

These are the most material cases, which can be urged as favorable to the defendants. They may be dismissed by remarking, that they all differ from the case at bar, in having the devise, after the estate to the first taker, to be in the technical words, "to heirs of the body," or "to the issue" of the first taker; and if there are superadded words, there is also a devise over on failure of issue. In the case at bar the devise is to Philip Sisson, and to his male children, not to the heirs of his body, or his issue; there are the superadded words, "their heirs for ever, to be equally divided amongst them;"

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[5] See Roe v. Grew, 2 Wils. 322; Shaw v. Weigh, 1 Eq. Cas. Abr. 184; King v. Burchell, 1 Eden, 424; Denn v. Puckey, 5 Term R. 299; Frank v. Stovin, 3 East. 548; Doe v. Applin, 4 Term R. 82; Stanley v. Lennard, 1 Eden, 87; Doe v. Halley, 8 Term R. 5.

and there is no devise over. If, under such circumstances, the estate is construed to be an estate tail in Philip Sisson, then, as there is no devise over, and no residuary clause in the will, the testator has failed to do, what he expressly states his intention to be in the beginning of his will, to dispose of all his worldly estate. Indeed, the whole reasoning on which this class of decisions is founded, when rightly understood, applies with great force to the opinion, which I have already expressed, on the true interpretation of the present will. The leading ground is, that words, which have a known technical meaning, or general use, as words of limitation, indicating heirs in succession, shall not be presumed to be used in any other sense, unless there is clear and unequivocal evidence, that a different sense was absolutely intended. Inconsistent words used do not necessarily import such an intention; for the testator may still use the words to denote heirs in succession, and mean to accomplish other objects incompatible by law with that intention. Apply the same ground of reasoning to the present case. The word "children" is in a technical, as well as a general sense, used as a word of purchase, as a description of persons, and not as a word of limitation. See Doe v. Mulgrave, 5 Term R. 320; Seale v. Barter, 2 Bos. & P. 485; Ginger v. White, Willes, 348. If another meaning is sought to be forced upon it in a particular will, deflecting it from its general and appropriate sense, that must be made out by clear and unequivocal evidence. In the case at bar, no such unequivocal evidence exists. On the contrary, every part of this clause of the will reads consistently, and full effect is given to every word in it by adhering to the technical and general sense. A departure from that sense involves the rejection of important words in that clause, sensible in the place where they occur, and indicative of a legal intention.

There are stronger cases than the present, where the general sense has prevailed. In Oates v. Jackson, 2 Strange, 1172, 7 Mod. 439, the devise was to A. for her life, and after her death to my daughter B., and her children of her body begotten, or to be begotten by her husband C., and their heirs for ever. B. at the time of making the will had one child, and afterwards had three more. It was held, that B. took, as joint tenant in fee, with all her children. And Co. Litt. 9, was relied on, that a gift to B., et liberis suis et a lour heirs, is a joint fee to B. and his children. Now, whether it might not have been a more just construction of the will in 2 Strange, 1172, to have held it an estate to B. for life, with remainder in fee to her children, I do not stop to inquire. It is sufficient, that it was not held to be an estate tail in B. The case of Jeffery v. Honywood, already cited 4 Madd. 398, is still more direct, and is certainly far more satisfactory. Crawford v. Trotter, 4 Madd. 361, leads in the same direction, as far as it goes. Upon the whole, I can find no case, which goes the length of establishing the correctness of the construction of this will contended for by the defendants; and to adopt it, would, in my judgment, be to overthrow the clear and positive intention of the testator. On the other hand, there are, as I think, decisive authorities in favor of construing the estate of Philip Sisson to be a life estate only, with remainder in fee to his male children, under circumstances far less strong than those belonging to the present case. And I would add, that, in all cases of this sort, if the intention be clear, no authorities, applicable to other wills, ought to preclude the court from carrying that intention into effect, if it can be done without disturbing the settled principles of law.

My opinion is, that the plaintiffs are entitled to recover, unless the warranty in this case is a rebutter or estoppel of their claim. This leads me to the consideration of the question of the effect of the warranty. If the statute of 4 & 5 Anne, c. 16, upon the subject of collateral warranty, has been adopted in Rhode Island, it puts an end to the question. In February, 1749, the legislature of Rhode Island passed an act, reciting in the preamble, that a committee had been appointed at a previous session to prepare a bill for introducing into the colony such of the statutes of England as are agreeable to the constitution, and to make a report of their doings, and that the committee had presented a report (reciting the report at large), and therefore enacted, "that all and every of the statutes aforesaid (that is, the statutes referred to in the report) be and they are hereby introduced into this colony, and shall be in full force therein, until the general assembly shall order otherwise." The report referred to begins as follows: "We the subscribers, being appointed to report, what statutes of Great Britain are and ought to be in force in this colony, do report as followeth, that the following statutes, namely, the statute of Merton concerning dower; the statute of Westminster the first, as far as concerns bail; Gloucester; Westminster the second, 'de donis conditionalibus'; first Henry the Fifth, ch. 5th, of additions; partitions in general; the statutes of Henry the Eighth, concerning leases, saving and excepting the last paragraph of the said statute; twenty-first of James First, ch. 16th, for limiting real actions; and that of thirty-second of Henry the Eighth, ch. 2; the statutes of James and Elizabeth, and all other statutes that concern bastardy, so far as applicable to the constitution of this colony, &c., &c.; the statute of twenty-seventh Henry the Eighth, commonly called the statute of uses;" and (after enumerating several other statutes in the same general way) adds "the statute of the fourth and fifth of Anne,

ch. 16, relating to joint tenants and tenants in common; that part of the statute of the —— of Anne, that subjects lessees that hold over their term against the will of the lessor, to the payment of double rent during the time they hold over," &c., &c. And then concludes, "All which statutes, we are humbly of opinion, have heretofore been, and still ought to be, in force in this colony." The language of this report is extremely loose and inaccurate. But it is observable, that the words descriptive of the particular statutes are not their exact titles, but rather those, by which they were commonly known; and where a part of the statute only is intended to be adopted, and a part excluded, that intention is expressed in positive terms.

In the Revision of 1767 (page 55), the introductory enactment is, "that all the courts in this colony shall be held to, and governed by the statutes, laws, and ordinances of this colony, and such statutes of parliament as are hereinafter mentioned, that is to say," —and it recites the same statutes in the very terms of the report of 1749. The statute here described, as "the statute of the fourth and fifth of Anne, ch. 16th, relating to joint tenants and tenants in common," is entitled "An act for amendment of the law and the better advancement of justice." It contains a great variety of sections, among which are provisions for allowing double pleas, extending the statutes of jeofails, authorizing a view by juries, dispensing with attornments by tenants, regulating dilatory pleas, allowing a plea of payment after the day to bonds, and stay of proceedings on payment of principal and interest, fixing the competency of witnesses to nuncupative wills, providing for declarations of uses upon fines and recoveries after they are levied, limiting actions against persons beyond seas, regulating suits on bail bonds, providing against bars by collateral warranty, providing for costs to defendants in error, and finally, in the last (the twenty-seventh) section, for actions of account by one joint tenant or tenant in common, his executors or administrators, against another joint tenant, or tenant in common, his executors or administrator; and also an action of account against the executors or administrators of every guardian, bailiff, or receiver; neither of which lay at the common law. Com. Dig. "Accompt" B, D; Wheeler v. Horne, Willes, 208; Co. Litt. 172.

Now, it is not unimportant, that the committee in their report state, that the statute of Anne and the other statutes referred to, have heretofore been in force in the colony. And it would certainly require very strong language to induce the court to believe, that a statute professedly in "amendment of the law and for the advancement of justice," and which, in most of its provisions, was directly applicable to the colony, was not intended to be generally adopted. The words "relating to joint tenants and tenants in common," are descriptive of the statute generally, and do not import in the connexion, in which they stand, that the part, which relates to joint tenants or tenants in common, and no more, is or has been adopted. If it had been the intention of the committee or of the legislature, thus to restrain the adoption of the statute, the same language would have been used, as in other parts of the report, where such an intention existed. Thus, the statute of Westminster the first is adopted "so far as concerns bail"; the statute of 32 Hen. VIII., concerning leases, excepting the last paragraph; that part of the statute of —— Anne respecting tenants holding over, &c., &c. Indeed, it seems almost incredible, that the committee, or the legislature should have intended to adopt that part only of the twenty-seventh section of the statute, which gives an action of account between joint tenants and tenants in common, and yet have left out that part of the same section, which gives an action of account against the executors and administrators of guardians, bailiffs, and receivers. And yet this would be the inevitable result of giving a construction to the language of the report, which should consider the words as restrictive, instead of being descriptive of the statute. It would be far more incredible, that there should be an intention to adopt this comparatively unimportant part of the statute of 4 & 5 Anne, c. 16, to the total neglect and exclusion of the other numerous and infinitely more important provisions for the amendment of the law and the furtherance of justice contained therein. The doctrine of collateral warranties, for instance, which this statute cuts down, is one of the most unjust, and oppressive, and indefensible in the whole range of the common law; and, in a country like ours, would daily work the greatest public mischiefs. Collateral warranty is, as every lawyer knows, where the ancestor has made a warranty of land, which warranty, upon his death, descends upon the heir, whose title to the same land neither is, nor could have been, derived from the warranting ancestor. And yet, though no assets should descend to the heir from that ancestor, and though the heir's title to such land should be otherwise complete, he would be barred of his title by the warranty of his ancestor. Thus, a tenant for life by the curtesy might alien the land with warranty, and by this warranty, descending upon his son, might without assets bar him of his maternal inheritance. This was cured by the very statute of Gloucester (6 Edw. I. c. 3) referred to in the report, as to tenants by the curtesy, and by a later statute as to tenants in dower. But it remained a standing reproach upon law and justice, until the statute of 4 & 5 Anne applied the same rule to all other tenants for life. 2 Bl. Comm. 302, 303. Surely, this was a grievance of a far more weighty nature, than the mere defect of a remedy for an account between joint tenants and tenants in common, in cases where they had not been made bailiffs. It appears to me, therefore,

that as the language of the report, taken in connexion with the legislative enactment, is, that the "statutes of fourth and fifth Anne, ch. 16," are adopted, it would be a most unjustifiable interpretation for the court to say, that the chapter sixteenth was not adopted; but only a fragment of a single section of the statute. My opinion is, that the legislature adopted the whole statute, so far as it was, or could be, applicable to the colony.

This disposes of the question of warranty, and thus removes the only remaining ground against the plaintiffs' right to recover. I will only add, in reference to a point made at the argument, that the covenant of warranty, though it is deemed a personal covenant in this country, and may not authorize a recovery over of the value from the heir, if he has assets, in a warrantia chartæ, but only in an action of covenant; yet that does not prevent the covenant of warranty from operating as a bar to the title of the heir by way of rebutter, when it descends upon him from the warranting ancestor. See Doe v. Prestwidge, 4 Maule & S. 178.

The district judge concurs in this opinion, and judgment must be given accordingly.

SIX BARRELS OF DISTILLED SPIRITS (UNITED STATES v.). See Case No. 16,-294.

SIX BOXES OF ARMS (UNITED STATES v.). See Case No. 16,295.

Case No. 12,914.

SIX CASES OF SILK RIBBONS.

[3 Ben. 536; [1] 11 Int. Rev. Rec. 13.]

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

CUSTOMS DUTIES — UNDERVALUATION — MARKET VALUE—EVIDENCE.

1. Under the act of March 3, 1863 (12 Stat. 737), where goods imported from abroad are owned by their manufacturer, he must swear that his invoice contains the actual market value of the goods at the time and place when and where they were manufactured.

2. "Actual market value," is the price at which the manufacturer holds his goods for sale in the ordinary course of trade.

3. The time when an article is manufactured is when its manufacture is completed.

4. The law presumes that there was, at such time and place, an actual market value, and no evidence can be received, in an action to forfeit the goods for fraudulent undervaluation, to show that there was no such value.

5. The law requires the best evidence to be given of any fact.

6. A series of sales or a single sale in the ordinary course of trade, is one of the best evidences of market value.

7. Offers by merchants or manufacturers to sell their goods in the usual course of trade are among the best evidences of their market value.

8. In an action to forfeit goods for fraudulent undervaluation, the jury have the right, in the absence of proof of such sales or offers, to resort to the cost of manufacture, with the manufacturer's profit added, as a means of determining what was their actual market value. But, in that case, the cost of the raw material is to be taken as of the time and place of manufacture.

9. Any intentional undervaluation is cause for the forfeiture of the goods; and the intentional undervaluation of any item in an invoice authorizes the forfeiture of the whole invoice.

10. Where the court decides that probable cause has been shown for the seizure of the goods as so forfeited, the burden is upon the claimant to show that the invoice contains the actual market value of the goods.

At law.

William M. Evarts and William G. Choate, for the United States.

Edwin W. Stoughton and Sidney Webster, for claimants.

BLATCHFORD, District Judge (charging jury). This prosecution, gentlemen, for the forfeiture of the goods in question here, is founded upon two statutes of the United States—the fourth section of the act of May 28, 1830 (4 Stat. 410), and the first section of the act of March 3, 1863 (12 Stat. 737). The substance of the act of 1830 is, that if the invoice upon which foreign goods are entered at the custom-house is made up with intent, by a false valuation, to evade or defraud the revenue, the goods shall be forfeited; and the substance of the act of 1863 is, that if any owner of any imported goods shall knowingly make, or attempt to make, an entry thereof by means of any false invoice, or of any false paper, or of any other false practice or appliance whatever, all the goods named in the invoice shall be forfeited to the United States.

At Basle, in the Swiss Confederation, there has existed, for a long series of years, a manufacturing and mercantile house, doing business under the name of Forcart Weiss and Burkhardt Wildt, composed, at present, of three partners, Daniel Burkhardt, Daniel Burkhardt Forcart, and Louis Burkhardt Forcart. These gentlemen are engaged in the manufacture of silk ribbons, and they dispose of a large portion of their manufactures by sending them on consignment to the United States, to the city of New York, for sale here by a mercantile house—Kutter, Luckemeyer & Co. They have pursued this business of sending their goods to New York, to this house, and its predecessors, for about twenty-seven years. The law on the subject of invoicing foreign goods, in a case of this kind, is very explicit. As these goods were sent here by the persons who manufactured them, on consignment, for sale on their account, the proceeds to be returned to them, and were not actually sold abroad, the law requires that the invoice shall contain the actual market value of the goods at the time and place when and where they were manufactured. In the present case, in compliance with the law and

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the instructions from the proper authorities of the United States, one of the partners of this house has made oath, as required by the act of March 3, 1863, that the invoices contain the actual market value of the goods at the time and place when and where the same were manufactured. The definition of the words "actual market value" has been read to you from the decision made by the supreme court of the United States in the case of Cliquot's Champagne, 3 Wall. [70 U. S.] 114. The definition is, that the words "actual market value" mean the price at which the manufacturer holds his goods for sale, the price at which he freely offers them in the market, the price which he is willing to receive for them if they are sold in the ordinary course of trade. That is a definition which commends itself to the good sense of every man. A manufacturer who sends his goods to this country under the circumstances under which the goods in this case were sent, has no right to substitute, in his invoice, anything else for the actual market value. The oaths in this case are, that the invoices contain the actual market value; and the question will be, in the first place, whether these invoices contain the actual market value of these goods at the time and place when and where they were manufactured, and, in the next place, if they do not, whether they were made up by these manufacturers with the intent to evade and defraud the revenue of the United States, or with a knowledge on their part that they did not contain such actual market value.

There are seven invoices involved in this case, the first of them dated on the 6th of July, 1866, and the last of them on the 28th of August, 1866, covering a space of fifty-three or fifty-four days. The government claims to have shown to you, by the evidence, that there is, in fact, an undervaluation in these invoices, or, in other words, that these invoices do not contain the actual market value, in respect to five different descriptions of ribbons—what are known as patterns 350, 351 and 261, taffetas unis and satins unis L. There are some ribbons of pattern 350 in every one of the seven invoices; and the law is, that if there is a knowing undervaluation in respect to any one item in any invoice, all of the items and goods in that invoice are to be forfeited to the United States, as well as the item in respect to which such undervaluation exists. Of pattern 351 there are some only in invoices 1 and 2; of pattern 261 there are some only in invoices 2, 4, 6 and 7; of taffetas unis there are some only in invoices 1, 2, 3 and 6; and of satin unis L there are some only in invoices 1, 3, 6 and 7.

The expression "actual market value" having been defined to you, there is only one other term in the statute that requires any explanation or definition. The statute requires that, when the goods are obtained in any other manner than by purchase, the invoice shall contain the actual market value thereof at the time and place when and where the same were procured or manufactured. In this case, it must be the actual market value at the time and place when and where the goods were manufactured. The time when an article is manufactured means, under this law, the time when its manufacture is completed—when it is in a condition to have, as a complete manufactured article, a market value; and it does not mean any other preceding stage in the process of manufacture. The testimony of Mr. Daniel Burkhardt is, that these goods were in that state of complete manufacture from one to two weeks prior to the dates of the several invoices. From these views, you will perceive why it is that the law, which requires such actual market value to be inserted in the invoice, does not and will not permit anything else to be inserted in place of such actual market value. It will not permit the actual cost of the goods, with a manufacturer's profit added, to be inserted in the invoice instead of the market value; and this case furnishes an illustration of why such a principle, under this law, never could be admitted. It appears, from the evidence on both sides, that the cost of the raw silk used in the manufacture of these ribbons enters so largely into the expense of manufacturing them, as to constitute from seventy to eighty per cent. of the entire expense of their manufacture, the cost of the dyeing and weaving, and other expenses, in an old settled country, such as Switzerland, being, as a general rule, a fixed sum; that the variation in the cost of manufacture depends upon the variation in the price of raw silk; that, in consequence of the war between Austria and Prussia, in the summer of 1866, there being an interruption of trade, and the demand for ribbons being less, there was a fall in the price of raw silk; and that, after the war closed, in July, 1866, raw silk advanced, because of the prospect of a market for ribbons. Now, if the claimants in this case bought raw silk at its lowest price in May or June, and out of such silk manufactured ribbons, but did not have them completed and ready for market until after the 8th of August, when the witnesses, Mr. Farwell and Mr. Viollier, were at Basle, and by which time the price of raw silk had advanced to a point from twelve to fifteen per cent. higher than its lowest price in May or June, and if the claimants afterward made out invoices of such ribbons, upon the basis of their cost, as made of the raw silk bought at such lowest price in May or June, you will perceive that the cost of the goods so arrived at would not and could not represent their market value at the time when they became a completed manufacture, which is what the law of the United States requires. It would represent the cost of the goods to the manufacturer, undoubtedly, because he was fortunate enough to procure his raw silk when it was low, and to have a market for his manufactured goods some time afterwards, at a price for those goods

based upon an increased price of raw silk. This case, therefore, furnishes a complete illustration of why the United States can never admit that a manufacturer shall invoice his goods at their cost to him with a profit added—at the price that he paid for the raw silk which he puts into the particular goods, with the other expenses of manufacture and a profit added. If any such principle of valuation were to be admitted by the United States, as cost with a profit added, the cost that the United States would have a right to insist upon, in a case like the present, would be a cost based upon a price for raw silk at the advanced rate at which it stood when the goods were completely manufactured, ready for market; otherwise, the United States would be defrauded of its just revenue. But it is not the law that an individual has any right whatever, under any circumstances, to substitute, in his invoice, for the actual market value, cost with a manufacturer's profit added. He must put in the actual market value.

How is the market value to be arrived at? There are three sources of evidence, which have been laid before you by the two parties to this controversy. One source of evidence is actual sales at Basle. Another source is, offers to sell at Basle, made by these manufacturers, to individuals seeking to purchase. A third source of evidence is the cost of the goods, with a manufacturer's profit added. It is in evidence, that the claimants had been in the habit, for some period before the date of the first invoice in question here, the 6th of July, of invoicing to Kutter, Luckemeyer & Co., at New York, goods of the same patterns, qualities, styles, and general assortment with the goods under seizure, at the same prices that are found in the invoices of the goods seized; and I believe that the prices in these seven invoices do not vary at all from each other, for the same quality of goods.

The evidence in regard to actual sales of these goods, as a basis of ascertaining their actual market value, at the time and place when and where they were manufactured, and the manufacture of them was completed, consists, in this case, of three sales, made at Basle, by the claimants—one to a person by the name of Mitschke, residing at Riga, in Russia; another to a German merchant at Leipsic, by the name of Kettembeil; and a third to Tobin, Dixon & Davisson, of San Francisco. You have heard the evidence and the arguments of the counsel for the respective parties in regard to these various sales. I shall not recapitulate the evidence. It is claimed, on the part of the government, that, as compared with the prices charged by the claimants on the sale to Tobin, Dixon & Davisson, of taffetas unis, and satins unis L, the same kinds of goods are undervalued in the invoices involved in this suit—the taffetas unis, to the extent of $12^8/_{10}$ per cent., and the satins unis L, to the extent of 18 per cent. The manner of making the comparison, and the basis and grounds of it, you have heard discussed by the counsel on both sides. So, also, as compared with the prices charged to Mitschke, it is claimed, on the part of the government, that there was a large undervaluation in the invoices in this suit, and some undervaluation, also, as compared with the prices charged to Kettembeil.

The second class of evidence consists of offers made by Forcart Weiss and Burkhardt Wildt, to sell ribbons at Basle, which are claimed to be like ribbons, in quality and value, and merchantable worth at Basle, with the ribbons in these invoices, those offers being contained in the letters which have been read to you. One was an offer, made in writing, on the 8th of August, 1866, at the time that Mr. Farwell and Mr. Viollier visited the establishment of the claimants, at Basle. In the letter, which the claimants then and there wrote and delivered to Mr. Farwell, they say: "In answer to your request, we have the honor to hand you, herewith, some samples of our three qualities," that is, qualities 350, 351, and 261, "taffetas a lisieres," that is, taffetas with edges, "the prices of which are below. Trusting that our offer, which we have based upon the lowest prices of the raw material, will induce you to give us an experimental order, we present to you, sir, our respectful salutations." Subjoined to the letter are the prices of each of the patterns, 350, 351, and 261, for each of the various widths, the price being stated for each piece of 14.40 metres in length, with a deduction to be made, of 24 per cent., as "bonification d'aunage," or allowance for difference of measure, to reduce the price to the price for each piece of 11 metres, or 12 yards, in length, because the pieces were to be put up in pieces 11 metres in length, instead of 14.40 metres in length. There was, also, to be a further discount, of 20 per cent., and the price was to be payable in three months, with an allowance of 2 per cent., for payment within thirty days of the date of the invoice, an acceptance on Paris to be given, and the goods sent free to Havre. Next, you have the letter of the claimants, addressed and sent by them to Mr. S. D. Jones. Mr. Farwell, over the signature of Samuel D. Jones, wrote, at Geneva, a letter, addressed to the claimants, at Basle, and dated Lyons, August 27th, 1866, and forwarded it to Mr. Viollier, at Lyons. Mr. Viollier posted it at Lyons. It reached the claimants at Basle, and their answer to it, addressed to Mr. S. D. Jones, at Lyons, and dated at Basle, August 30, 1866, was sent to Lyons, through the post office, and was received by Viollier, and was sent by him, with its contents, which consisted of the letter, and of the samples of ribbons referred to in it, to Farwell, at Geneva. In the letter of the 27th of August, to the claimants, the writer says: "Being on my first visit to Europe, for the purpose of purchasing goods for the market in California, I am desirous of comparing the qualities of Basle ribbons, of the cheapest kinds of taffetas unis, with St. Etienne

goods." Taffetas unis is a quality of ribbon not mentioned in the letter of the 8th of August, from the claimants to Farwell. "I shall be in Basle at the close of next week, or early the week after, and hope then to have the pleasure of visiting your house, and perhaps doing some business with you. In the mean time, will you have the kindness to forward to me samples, and your lowest cash prices, for, say, three or four of your lowest qualities of taffetas unis and a lisieres, suitable for country trade in California, in order that I may examine and compare them with others here, and so satisfy myself as to which is the best market for me to purchase in. On my visit to Basle, if I find it possible to do some business with your house, I will furnish you with my references, which will be found satisfactory. Be kind enough to let me know how early you could fill an order for from four hundred to five hundred cartons, in case I should conclude to purchase. Please address me, poste restante, at Lyons." In answer to that letter, the claimants addressed and sent to Mr. S. D. Jones, at Lyons, the letter dated Basle, August 30th, 1866, in which they acknowledge the receipt of his letter of the 27th of August, and say: "According to your demand, we have the pleasure of handing you, enclosed, samples of our two qualities in taffetas unis, and two qualities taffetas a lisieres, whose actual very lowest prices you will find at the foot of the present letter. As we suppose that you will sufficiently know the actual standing of the silk market, when the prices of raw silk are going higher from day to day, you will please to observe that, under those conditions, we cannot engage ourselves to keep you our very lowest prices for some time. To fill an order of 400 to 500 cartons, would require at least two months, as those goods are not ready on hand, but are to be manufactured expressly on order. Expecting your kind visit for next week, we shall be glad to hear from you, that our offers will give you occasion to a satisfactory business." Appended to this letter, were the prices of two qualities of taffetas unis, and of patterns 350 and 351, for the various widths of each, for pieces 14.40 metres in length, with 20 per cent. discount, payable at three months, with an extra discount of two per cent., for cash, goods free to Havre. It is claimed, on the part of the government, that the prices stated by the claimants, in these letters of the 8th of August and the 30th of August, are considerably higher than the prices stated in the invoices of the goods under seizure, for articles of like description, quality, pattern, and value.

If you believe, from the evidence, that the claimants, when they wrote those letters, and delivered or sent them to Mr. Farwell or Mr. Jones, believed that Mr. Farwell and Mr. Jones, respectively, came to them as customers, in good faith, intending to purchase ribbons, and if you believe that the offers made by the claimants, in these letters, were bona fide offers to sell the goods named therein, upon the terms named therein, you have a right to regard such offers, if they refer to goods like those under seizure, as evidence to be taken into consideration by you, in determining the question of the actual market value of the goods under seizure, at the time and place of the manufacture of those goods.

The law, in all departments of its administration, in courts of justice, always requires the best evidence to be produced of any fact. In regard to the actual market value of merchandise abroad, a series of sales, general in their character, not accompanied by any exceptional circumstances, tending to make any one or more of such sales higher or lower than it would be but for such exceptional circumstances, or even a single sale, in the ordinary course of trade, is one of the best evidences of market value. So, also, offers by merchants or manufacturers to sell their goods to persons who are supposed by them to come as buyers, in good faith, such offers being made in the usual course of trade, under such circumstances as generally attend the sale of merchandise, are among the best evidences of the actual market value of the goods in respect to which the transactions take place. It is only when such evidence is wanting, in a case of this kind—it is only when you are unable to arrive at the actual market value of the goods, from actual sales of similar goods about the same time, or from offers to sell, made under the circumstances which I have specified as necessary, in respect to the same goods, or goods of the same quality, that you have a right to resort to an inferior class of evidence, as evidence of market value—that is, to the cost, with a manufacturer's profit added. But, as I said before, if, in this case, you shall consider that there is no evidence of actual sales, at Basle, of goods like those under seizure, and no evidence of offers by the claimants to sell, at Basle, similar goods, from either of which you can arrive at a conclusion as to the actual market value, at Basle, of the goods in the invoices in question, and if you shall then have to resort to the cost of the goods, with a manufacturer's profit added, you will not be authorized to compute such cost on the basis of the cost of the raw silk to the claimants, if you shall find that the claimants were paying for raw silk a higher price, at the time of the completion of the manufacture of the goods, than the actual cost to them of the same quality of raw silk, which went into the manufacture of such goods. The government is not bound to accept such low cost of the raw material. It is entitled to the benefit of the price of the raw material at the time when the goods were completed in their manufacture.

It results, therefore, that if the invoices, or any of them, of the goods under seizure,

were made up by the claimants with an intent, by a false valuation of the goods described in them, to evade the payment of any part of the duties chargeable by law thereon, the goods contained in any invoice so made up are forfeited, and your verdict must be for the United States, as to such invoice. So, too, if you shall find that the goods seized, or any of them, were entered by means of an invoice which did not truly state the actual market value of the goods, or of any of them, named therein, at the time and place when and where the same were manufactured, with the knowledge, on the part of the claimants, that such invoices did not contain such actual market value, all the goods so entered are forfeited, and your verdict must be for the United States. There are, therefore, two questions for your consideration. You will, in the first place, inquire whether the actual market value was, in point of fact, higher than the value stated in the invoices to be such market value. If you shall find that it was not, and that the invoices were not undervalued, your verdict will be for the claimants. But, if you shall find that the invoices were too low, you will have to go into a further inquiry, whether such undervaluation was made, on the part of the claimants, knowingly, or with an intent to evade or defraud the revenue of the United States. If you shall find that it was not, your verdict will be for the claimants. But, if you shall find that it was, your verdict will be for the United States.

The market value to which the claimants were required to conform the valuation in their invoices, was the actual market value of the goods, or of goods of the same description and quality, at Basle, at the time of the completion of the manufacture of the goods, which was, according to the testimony, within a week or two before the date of each invoice. The law presumes that there was, at the time and place of the manufacture of the goods seized, an actual market value thereof; and no evidence can be received or considered, under the law, and under the oaths to the invoices, to show there was not, in fact, such actual market value thereof. The cost of the goods will come under consideration, if at all, not as a substitute for market value, but merely as an item of evidence on the question as to what was the actual market value. Therefore, you must assume, in this case, that there was an actual market value for these goods, at the time and place of their manufacture, the only question being to ascertain what such actual market value was. The claimants had no right to adopt any other standard of value than such actual market value, nor do I understand them as claiming that they had such right. They have sworn, in the oath on each invoice, that such invoice contains the actual market value; and their claim is, not that they had a right to set forth anything except the actual market value, but that the actual market value was the cost, with the manufacturer's profit added, at the percentage named in the testimony, and that such actual market value was no greater, according to their idea of actual market value. So, also, the claimants were required to state, in their invoices, the actual market value of their goods, at the time and place of their manufacture, not only without regard to the cost thereof, but without regard to the profit or loss which might result from their consignment thereof, or any loss which may be shown, in the end, to have resulted therefrom. If they chose to take the cost, and add a profit, and made up the actual market value in that way, and it turns out, in the end, that that is the actual market value, very well; but, if it turns out, in the end, that that is less than the actual market value, the claimants cannot maintain, under the law, that they had a right to put in place of the actual market value, the cost, with the manufacturer's profit added. Nor is the manufacturer relieved or excused from stating in his invoice such actual market value, or justified in adopting any other standard of value, because he may not himself make sales at home of similar goods, but may consign all such goods for sale to foreign markets. Although he may adopt such course of trade, he is, nevertheless, required to state, in his invoices, the actual market value of such goods, at the time and place of their completed manufacture; that is, the price at which he holds such goods for sale, at such time and place, the price at which he, then and there, freely offers them in the market, such price as he is, then and there, willing to receive for them, if they are sold in the ordinary course of trade. As I stated to you before, but perhaps not quite fully enough, you must, in considering the question of individual sales of similar goods, such as the sales to Mitschke, Tobin, Dixon & Davisson, and Kettembeil, inquire whether they were made in the ordinary course of business, or whether the circumstances under which they were made were such as to make them sales exceptional in character, and not a fair index of actual market value. So, in regard to offers to sell goods, such as are contained in these letters of the 8th and 30th of August, they are competent evidence, from which you may find actual market value, if you shall believe that they were fair ordinary business offers, made in good faith, and under the belief, on the part of the claimants, that the party to whom they were made was intending to become, and might become, a purchaser; and the circumstance, that the party to whom they were made did not, in fact, intend to purchase, is wholly immaterial. The question is. the state of mind, and the belief and intent, of the claimants, not what was intended by Jones or Farwell. The test is, whether the claimants believed that Farwell and Jones came

to them in good faith, intending to become purchasers.

In determining the question of knowledge or intent, on the part of the claimants, in the undervaluation of their goods in the invoices, if you shall find that such undervaluation was made, the question for consideration will be, whether such undervaluation was made knowingly, that is, with a knowledge, on the part of the claimants, that the value stated ought to have been higher, in order to be the actual market value, or designedly, or whether it was the result of honest mistake, or an accident. If you shall find that it was made knowingly, or designedly, your verdict must be for the United States; otherwise, for the claimants. So, also, if you shall find that the claimants knowingly or designedly stated, in any invoice, a value less than the actual market value, knowing what that actual market value was, and that it was greater than the value stated in the invoice, it makes no difference as to what was the motive, or the reason, or the process of reasoning, on the part of the claimants, upon or by which they arrived at the value stated in the invoice.

It is the law, and has been ever since the year 1799, that, in cases of this kind, where the court decides that probable cause is shown for the seizure of the goods, the burden of proof is upon the claimant to clear up the suspicion thrown around the case, and to show that the invoice contains the actual market value of the goods. In the present case, the burden of proof is upon the claimants, to show affirmatively, by evidence satisfactory to you, either that the goods seized were, in fact, invoiced at their actual market value, or, in case they were not so invoiced, that the undervaluation was not made knowingly or with a design to evade or defraud the revenue, but was made by an honest mistake or by an accident. If, upon the whole evidence, the claimants have not proved, to your satisfaction, either that the goods were invoiced at their actual market value, or that the failure to so invoice them was the result of an honest mistake, or of an accident, your verdict will be for the United States; otherwise, for the claimants. Any undervaluation, however small, made knowingly or intentionally, will entitle the government to your verdict, and any undervaluation so made, in respect to any one item in any invoice, will authorize a forfeiture of all the goods contained in the same invoice.

The questions of fact in this case, which have been so elaborately argued by the counsel on both sides, I shall leave entirely to your consideration. They are questions exclusively for you, under the rules of law which I have stated. Impressing upon you the importance of this case to the United States, in respect to the principles involved in it, and reminding you of the equal duty, that is incumbent upon you, to stand between the United States and individuals resident abroad, if they have made an honest mistake, looking, as they do, equally with the government, to you and to your action for shield and protection, and satisfied that you will give to the case patient and attentive deliberation, and apply it to the rules of law which I have laid down, I commit it to your arbitrament.

The jury were discharged, without having been able to agree on a verdict.

SIX FERMENTING TUBS (UNITED STATES v.). See Case No. 16,296.

Case No. 12,915.

SIX HUNDRED AND EIGHTY PIECES OF MERCHANDISE.

[2 Spr. 233.] [1]

District Court, D. Massachusetts. Oct., 1863.

PRIZE—ADMIRALTY JURISDICTION—ENEMY PROPERTY.

The district courts of the United States have jurisdiction in prize in case of enemy's property found on a wharf, having been recently water-borne, and there captured by a force sent in boats from a vessel-of-war.

[Cited in U. S. v. Two Hundred and Sixty-Nine and One Half Bales of Cotton, Case No. 16,583.]

These articles of merchandise were ferried across the Chowan river in North Carolina, at Reddick's ferry, and landed on a wharf, preparatory to their being taken to Weldon. They were not contraband of war, but were the property of an inhabitant of the country under the rebel government, who, the evidence showed, was himself actually a rebel. The Chowan river was at the time occupied by a naval force of the United States for blockading and all other purposes of war. The goods were captured soon after they were landed, by a force sent for the purpose, from the United States steamer Hunchback, under Lieutenant Colhoun. Being found in a damaged condition, the property was sold after an appraisement, by order of the commander of the squadron, and the proceeds sent to the assistant treasurer at Boston, to await adjudication. There were no claims interposed. It was libelled as prize, and the only question was of admiralty jurisdiction.

R. H. Dana, Jr., U. S. Atty., for the United States and captors.

The court of admiralty in England has always taken cognizance of captures made by the forces of the admiral (i. e. the naval forces), whether the property at the time of its capture was actually water-borne or on land and whether the capture was made by the naval forces alone, or in conjunction with the land forces, where the capture is part of the necessary operations of war, and not

[1] [Reported by John Lathrop, Esq., and here reprinted by permission.]

mere seizure by land forces for the purpose of private loot or booty. Lord Mansfield's opinion in Lindo v. Rodney, 2 Doug. 613 [note]; Key v. Pearse, cited in Le Caux v. Eden, 2 Doug. 606; Ships Taken at Genoa, 4 C. Rob. Adm. 388; The Army of the Deccan, 2 Knapp, P. C. 152, and note; The Cape of Good Hope, 2 C. Rob. Adm. 274; The Thorshaven, Edw. Adm. 102; The Rebeckah, 1 C. Rob. Adm. 227; The Stella Del Norte, 5 C. Rob. Adm. 349; The Island of Trinidad, Id. 92. This view of the subject has the sanction of the highest authorities in the United States. Marshall, C. J., in Jennings v. Carson, 4 Cranch [8 U. S.] 20; Peters, J., decision, note to 4 Cranch [8 U. S.] 5; The Emulous [Case No. 4,479]; Story, J., in Brown v. U. S., 8 Cranch [12 U. S.] 137. The distinction is that captures made by naval forces, in that capacity, under the direction of naval or admiralty authorities, as part of naval warfare, are prize, within the meaning of the law, whether made on land or at sea, and are passed upon by the court of the admiralty, on principles of international law; while property taken by land forces is booty, and governed by different rules. The federal courts of the United States, as courts of admiralty, have jurisdiction over the whole subject of prize, as extensive as that of the court of admiralty in England. The Betsey, 3 Dall. [3 U. S.] 6; Talbot v. Janson, 3 Dall. [3 U. S.] 133; Jennings v. Carson, 4 Cranch [8 U. S.] 2; The Alerta, 9 Cranch [13 U. S.] 359; Penhallow v. Doane, 3 Dall. [3 U. S.] 54; The Amiable Nancy [Case No. 331]; The Emulous [supra]; 2 Wheat. (Story's Append.) 1. The act of 1861 (chapter 60; 12 Stat. 319) specially recognizes the jurisdiction of this court over all classes of prize.

SPRAGUE, District Judge. The evidence leaves no doubt that this is property of the enemy. The only question is whether this court has jurisdiction over it as prize in admiralty. It seems to be settled that the district courts of the United States possess all the prize jurisdiction of a court of admiralty. Such is the construction given by the authorities to the statutes and the clause in the constitution conferring jurisdiction on the federal courts, and such has been the practice. The authorities cited show that the jurisdiction of the admiralty over matters of prize certainly extends far enough to cover the circumstances of this case. How much farther it may extend, it is not necessary to consider. Here the merchandise, being enemy's property, was ferried across a river occupied by our naval forces for all purposes of war, acting under strictly naval authority; and it was soon afterwards seized on the wharf by a naval force sent from one of our vessels for the purpose. It is not necessary to decide whether this property might not be liable to municipal confiscation or forfeiture on the instance side of this court, under any of the special statutes passed to meet this rebellion. It is not proceeded against as forfeited or confiscated, but for condemnation as prize of war; and I am satisfied that the admiralty jurisdiction of this court is sufficient to embrace the case.

See Alexander's Cotton, 2 Wall. [69 U. S.] 404.

Case No. 12,916.

SIX HUNDRED AND FIFTY-ONE CHESTS OF TEA v. UNITED STATES.

[1 Paine, 499.] [1]

Circuit Court, S. D. New York. April Term, 1826.

CUSTOMS DUTIES—FORFEITURE—INTENT OF ACT—MARKS AND CERTIFICATES.

1. The spirit of the revenue laws is, not to create a forfeiture of property, except for acts of the owner attended with fraud, misconduct, or negligence.

[Cited in The Waterloo, Case No. 17,257; U. S. v. Curtis, 16 Fed. 189; Cargo ex Lady Essex, 39 Fed. 767.]

2. He is not to suffer for the fraud, misconduct, or negligence of the revenue officers, in which he does not participate.

[Cited in U. S. v. The Sarah B. Harris, Case No. 16,223.]

3. Spirits, wines, and teas are not subject to seizure, under the 43d section of the collection law [of 1799 (1 Stat. 660)], which declares, that "if any chest, &c. shall be found in the possession of any person, unaccompanied with such marks and certificates, it shall be presumptive evidence that the same is liable to forfeiture," unless the certificates and marks are both wanting.

4. "Possession of any person," as used in this section, means the possession of the purchaser, to whom the certificates are required to be delivered on a sale, and not the possession of a wrong doer

5. The collection law is adapted to a regular and usual course of business, and extraordinary cases where a compliance with its letter is impracticable, do not come within its sense and meaning.

6. The information alleged, that the teas were unaccompanied by marks and certificates; but the proof was, that the certificates only were wanting: *Held*, that the averment was unsupported by proof.

7. And the necessity of this allegation shows, that the true construction of the act is, that both must be wanting.

8. The want of marks and certificates, and not the illegal importation or non-payment of duties, is the specific cause of forfeiture under this section.

9. And this is evident, from its not being necessary to allege in the information, that the teas were illegally imported, or the duties unpaid, but only that they were unaccompanied with marks and certificates.

10. So of the other provisions of the act; their object is to guard against illegal importation and the non-payment of duties; but the forfeiture which they create is incurred only by a violation of the special regulations which the law has provided as guards and checks.

11. The marks and certificates, being evidence only of a lawful importation, the want of them

[1] [Reported by Elijah Paine, Jr., Esq.]

affords no presumption of the non-payment of duties.

12. Impolicy of allowing a forfeiture where it is to be the consequence of the fraud or negligence of such revenue officers, as might entitle themselves to a share of it.

13. The general bond of the importer for duties on teas, accompanied with a deposite of the teas, as provided for by the 62d section of the collection law, is a securing of the duties, within the meaning and true interpretation of the 43d section.

14. And if this were not such a securing of the duties, the teas could not have been landed.

15. A deposite, in all cases under this act, is in effect a pledge, and in lieu of the personal sureties dispensed with, unless specially declared to be otherwise.

16. Whether, if government regain the possession of teas, irregularly obtained from their keeping without the payment of duties, they can enforce their lien for the duties, or how long such lien continues after the teas have gone into circulation in the market? Quere.

17. A forfeiture for the embezzlement of wines, &c. under the 5th section of the act of April 20, 1818 [3 Stat. 470], is incurred only by the act of the owner, and not of a mere stranger, or the inspectors of the revenue. But the provisions of this act have no application to a case arising under the 43d section of the collection law.

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

This was an information, under the 43d section of the collection law, against 651 chests hyson skin tea, for being found unaccompanied with the marks and certificates required by law. At the trial in the court below, the jury found a special verdict, upon which judgment of condemnation was entered [case unreported], and a writ of error brought for its reversal. The information alleged, that the teas in question were, on the 1st day of July, 1825, imported from China, in the ship Benjamin Rush, at Philadelphia, and were unladen without having been entered and without any permit, and that the duties had not been paid or secured to be paid. That the said teas, being subject to the payment of duties, were found concealed in a store in Pearl-street, New-York, unaccompanied with the marks and certificates prescribed by law, the duties not having been paid or secured to be paid. That the said teas were found in a store in Pearl-street, in the possession of Smith and Nicoll, unaccompanied by such marks and certificates as are prescribed by law, the duties not having been paid or secured to be paid.

The claim of Joshua Lippincott, William Lippincott, and Benjamin W. Richards, set forth, that they were merchants of Philadelphia, in the auction and commission business, and that the teas in question were their property: that said teas were imported at the time and place stated in the information by Edward Thompson, in his ship the Benjamin Rush, and were duly entered and permits obtained to land the same, and were thereupon duly landed and inspected, weighed, marked, and numbered by the proper officers: that said Thompson gave his bond to the collector for double the amount of duties due upon the teas, conditioned for the payment of the duties in two years thereafter; and the said teas were thereupon, by an agreement with the collector, at the risk of Thompson, deposited and stored in a custom-house store, upon which were affixed two locks, the key of one of which was given to Thompson, and of the other was taken by the inspector; and that all the before-mentioned acts were done as the law directs; and as evidence that the teas were lawfully imported, a certificate, in due form of law and duly signed and sealed, was then issued to accompany each of said chests of tea, and delivered to Thompson; which certificates afterwards came into the hands of the claimants, and are now held by them: that the claimants being in the practice of making advances on teas received by them for sale, the teas being a pledge for their reimbursement, Thompson, on the 12th of July, 1825, applied to them, and proposed to transfer a large lot of teas, to be sold by them, among which were those in question, on their making him an advance; and that they accordingly advanced to him 100,000 dollars, and soon after other large sums. The claim then set forth the instrument by which said teas were conveyed to the claimants, from which it appeared, that 17,274 packages of tea were assigned as collateral security for certain notes granted and to be granted by the claimants to Thompson, with power to enter the same from custom-house stores, and to secure the duties thereon, should it be deemed necessary. The claim further stated, that Thompson at the same time endorsed and delivered to the claimants the bills of lading and invoice of said teas, and also delivered to them his key of the custom-house store, containing said teas, among which were the teas in question: that the claimants having long dealt with Thompson, in selling teas for him at public and private sale, and knowing the manner in which he had bonded and stored the teas in question, and that they could not be delivered from the store until the duties had been paid or secured to be paid, and that a permit must be obtained for the delivery of the same, they occasionally delivered to Thompson their key, that he might deliver the teas to purchasers, believing, as the officers had the other key, no teas would be delivered improperly. That on the 5th of November, 1825, Thompson applied to them, informing them, that he was about selling the 651 chests of tea to Smith and Nicoll, for which they were to give their notes, and which he would give to the claimants in part payment of their said advances; and that they thereupon delivered Thompson the key to obtain the teas. That Smith and Nicoll knew of the claimants' property in the teas, and understood that the notes were to be paid to them; but that after the arrival of the teas in New-York, they called on Smith and Nicoll, and demanded the teas, or that they should pay for them; the claimants not

then suspecting that they had been improperly obtained from the public stores. The claim also stated, that the teas were shipped from Philadelphia to New-York, and entered and cleared at those ports by the custom-house.

The special verdict found, that the teas were imported, entered, landed, and inspected according to law, and as set forth in said claim and answer. That the duties imposed by law on the said teas, on being so imported, have not been paid; but that the same had been secured to be paid in no other way than by said Thompson's general bond, and by storing said teas as provided by law, and in manner set forth in the answer and claim. That at the time said teas were found in said store, the certificates provided by law to accompany each chest did not accompany each chest of said tea; but that each chest of tea was duly marked, and then bore all the marks on each chest which the law requires; and that the certificates were, at the time when said teas were found in Philadelphia, in the hands of the claimants, as set forth in the claim. That said teas were not concealed in manner and form as is set forth in said information. That the claimants, until after the teas were found in said store in New-York, were wholly ignorant of the manner in which they had been obtained from the store in Philadelphia without paying the duties due thereon, or giving further bond to secure the same. And that said teas were transported to the city of New-York, in manner set forth in the claim.

D. B. Ogden and S. P. Staples, for plaintiffs.

R. Tillotson, Dist. Atty., for defendants.

THOMPSON, Circuit Justice. This case comes up on a writ of error to the district court of the Southern district of New-York. The seizure of the teas having been made upon land, the information was filed in that court, as a court of common law, and the cause tried by a jury, and a special verdict found, which ascertains and settles all matters of fact in the cause.

The information sets out that the teas were imported into the United States in July, 1825, from Canton, in the ship Benjamin Rush, and were subject to the payment of duties; and then alleges the following grounds upon which the forfeiture is claimed: 1st. That the teas were unladen and delivered from the ship or vessel in which they had been imported at Philadelphia, without having been entered at any custom-house or in the office of any collector of the customs in the United States, and without any permit from any collector and naval officer; and that the duties imposed by law on the said teas had not been paid or secured to be paid to the United States. 2d. That the teas so imported ought, according to the provisions of the act in such cases made and provided, to have been marked, and accompanied with the certificates required by the act; and were found concealed in a store in Pearl-street, in the city of New-York, in the possession of some person unknown to the district attorney, unaccompanied by the marks and certificates prescribed by law, and that the duties had not been paid or secured to be paid. 3d. That the said teas, so imported, &c. ought to have been marked, and accompanied with certificates, as required by the act in such cases made and provided; and were found in a store in Pearl-street, in the city of New-York, in the possession of Smith and Nicholl, unaccompanied by such marks and certificates as are prescribed by law, on which said teas the duties had not been paid or secured to be paid. To this information, Lippincott and Co. interpose their claim and answer, setting out particularly and circumstantially the importation of the teas by Edward Thompson; that they were duly entered at the custom-house in Philadelphia, and unladen and landed in the presence of a custom-house officer, under a permit from the collector, and each chest duly inspected, weighed, marked, and numbered, and a certificate issued accompanying each chest, as by law required: That Thompson, the importer, gave his bond for the duties: That the teas were deposited in store according to the provisions of the 62d section of the collection law of 2d March, 1799 (3 Laws [Bior. & D.] 193 [1 Stat. 673]), and then setting out the purchase and transfer of the teas to the claimants, and denying all knowledge of the teas having been illegally or in any improper manner taken from the stores where they were deposited. And traversing the allegations in the information; that the teas were unladen, and delivered, without having been duly entered, or without a permit, or without the duties having been paid or secured to be paid, or that the teas were concealed, unaccompanied with the marks and certificates prescribed by law. The special verdict finds, that the teas were imported, entered, landed, and inspected according to law, and as set forth in the claim and answer. That the duties imposed by law on the teas, had not been paid, nor secured to be paid in any other manner, than by said Thompson's general bond, and by storing said teas as provided by law, and in the manner set forth in the claim and answer. That when the teas were found in New-York, the certificates provided by law to accompany each chest, did not accompany them, but were in Philadelphia, in the hands of the claimants; but that each chest bore all the marks required by law, and as set forth in the claim. That the teas were not concealed as set forth in the information. That the claimants, until after the teas were found in New-York, were wholly ignorant of the manner in which the same had been obtained from the store in Philadelphia, without paying the duties thereon, or giving further bond to secure the same. And that the teas were

transported to the city of New-York, in the manner set forth in the claim.

In examining the questions which are presented by this case, it is to be borne in mind, that it is a proceeding against these teas as forfeited to the United States, by reason of an alleged violation of some part of our revenue laws; and not to regain the possession of the property, of which the United States may have been wrongfully or fraudulently deprived, so as to enable them to enforce payment of the duties for which there may be a lien. And it is a proceeding to enforce their forfeiture against innocent bona fide purchasers of the property, who are not chargeable with the least misconduct or even negligence, by which the government lost the possession it once had of the teas. The manner in which or the means by which that possession has been lost, are not particularly disclosed by the record. But enough is shown to warrant the conclusion, that it must have been effected by the misconduct or negligence of some of the custom-house officers at Philadelphia and some other persons, for neither of whom however can the claimants be held responsible, or be in any manner implicated by their acts. If under such circumstances, the teas in question have become forfeited, it ought to be the result of some plain and positive provision of law. Whilst on the one hand, security to the revenue of the country may require rigid laws to guard against frauds, yet on the other, the rights of the innocent ought to be protected, and care should be taken not so to shackle trade and commerce, as to check the industry and enterprise of the merchant, and render hazardous to the whole community the purchase of articles which may have been subject to the payment of duties. I am not aware of a single instance where by any positive provision in the revenue laws, a forfeiture is incurred, that it does not grow out of some fraud, misconduct, or negligence of the party on whom the penalty is visited. In the case of U. S. v. Cargo of The Favourite (4 Cranch [8 U. S.] 365), to which I shall have occasion hereafter more particularly to refer, the supreme court of the United States, in speaking of the provisions in the collection law of 1799, relative to forfeitures, say, "that the law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners or consignees could have no control." And if not on account of the misconduct of strangers, much less justice would there be, in making the misconduct of the custom-house officers, who are the agents of the government, draw after it such a penalty upon the innocent owner.

With these preliminary observations, I shall proceed to a more particular examination of the several grounds upon which the forfeiture of these teas is attempted to be sustained, and which may be done under the following heads: 1st. That certificates did not accompany each chest of tea, when found in New-York. 2. Whether, by the general bond of Edward Thompson the importer, and the deposite of the teas in store, according to the provisions of the 62d section of the collection act of 1799, the duties were secured within the meaning, and true interpretation of the 43d section of the same act.

By this law, from the 37th to the 43d sections inclusive, various provisions are made with respect to the entry, and landing of distilled spirits, wines, and teas; and among other things, it is required, that the officers of inspection, at the port where the same shall be landed, shall, upon the landing thereof, mark in durable characters, the several casks, chests, vessels, and cases containing the same, showing the quantity and quality of each; the port of importation, the name of the vessel, the surname of the master, the date of the importation, and the name of the surveyor or chief officer of inspection for the port. The special verdict finds that all this was done, with respect to the teas in question, and that such marks were upon each chest when they were seized. The surveyor or chief officer of inspection, within the port or district in which the spirits, wines, and teas, shall be landed, is required to give to the proprietor, importer, and consignee, or his agent, a general certificate, which he is to retain, showing the whole quantity so imported; and the name of the proprietor, importer, consignee, or agent, and of the vessel from on board which the spirits, wines, or teas, shall have been landed, and the marks of each cask, chest, vessel, or case, containing the same. In addition to this general certificate, the surveyor or chief officer of inspection is required to give a special certificate, which shall accompany each cask, chest, &c., wherever the same may be sent within the limits of the United States, as evidence that the same may have been lawfully imported. It is the latter certificate, that the special verdict finds did not accompany each chest of tea, when found in New-York. The certificates, however, were duly issued by the surveyor, and were in the possession of the claimants in Philadelphia, when the seizure was made. Then comes the 43d section under which the forfeiture is claimed, which declares that the proprietor, importer, or consignee, or his agent, who may receive said certificates, shall upon the sale or delivery of any of the said spirits, wines, or teas, deliver to the purchaser thereof, the certificate that ought to accompany the same, on pain of forfeiting the sum of fifty dollars for each cask, chest, &c., with which such certificate shall not be delivered. And if any cask, chest, vessel, or case, which by the foregoing provision ought to be marked, and accompanied with certificates, shall be found in the possession of any person, unaccompanied with such marks and certificates, it shall be presumptive evidence that the same

is liable to forfeiture; and it shall be lawful for any officer of the customs or of inspection to seize them as forfeited.

The form of this special certificate is given in the act, and contains substantially no more than the law requires to be expressed by the marks on each cask, chest, vessel, or case, and it is to accompany each cask, chest, &c. as evidence that the same has been lawfully imported. It is by no means however to be inferred, that this is the only document or evidence to be received and looked to, showing a lawful importation. It is one of the checks which the law has provided, to guard against illegal importations. The marks are for the same purpose, and of at least equal if not of more importance. They are required to be made in durable characters on each cask or chest, &c. and must of course accompany it wherever it goes. The certificate, from the very nature of the document, cannot always accompany the cask or chest. It is not required to be nailed to it; and the act only requires that upon the sale or delivery of the teas, &c., the certificate shall be delivered to the purchaser. And when it speaks of the cask or chest being found in possession of any person unaccompanied by this evidence, it must be intended to refer to the person who has possession as purchaser. And to authorize the seizure, the cask or chest must be unaccompanied with such marks and certificates. The absence of both are necessary. This is not only made so by the letter of the act, but is what may reasonably and fairly be presumed to have been the intention of the legislature. And when the law has declared that two concurring circumstances shall authorize an act, and produce a certain effect, it is going great lengths in the construction of a statute so highly penal as this, to say, that one or the other circumstance shall produce the same effect, and that both need not concur. It was the want of the certificates only upon which the seizure was made, and if the condemnation is to be sustained, it must be upon this alone, for the chests were all duly marked as by law required. The reasonableness and necessity of requiring the want of both marks and certificates, to warrant a seizure and condemnation, may be illustrated and enforced by a hypothetical case. Suppose a chest of tea sold in the usual course of business, and the certificate delivered as the law requires to the purchaser, and the tea sent by a cartman to the place where it was to be used or retailed, unaccompanied by the certificate; would a custom-house officer be authorized to seize this chest of tea, and would condemnation follow thereupon? I presume no one would contend for such a construction of the act; and yet, would it be more extravagant than a construction must be which sustains the forfeiture in the present case? The claimants, as owners of the teas, were entitled to the possession of the certificates, and in fact bound to have them, as one of the vouchers of their title; and not having sold the teas, there was no purchaser to whom the certificates could be delivered as the law requires. It is upon the sale or delivery of the tea, that the law requires the certificates to be delivered over to the purchaser. And if the owner is wrongfully or fraudulently deprived of the possession of his teas, it would involve a great absurdity to say, he is bound under the penalty of forfeiting his property to hand over the certificates to the wrong doer.

Have the claimants incurred the penalty of fifty dollars for each chest which the law imposes upon the proprietor for not delivering the certificates to the purchaser upon the sale of the teas? Certainly not. It would seem to me that the claimants might with equal justice be subjected to a forfeiture of their property, if it had been stolen and afterwards found in the possession of some person unaccompanied with the certificates. But these, and the like extraordinary cases, do not come within the sense and meaning of the law, which is adapted to a regular and usual course of business, and where it is in the power of a party to comply with the requirements of the law; and not to cases where from the nature of things, a compliance with the letter of the law is impracticable. The want of the certificates was open to explanation, and was satisfactorily accounted for. In the case of Cargo of The Favourite, 4 Cranch [8 U. S.] 363, the court say, "It is unquestionably a correct legal principle, that a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed." To apply this principle to the present case; the claimants were ignorant of the fact that these teas had been illegally taken from the stores in Philadelphia: nor is it pretended that this was done by any one for whom they are responsible. What means then were in their power to guard against the forfeiture now claimed? These considerations show the propriety of requiring, that in order to make out a prima facie case of seizure and forfeiture, the teas should have been unaccompanied with both marks and certificates. But this will appear in a still more obvious point of light, by an inquiry as to the necessary allegations in the information. Would it have been sufficient to have alleged that the teas were found in the possession of Smith and Nicoll, unaccompanied with the certificates only? I think it would not. And such must have been the understanding of the district attorney in framing this information, otherwise he would not have alleged the want of both marks and certificates, in the language of the act, as it must have been known that the proof would not sustain such an allegation. The want of marks is certainly not an immaterial allegation, and having been

made, it was necessary to be proved. The reverse of which, however, is found by the special verdict, which establishes the fact, that each chest when found bore all the marks which the law requires. The proof, therefore, did not support the allegation (and as I think a necessary allegation,) in the information.

But it is said the want of marks and certificates is not the ground of forfeiture, but only authorizes the seizure; but that the condemnation is for illegal importation and non-payment of duties. This I apprehend is not a correct view of the 43d section of the act; nor is it the construction assumed in the information. The want of marks and certificates, is alleged as the substantive ground of forfeiture. The marks and certificates have no connexion whatever with the payment of duties. They relate altogether to the importation. With respect to the certificates, the 41st section of the act expressly declares that it is to accompany each chest, as evidence that the same has been lawfully imported, and the marking is by the officers of inspection, who are under the superintendence of the surveyor, under whose direction the teas are to be landed; the duties, however, or security for the same, are received by the collector. The existence of marks and certificates being no evidence of the payment of duties, the want of them can afford no presumption of the non-payment. And if the want of the certificates in the present case, was presumptive evidence of illegal importation, that presumption is rebutted by the special verdict, which finds expressly, that the teas were legally imported. The condemnation, therefore, cannot be sustained on any presumption of illegal importation. And if the certificate has no connexion with the payment of duties, the want of it, as has been already observed, affords no presumption of non-payment. But let us look a little more particularly into the provisions of this 43d section, and see whether the want of marks and certificates is not the substantive ground of forfeiture. And one of the surest tests by which to ascertain this, is, to see what allegations the information must contain. And I think it very clear, that it is not necessary to allege any thing more than that the teas were found in the possession of some person unaccompanied with marks and certificates. This the act declares shall be presumptive evidence that the teas are liable to forfeiture, and may be seized as forfeited. The act does not declare that the want of marks and certificates shall be presumptive evidence of illegal importation, or the non-payment of duties, which it would undoubtedly have done if this was made the substantive ground of forfeiture under this section. The ultimate object of the provision undoubtedly is, to guard against illegal importations, and compel the introduction of goods through the regular channel provided by law. But the act makes the want of marks and certificates prima facie, sufficient to sustain the forfeiture. The information need not allege an illegal importation, or the non-payment of duties. The act makes it matter of defence to show that the teas were legally imported, and the duties paid or secured; and it is never necessary to state in a libel any fact which constitutes the defence of the claimants, or a ground of exception to the operation of the law on which it is founded. This has been expressly so laid down by the supreme court of the United States. [The Aurora v. The United States] 7 Cranch [11 U. S.] 382.

If the information then need only allege that the teas were found unaccompanied with marks and certificates, no more need be proved prima facie to warrant a condemnation; and unless the claimant should set up as matter of defence, evidence in relation to the importation or payment of duties, the only ground of condemnation would of course be the want of marks and certificates; and for this the act declares the teas shall be adjudged to be forfeited, unless the claimant, upon the trial, shall prove the same to have been imported according to law, and the duties paid or secured. So with respect to all the other provisions in the act, where the penalty of forfeiture is inflicted, they may be considered as having for their object, to guard against illegal importations, and to secure the payment of duties; yet it cannot with propriety be said that the illegal importation or non-payment of duties is the ground of forfeiture. This is incurred by a violation of the special regulations which the law has provided as guards and checks. Thus to unlade goods before the vessel comes to the proper place for the discharge of the cargo, or without authority from the proper officer, subjects them to forfeiture; but it is enough to allege and prove the simple facts of the unlading at an improper place, or without a permit, without alleging or proving that the importation was illegal or the duties not paid (27th section). So under the 37th and 38th sections of the act, spirits, wines, and teas are required to be landed, under a special permit endorsed, as therein prescribed, and under the inspection of the surveyor or other officer acting as inspector of the revenue, on pain of forfeiture. In these and many other cases that might be referred to, it is the violation of the special regulation that is made the ground of forfeiture. In the same manner as the want of marks and certificates is the ground of forfeiture under the 43d section.

I am persuaded that under the extraordinary circumstances of this case, the single fact, that the teas were unaccompanied by the certificates, when found in New-York, is not sufficient to sustain the condemnation. It is neither within the letter

nor spirit of the act; and it cannot be supported under any rule of construction applicable to penal statutes. The case of U. S. v. Cargo of The Favourite [supra], already referred to, contains principles and rules of construction which have a very strong bearing upon the present case. The goods libelled in that case consisted of wines, spirits, and other articles, saved from a wreck, and landed not in conformity to the regulations of the law with respect to such articles. The libel alleged as grounds of forfeiture: 1. That the wines and spirits were unaccompanied with the marks and certificates required by law; and 2dly. That they were removed without the consent of the collector, before the quantity and quality of the wines and spirits had been ascertained according to law. The facts alleged in the libel as the grounds of forfeiture were not controverted. There was, therefore, clearly a forfeiture according to the letter of the law. And it was urged upon the court that the remission or mitigation of the forfeiture could only be exercised by the secretary of the treasury. One count in the libel in that case was under the 43d section of the act, like the present, and the want of marks and certificates alleged as the ground of forfeiture. And the court said the legislature, by the provisions referred to, did not intend to comprehend wrecked goods, or goods found under like circumstances. And this opinion of the intention of the legislature, was formed not exclusively upon the extreme severity of such a regulation, but also on what is deemed a fair construction of the language of the several sections of the act, which seems not adapted to such cases. And with respect to the other ground alleged as sustaining the forfeiture, the court said the removal for which the act punishes the owner with a forfeiture of his goods, must be made with his consent or connivance, or with that of some person employed or trusted by him. If by private theft or open robbery, without any fault on his part, his property should be invaded while in the custody of the officers of the revenue, the law cannot be understood to punish him with a forfeiture of that property. The acts being done with no view to defraud the revenue, the court would not be inclined to put a strained construction on the act of congress in order to create a forfeiture. May it not with equal force and propriety be said, that the legislature never intended to apply the penalty of forfeiture to goods found under circumstances like the present? And indeed this is a stronger case; for it does not come within the letter of the act. The marks did accompany the teas. The certificates only were wanting; and they wanting under circumstances satisfactorily showing that no fault or negligence was imputable to the owners, any more than if the teas had been stolen from the stores in Philadelphia. And the principles laid down by the court in the case referred to, apply with peculiar force—"That a forfeiture can only be applied to those cases in which the means prescribed for the prevention of a forfeiture may be employed; and that the law is not understood to forfeit the property of owners, on account of the misconduct of mere strangers, over whom such owners could have no control." I abstain from any remarks in relation to the conduct of the officers of inspection, who had charge of the storehouse in Philadelphia in which the teas were deposited, except barely to observe, that the teas could not have been removed without fraud or gross negligence in them; and it would be dangerous, and a violation of all sound principles, to admit a construction of the law, which, in its consequences, might reward such misconduct with a portion of the forfeiture. For if these teas are forfeited, they would have been equally liable to forfeiture, if they had been seized by a custom-house officer in Philadelphia whilst on their way from the store to the vessel in which they were transported to this city.

So far as the forfeiture may be claimed on the allegation of concealment, it is sufficient to say, the fact is expressly disproved by the special verdict. There was not, therefore, made out, on the part of the United States, the presumptive evidence which the 43d section of the act declares shall render the property liable to forfeiture. And the claimants were under no necessity of proving that the teas were imported into the United States according to law, and the duties paid or secured.

2. This would supersede the necessity of examining the second point that has been made in this cause. But as the question has been fully argued, it may not be amiss for me briefly to state the view I have taken of it. The special verdict puts at rest all questions that could arise respecting the legality of importation: And under this branch of the case, the only inquiry is, whether by the general bond (as it is called) of the importer, and the deposite of the teas as required by law, in such cases, the duties were secured within the meaning and true interpretation of the 62d section of the act. If we look at this question upon general principles, and judge of it according to the common or legal understanding of such a transaction, independent of any statutory provision, no doubt could arise. To say that a bond, fixing the amount of a debt, and limiting the time of payment, accompanied with a deposite of goods to double the amount in value, to be held as a pledge, with authority to sell the same at the expiration of the time limited for payment, and out of the proceeds to pay the debt, is not a security for such debt, would be considered an extraordinary proposition, and could not be sanctioned. If so, is there any thing either in the letter or in the spirit and policy of the collection law, calling for the application of other and

different principles? This 62d section of the act declares, that, with respect to teas imported from China or Europe, it shall be at the option of the importer to be determined at the time of making the entry, either to secure the duties thereon, on the same terms and stipulations as on other goods, &c. or to give his own bond in double the amount of the duties, with a condition for the payment of the duties in two years from the date of the bond, which the collector is directed to accept without surety, (that is to say, personal surety,) upon the terms particularly specified in the act: Which are substantially, that the teas shall be deposited at the expense of the importer in a storehouse, to be agreed upon between the importer and inspector of the revenue, upon which storehouse the inspector is required to affix two locks, the key of one to be kept by the importer, and the key of the other by the inspector, who shall attend, at all reasonable times, for the purpose of delivering the teas out of the storehouse. But no delivery is to be made without a permit in writing from the collector and naval officer. And to obtain such permit, the duties upon the teas so to be delivered must be first paid to the collector, or a bond with sureties to the satisfaction of the collector, given in double the amount of the duties, payable as specified in the act. And if the duties on any parcel of the teas shall not have been paid or secured to be paid in the manner last specified, (that is by bond with sureties,) within the term of two years, the collector is authorized and required to sell so much of the teas, as may be necessary to pay the duties and expenses on the teas remaining in store, and to return the overplus, if any, to the owner or owners thereof. There is nothing in this provision essentially to vary it from the ordinary deposite of goods between individuals, as a pledge to secure the payment of a debt. It is unimportant that the importer was liable for the duties without his bond, or that the government had possession of the teas, and a lien for the duties before the deposite. Of this there can be no doubt. But the government, by the provisions of this act, has agreed to hold this security under a different modification, and with different powers, than it possessed before. And whether this arrangement is exclusively for the accommodation and benefit of the importer, or not, cannot alter the question. The possession of the property and the liability of the importer constituted the security which the government had for the duties; and that continues until discharged, from time to time, upon different parcels of teas delivered out of store, under the permit of the collector, according to the provisions of the act. And what security could be more ample and satisfactory to the government? It is much more safe than the personal responsibility of individuals, especially upon so long a credit as two years. This security cannot be lost without the misconduct of the agents of the government.

I do not mean to be understood that the lien is discharged by any such misconduct, if possession is regained so as to enable the government to enforce the lien. But how long such lien continues, after the teas have got into circulation in the market, is a question I leave untouched. If the teas remain in store for the two years, under the general bond, can it with any propriety be said, that the government has no security for the duties? The law does not authorize the landing until the duties are paid or secured. And if the general bond of the importer, and the possession of the teas, landed and held under the inspection and control of the officers of the customs, (according to the 38th section of the act,) and the election of the importer, to have them deposited in stores, do not constitute the security, by what authority were they landed? The security required to be given, upon granting the permit, to deliver the teas out of store in parcels, cannot be the security required upon landing. That is an after transaction, and totally distinct in its provisions. The one is the general bond of the importer, on a credit of two years, and a deposite of the teas in the store. The other the personal security of individuals for the duties upon the particular parcels delivered out of store, and payable at much shorter periods, according to the amount of duties. The latter is pro tanto a substitution for the former. If at the expiration of two years the duties shall not have been paid, or secured by bond, with sureties, so as to discharge the lien, the teas are dealt with in the same manner as property pledged in ordinary cases as security for a debt. They are to be sold and the debt and expenses paid, and the surplus returned to the owner;—not forfeited. The acceptance of goods as a deposite for the security of duties in lieu of personal security, is a provision incorporated in all our collection laws, from the first organization of the government to the present time. See Acts 1789 and 1790 (2 Laws [Bior. & D.] 3, 161 [1 Stat. 42, 168]); Act 1799 (3 Laws [Bior. & D.] 195 [1 Stat. 674]). The collector, in lieu of sureties, is authorized to accept of a deposite of so much of the goods as shall in his judgment be sufficient security for the amount of the duties for which the bond shall have been given; which goods are to be kept at the expense and risk of the party on whose account they have been deposited, until the bond becomes due; and if the bond shall not then be paid, so much of the deposited goods as shall be necessary to pay the same, with the costs and charges, are to be sold. These are essentially the same provisions as those in relation to teas. There is a bond in both cases given by the importer. The goods are substituted in place of sureties, and are called a deposite. If the bond in each case shall not be paid according to its condition, the goods are to be sold, and the duties and expenses paid, and the surplus returned to the owner. There can be no reason why the same meaning should not be attached to the term deposite in both cases. If in the one case it has a technical meaning,

and signifies a pledge, I am unable to discover why it should not have the same meaning in the other. The only difference between the cases is, that with respect to teas, there is a deposite of the whole, and the lien continues, until discharged by a substitution of personal security, as they are delivered out of store in parcels as may be required. And with respect to other goods, a part of the importation on which the duties were payable, are received as a substitute for sureties, and the lien on the residue is at once discharged. But this cannot materially change the essence and nature of the transaction. The deposite in both cases is in lieu of personal sureties. For with respect to teas as well as other goods, the importer has an option to give a bond with sureties, instead of making a deposite.

The different modes of securing duties, when not paid at the time of the entry, are all prescribed in this same 62d section. It may, in all cases above fifty dollars in amount, be done by the bond of the importer with sureties. And upon all goods, except teas, by a like bond for the amount of duties, with a deposite of goods sufficient to pay such duties and expenses. And with respect to teas, a bond in double the amount of duties, with a deposite of the teas, according to the special regulations pointed out in the act. This appears to me to be the plain and obvious interpretation of this section of the law. And whenever the terms "duties secured" occur, as they do in various parts of the collection act, they embrace these different modes, unless restricted to one or the other, as they sometimes are. To consider the deposite of teas in stores as done merely for safe keeping, and because the importer is not able to find personal securities for the duties, does not strike me as being a just construction of this provision. If such had been the sole object, and possession retained by the government with no other view, that possession would, as in other cases where duties are not paid or secured at the time of entry, have been held exclusively by the revenue officers. Instead of which, the possession is held jointly by the importer and the inspector, at a store agreed upon between them, and under two locks, the key of one to be kept by the importer or his agent, and the key of the other by the inspector: so that all lawful interference with such deposite, until the expiration of two years, by one party, without the assent of the other, is rendered impracticable. All this shows an arrangement, with the concurrence of two parties, having the right and the power to act on the subject; and not the act of one, by reason of the inability of the other to avoid it. It is a course submitted by law to the option of the importer; and to say he was driven to it on account of his inability to elect the other alternative, would seem rather more like aggravating his necessities, than fairly presenting to him an option, which necessarily implies the ability to choose. The construction I have given to the provision is in every respect calculated for the security of the revenue and the accommodation of the merchant. The inspector is required to attend at all reasonable times, to deliver out such parcels of teas as may be required, under the permit of the collector, on the duties being paid, or secured by bond with sureties, which is to be accepted as a substitute for such parcels; by which the government is amply secured, and the interest and convenience of the importer greatly promoted. But any other construction would be interposing greater restrictions and embarrassments with respect to the importation of teas than any other articles, which was clearly not the intention of the law. The duties were, therefore, in my judgment, secured by the general bond of the importer, and the deposite of the teas in store, according to the provisions of the act, as found by the special verdict. And if so, where is the ground of forfeiture? No fault has been imputed to the owner. Forfeiture, throughout the act, is visited only upon fraud, misconduct, and gross negligence, in the party or his agents. Admitting the lien for the duties still continues, and that the government has a right to reclaim the possession, and enforce the payment of the duties, (which by the by are not yet due;) that would seem to be all that justice would demand, or policy require against an innocent party. But to follow this up with the penalty of forfeiture under such circumstances, is what I should be very unwilling to sanction. I find no special provision in any act of congress calling for the application of such a severe rule, and it is certainly utterly at variance with the general principles of law. All that can be claimed out of property pledged or mortgaged, is satisfaction of the debt, for which it is held as security, and the expenses incurred by reason of a noncompliance with the condition upon which it is so held.

It was said at the bar, that the same principle which is expressly adopted in the 5th section of the act of the 20th of April, 1818 (6 Laws [Bior. & D.] 354 [3 Stat. 470]), with respect to wines and distilled spirits; is by implication applicable to the teas in question. Should this be conceded, (which however is not) it would not draw after it a forfeiture in the present case. That act adopts substantially the same provisions with respect to the deposite of wines and distilled spirits, as are contained in the 62d section of the collection law with respect to teas. And then the 5th section declares, "That if any wines or other spirits, deposited under the provisions of this act, shall be embezzled or fraudulently removed from any store wherein they shall have been deposited, they shall be forfeited: and the person or persons so embezzling, hiding, or

removing the same, or aiding therein, shall be liable to the same penalties, as if such wines had been fraudulently unshipped or landed without payment of duty." The forfeiture here can only arise upon the fraudulent removal by the owner, or some person for whom he is responsible. It would surely not be incurred by the acts of mere strangers, or the inspectors of the revenue, who are the agents of the government. The rule I have before referred to, would apply with peculiar force to such a case, "that the law is not understood to forfeit the property of owners on account of the misconduct of mere strangers, over whom such owners could have no control."

Upon the whole then, after the most mature and deliberate examination of this case, I am of opinion, that no forfeiture of the teas in question has been incurred, and that the sentence or decree of condemnation must be reversed.

[NOTE. A libel was filed in the district court of the United States for the Southern district of New York, in the name of the United States, against 350 chests of hyson skin tea imported from Canton in the ship Benjamin Rush, as forfeited to the use of the United States. The chests of tea were seized by the collector of customs for the district of Philadelphia on the 6th of December, 1825, at the city of New York, on waters navigable from the sea by vessels of 10 or more tons burden. The district court decreed the teas to be forfeited to the United States, from which sentence an appeal was taken to the circuit court, where the decree of the district court was reversed. On appeal to the supreme court the decree of the circuit court, awarding restitution to the claimants, was affirmed. 12 Wheat. (25 U. S.) 486.]

Case No. 12,917.

SIX HUNDRED AND FOUR TONS OF COAL.

[7 Ben. 525.] [1]

District Court, S. D. New York. Dec., 1874.

PRACTICE IN ADMIRALTY — LIEN FOR FREIGHT — PROCEEDS OF CARGO—VALUE.

A cargo of coal brought to the port of New York was delivered to a gas company, under an agreement by the company that they would receive it and hold it or its representative in value subject to the lien of the owners of the ship for freight and demurrage. The company having received the coal and used it, a libel for freight and demurrage was filed against the cargo or its proceeds in their hands. They brought into court a certain amount as the representative in value, claiming that the coal was worth but $4 a ton in the market at the time. A reference being had to the clerk to ascertain whether that sum was the representative in value of the coal, it appeared that the coal was delivered in November, 1873, under a contract made in the February previous between the company and the charterers of the ship for the purchase of 30,000 tons of such coal at the price of $1 75 gold, free on board, at the mines, which would be equal to about $7 a ton in New York; that the coal was gas coal, for which there was but very little market outside of the gas companies; and that during the months of October and November, 1873, 23 cargoes of similar coal were delivered to the company under the contract, and paid for at contract rates: *Held*, that the representative in value of this coal was to be determined, not by the market for such coal outside of the contract, but by the contract price.

This was a libel by the owners of the bark Ibis against a cargo of coal brought in the bark from Nova Scotia to New York, and against the charterers, to recover charter money and demurrage alleged to be due on a charter of the vessel. The marshal served the process on the charterers personally, but failed to attach the coal. The libellants then presented to the court affidavits showing that the cargo of coal had been delivered to the New York Gas Light Company under an agreement signed by the president of the company and reading as follows: "We will receive the cargo of coal per bark Ibis, laden under the within charter, subject to the vessel's lien on the same for any moneys which may be due under the said charter party, and we agree to hold the said coal or the representative thereof in value subject to said lien." The affidavits further showed that when the marshal went to attach the coal under the process, the officers of the company told him that the coal had been received by them and consumed. On these affidavits the court gave the libellants leave to file an amended libel, alleging that the coal or the proceeds thereof were in the hands of the gas company, and praying process "against the coal or the proceeds thereof in the hands of the New York Gas Light Company." Process was issued according to the prayer of the amended libel, and, on the return of the process as served on the company, an appearance was entered in behalf of the owners of the proceeds of the coal. The libellants then filed a petition and obtained an order to show cause why the gas company should not bring into court the proceeds of the coal. On the return of this order the gas company appeared and brought into court $1,935 51 and filed an affidavit that this sum, together with $495 49 duties on the coal and $4 60 custom house expenses which the company had paid, constituted the proceeds of this coal. Thereupon, on motion of the libellants, the court referred it to the clerk to ascertain on proofs whether that sum of $1,-935 51 was the "representative in value" of the coal, and if not what sum was such representative in value as specified in the agreement under which the company received the coal. On the hearing before the clerk, the libellant gave evidence to show that the coal was delivered in November, 1873, under a contract made in February, 1873, between the New York Gas Light Company and Bird, Perkins & Job, the charterers, for the purchase by the company of 30,000 tons of coal at the rate of $1 75, free on board of vessels at Port Caledonia, N. S. The libellants fur-

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

ther showed that this was gas coal; that there was but a very small market for that kind of coal in New York outside of the gas companies; that the companies made their contracts in the spring for the year ensuing, the coal to be delivered during the shipping season; that this company received during the month of October and the month of November, 1873, twenty-three other cargoes under the contract above stated; and that the rate of "$1 75 gold, free on board," was equal to about $7 a ton currency in New York. On behalf of the company, evidence was given to show that the two or three similar cargoes of coal sold in the market outside of the contracts of the companies in November, 1873, brought only $4 a ton. The clerk reported that the representative in value of the coal was $2,435 60, being at the rate of $4 a ton, and that he had refused to allow as such representative in value the price agreed upon in the contract above specified. The libellants excepted to the clerk's report because he had allowed only $4 a ton, and had not allowed the price fixed in the contract between the charterers and the company, claiming that what was meant by the words "representative in value" in the agreement under which the company received the coal, was the amount which the company would be called on to pay to the charterers on the delivery of the coal by them to the company under the contract; and that if the question was to be considered as one of market value, the evidence of the receipt of so many cargoes of coal in October and November by the company, and their paying for them under the contracts, fixed the market value, rather than the evidence of one or two occasional sales of similar cargoes about the same time, which were not bought under such contracts.

BLATCHFORD, District Judge, after hearing argument, sustained the exceptions, and sent the report back to the clerk for a new report in accordance with them.

The case proceeded no farther, having been settled by the parties.

SIX HUNDRED AND SIXTY-ONE BALES OF TOBACCO (UNITED STATES v.). See Case No. 16,297.

Case No. 12,918.

SIX HUNDRED AND THIRTY CASKS OF SHERRY.

[14 Blatchf. 517.][1]

Circuit Court, S. D. New York. June 21, 1878.[2]

CARRIERS — DAMAGE TO CARGO — LEAKAGE AND BREAKAGE—QUALITY OF CASKS.

1. Casks of wine were shipped to New York, on a vessel, under a bill of lading which stated that the casks were in good order and well conditioned, and said, also: "Weight and contents unknown; not liable for average leakage or breakage." The casks, without reference to their contents, were delivered from the vessel at New York, and placed in the custody of officers of the customs. There was some leakage during the voyage. Some of the casks were empty on their arrivel, and others were partially so. The casks were of an inferior quality, and were in poor condition, on their arrival, arising from their quality and the usual perils of navigation. The master of the vessel libelled the casks of wine, in rem, in admiralty, for the freight money, and sued the claimants therefor, in the same suit: *Held*, the vessel was not liable for leakage and breakage not arising from her own negligence.

2. Proof of the inferior quality of the casks threw on the claimants the burden of showing that the injury to the casks was caused by the negligence of the vessel.

[Cited in The Tommy, 16 Fed. 603; The Querini Stamphalia, 19 Fed. 124; F. O. Matthiessen & Wiechers Sugar Refining Co. v. Gusi, 29 Fed. 796.]

3. The burden was on the claimants, of proving that the leakage was greater than the average in such casks.

4. The claimants and the property could be joined in the suit.

[Cited in The J. F. Warner, 22 Fed. 344; Joice v. Canal Boats Nos. 1,758 & 1,892, 32 Fed. 553; The Baracoa, 44 Fed. 103. Cited in brief in Heney v. The Josie, 59 Fed. 782.]

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

This was an appeal by the claimants from a decree of the district court in favor of the libellants (Vaughan v. Six Hundred and Thirty Casks of Sherry [Case No. 16,900]), in a suit in rem, in admiralty.

Thomas H. Rodman, for libellant.
Franklin A. Wilcox, for claimants.

WAITE, Circuit Justice. On or about April 12th, 1873, John Haurie, Nephew, shipped on board the ship Hudson, whereof the libellant was master, at Cadiz, Spain, 630 quarter casks of sherry wine, to be transported to New York and there delivered to the shipper, or his assigns, he or they paying freight and primage therefor, amounting to $866 25, in gold. Bills of lading in the usual form, signed by the master, were delivered to the shipper, specifying that the casks were in good order and well conditioned, but which contained the following clause: "Weight and contents unknown; not liable for average leakage or breakage." The bills of lading were transferred by the shipper to the claimants, John Osborn, Sons & Co., New York. The whole 630 quarter casks, without reference to what was in them, were delivered in due time from the ship, in New York, and taken to the bonded warehouse of the United States, in the custody of the officers of customs, where they remained at the time of the filing of the libel in this case. There had been some leakage during the voyage. Some of the casks were empty on their arrival, and others partially so. The casks were of an inferior qual-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]
[2] [Affirming Case No. 16,900.]

ity, badly coopered and shaky. Upon their arrival they were in poor condition generally, but it does not appear that their bad condition could be attributed to anything else than their inferior quality and the usual and ordinary perils of navigation. The freight and primage payable according to the terms of the bills of lading were duly demanded of the claimants, and payment thereof refused, before the libel was filed. No evidence was offered by the claimants, and there was no other evidence of the negligence of the vessel than the condition of the casks upon her arrival. There was no evidence as to what the average leakage would be upon such a voyage, or that the actual leakage in this case was greater than the average.

The exception in the bill of lading exempted the ship from liability for leakage and breakage not arising from her own negligence.

The burden of proving that the injury to the casks was caused by the negligence of the ship, was cast upon the claimants by the proof of the inferior quality of the casks. As there was no evidence upon that subject, the case of the claimants in this particular has not been made out.

The burden of proving that the leakage was greater than the average, in casks of the quality and condition of these when received on board the ship, was upon the claimants. No evidence having been given upon this subject, the case of the claimants, in this particular, also, has not been made out.

As the cause of action in this case arises upon a contract which, if it binds the claimants personally, binds also the property, both the claimants and the property may be joined in the suit.

The libellants are entitled to a decree for $866 25, in gold, with interest at the rate of seven per cent. per annum from the time of filing the libel, and for costs.

SIX HUNDRED AND THIRTY CASKS OF SHERRY WINE (VAUGHAN v.). See Case No. 16,900.

SIX LOTS OF GROUND (UNITED STATES v.). See Case No. 16,299.

Case No. 12,919.

SIXPENNY SAV. BANK v. ESTATE OF STUYVESANT BANK.

NEW YORK SAV. BANK v. SAME.

[12 Blatchf. 179;[1] 10 N. B. R. 399; 9 N. B. R. 318; 1 Cent. Law J. 83.]

Circuit Court, S. D. New York. June 16, 1874.

BANKRUPTCY — STATUTORY LIEN ON ASSETS OF BANK—DISTRIBUTION.

The act of the legislature of New York passed April 15, 1853 (Laws 1853, c. 257), provided that it should be lawful for savings banks in the county of New York to make temporary deposits in banks to a limited amount and for a limited time, and that all the assets of any bank that should become insolvent should, after providing for the payment of its circulating notes, be applied by the directors thereof, in the first place, to the payment of any sum or sums of money deposited with such bank by any savings bank, within the range of amount so limited. A savings bank in the county of New York deposited moneys in the Stuyvesant Bank, upon the understanding that the deposits would have the benefit of this statute. The Stuyvesant Bank was adjudged a bankrupt. The savings bank proved its debt and claimed to be entitled to be paid in full from the assets, before any payment should be made to other creditors, and to their exclusion, if need be, on the ground that it had, by virtue of the state statute, an interest in, or lien on, the property of the bankrupt: *Held*, that the statute provided a rule of distribution merely, and that the savings bank had, by virtue of the state statute, no lien, and was an ordinary creditor of the bankrupt, entitled to a distributive share of the assets, without preference.

[Cited in Re Baker, Case No. 762.]

[In review of the action of the district court of the United States for the Southern district of New York.]

The district court made an order disallowing the claim of the Sixpenny Savings Bank and the claim of the New York Savings Bank to be paid out of the assets of the estate of the Stuyvesant Bank, a bankrupt, the amounts of their debts, as proved, in full, as debts entitled to a priority in payment. The claimants brought the matter before this court, on petitions of review. The decision of the district court (Blatchford, District Judge) was as follows:

"The second section of the act of the legislature of the state of New York passed April 15, 1853 (Laws 1853, c. 257), provides that it shall be lawful for any savings banks or institutions for savings in the city and county of New York, then chartered, or which might be thereafter chartered, 'to make temporary deposits in any bank or banking association, to an amount equal to ten per cent. of the actual cash capital stock paid in, of such bank or banking association, and to receive interest thereon at such rates, not exceeding that allowed by law, as may be agreed upon, provided that all the deposits in any one bank or banking association shall not exceed in amount twenty per cent. of all the deposits belonging to such savings bank or institution for savings, and that no contract or agreement in relation to said deposits shall be for a longer period than one year.' The third section of the said act provides that 'it shall not be lawful for any of such savings banks or institutions for savings to make any loans to any bank or banking association, exceeding the limits above prescribed, unless such savings bank or institution for savings shall require and receive of such bank, for all sums so deposited exceeding the limits above prescribed, such securities therefor, and equal in amount, as the comptroller or superintendent of the banking department is now lawfully authorized to receive in exchange for bills or notes for circulation.' The fourth section

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

of said act provides that 'all the assets of any bank or banking association, now or hereafter to be created, that shall become insolvent, shall, after providing for the payment of its circulating notes, be applied by the directors thereof, in the first place, to the payment of any deficiency that may arise on the sales of the securities aforesaid, and, thereafter, of any sum or sums of money deposited with such bank or banking association by any savings bank or institution for savings, within the range of twenty per cent., as provided in the second section of this act.'

"The first section of the act of the legislature of the state of New York, passed April 10, 1858 (Laws 1858, c. 136), provides that 'the temporary deposits which any savings bank or institution for savings in the city and county of New York * * * is authorized to make by the second section of chapter two hundred and fifty-seven of the laws of eighteen hundred and fifty-three, shall not exceed in amount twenty per cent. of all the deposits belonging to any such bank or institution for savings in any bank of issue, exceed in the aggregate, at one time, the sum of one hundred thousand dollars.'

"The Sixpenny Savings Bank of the City of New York, a savings bank in the city and county of New York, chartered by the state of New York, as a corporation, has proved against the estate of the bankrupt, a claim for the sum of $23,261.06, with interest thereon, at the rate of five per cent. per annum, from the 11th of October, 1871. In its proof of debt, it claims that, under the said two acts, it has a valid and first lien on the assets of the estate of the bankrupt, and is, in the distribution and division of said estate, entitled to a preference or priority of payment prior to any creditor of the bankrupt other than the New York Savings Bank, on the ground that the said moneys were deposited and loaned under the express agreement that the Sixpenny Savings Bank should be entitled to such priority under the said two acts, and that the said two acts entered into, and formed a part of, the contract under which said deposit or loan was made to the bankrupt.

"The New York Savings Bank, a savings bank in the city and county of New York, chartered by the state of New York, as a corporation, has proved against the estate of the bankrupt a claim for the sum of $20,020.41, with interest thereon, at the rate of seven per cent. per annum, from the 12th of October, 1871. In its proof of debt, it claims that, under the said two acts, and its agreement with the bankrupt thereunder and in pursuance thereof, prior to the insolvency of the bankrupt, or any suspension thereof, it is entitled to have its said claim paid in full out of the assets of the bankrupt, before any payment is made to other creditors not entitled by law to a preference.

"Assuming that all, or some parts, of the amounts of these claims, fall within the terms of the provisions of the state acts, the question arises whether the priority or preference claimed under the fourth section of the state act of 1853, can be allowed, in the distribution of the assets of the bankrupt.

"It is contended, on the part of the savings bank, that, by virtue of the agreements made by them with the bankrupt, under and within the provisions of the state acts, they acquired a lien on all the assets of the bankrupt, in case of insolvency, and are, in the distribution of the proceeds of its assets, entitled to the same preference and priority of payment over its general creditors to which they would have been entitled if its assets had been distributed under the state laws; that the provision of the fourth section of the state act of 1853, is not an insolvent law; that it contemplates a lien on the present and future assets of the banks; that all liens are made in contemplation of insolvency, in the same sense as the lien created by said fourth section; that the bankruptcy act preserves all liens, both legal and equitable, and all charges or incumbrances, and, except in cases of fraud on the act, gives to the assignee in bankruptcy only such rights and interests in the estate of the bankrupt as the bankrupt had or could assert; and that the rights acquired by the savings banks under the state act, were rights of property, in the form of contracts, constituting equitable liens, which can be enforced against the estate of the bankrupt in the hands of the assignee in bankruptcy, to the same extent to which they could have been enforced against the estate of the bankrupt in the hands of the bankrupt, in case of insolvency, if there had been no proceedings in bankruptcy.

"I have given much consideration to the question involved, especially in view of the fact that, at a prior stage of these proceedings, I indicated an opinion in support of the claims of savings banks, when the question was submitted to me on written briefs. But an oral re-argument, and a full consideration of the provisions of the bankruptcy act, have led me to the conclusion that those claims cannot be allowed.

"I do not think that those claims can, under the terms of the state act, be properly considered as rights of property, inhering in, or adhering to, the property of the bankrupt. The savings banks, it is true, made contracts with the bankrupt, but those contracts were merely contracts for the making of deposits, and the paying of interest thereon. No part of the state act gives any lien for such deposits on any of the assets of the bankrupt. Those assets, consisting, in part, of the moneys so deposited, could be dealt with, and disposed of, by the bankrupt, free from any lien, charge, or incumbrance thereon, arising out of such contracts. No provision of the state act purports to interfere with the disposition of the assets of the bankrupt, until insolvency occurs, and then a rule for the application of such assets, in the distribution of the estate of the bankrupt, as the estate of an

insolvent debtor, is created by the fourth section of the state act of 1853. But that rule establishes in favor of the savings banks no such interest in the property of the bankrupt, that such property passes, under the bankruptcy act, into the hands of the assignee, subject to such interest.

"The second section of the bankruptcy act of August 19, 1841 (5 Stat. 442), provided 'that nothing in this act contained shall be construed to annul, destroy, or impair * * * any liens, mortgages, or other securities on property real or personal, which may be valid by the laws of the states respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act.' By the fifth section of the act of 1841 all creditors were to share pro rata in the bankrupt's property, except that debts due to the United States, and debts due to persons who, by the laws of the United States, had a preference in consequence of paying moneys as sureties for the bankrupts, and debts due to operatives (to a certain amount) were to be first paid out of the assets. In determining what ought to be regarded as 'securities on property,' 'valid by the laws of the states,' within the meaning of the second section of the act of 1841, it was held that all vested legal or equitable rights and interests in property, created by the laws of the states, were left undisturbed. Storm v. Waddell, 2 Sandf. Ch. 494, 502; Parker v. Muggridge [Case No. 10,743]; Mitchell v. Winslow [Id. 9,673]; Winsor v. McLellan [Id. 17,887]. This view cannot be questioned; and it is equally applicable to the present bankruptcy act, notwithstanding any difference in language between it and the act of 1841, in any provision in regard to liens. But it still leaves open the question as to whether a particular claim is a right or interest in property. If it is not, it is not a lien or security. There may be priorities or preferences in distribution under the bankruptcy act, which cannot be called liens or securities, or rights or interests in property. Debts due to the state in which the proceedings in bankruptcy are pending, are, by the twenty-eighth section of the present act, entitled to priority or preference and to be first paid in full, as the third class of claims in order; and there may be many such debts due to such state which are not by the laws of such state made liens or securities, so as to create rights or interests in property, and which depend wholly, for their preference or priority, on the terms of the twenty-eighth section. The same thing is true of the provision of the twenty-eighth section, giving preference to wages due to certain persons.

"The twenty-eighth section of the present act provides that certain claims shall 'be entitled to priority or preference, and to be first paid in full in the following order.' Then follow five classes. The fifth is, 'all debts due to any persons who, by the laws of the United States, are or may be entitled to a priority or preference, in like manner as if this act had not been passed.' This is limited to priorities or preferences created by the laws of the United States. It does not extend to priorities or preferences created by the laws of a state. Under it, the state could have no priority for debts due to it which were not liens or securities, and, but for the provision, in the third class of priorities, for such debts due to the state, there could be no priority for such debts. It would have been easy to say, in the provisions for distribution in the twenty-eighth section, that a priority or preference, as a sixth class, should be given to 'all debts due to any persons who by the laws of the state in which the proceedings in bankruptcy are pending, are or may be entitled to a priority or preference, in like manner as if this act had not been passed,' if it had been intended to recognize priorities or preferences given by the laws of the state, which are not liens or securities or rights or interests in property. If the preference or priority given by the fourth section of the state act of 1853 is to be upheld, in a distribution under the 28th section of the bankruptcy act, on the ground that it can be called a lien or security, to be satisfied before the twenty-eighth section comes into operation, it is difficult to see why every priority or preference in the distribution of the estate of an insolvent debtor, created by a state law, must not be upheld. Every such priority or preference is relied on by the person in whose favor it operates, equally with the preference under the fourth section of the state act of 1853, relied on in this case. Every such priority or preference is a security to such person, as much as the preference in the present case was a security to the savings banks. But such priorities or preferences created by state laws in the distribution of insolvents' estates, are not liens or securities or rights or interests in property. If so, they are not saved by the general scope of the bankruptcy act; and they are not recognized by the twenty-eighth section.

"The claims to priority on the part of the savings banks must be disallowed."

[2] [The thirty-seventh section of the bankruptcy act provides in substance that the property and assets of a bankrupt corporation shall be distributed as the assets of a natural person would be under the act. Section 28 directs the order of distribution of the assets of a natural person.

[The counsel for the savings banks contend, however, that section 28 applies only to what portion of the bankrupt's estate remains after satisfying prior or paramount interests or titles, and that the savings banks have, under the statute of New York on which they rely, a prior or paramount title in the nature of a lien, the amount of which must be deducted from the whole mass of the bankrupt's estate in the hands

[2] [From 10 N. B. R. 399.]

of the assignee, leaving the residuum for distribution under the twenty-eighth section.

[The assignee, however, contends that (1) the statute of New York did not create a right of property in the nature of a lien or otherwise, but (2) only imposed upon the officers therein mentioned the duty of observing a certain rule of distribution in case of insolvency, which rule the legislature or congress had a right to abrogate.] [2]

Frederick Hughson, for New York Savings Bank.

D. Noble Rowan, for Sixpenny Savings Bank.

Francis N. Bangs, for assignee in bankruptcy.

[2] [In support of the views of the assignee, the following propositions are submitted.

[First. The New York statute relied upon by the claimants is similar in its language to other statutes of the same state, and of other states, and of the United States, such as the statute for the distribution of the estates of absconding debtors, or of deceased persons, or of bankrupts.

[Second. If the statute in question gives to a savings bank a right of property in the nature of a lien, then the other statutes above mentioned give a like right, in the nature of a lien, to all persons entitled under them to shares in the estate which is to be distributed.

[Third. The right which the New York act gives does not accrue at the time of making a deposit (unless the depository bank is then insolvent). The savings bank does not after deposit retain the ownership of its own deposit, nor does it at the time of deposit acquire a right of property or appropriation in, nor any specific claim against, any other specific thing. It is (until insolvency at least) a general creditor—the holder of a chose in action.

[Fourth. If in each deposit, as it is made, there inheres a right of property, or if there springs up from it a right of appropriation, then that right must necessarily attach to everything else in the possession of the depositary, except that, the deposit of which created a like exclusive right; or else each deposit creates a lien on the next deposit, and each depositor of the class provided for is both pledgor and pledgee. If the New York Savings Bank deposits one thousand dollars on one day, and the Sixpenny Bank one thousand dollars on the next day, the second deposit is subject to the lien of the first. If, then, the New York Bank makes another deposit, that is subject to the lien of the second, and so on. The use, by the depositary, of any deposit after the first would be a conversion of another's property. This idea is inconsistent with the obligation to pay interest, and is otherwise out of joint with the necessities of a banking system.

[Fifth. If the statute relied upon, and other like statutes, create a right of property or a vested interest, then, of course, such right of property or vested interest is indefeasible, except by the act of the party. Thus, under section 28 of the bankruptcy act, a servant to whom his master now owes wages has an indestructible lien for such wages, which lien congress, by a repeal or modification of the bankruptcy act, could not deprive him of. To argue thus, however, would be plainly a reductio ad absurdum, which would bring argument to an end; for there can be no doubt of the power of congress to modify section 28, nor of the power of the New York legislature to repeal the act referred to.

[Sixth. The provision referred to applies only in case of insolvency. A bank of deposit in a solvent condition may be wound up without first paying off savings bank depositors. This could not be so if such depositors were, qualifiedly or unqualifiedly, proprietors of any part of the estate.

[Seventh. These arguments and illustrations show that the claimants had not a right of property, in the nature of a lien or otherwise, in the estate of the Stuyvesant Bank; and the alternative is inevitable that the New York statute only imposed on certain agents, therein designated, the duty of observing a certain rule, upon a certain contingency, in the distribution of certain estates.

[Eighth. This rule was subject to abrogation by any authority having paramount power to legislate on the subject. Certainly the New York legislature might, before the Stuyvesant Bank became insolvent, have altered the rule. If it had done so, it would no more have interfered with vested rights than the British parliament would by abolishing the law of primogeniture, or regulating the distribution of intestate estates. Congress, having paramount control over the subject, could do the same thing, and in doing it, would violate no constitutional nor moral right; for it would give the savings bank ample opportunity to withdraw its funds; or rather the savings bank, if it continued its deposits after the passage of the bankrupt law, would act in spite of ample warning.

[Ninth. If the savings bank had no right of property or of appropriation, in the nature of a lien or otherwise, in the estate of the bankrupt, then that whole estate becomes subject to the operation of sections 37 and 28 of the bankruptcy act, and under those sections the claim to priority should be rejected.] [2]

HUNT, Circuit Justice. The facts in the two cases presented are the same, with the exception of a difference only in the amount claimed. A statement of the facts in the case

[2] [From 10 N. B. R. 399.]

[2] [From 10 N. B. R. 399.]

of the Sixpenny Savings Bank will suffice for a statement in the case of the New York Savings Bank as well.

The Sixpenny Savings Bank is a savings bank in the city of New York, chartered by the state of New York, and has proved against the estate of the bankrupt a claim for the sum of twenty-three thousand two hundred and sixty-one dollars and six cents, with interest at the rate of five per cent. per annum from October 11th, 1871. It claims that under the statutes of the state of New York, which will be presently mentioned, it has a first lien upon the assets of the estate of the bankrupts, and is entitled to a priority of payment, by virtue of those statutes, and the agreement under which the debt was contracted over the other debts of the bankrupt. The statute of the state of New York, passed April 15, 1853 (Laws N. Y. 1853, c. 257), provides that it should be lawful for a savings bank in the counties of New York and Kings to make temporary deposits in bank or banking associations to a limited amount and for a limited time. In certain cases the savings bank may receive as security for such deposits securities of the character of those authorized to be received by the controller or superintendent of the bank department in exchange for bills for circulation. It is provided in section 4 of the act that "all the assets of any bank or banking association, now, or hereafter to be created, that shall become insolvent, shall, after providing for the payment of its circulating notes, be applied by the directors thereof in the first place to the payment of any deficiency that may arise on the sales of the securities aforesaid, and thereafter for any sum or sums of money deposited with such bank or banking association by any savings bank or institution for savings within the range of twenty per cent., as provided in the second section of this act." The act of 1858 (Laws 1858, c. 136) imposes certain further limits and restrictions, but contains nothing to affect the question before us. The Sixpenny Savings Bank made deposits with reference to these acts, and upon the understanding that the deposits would have the benefit of the provisions referred to. In making proof of its debt it claims to be entitled to payment in full from the assets of the bankrupt before any payment is made to any other creditors, and to their exclusion, if need be. The question comes to this: Is the statute, which declares that the debt of the savings bank shall be paid next after the claim of billholders, and to the exclusion, if need be, of all other creditors, a rule of distribution of estates appertaining to the remedy only, or does it give to the bank an interest in, or lien upon the property of the insolvent corporation? If the former only it is conceded that the claim of the petitioners must fail; if the latter, then the exclusive payment of the debt is insisted upon.

As bearing upon, and illustrating this question, certain provisions of the constitution and statutes of the state of New York are worthy of consideration. The constitution of that state, adopted in November, 1846, contains the following provision: "In case of the insolvency of any bank, or banking association, the bill-holders thereof shall be entitled to preference in payment over all other creditors of such bank or association." Article 8, § 8.

By the act of 1855 (chapter 69, § 13) it was provided that the receiver should apply the moneys in his hands to the payment of the bills or notes held by the bill-holders of such corporation in just and equal proportions, and if no surplus remains he shall divide the same among the creditors of the corporation having demands contracted after the 1st day of January, 1850, and any remaining surplus shall be divided among all the other creditors of the corporation whose demands shall have been presented and ascertained. By the insolvent laws of the state of New York the estate of the insolvent is directed to be distributed as follows, viz.:

First. All the debts due to the United States shall be paid.

Second. All debts due to persons who, by the laws of the United States, have a preference in consequence of having paid money as sureties of such debtors.

Third. All the debts due from the debtor as guardian, executor, administrator, or trustee.

Fourth. Debts due execution creditors, issues of attachment, etc., in the various cases specified. In all cases certain costs and disbursements are to be first provided for. 3 Rev. St. (5th Ed.) pp. 119, 120 (marg. pp. 46, 47, pt. 2).

In cases of intestacy the statutes of that state enact that the personal estate of the deceased shall be distributed as follows, viz.:

First. To the widow one-third part thereof after the payment of the debts of the deceased.

Second. All the residue among the children, and the representatives of the children, if any have died before the intestate, in equal proportion.

Third. If there be not any children, or representatives of them, one moiety of the whole shall be allotted to the widow, and the residue to the next of kin, as afterwards provided.

Numerous details for other cases are given in the subsequent sections of the statutes; relatives of the half blood taking equally with those of the whole blood in the same degree; and descendants begotten before the death of the intestate, but born after, taking in the same manner as if born in the lifetime of the deceased, and as if they had survived him. 3 Rev. St. (5th Ed.) pp. 183, 184 (marg. p. 97, pt. 2). Subsequent to all these are the provisions of the statutes of 1853 and 1858, now before us, to the effect that upon the occurrence of the insolvency of a banking corporation the debts due from it to the holders of its circulating notes shall be first paid. The debts due to savings banks upon sales of securities given to such savings banks to secure payments of debts due to them, or upon de-

posits, shall be next paid, and no other debts can be paid until those mentioned are fully satisfied.

I am of the opinion that these laws are all of the same general character: that they are statutes furnishing a rule of distribution merely, and do not give any interest in or place any lien or incumbrance upon the estate to be disposed of. If distribution is to be made under the state laws, these rules will govern such distribution, because they are the rules made by the state, not because a lien or right in the property is conferred by them.

The soundness of the position that liens are preserved under the bankrupt act, and that the holders of them are to be protected, cannot be well doubted.

The bankrupt act of 1841, in its second section, was very explicit on this subject, and it was repeatedly held that liens or rights of property created by the laws of the state could not be disturbed while enforcing the provisions of the act. The rule is the same under the present bankrupt law, and although not stated in terms so precise and specific as are found in the act of 1841, the provisions of sections 14 and 20 establish the same rule.

I concur with the counsel for the appellant and petitioner, that if the savings bank had a lien upon the assets of the Stuyvesant Bank, that lien must be protected in the distribution of its assets. Nor do I find any fault with his definition of a lien, to wit: that which gives a vested right or interest in the property sought to be appropriated. The preferences given by the statutes of the state of New York already mentioned, or by the fifth subdivision at the end of the twenty-eighth section of the bankrupt act, cannot properly be described as liens. Those under the state laws and those under the twenty-eighth section are alike in their nature and character. They are rules or directions for the disposition of the property of the bankrupt or insolvent made because they seem wise and just, and which may be modified or abrogated whenever it becomes apparent that they are unwise or unjust. The debts due the United States from an individual citizen, it is enacted, must be first paid whether they are for taxes or for individual debts, or for debts due as surety for another, whether fiduciary, confidential, commercial, or in the nature of an enforced compulsory obligation. If A B becomes surety for C D, under the revenue laws of the United States, and a default ensues, although without his participation or knowledge, his estate in bankruptcy is liable for the debt of his principal, and the United States will receive payment in preference to his own creditors.

In the exercise of its sovereign power, the government so enacts, and therefore such is the law, but the government had no lien upon the estate either when he became surety for the government debtor, when that debtor failed to pay, or when he himself became bankrupt. His property was his own throughout, subject to consumption, exchange, or other use until its status became fixed by the provisions of the bankrupt act. In cases of preference under the state laws, no interest is acquired in the property of the debtor either by deposit in the bank—for it may then be solvent, and the money goes into its business and forms a part of its general funds—nor by insolvency founded upon the principle that the event can produce no such result, and it is not declared in the statutes that such shall be its effect. No lien upon or specific interest in the property is declared in favor of any preferred creditors, and it is difficult to see when, where, or by what process the change from general creditor to a creditor with specific lien occurs. The language of the statute is satisfied by a rule of preference in making payment. This is easily understood, and I think is the basis of the law. I do not doubt that there may be a trust estate in which the trustee may have power from time to time to change investments, and that the lien may attach to new securities as they form a part of the estate. This does not, however, affect the main question. It is possible, too, that the fluctuating assets of a bank of discount and deposit may be the subject of a trust, although I do not recollect to have met with any case that sustained that proposition. Neither does it affect the main question in this case, to wit, the existence of a lien. Preference is given by the bankrupt act, and it usually is by the state laws, to debts due to the state in which the bankruptcy proceedings are pending. As the sovereign authority upon a subject within the jurisdiction of the federal authority, congress provides first for the payment of debts due to the United States. In apparent deference to the authority which would be supreme, except for its own intervention, it enacts that debts due to the state in which the proceedings are pending, shall next be paid. This preference exists simply because the act of congress so enacts, and if congress had not so enacted, or if it should afterwards enact otherwise, the preference would cease. It is a rule of distribution merely, and if congress should abolish the preference given by the act to either government, it would be an exercise of undoubted power and no right or liens would be infringed. The power to establish a system of bankruptcy carries with it the power to establish the details of the system if congress shall think proper. In like manner, it is competent to the state of New York to provide that upon the failure of a bank of circulation and deposit, the assets of the bank shall be applied first in payment of its circulating notes; and second, in payment of debts due to savings banks; and third, to creditors generally. It may deem this rule of distribution to be so important that it will incorporate it with its fundamental law, when it will be, to some extent, free from the effects of public excitement. It is still, however, but a law of no further effect than an ordinary statute, while both remain unrepealed or uncontradicted. The same language, in the same circumstance, will confer the same rights, neither more or

less, whether embodied in a state constitution or in a state statute. Such a law does not either by its language or upon principle give a lien or claim upon the funds of the insolvent corporation. They remain with the receiver or the assignee. The law simply directs to whom and to the payment of what debts the funds shall be applied by such receiver or assignee. The distribution of estates of insolvents under the state laws, and of the estates of intestates stands upon the same principle. I am not able to discern any difference between these cases and the one we are considering. In each instance the proceeding is taken by virtue of the state authority. The title to the property vests in the assignee, receiver, trustee, administrator, or by whatever name he may be called; the statute says that he shall apply it by giving a particular portion to the widow, and another portion to the children; or the statute directs that certain debts due to the state shall first be paid, and certain other debts shall be then paid. This is a rule of distribution and gives no interest in or lien upon the property in the hands of the trustee. As the result of this principle, the legislature may alter the theory of disposition at its pleasure, as often as it thinks fit and no rights are infringed. The statutes of 1853 and 1858, in my judgment, stand upon the same foundation; they give no lien upon or claim on the property in the hands of the receiver, and creditors are entitled to no other protection under them than are claimants under the other statutes referred to.

A brother of the half blood would to-day be entitled to an equal participation under the laws of New York in the estate of his deceased brother, should he now die, with a brother of the full blood. No one will argue, however, that he has any claim, interest in, or lien upon, the estate of his living brother that will prevent the legislature from passing a law that brothers of the full blood only shall inherit his inheritable. This heritable capacity is destroyed, but no lien or interest is effected if he had no interest in his brother's estate. So an after begotten child may by legislative action be cut off from the participation which the law now gives him to the estate of his father. It results, however, from a change of a rule of distribution merely. Neither the child, this brother, or the savings bank have any greater interest in the property than an expectation derived from an existing rule of distribution. The property, and all and every interest in it belongs to the owner thereof, if the rule of distribution remains unaltered. They would, in certain contingencies, receive a portion on final distribution; but if altered, as it may be at any time, they take nothing. Norris v. Crocker, 13 How. [54 U. S.] 429; Steamship Co. v. Joleffe, 2 Wall. [69 U. S.] 450, etc.; Bronson v. Kinzee, 1 How. [42 U. S.] 316.

The object no doubt of the law of 1853 was to give additional securities to savings banks. They are in the nature of charitable institutions, and it may be assumed that the legislature intended to give them a preference over other creditors of insolvent banking corporations. This they intended to do by providing the rule of distribution contained in that act. The operation of a bankrupt law was probably not in the mind of the persons decreeing the act of 1853. Such a law is exceptional in the history of this country. The bankrupt laws passed prior to 1853, had been temporary in their character, and their consideration did not enter into ordinary business arrangements.[3] It was assumed in the event of the insolvency of banking corporations that they would be wound up by the courts of the state, and by officers appointed by them. In such cases the statute offered ample protection to savings banks. The rule of distribution provided by it would save their preferences. It is upon this theory that both the legislature and the parties probably acted, and it can scarcely be said with accuracy that the parties relied upon the plighted faith that the assets of the bank were pledged for the repayment of this deposit. There is no reason in fact or in law to suppose the parties in this case understood themselves to have given or to have received a lien upon the property of the Stuyvesant Bank, or that they had a vested, or any other right. in its estate. They were aware of the provisions of the law in that respect. They knew that if this bank became insolvent, and was wound up under the laws as they then stood, their debts would have a preference. It is assumed that they contracted with reference to this, but to assume that they anticipated the passage of another bankrupt law, and provided to themselves a lien and pledge upon the assets of a bank then in prosperous condition, which would protect them as parties holding incumbrances, is quite unreasonable. We find nothing in the fact proved, or in the principles of law, to warrant this assumption.

The deposits of the savings banks in question it is proved were made in reference to the law of 1853, and upon an understanding that there were such provisions as are relied upon here. This is not in law a material circumstance; if it be assumed to amount to an agreement, that, in case of the occurrence of the insolvency of the Stuyvesant Bank, the savings bank should have a preference over other creditors in payment of its debts, it would not avail. Such an agreement is not valid. It would amount to nothing more. No present security was offered or expected. No advantage was to be received except upon in-

[3] The first act to establish a uniform system of bankruptcy was passed by congress April 4th, 1800, and was repealed on the 9th of December, 1803 (2 Stat. 19, 248).

The second act by the United States authority to establish a system of bankruptcy was passed August 19th, 1843 (5 Stat. 440, 614).

In the year 1853, when the New York statute we are considering was passed by the legislature of that state, no bankruptcy system under the authority of the United States was in existence, nor had there been for ten years previously, nor was there until sixteen years afterwards.

solvency. If the Stuyvesant Bank should become insolvent the statute provided for a preference, the understanding or expectation went to that point only. If there was an agreement it could only be to the effect that the law did and should continue to give them a preference. The bankrupt law could not exist a moment under the rule that the debtor could by such an agreement give a preference on his assets, and an agreement of this character is contrary to its entire spirit and purpose, and will at once destroy its effect. By the statutes of New York a banking corporation cannot give a preference in contemplation of insolvency. 2 Rev. St. (5th Ed.) p. 517, § 1.

It can hardly be assumed that they intended by implication to authorize a lien and charge which would fix such preference beyond their own power of change.

Holding that the appellant had no lien upon the funds in the possession of the Stuyvesant Bank, it is clear that the appeal must be dismissed, and within the bankrupt act the appellant is an ordinary creditor, and takes its chance with others to receive its distributive share without preference or advantage. The order of the district court of January 31st, 1874, is affirmed.

SIXTEEN BARRELS OF DISTILLED SPIRITS (UNITED STATES v.). See Case No. 16,300.

SIXTEEN CASES OF SILK RIBBONS (UNITED STATES v.). See Case No. 16,301.

SIXTEEN HOGSHEADS OF TOBACCO (UNITED STATES v.). See Case No. 16,302.

SIXTEEN PACKAGES (UNITED STATES v.). See Case No. 16,303.

SIX THOUSAND TWO HUNDRED AND FIFTY CIGARS (UNITED STATES v.). See Case No. 16,304.

SIXTY FIVE-EIGHTHS CARATS BRILLIANTS (UNITED STATES v.). See Case No. 16,305.

SIXTY-FOUR BARRELS DISTILLED SPIRITS (UNITED STATES v.). See Case No. 16,306.

SIXTY-NINE BARRELS (UNITED STATES v.). See Case No. 16,307.

Case No. 12,920.

SIZE et al. v. CURTIS.

[1 Lowell, 110.][1]

Circuit Court, D. Massachusetts. May Term, 1866.

INTERNAL REVENUE — NEW DUTIES — RIGHT TO ADD TO CONTRACT PRICE—CHANGE OF TAX.

While the internal revenue law of 1863 [12 Stat. 713], which laid a duty of two per cent upon ships, was in force, a ship-builder contracted to sell a vessel which he was then building for a certain sum "which shall be in full." Not long before the ship was completed, the statute of 1864 [13 Stat. 223] was passed which laid a duty of two per cent. upon the hulls of ships, the effect of which was that the builder paid upon the hull only, instead of upon the whole ship. *Held*, that he could not recover of the purchaser the amount of the tax, as provided by section 94 of the new act, for duties imposed by that act and not provided for in the contract, because the tax was merely changed and reduced, and not imposed by the new statute.

Assumpsit. From the agreed facts it appeared that the defendant [Paul Curtis], a ship-builder, contracted for the sale of an unfinished vessel to the plaintiffs [Edward F. Size and others], and the parties exchanged notes of the contract, which were substantial counterparts of each other, and of which one part was as follows:

"East Boston, May 9, 1864. For value received, I, Paul Curtis, agree with Edward F. Size, John Chase, and John S. Pray, to sell them the ship I now have on the stocks, nearly completed, for eighty-one thousand five hundred dollars, equal to cash, when the ship is completed, which shall be in full, to have a tank and bilge pumps, and to be fitted as I usually fit my ships, that is, one suit of every thing complete."

The ship was completed and delivered early in July, 1864, and presently afterwards the assessor of the district, in accordance with information given him by the defendant, assessed upon her as the property of the plaintiffs an excise tax in behalf of the United States. The plaintiffs insisted that the tax should have been assessed to and paid by the defendant; but the officers of the revenue refusing to go into this question, they paid the amount, and brought this suit to recover it of the defendant. And it was agreed between the parties, that if the tax should properly have been assessed to and paid by the defendant, and if he would in that event have had no recourse over upon the plaintiffs therefor, judgment was to be rendered for the plaintiffs for the amount so paid by them, with interest; otherwise, they were to be nonsuited.

D. Thaxter and S. Bartlett, for plaintiffs.

E. Wright, for defendant.

LOWELL, District Judge. By the ninety-fourth section of the act of June 30, 1864 (13 Stat. 267), by virtue of which, as both parties agree, and as is obvious, this tax was assessed, the manufacturer or producer of the various articles therein mentioned is to pay a duty upon them. Among other articles are the hulls of ships, on which are to be paid two per cent ad valorem. The assessment, therefore, should have been made to the defendant, who was the manufacturer of the hull of this ship, and the tax should have been paid by him. But he alleges that he would have been entitled to recover the amount of the plaintiffs under the 97th section of the same act (13 Stat. 273), which, so far as material to this case, is as follows:

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

"That every person, firm, or corporation, who shall have made any contract prior to the passage of this act, and without any provision therein for the payment of duties imposed by law enacted subsequent thereto, upon articles to be delivered under such contract, is hereby authorized and empowered to add to the price thereof so much money as will be equivalent to the duty so subsequently imposed on said articles and not previously paid by the vendees, and shall be entitled by virtue hereof, to be paid, and to sue for and recover the same accordingly."

By the act of March 3, 1863, which was in force when the contract was made, the defendant would have been assessed two per cent upon the value of the finished ship, and it is not disputed that as between these parties the defendant must have paid this tax, because the payment for the ship was to be "in full." The actual assessment was of a like percentage upon the hull only, and though the new law may lay other taxes on the materials used for rigging, &c., which would make the actual indirect burden upon vessels as great as before, concerning which we have not made inquiry, it is obvious that in this case of a ship nearly completed in May, and delivered within a few days after the act of June 30 was passed, the defendant must have escaped any such assessment, and in point of fact have been liable to an assessment of about seven hundred dollars on this ship, instead of about sixteen hundred dollars, which by his contract he appears to have expected to assume and pay.

It cannot be doubted that the intent of the 97th section of the new law is to throw upon the purchaser the burden of an unexpected tax, which by increasing the cost, is presumed to have increased to the same extent the value of the article. But here the defendant asks the plaintiffs to pay him seven hundred dollars more for what has cost him nine hundred dollars less than the parties must be supposed to have anticipated. His argument is that this tax was imposed by the new act, and that the parties in their contract made no provision for the contingency of a new law being enacted. We have examined this point with much care, because it must be of importance in a large class of contracts, and we are of opinion that the statute expresses what all must admit to have been the purpose of its framers. To enable the manufacturer to recover, it is not enough to show that the tax is assessed under the new law, which of course it must be, since the former law is repealed, but that the article to be delivered has had a duty imposed upon it by the new law to which it was not subject under the old. When this contract was made a tax existed by law upon ships, and this was in contemplation of the parties, and the defendant was to pay it. The new law provides for a tax on ships, but at the same moment, by repealing the former statute, abolishes a still larger duty. The defendant is to have from the plaintiffs a sum equivalent to the new imposition. Can this sum be ascertained except by looking at the net result to him of this enactment? Take the case of a simple re-enactment of the duty. The parties have made a contract, and the manufacturer is to pay the tax. It is assessed to him at the same time, and for the same amount as was expected, and he pays it and calls on his vendee to refund. The answer would be this tax is retained, not imposed by the statute. And so a fortiori of a tax reduced. The imposition to which the law refers is a new one, and not one merely retained or diminished. It must be not only a duty imposed on the particular ship by the assessor. under and by virtue of the new law, but a duty imposed on the general article of ships, by the new law, as contradistinguished from the old. In this sense, the only just one between contracting parties, and a perfectly fair and reasonable one in itself, the tax on ships, was not imposed by the new law.

If it be said that the act of 1864 imposed a duty for the first time upon the hulls of ships, it is enough to reply that the tax upon the completed vessel included the hull; and if a distinction is to be taken between the ship and the hull, then this tax upon the hull was not a tax upon the article contracted to be delivered, which was a ship.

Judgment must be entered for the plaintiffs for $736, and interest from July 21, 1864, and costs.

SIZER (MANY v.). See Cases Nos. 9,056 and 9,057.

SKAM (UNITED STATES v.). See Case No. 16,308.

SKATES (MATTHEWS v.). See Case No. 9,291.

Case No. 12,921.

In re SKELLEY.

[3 Biss. 260; [1] 5 N. B. R. 214.]

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

BANKRUPTCY — JURISDICTIONAL AMOUNT — PAYMENTS—ALLEGATIONS OF PETITION—INVOLUNTARY PROCEEDINGS—COSTS.

1. The district court has no jurisdiction of an involuntary case in bankruptcy, unless it appears on the trial that the debtor, at that time, owes debts provable under the act [of 1867 (14 Stat. 517)] exceeding the sum of three hundred dollars, and is indebted to the petitioning creditors in the amount of two hundred and fifty dollars. This is true even though the debtor, at the time of the filing of the petition, was indebted to exceed those sums. When his indebtedness, by subsequent payments, is reduced below those sums, the court loses jurisdiction.

[Cited in Re McKibben, Case No. 8,859.]

2. The latter clause of the forty-first section of the act was intended to allow the debtor to disprove on the trial all the material allegations of the petition.

[Cited in Re Price, Case No. 11,411.]

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

3. Payments made by the debtor to the petitioning creditors are material facts on the issue on denial of bankruptcy, and the debtor can introduce evidence of such payments without a special traverse of the amount of his indebtedness.

4. The receipt of such payments by the petitioning creditors to an amount sufficient to reduce this indebtedness below the minimum established by the act, must be considered as a waiver of the alleged act of bankruptcy.

5. The petitioning creditors cannot add the costs paid and incurred by them to their debt in order to raise it above the jurisdictional limit. Such costs are not a part of their debt. The debtor must owe them two hundred and fifty dollars or they have no right to make costs. Nor can the creditors add counsel fees to their debt.

6. In this case, the respondent, having been guilty at the time of the filing of the petition, was ordered to pay all costs up to the time of filing his denial, except the docket fee.

In bankruptcy. On the fifth day of July, 1870, John V. Farwell & Co. filed their petition in this court, alleging that they were creditors of William H. Skelley in a sum exceeding two hundred and fifty dollars, to-wit: in the sum of nine hundred and eleven dollars and ninety-two cents; that said indebtedness was upon a promissory note for nine hundred and eleven dollars and ninety-two cents, given by said Skelley to the petitioners, bearing date on the third day of June, 1870, and payable to petitioners in fifteen days from date; that said Skelley owed debts to an amount exceeding three hundred dollars; that said Skelley, being a merchant and trader, was, on the fifth day of July, 1870, guilty of an act of bankruptcy within the meaning of the bankrupt act by the suspension of payment upon his commercial paper, and failure to resume payment thereof within the period of fourteen days, the commercial paper upon which he so suspended payment being the said promissory note. On the twenty-first day of September, Skelley filed a denial of the alleged act of bankruptcy, and the issue was by agreement of parties submitted to the court for trial without a jury. On the trial the petitioner produced the note described in the petition, and showed that the sum was due and unpaid as set forth, at the time the petition was filed. Proof was then introduced on the part of the respondent Skelley, showing that after the filing of said petition and before the filing of his denial, he had made payments on said note which reduced the amount due thereon at the time of the trial to less than two hundred and forty dollars. The petitioners objected to said evidence as not being germain to the issue made by the pleadings, but the court admitted the proof, subject to objection. It did not appear, from the evidence, that respondent owed any other debts. It also appeared from the proof that the petitioners had advanced sixty-five dollars for costs in this proceeding, and had incurred liabilities for attorney's fees to the amount of two hundred dollars.

Tenney, McClellan & Tenney, for petitioners.

T. Leddy, for respondent.

BLODGETT, District Judge. The only question is, can the respondent be adjudged a bankrupt under this issue and proof?

It is clear that at the time of the trial respondent was not indebted to the petitioning creditors in the sum of two hundred and fifty dollars. And it does not appear that he then owed debts to the amount of three hundred dollars. But it is contended on the part of the petitioning creditors, that inasmuch as the proof shows that respondent owed them much more than two hundred and fifty dollars, and owed in the aggregate much more than three hundred dollars at the time the petition was filed, the evidence of the reduction of the indebtedness by subsequent payments, is wholly immaterial and inadmissible.

It is manifest that this court has no jurisdiction to adjudge a person bankrupt unless such person owes debts to the amount of three hundred dollars, and is also indebted to the petitioning creditor or creditors in the sum of two hundred and fifty dollars; the subject matter is not within the jurisdiction of the court unless the indebtedness reaches the amount named. And I think the better rule is that, under the issue made by the denial of bankruptcy, the debtor can introduce proof to contradict all the material allegations in the petition.

In at least two important cases to which my attention has been called—Brock v. Hoppock [Case No. 1,912], and National Exchange Bank v. Moore [Id. 10,041]—it has been held that the burden of proof rests upon the creditor, and he must establish his debt before proceeding to show acts of bankruptcy. But without intending to fully indorse the rule laid down in those cases—as I do not deem it necessary to go so far in this case—the last clause of the forty-first section of the bankrupt act provides that, "if upon the trial the debtor proves to the satisfaction of the court or jury, as the case may be, that the facts set forth in the petition are not true, or that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens were the sole ground of the proceeding, the proceedings shall be dismissed and the respondent shall recover costs," thus evidently intending to allow the debtor the right on the trial to disprove all the material allegations in the petition, or in other words to rebut the prima facie case made by the petition and the preliminary proofs filed therewith.

It seems to me the question is analogous to the question of jurisdiction of the parties in a suit brought in the federal courts. If it appear at any time during the trial

that the plaintiff is not entitled to sue in that court; his suit will be dismissed, although the right so to sue is not specially raised by the plea. So in proceedings in bankruptcy, if it appear at any stage in the trial that the case is not within the bankrupt law, the proceedings should be dismissed. It is true some of the courts have held that the debtor should specially traverse the amount of his indebtedness to the petitioner if he wishes to raise that question, but the reasons assigned for this holding do not occur to me as in harmony with the well received rules of pleading, or the spirit and letter of the bankrupt act. I think, therefore, that the evidence as to the payments made by respondent to the petitioners after the filing of the petition, was admissible under the issue, and it appearing that by such payments the petitioners' debt is reduced below two hundred and fifty dollars, they have lost their standing in court to have the respondent adjudged a bankrupt.

The receipt of such payments seems to me a waiver by the petitioners of the act of bankruptcy alleged, so far as they are concerned, for if the respondent were to be adjudged guilty on their petition, the payments made to petitioners are certainly such payments as amount to preferences of themselves as creditors, and would prevent the petitioners from proving their debt.

I cannot presume that the creditors to whom these payments were made contemplated any such serious consequences to follow the mere receipt of part of their debt, but will rather presume, under the circumstances, that they intended to condone and waive the alleged act of bankruptcy.

The acceptance of these payments renders the petitioners incompetent to further urge or insist upon the act of bankruptcy. True, the petition is filed for the benefit of all creditors, but it is equally true that only creditors to whom the sum of two hundred and fifty dollars or upwards is due, can demand an adjudication, and that amount must be due at the time the court is asked to render judgment.

I ought, perhaps, before dismissing the subject, to notice the point made by petitioners in regard to the costs which have been paid and incurred by them, and which they claim constitute a part of their debt against the respondent.

This position seems to me wholly untenable. The debtor must owe his creditor two hundred and fifty dollars, and be guilty of an act of bankruptcy, before the creditor has any right to make costs for the purpose of having him adjudicated a bankrupt, and when the costs are made they are not added to the petitioners' debt, but the creditor may have them re-imbursed to him out of the debtor's estate if he is adjudged a bankrupt, while he is only entitled on his debt to his pro rata with other creditors.

As to the counsel fees incurred by petitioners, the courts of this state do not recognize them as any part of the costs to be recovered in a case, and in bankruptcy it is a matter of discretion with the court to allow them a reasonable amount against the estate.

In this case the evidence shows the respondent guilty at the time the petition was filed, and as no stipulation seems to have been made, I shall render judgment that the respondent pay all taxable costs except docket fees made up to the filing of his denial, and that on such payment the proceedings be dismissed.

NOTE. Where there are no other debts than that of the petitioning creditor, the debtor is entitled to have the proceedings dismissed, on tender of the debt and costs. In such case no counsel fees can be allowed, there having been no adjudication, and no estate or fund created. In re Sheehan [Case No. 12,738].

SKELTON (CITY BANK OF NEW YORK v.). See Cases Nos. 2,739 and 2,740.

Case No. 12,922.

SKIDDY et al. v. ATLANTIC, M. & O. R. CO.

[3 Hughes, 320.] [1]

Circuit Court, E. D. Virginia. May 9, 1879.

RAILROAD COMPANIES — RECEIVERS — WAGES DUE EMPLOYES—BONDHOLDERS—TRUSTEES—CONSOLIDATION OF ROADS—PARTIES.

1. Wages to employés past due for eight months before the order of court sequestrating the property of a railroad company and appointing receivers, were ordered to be paid to such employés as were retained in the employment of the road by the receivers.

[Cited in McIlhenny v. Binz (Tex. Sup.) 13 S. W. 663.]

2. The court refused to pay similar past due wages of employés, which had been assigned to third persons who petitioned for payment. It also refused to pay for steel rails and supplies furnished before the appointment of receivers on the credit of the company.

3. On petition of complainants that the receivers should be ordered to issue ten-year extension certificates to such holders of matured bonds and past due coupons as were willing to accept them, the court made the order prayed for.

4. The complainants are trustees in a mortgage of $5,500,000, owned almost wholly in England and Holland. These bondholders are respectively represented by a London committee and an Amsterdam committee, with whom bonds are deposited, with powers of attorney. The London committee claim to have given all bondholders notice of their intention to bring this suit, and to represent all; but the Amsterdam committee deny this, and claim to represent $2,000,000 of bonds, and aver that the London committee represent only about $2,000,000. It is certain that the Amsterdam committee represent a very large number of bonds, approximating the amount which they claim to represent. This agency, showing powers of attorney, file a petition setting out grounds for disapproving the trustees' management of the suit, denying that the trustees represent their interests satisfactorily, and praying

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

to be admitted as parties defendant to the suit. Their prayer was denied by the court, the opinion of the circuit judge prevailing; the district judge dissenting from this ruling of the court.

[See Lyon v. Virginia & S. R. Co., Case No. 14,321.]

5. The defendant in this case (the Atlantic, Mississippi and Ohio Railroad Company) was consolidated, under an act of the Virginia legislature, of three other companies, one of which is the Virginia and Tennessee Railroad Company. The process of consolidation authorized was, that shareholders in the divisional companies were allowed to subscribe their stock to the stock of the consolidated company. So nearly all of the stock held in two of the divisional companies was stocked into that of the consolidated company, that those two companies practically went out of existence. But the case was different with the Virginia and Tennessee Company, 3,389 shares in which remain outstanding. The charter of consolidation, in terms, keeps alive the company so long as this stock remains in its present status. Several mortgages executed before consolidation by this Virginia and Tennessee Company remain unsatisfied. The amount and priorities of the debts they secure were part of the subject of reference to a commissioner in this suit, and of the decrees of the court. Parties in interest prayed that this company should be made a party defendant to the suit. The court [was] composed of Chief Justice Waite and Circuit Judge Bond (District Judge Hughes dissenting). *Held*, that this company was not a necessary party defendant, and denied the prayer of the petitioner.

[Cited in Clyde v. Richmond & D. R. Co., 55 Fed. 448.]

In equity. The line of railroad consolidated under the company, which is the defendant in this suit, was originally owned by three several companies. The Norfolk and Petersburg Company owned the road between those cities. The Southside Company owned the road between Petersburg and Lynchburg. The Virginia and Tennessee Company owned the road between Lynchburg and Bristol, a town on the border of Tennessee. There was also a fourth company, chartered for the purpose of extending the line to Cumberland Gap, called the Virginia and Kentucky Company; and this company was also consolidated with the other three by the legislation about to be described; but none of its road was ever completed, and it was afterwards, by later legislation, dropped out of the consolidated company, and its connection with the subject will not be regarded in what follows. By an act of the general assembly of Virginia, passed the 17th June, 1870, the four several railroad companies just named, the lines of the three first of which reached from Norfolk to Bristol, a distance of four hundred and seven miles, were authorized to be consolidated into one company by the name of the Atlantic, Mississippi and Ohio Railroad Company, upon such terms as the stockholders of such company, in general meeting might agree upon, but with no power to compel any stockholder in any divisional company to exchange his stock in such company for stock in the consolidated company; each company to retain an existence as such for certain purposes until all its stock should be subscribed by its owners to that of the consolidated company, at such estimate of comparative value as should be agreed upon by the companies in general meeting. The stock held in the Norfolk and Petersburg, and the Southside Companies was virtually all stocked into the Atlantic, Mississippi and Ohio Company. That in the Virginia and Tennessee Company was also all stocked in, except 3389 shares, of the par value of $100 per share. The conditions of the act of charter, of June 17th, 1870, were otherwise fully complied with in general meeting of the companies, and the consolidated company was formed in November, 1870. The remaining facts of the case are recited in the bill of the complainants, the substance of the more material portions of which are as follows:

Bill of the Complainants.

To the Judges of the Circuit Court of the United States for the Eastern District of Virginia, Fourth Judicial Circuit:

Your orators, Francis Skiddy, William Butler Duncan, and Samuel L. M. Barlow, of the city, county, and state of New York, and citizens respectively of the said state of New York, trustees as hereinafter more particularly set forth, bring this their amended bill against the Atlantic, Mississippi and Ohio Railroad Company, a corporation created, organized, and established under and by virtue of the laws of the state of Virginia, and a citizen of the state of Virginia, George Blow, Jr., Richard H. Chamberlain, George W. Camp, John S. Tucker; the city of Petersburg, John Mann, executor, etc.; Martha Wallace, W. H. F. Lee, and W. N. Bolling, executrix and executors, etc.; Richard G. Pegram, Odin G. Clay, Thomas S. Bocock, Abram S. Hewitt, C. L. Mosby, C. W. Purcell, F. Johnson, R. J. Davis, R. H. Maury, D. H. Miller, trustees, etc.; the board of public works of the state of Virginia, and also specially the state of Virginia, in so far as said state can be made a party, as hereinafter mentioned, or shall elect to come in as a party; and thereupon your orators complain and say:

That, on the 9th day of September, A. D. 1871, the defendant, the Atlantic, Mississippi and Ohio Railroad Company was, and now is, a corporation duly created, organized, and established as aforesaid, under and by virtue of the laws of the state of Virginia, and owning and operating a continuous line of railway from the seaport of Norfolk, in the said state of Virginia, to Bristol, in the state of Tennessee, and having due authority of law to extend the said line to Cumberland Gap, in the state of Kentucky, and did possess due authority of law to execute a mortgage upon its said line of railroad property and franchises, for the sum of fifteen million dollars, to secure the

bonds of the said company, to be issued, negotiated, and sold for the purpose of raising money for the use and benefit of said company. That on the said 9th day of September, A. D. 1871, the said company did execute and deliver to your orators its certain indenture and deed of trust and mortgage, wherein and whereby the said company did convey to your orators, for the consideration and upon the trusts therein fully and at large set forth, all the right, title, and interest of the said company which the said company then possessed, or might thereafter acquire, in and to all and singular its franchises and entire line of railway, constructed or to be constructed, extending from Norfolk, aforesaid, to Cumberland Gap, aforesaid, together with all branches thereof, constructed or to be constructed, together with the tolls, incomes, rents, issues, and profits thereof, and all real estate, rights of way, easements, fixtures, rolling-stock, machinery, tools, and equipments, and all other personal property thereunto belonging; but in and by the said indenture, among other things, it was and is provided and declared that the premises aforesaid were conveyed to your orators to secure the bonds of the said company to the amount, in the aggregate, of fifteen million dollars; that is to say, fifteen thousand bonds of one thousand dollars each, bearing date even with the said indenture, payable in gold coin of the United States, thirty-three years from the said date, with interest coupons thereto attached for the payment of interest thereon semi-annually, at the rate of seven per cent. per annum, in gold coin of the United States, or in British sterling, at the option of the owner.

And for the equal benefit and security of all persons or corporations who might become holders of any of the said bonds, without preference, it was further provided that if default should be made in the payment of any of the interest coupons upon any of said bonds then outstanding on the demand of the bona fide holders of said coupons, representing at least one-fifth of the bonds secured by said indenture, and within ninety days after the said demand, your orators, trustees as aforesaid, should enter upon the mortgaged premises and take possession thereof, receive the rents, tolls, and income thereof, and apply the same as herein provided; and might proceed to sell, upon and after certain notice therein provided for, the mortgaged premises, or so much thereof as might be necessary to raise and produce the amount of money then due by the said company, and in arrear in respect of the said mortgage bonds; and it was further provided, in case of default in the payment of such bonds at maturity and the continuance thereof for the period of ninety days, and upon the demand of the holders of one-fifth in amount of said bonds remaining due at the time, then, if required by the bona fide holders of one-fifth of the said amount of bonds, your orators, the survivors of them, or their successors, should enter upon the premises and take possession of the entire property, lines of railroad and franchises of the said company, and proceed by their duly appointed agents to conduct the business of the same and control its various receipts and disbursements until the amount of any past due and unpaid principal and interest shall have been duly discharged; or, in their discretion, proceed to sell the premises, or so much thereof as might be necessary, at public auction on certain notice therein provided for, and execute good and sufficient conveyance thereof to the purchasers. That after the execution and delivery of the said indenture to your orators, the said company issued, negotiated, and sold in the open market, bonds of the said issue, to the amount, in the aggregate, of five millions four hundred and seventy thousand dollars, all of which are now outstanding in the hands of bona fide holders. Five millions five hundred thousand dollars additional of the said bonds were deposited by the said company, to be exchanged, under the supervision and direction of your orators, for certain prior mortgage bonds of the said company, then outstanding. $474,000 of such bonds have been issued and so exchanged; and the remainder of the said bonds have not yet been issued by the said company, are under your orators' control, and constitute no lien upon the mortgaged premises. Four thousand additional bonds of the fifteen thousand were authorized to be created for the purpose of extending the line from Bristol to Cumberland Gap, but they were never issued, and the company was released by the legislature from the duty of constructing such extension of road.

The said company continued to pay interest according to the tenor of the said bonds, as it became due and payable, to and inclusive of the first day of October, 1873, on the said five thousand four hundred and seventy bonds so issued, negotiated and sold, as hereinbefore stated. The said company made default in the payment of the interest which became due upon the said bonds on the first day of April, 1874; subsequently the said company paid the interest, which became due on the 1st April, 1874, as aforesaid, one-half of the interest, which became due on the 1st October, 1874, and one-half of the interest on the said bonds which became due on the 1st April, A. D. 1875. It has paid no interest on the said bonds since the date last aforesaid, and all of the interest accruing on the said bonds since the date last aforesaid, as well as one-half the interest thereon due on the first day of October, 1874, and one-half of the interest due April 1st, 1875, now remains due and unpaid.

Your orators are informed and believe that when, and as the interest aforesaid became

due and payable, according to the tenor of the said bonds, payment thereof was duly demanded by the holders, respectively, of interest warrants or coupons; and that if, in case, formal demand was omitted, and such omission was in pursuance of notice on the part of said company that such interest would not be paid. That payment was refused by the said company and its agents; that public notice was given of the inability of the said company to make such payment, and that various negotiations have, from time to time, been had between the said company, its agents and the holders of such bonds and coupons, to the end of inducing such holders to forbear proceeding to enforce the mortgage security therefor, and to grant time and indulgence to the said company for the payment thereof, all of which negotiations have failed.

Your orators further say that the said Atlantic, Mississippi and Ohio Railroad Company was, in pursuance of the said act of the general assembly of the state of Virginia, approved June 17th, 1870, created by the consolidation of the following railroad companies theretofore created and then existing as separate and independent companies, that is to say: The Norfolk and Petersburg Railroad Company, owning and operating a railroad extending from Norfolk to Petersburg. The Southside Railroad Company, owning and operating a railroad extending from said Petersburg to Lynchburg. The Virginia and Tennessee Railroad Company, owning and operating a railroad extending from Lynchburg to Bristol aforesaid. Your orators are informed and believe that prior to the 17th day of June, 1870, and prior to the execution and delivery to your orators of the indenture aforesaid, the property and franchises of the several railroad companies so consolidating, and whose railroads respectively became the property of the said defendant company, and were mortgaged as aforesaid by the defendant company to your orators, had been incumbered by sundry mortgages to sundry persons as security for certain debts of the said companies respectively, and that the said incumbrances, to the extent that they are valid and subsisting liens, are prior in point of time to the lien of the mortgage or deed of trust to your orators. Your orators are informed and believe that the said mortgage debts, in the aggregate, now amount to the sum of about $5,493,008.11, the interest on which is payable semi-annually, and that half-yearly interest thereon, amounting to about the sum of $176,239.18, will become due on the first day of July next; and your orators are informed and believe that the said defendant company does not expect or intend to pay such interest at maturity, and that default in the payment thereof will expose the rights and interests of your orators to great jeopardy.

Your orators pray that it may be ascertained what amount is due, and to whom, in respect of the said several prior liens; and that when ascertained, such order and direction may be given that the foreclosure and sale hereafter prayed for may be made, subject to the lien thereof, upon such terms as may seem to be just and equitable. Your orators say, as they have before said, that they are ignorant of the names of the person or persons to whom the said several prior mortgages or deeds of trust were executed and delivered. And your orators pray that, when discovered, they may have leave to make such person or persons, respectively, parties defendant hereto, if they shall be advised that it is proper or necessary to make them such parties. Your orators are informed and believe, that prior to the execution of the deed of trust aforesaid to your orators, the following deeds of trust or mortgage were executed, delivered, and recorded by the several corporations hereinafter mentioned, owning and operating respectively at the respective dates hereinafter mentioned, part of the premises conveyed to your orators, all of which deeds of trust or mortgage remain of record uncancelled, that is to say. (Here follows a list of the divisional mortgages.) Your orators are informed and believe that the state of Virginia has or claims to have some interest in the mortgaged premises, by way of lien thereon, subsequent, however, and subordinate to the lien created by the aforesaid mortgage or trust deed to your orators. Your orators are informed and believe that this claim is made on behalf of the state of Virginia, under and by virtue of a certain act of the general assembly of the said state, approved June 17th, 1870, entitled "An act to authorize the formation of the Atlantic, Mississippi and Ohio Railroad Company," and under and by virtue of a certain covenant to stand seized, in the nature of a mortgage made to the defendants, the board of public works of the state of Virginia, for the benefit of the state of Virginia, by the said defendant, the Atlantic, Mississippi and Ohio Railroad Company, dated on the 22d day of December, 1870, a copy whereof is annexed hereto in Schedule A, to which said act of the general assembly, and the said covenant to stand seized, your orators crave leave to refer, from time to time, as they may be advised, and as occasion may require, and with like effect in respect of such act of the general assembly as though the same were herein set out at length. Your orators further say, on information and belief, that the said company is indebted to various persons, whose debts are unsecured by any lien upon the mortgaged premises, to an amount exceeding one million dollars, including a large debt for labor to its servants, agents, and operatives employed in the management of its said road, and the conduct of its general business, in an amount, as your orators are informed and believe, exceeding the sum of $195,000, the wages of such persons being unpaid and in arrear, as your orators are in-

formed and believe, for a period of more than six months, and that by reason of such nonpayment of wages, if the same shall be continued for any considerable length of time, the mortgaged premises will be in imminent danger of irreparable injury and liable to waste and destruction.

Your orators are further informed and believe that there are sundry judgments against said company outstanding and unsatisfied; but your orators have no information or belief as to the amount thereof, or as to whether such judgments, if any, do or do not constitute a lien upon the mortgaged premises, or any part thereof; and they pray that the facts in this behalf may be ascertained. And your orators, upon their information and belief, further say, that $5,430,000 in amount of the bonds issued under the said mortgage to your orators, commonly called the consolidated mortgage, and which are now outstanding in the hands of bona fide holders, as aforesaid, were issued, negotiated, and sold by the said railroad company, under and upon the faith of the representation of the said railroad company, made through its president to the purchasers and takers of said consolidated bonds; that of the whole issue of $15,000,000 of such consolidated bonds $5,500,000 were to be specially appropriated to and reserved for taking up the prior mortgage bonds of that aggregate amount upon separate portions of the said railroad line, and which are commonly called the divisional bonds; $4,000,000 were appropriated to and specially reserved for the projected extension of said railroad from Bristol to Cumberland Gap, no part of which has ever been constructed; and the proceeds of the remaining $5,500,000 of such consolidated bonds were to be applied to paying off the entire floating debt of said railroad company then existing, and to repairing, completing, equipping, and putting in full, complete, and suitable condition the entire line of said railroad in the state of Virginia, extending from Norfolk via Petersburg and Lynchburg to Bristol, on or near the state line between Virginia and Tennessee, and that the proceeds of said $5,500,000 of bonds would be amply sufficient for the fulfilment of all those objects and purposes; and it was then represented by said company to the purchasers of said bonds that the amount of its then floating debt was only about $771,000, exclusive of such as was being temporarily contracted for the purposes of the reparation of said line between Norfolk and Bristol, by way of anticipating the proceeds of such $5,500,000 of bonds while the arrangements for the negotiation thereof were in progress, and to be provided for out of such proceeds when received. And it was then further represented by the said company to the parties to whom the said consolidated bonds were negotiated, that the net income of the said railroad would unquestionably be much more than sufficient to meet all the current interest on the consolidated bonds which were issued, and upon the prior divisional bonds. (Here follows a financial statement.)

Yet the said company is in default for interest on said consolidated bonds during said period to the extent of some $600,000, besides having made no provision for the large amount of interest falling due on 1st July, 1876, upon the divisional bonds; and in place of having paid off and extinguished their floating debt out of the proceeds of such consolidated bonds, in accordance with their representations and promises, they have, as well as can be judged from their published reports and statements, actually increased the amount of such floating debt. (Here follows a financial statement.) And it is notorious and is given out by the said company itself, that the funds for the payment of the interest on divisional bonds, falling due July 1st, 1876, are not and will not be on hand, and that such interest cannot be paid by the company, and thus in the management of the company and the application of its revenues, since the first day of July last, there has been a misapplication and diversion to the extent of more than $300,000 of the net income of the road from the purposes to which it is pledged by the mortgage deed and to which it ought to have been devoted; and if the road be left in the hands and control of the company, there is imminent danger, and, in fact, substantial certainty, that the like course will be pursued by them in the future. And your orators further show that it is absolutely essential to the protection of the rights and interests of the consolidated mortgage bondholders, as well as for the interest of the public interested in the travel and traffic of said railroad, that the whole line from Norfolk to Bristol should be held together and maintained as one entire property. That by reason of the aforesaid misapplication and diversion of income and the failure of the company to make provision for the interest falling due on the first of July next, on the divisional bonds, there is imminent danger of foreclosures taking place on the divisional mortgages, and a consequent breaking up of the consolidated line, and great sacrifice of the property, rights, and interests of the consolidated bondholders, unless the said railroad be at once taken out of the hands of the company and placed in the hands of a receiver or receivers, so that a proper application of its revenues for the future may be secured, and due order may be taken for the avoidance of foreclosure of the divisional mortgages, either by raising means for the payment of the divisional mortgage interest upon the credit of the property, or otherwise. And your orators further show that the whole of said mortgaged property in its present condition is an insufficient security for the payment of the consolidated mortgage bonds which are outstanding in the hands of bona fide holders as aforesaid, and cannot be expected to produce upon the sale thereof, subject to the divisional mortgages, a sum sufficient to satisfy

said consolidated mortgage bonds now outstanding in the hands of bona fide holders, or to result otherwise than in a large deficiency remaining due thereon. That a sale of a parcel or parcels of the mortgaged property to satisfy only the interest due would be substantially impracticable, because of the existence of the prior mortgage liens thereon, and if the same were practicable, it could not result otherwise than in enormous sacrifice and loss. That a sale in parcels for such purpose of property other than the roadway, stations, and other fixed property, could only be of rolling stock and materials and supplies, thus rendering the future operation of the road and the obtaining of income therefrom impracticable; that a sale for such purpose of a parcel or parcels of the road itself, if at all practicable, would be an immense sacrifice and loss in respect of the value of the property, as a whole, and that if a sale is to be made at all, it must necessarily be of the whole property as an entirety in order to avoid great loss and injury, and, in fact, enormous sacrifice to the parties interested in the sale and its proceeds.

Your orators further say that the said company is insolvent, possessing no property of any considerable value, other than the mortgaged premises; that the mortgaged premises are an entirely inadequate security for the several mortgage liens thereon; and that the current revenues and income of the said road are being diverted and appropriated by the said company to other purposes, and to the payment of other debts than those secured by the indenture to your orators, and by several prior mortgages hereinbefore mentioned; whereas, in fact, the net revenues of the said road are entirely inadequate, as the said company concedes and admits, to the satisfaction of the payment of such current interest as it matures, and the interest on the aforesaid indebtedness secured by mortgage of the premises and the principal thereof as the same becomes payable. Your orators further say that they bring this their bill as trustees aforesaid, in pursuance of the request and demand, as they are informed and believe, of all the holders of bonds secured by the aforesaid mortgage to your orators, now outstanding. Your orators, therefore, pray that a receiver may be appointed of all and singular the mortgaged premises, including all books, papers, and accounts of the said company, relating to the business of the said company, in and about the mortgaged premises, and all choses in action, bills receivable, moneys on hand or in the hands of agents, with the usual authority of receivers, in like cases, to take possession of all the mortgaged premises, books, papers, records, choses in action, bills receivable, moneys on hand or in the possession of agents, with authority to maintain and operate the said road in the usual course of business, and to do all things usual, needful, and proper in that behalf; to receive the tolls, rents, income, and earnings of the mortgaged premises, safely to keep the same, and make such disposition thereof, as he may, from time to time, be ordered and directed by this court. Your orators further pray that the said company, its officers, agents, attorneys, laborers, and servants, and all persons whomsoever, may be strictly commanded and enjoined forthwith, on demand, to surrender to the receiver so appointed all and singular the premises whereof he is appointed receiver. Your orators further pray that the said company, its officers, attorneys, servants, and agents, may be restrained and enjoined from issuing, negotiating, or parting with any of the bonds created under the aforesaid indenture to your orators remaining unissued. And that they may also be enjoined and restrained from in the meantime parting with, disposing of, or surrendering to any person any part of the mortgaged premises, and from applying any money or property, the proceeds or income of the mortgaged premises, to the payment of any antecedent debt, or to any purpose other than the payment of the ordinary current expenses of operating the railroad and managing the business of the company. Your orators further pray that an account may be had and taken of all and singular the liens of every kind upon the mortgaged premises, stating the order and priority thereof, the amount due in respect of each lien, and to whom; and that upon your orators complying with such terms as may be just and equitable, all and singular the mortgaged premises may be adjudged and decreed to be sold, and sold under the aforesaid indenture of mortgage to your orators, subject to all liens that may be prior thereto, and that the same may be sold at such time and in such manner as may be most beneficial to your orators, due regard being had to the rights and interests of all parties having liens upon the premises, and that the several defendants and the state of Virginia may, by such sale, be barred and foreclosed of, and from all equity of redemption, and all other estate, right, interest, lien, or claim of, in, to, or in respect of the said mortgaged premises. And that your orators may have such further and other relief in the premises as the nature of their case shall require, and as to the court may seem meet. Therefore will your honors grant unto your orators the writ of subpœna, etc. (The usual prayer.)

The bill was filed in March, 1876. The defendant company filed an answer. Each party supported their pleadings with affidavits. The hearing on the motion for an injunction and for a receiver was adjourned by consent from time to time, until the 6th June, 1876, when, after full argument by Messrs. W. D. Shipman, Joseph H. Choate and W. W. Macfarland, of New York, for the complainants; and by Messrs. W. J. Robertson, James Alfred Jones, W. W. Cramp, W. W. Gordon, Thomas S. Bocock, Charles S. Stringfellow, and others, representing different interests in defence, the court (Circuit Judge HUGH L. BOND, and District Judge ROBERT W. HUGHES,

sitting) decided that a case had been made in favor of the motion, and announced that two receivers would be appointed, one to be named by the complainants, the other by the defendant company. Accordingly, Charles L. Perkins and Henry Fink were named as receivers in the decree of the court, who gave bond in $100,000 each, the decree providing that each receiver should be responsible only for his own official acts. Legh R. Page was afterwards appointed counsel for the receivers at Richmond.

The following is the material portion of the decree which was entered:

Decree Awarding an Injunction and Appointing Receivers.

The motion for the appointment of a receiver in this cause having been argued and considered, it is ordered by the court:

First. That Charles L. Perkins, of New York, and Henry Fink, of Lynchburg, Va., be and are hereby appointed joint receivers of all and singular the mortgaged premises specified and described in the deed of trust referred to in the plaintiffs' bill of complaint, including the entire line of railroad therein mentioned, all and singular the franchises, lands, tenements, and hereditaments of the said defendant company, all and singular the books, papers, and records thereof, all and singular the rolling stock, tools, machinery, engines, and all other personal property of every kind and description of the said company.

Second. That the said receivers, before entering upon the performance of their duties as such under this order, do each of them severally execute a bond with sureties to be approved as to form and sufficiency by a judge of this court, and filed with the clerk thereof in the sum of one hundred thousand dollars for the faithful discharge of his duties in the premises.

Third. That upon filing such bond the said receivers proceed to take possession of all and singular the premises whereof they are hereby appointed receivers; that they continue to run and operate the said railroad of the defendant as the same is now operated for the common carriage of freight and passengers, keeping the premises and property, both real and personal, in good condition and repair, to the end that said road may be operated efficiently and with safety to the public; that they as such receivers have authority to employ, pay, and discharge, from time to time, in their discretion, all needful laborers, servants, agents, attorneys, and counsel; to purchase and pay for all needful materials and supplies; to settle and adjust with other roads all traffic balances in the usual course of business; to make from time to time, in their best discretion, all needful and proper traffic arrangements with other roads for the interchange of business; to pay all taxes on the property, whereof they are appointed receivers, that may be due and payable, or may become due and payable during this receivership; to prosecute and defend without the further order of this court all existing actions by or against said company; and to defend all actions that may hereafter be brought against the said company or against themselves, as such receivers, by the permission of this court, and to pay the expenses of such prosecution and defence, and also the expenses and disbursements of the plaintiffs, trustees in and about the appointment of the said receivers; to use the name of the said company in the prosecution of all such actions as they may find it proper or necessary in their discretion to bring, maintain, or defend, with full power to compromise, adjust, and settle, in their best discretion, all such actions, suits, or controversies now existing, or that may hereafter arise; to do whatever may be needful and proper to maintain and preserve the corporate organization and franchises of the company until the further order of this court, and to pay and expend such sum, and no more, for that purpose as may be hereafter, on application and hearing, ordered by this court; to redeem any and all securities of the company now pledged as security for loans of money, if any there be, if it shall be for the interest of the trust, hereby reposed in the said receivers so to do, but not otherwise.

Fourth. It is further ordered that as soon as may be, after the said receivers have entered upon the performance of their duties, they make a true, full, and perfect inventory of all and singular the real and personal property of every kind and description whereof they are appointed receivers, and which may come into their possession, and file the same with the clerk of this court, and due notice of such filing to be given to the plaintiffs' solicitors. That the said receivers do keep full, true, and accurate accounts of all and singular their acts and doings in the premises; that they render and file with the clerk of this court such account within ten days after the expiration of every month of their receivership, and serve copies thereof upon the plaintiffs' solicitors, and that they have liberty to pass their accounts from time to time before Matthew F. Pleasants, who is hereby appointed a master for that purpose, on ten days' notice to the plaintiffs' solicitors after the service on them of such copy thereof; that any question which may arise on such accounting be reported to this court for examination and decision, and that such accounting, when from time to time had and completed, shall be final and conclusive upon all parties, unless on due cause shown the same shall, during the pendency of this action, be opened on special application.

Fifth. It is further ordered that all mon-

eys coming into the hands of the said receivers, or either of them, be by them deposited in one or more safe banks of deposit within the state of Virginia, to be approved by this court or a judge thereof, to the joint credit of the receivers, to be thence drawn out on their joint order or on the order of an agent or attorney to be by them agreed upon. It is further ordered that the said receivers, exercising due prudence and caution in the selection thereof, shall not be responsible for the wrongful acts of their servants and agents. It is further ordered that the said receivers shall not, nor shall either of them, in any case incur any personal or individual liabilities in the operation of the said line of railroad, or otherwise in the premises by reason of any act or thing done by them or either of them as receivers, or by their servants, agents, or attorneys, the said receivers respectively acting in good faith and in the exercise of their best discretion, but the mortgaged premises shall nevertheless be chargeable with any judgment which may be established against the receivers in any action brought against them by any person under leave of this court first had and obtained. It is further ordered that the said receivers respectively shall in no case be responsible jointly for the acts of each other, but shall be responsible only severally each one for his own acts.

Sixth. It is further ordered that all applications for interlocutory order or relief in this action by or on behalf of any party thereto, or the receiver therein, shall be made on notice by the moving party to the party or parties of at least ten days, exclusive of the day of service, and on due proof of personal services of notice, unless the notice hereby required be waived in writing.

Seventh. It is further ordered that the said defendant and all persons whatsoever, be and they are hereby strictly commanded and enjoined peacefully to deliver up and surrender to the said receivers all and singular the premises whereof they are hereby appointed receivers under the penalty attaching by law to disobedience. And in the meantime and until the actual taking possession of the said property by the said receivers, it is ordered that the said Atlantic, Mississippi and Ohio Railroad Company, its president, officers, agents, and attorneys, be and they hereby are enjoined and restrained from disposing of or parting with any of the said property, real or personal, except in the payment of the necessary daily expenses of said road, and that the said company forthwith deposit all moneys and available balances now in its possession or control, and which may come into its possession from day to day, except what is needed for the said necessary daily expenses, in the Exchange National Bank of Norfolk, subject to the order of this court in this cause.

HUGH L. BOND, Circuit Judge.
RO. W. HUGHES, District Judge.

The first question of importance which came up for discussion, related to the wages past due and unpaid of the employés of the road. These were in arrears for the period of eight months. Upon argument it was decided that all back wages due to employés then actually in the employment of the company should be paid. The following order was entered on a representation of Receiver Fink that such a measure was necessary to the safe and successful operation of the road, and that he could not be responsible for the consequences of a refusal of it by the court, to the property of the company or the safety of passengers:

Decree for Payment of Past Due Earnings of Employés.

Upon the petition of the receivers heretofore filed in this cause, it is ordered and decreed that the said receivers be, and they are hereby directed to pay, whenever in their judgments such payment is expedient, the arrearages of wages due the employés of defendant company, who have not assigned their claims, beginning with the pay roll for the month of July, 1875. The said payment is to be made according to the pay rolls this day filed with the clerk of this court, and to the persons therein designated. All other questions touching the subject of this order are reserved.

HUGH L. BOND.
RO. W. HUGHES.

The next question presented was that of paying the holders of assigned labor claims and of certain petitioners who had furnished rails and other material and supplies to the company during a period of a year or more before the appointment of receivers. On this class of claims, after full argument the court rendered the following decision:

[Before WAITE, Circuit Justice, BOND, Circuit Judge, and HUGHES, District Judge.]

BOND, Circuit Judge. There have been filed a large number of petitions in this cause, asking that the receivers be required to pay out of the earnings of the Atlantic, Mississippi and Ohio Railroad, for materials furnished to the company shortly before the appointment of receivers, and for wages due to the employés of the company before the receivers took possession of it. The petition of George Faris is, to be paid the amount of judgment recovered against the company, upon which execution was issued and levied upon personal property belonging to it. We have thought it unnecessary to set out all the petitions, and have selected these as types of the whole. Whatever is the equity of these is the equity of all, and what is done by the court with them will be the disposition of the others. At the time the materials which the petitioners furnished the company were purchased, the railroad corporation was indebted several million of dollars, to secure which indebtedness it had long antecedently executed and recorded a mortgage, pledging its whole property, of every kind and description. This sum of mon-

ey was borrowed and loaned upon the express condition that this mortgage should be so made. When the mortgagees parted with their money they took the precaution to require this security for its repayment. When the parties who now seek payment for the materials furnished to the company by them, parted with their goods to the company, they did not take the precaution to require any security. Were the court now to grant their petition, and out of the mortgaged property pledged to pay a particular debt, pay them, it would substitute the unsecured for the secured debt: If these simple contract debts for goods, furnished on the credit of the company alone, are to be paid before the mortgage debt is paid, they stand on a better footing than the secured debts. If they are to be paid pari passu with the mortgagees, then the mortgage is valueless.

It is suggested that these claims for materials furnished stand in a different position from the general floating or unsecured debts of the company, because the contracts were made just before the commencement of these proceedings, and the material has been used by the receivers. This can make no difference. All material furnished the company, and for which it is indebted and which was not consumed in the use, is now used by the receivers. Whether a debt be an hour or a year old can make no difference in its equity. It stands in the same relation, no matter what its age, to the secured debt of the road. To allow one of these debts to be paid, out of the mortgaged property, is to allow all. That is to say, the unsecured debt would be paid pari passu with the secured debt, and in a court of equity it would come to pass that the only persons who had no security would be those who had taken it.

Certain of these petitions are on the part of former employés of the road to whom wages are due for work done before the receivers were appointed. Some of these claims are presented by the employés and others by their assignees. So far as this case is concerned, there can be no distinction, their equities are the same. It is impossible to discover upon what better footing these claims stand than do those of the material-men. They are simple contract debts of the company. The labor of the employé was bestowed upon the materials furnished, and both labor and goods became the property of the company. There can be no distinction in law or equity between a debt due for labor or for goods sold and delivered. But in order to set up some sort of equity in this behalf, it has been argued that the mortgagees had a right to take possession of the road so soon as default was made in their mortgage, and that not having done so, they suffered the defendant company to contract these obligations, which were for their benefit. It has never been decided yet that because a mortgagee does not immediately pounce upon his security, foreclose, take possession, and sell, that he impairs the obligation of his lien. If a man have a mortgage on a large stock of goods of a retail merchant, and default is made, it will hardly be contended that unless possession is at once taken the lien for wages of the mortgagees, clerks, and employés is superior to the mortgage.

These petitions present cases of great hardship, but the contract for hire was with the company, not with these mortgagees, and these claimants are entitled to be paid, as are the material-men, out of anything the company has unmortgaged. There was, at the time of these contracts for labor and material, no law of Virginia giving a statutory lien. The only lien pretended to be set up is an alleged equitable one. That the opinion of the legislature was that no such lien existed is plain, from the fact that by the recent act of March 21, 1877 (chapter 200), an effort has been made to give such a lien as that set up in these petitions. Like that of George Faris, the executions in these cases were levied upon mortgaged property. The creditor is entitled to whatever interest may result to the company after the mortgage debt upon the road or the locomotive taken in execution is paid. He is entitled to nothing more. When these proceedings are matured, the assets of the company will be marshalled and sold, the liens and priorities of creditors ascertained, and the proceeds of sale will be distributed according to the rules of equity, among such as have proved their debts. These petitioners must await that event.

In the course of events, the complainants filed a petition asking that leave be granted the receivers to issue receivers' ten years' extension certificates to such holders of bonds and coupons as had matured, or as would soon fall due, where the holders should be willing to receive them. This petition was heard at Norfolk in November, 1877; and the following was the decision of the court, rendered soon after, in granting the leave prayed for:

Receivers' Certificates.

On the complainants' petition for leave to the receivers to accept and provide for an extension of time for paying certain obligations of the defendant to creditors desiring to forbear the collection of the principal sums due them.

This petition was, after due notice to counsel of other parties in interest, brought on for hearing, and argued on the 24th inst. The decision of the court is now delivered as follows, by—

HUGHES, District Judge. The circuit judge was willing at once to sign the order asked for by the complainants on the 24th inst.; but we concurred in thinking it well to take a few days for consideration, and I am now ready to state the grounds of the action of the court.

The petition of the trustees of the consolidated mortgage sets forth that certain bonds secured by certain mortgages on the divisional roads of the defendant company, and amounting in the aggregate to $866,944, are past due, or will soon mature; and that the holders of a large portion of them are content to forbear the payment of the principal so due, and would do so if relieved from the necessity, when collecting the semi-annual interest accruing and to accrue, of transmitting their bonds to the places of paying interest, and having each payment indorsed upon the bonds. The petition, therefore, asks, as a convenient means of making and evidencing these payments. that the receivers be allowed to prepare coupons for the payment of future interest, to be attached to such bonds as may be held by persons willing to forbear the collection of the principal due them, and to continue to receive the semi-annual interest which their bonds now carry.

The class of bonds and obligations past due or soon to fall due, to which the petition refers, are as follows:

$157,000	of the 7 per cent. first mortgage bonds of the Norfolk and Petersburg road which were due in 1868, and were extended to 1875, and
306,000	of the 8 per cent. first mortgage bonds of said road which were due in 1868 and were extended to 1877—the two making $463,000 of first mortgage bonds of that road, past due.
5,000	of 6 per cent. first mortgage bonds of the Virginia and Tennessee road due since December, 1872.
260,500	of 8 per cent. bonds, called "interest funding bonds," issued to Decatur H. Miller, December, 1869, to take up and extend coupons of the Virginia and Tennessee road then due, and secured by deed of trust on that road.
138,444	of 8 per cent. bonds issued in December, 1873, by the consolidated company in extension of the time of paying certain coupons of the several divisional roads then about falling due, the unpaid coupons standing as a pledge for the security of these bonds issued in their stead, which will fall due January, 1879.
$866,944	being the total amount of the bonds to which the petition refers.

The allegations of the petitioning trustees are that "the holders of a large proportion of the said liabilities are willing to extend the time for the payment of the said principal;" and that "the interest of all parties will be promoted by an order of court authorizing and directing the receivers to prepare and issue to such holders of said obligations, as are or may hereafter be willing to receive them," such certificates as are described in the petition. It will be observed that the extension contemplated is but a repetition of what was done during the defendant company's regime on frequent occasions, without objection from any source, and to the common advantage of all parties interested.

No objection is made to the prayer of the petition by any class of bondholders, a large number of whom are represented to be in favor of the arrangement. The bondholders are the only persons substantially interested in the proposal, and are the class who are naturally most intelligent, alert, and sensitive on the subject. The only objection comes from certain of the trustees of mortgages resting on the divisional roads, especially the trustees under the first and second mortgages of the Norfolk and Petersburg road. But the interest of trustees, in such a question as this, is merely nominal, and their powers but little more than perfunctory. Under a proper sense of the responsibility of their position it is perfectly competent for them to file formal objections to the prayer of the petition; and submit the whole matter to the judgment and discretion of the court. This, it was no doubt, their duty to do, and they have performed that duty; but, as the question presented to the court is more one of interest and of policy than of law, if the bondholders, who are the persons really interested in the proposal, consent, and no shareholder objects, the court would be slow to thwart the wishes of the former, at the instance of trustees having no substantial interest, and who are but formal parties to the record.

If any of the divisional bondholders desire to forbear the collection of the principal of their bonds, why should they be required by their trustees to foreclose? If, in forbearing, they desire a convenient and usual process of collecting the instalments of interest due them to be provided, then, what right have their trustees to object? If this road were still in the hands of its company there could be no doubt of the right and power of the company (a right which it frequently exercised) to extend the time of paying such bondholders as were willing to forbear, and to devise a convenient means whereby such bondholders could collect and make receipt for the semi-annual interest falling and to fall due. And but for the fact that this road is in the hands of receivers, who are the servants of the court, and can do nothing except by its authority, this petition would be unnecessary. It has been presented out of abundant prudence; and its prayer is simply that the receivers may have leave to adopt a convenient and usual means of enabling those bondholders, who wish to forbear the collection of the principal due them, to collect and give receipt for the interest as it shall fall due. The coupons proposed by the trustees are to cover semi-annual instalments of interest for ten years; with the proviso (to be embodied in them) that they are to be delivered up whenever they shall be called in, either by the receivers or by any company succeeding to them in the control of the road. The bondholders who apply for them will be bound to an extension, for ten years, of the time for demanding the principal of their bonds. But the receivers, and the company succeeding to them, will be bound to no time of extension at all, and indeed nothing at all, except the payment of such instalments of interest as shall fall

due while the coupon certificates proposed shall be outstanding. No change of securities or of the rights of any party in interest can be effected by the proposition in any degree; except only, that the bondholders who choose, will be allowed to relinquish for a time their right to the immediate payment of the principal of their bonds.

As there can be no change in the rights of parties, except such as those bondholders who choose may voluntarily submit to, the only question for the consideration of the court is, whether it is for the interest of all concerned to permit the transaction proposed. The effect of the transaction will be to satisfy those bondholders who have a present right to the immediate foreclosure of certain divisional mortgages resting upon parts of the line of the Atlantic, Mississippi and Ohio road by a separate sale of those divisional roads. By satisfying them the court will diminish, and, I trust, remove, the danger of separate sales of parts of the line, and prepare the way for a sale of the road as an entirety. The court feels bound to employ every means in its power and within the scope of its jurisdiction, to prevent any disintegration of the line. Its custody of the road has not so far been prejudicial to any interest connected with it. Leaving out of view such injury as may have been caused by the floods of the last week, the road is in better condition than ever before, while the floating debt left by the company has been diminished. During the custody and management of its receivers the bonds secured upon the divisional roads have in every instance appreciated very materially, if the court may be presumed to take note of the quotations of the markets as made known by the public prints. The bonds of the second mortgage on the Norfolk and Petersburg division have appreciated since June, 1876, from sixty-eight cents in the dollar to seventy-eight cents. The bonds of the first mortgage of the Norfolk and Petersburg divisional road have appreciated since June, 1876, from about eighty-six cents in the dollar to about ninety cents. Certain other of the bonds secured on divisional roads have risen as much as thirty cents in the dollar since June, 1876, when the receivers took charge of the consolidated line. It is also true that there has been no depreciation in market value during this period of any class of bonds secured on the divisional roads. The court, therefore, being aware of these facts, does not consider that it acts to the prejudice of any party in interest in adopting any measure tending to prevent and avoid the separate sale of any division of the road in foreclosure of divisional mortgages, whereby it may insure a sale of the line as an entirety. It feels bound to pursue a policy looking to the preservation of the integrity of the road from Norfolk to Bristol, by many considerations. If the line were broken into several parts each would be comparatively valueless. The experience of all railroad management, in this country and elsewhere, is, that lines of road broken into parts under disjointed management, cannot be conducted with economy, efficiency, or success; and are incompetent to compete with rival lines for the business of the country. If the Atlantic, Mississippi and Ohio Railroad were broken at Lynchburg, in its ownership and management, the roads east of that point having little travel, would be reduced in their business to a very diminutive local trade, and, if sold with their feeble revenues, would not pay the mortgages resting upon them. If the road from Lynchburg to Bristol were detached from the line, in ownership and management, it would cease to be a part of a great avenue for the heavy products of the Western country, and would be dependent for its chief resources upon travel and light express freight, which it would carry as part of a north and south line. Running through a mountain region, it would speedily become under the heavy expenses constantly necessary to maintain it, as feeble in its revenues and resources, as when it was first consolidated in management with the roads to Norfolk.

As a consolidated line of east and west transportation for the trade of the West, this line of road has been growing in importance and public consideration more and more each year, ever since its consolidation. Western trade, the first avenue of outlet for which was the Erie Canal, and which afterwards sought the lines of road constructed parallel and near to that work, has been tending for several years to lines on lower latitudes and shorter routes. The large business of the Baltimore and Ohio road is a striking exemplification of this tendency. The growing magnitude of the business of the Chesapeake and Ohio Railroad is another evidence of the strong tendency of Western trade to avoid frost and long lines, in favor of more southern and shorter lines. The present great and growing business of the Atlantic, Mississippi and Ohio road is a further and conclusive proof that Western trade is seeking the shortest lines across the continent to the Atlantic ports. Whether Western produce seeks to reach the Atlantic seaboard from Memphis, or St. Louis, or Louisville, or Omaha, or Chicago, the line of the Atlantic, Mississippi and Ohio road presents the shortest, and with some inconsiderable expenditure on parts not yet completed, can be made the most eligible of all the great east and west lines of railway, except probably that of the Chesapeake and Ohio road. It has the advantage of resting upon tide-water in the East, near the foot of Chesapeake Bay, whose outlet to the ocean is on the same latitude vis-a-vis with the straits of Gibraltar, and of terminating at the first safe port north of the dangerous Carolina coast. Its western terminus at Bristol is a converging point for lines of railroad coming up from all parts of the Southern and Southwestern states, and from the Mississippi at Memphis and St. Louis. With a small expenditure in the direction of Cumberland Gap or of New river, Bristol or

Central Depot would become the focus also of lines of railway pointing from Louisville, Cincinnati, Omaha, and Chicago, to the seaboard. When a saving of 200 miles in distance is continually offered to the trade of a vast region of country, local influences and artificial contrivances cannot, for any very long period of time, prevent it from seeking the shorter routes. The prorating distance from Norfolk by sail vessels to Liverpool being only 500 miles, and to New York only 75 miles, and by steamers to Liverpool only 1,000 miles, and to New York only 125 miles, this tendency of trade to find outlet to the ocean by way of Norfolk over the Atlantic, Mississippi and Ohio road from beyond Bristol must continually strenghten, unless unfortunately the road should be broken into parts.

The disintegration of the line of the Atlantic, Mississippi and Ohio road at Lynchburg would be fatal to its value as an east and west avenue of produce moving to market from the West and Southwest, and of merchandise returning to those regions from the East, the North, and Europe. The Virginia and Tennessee division would degenerate into a mere road of rapid transportation for light goods and passengers between North and South. The Southside and the Norfolk and Petersburg divisions would lose their present through trade from the Western and Southwestern states, and speedily degenerate into the unimportant local works which they were within the memories of persons not yet of matured age. Paramount, however, to the mere pecuniary interests of the bondholders and shareholders in this line of road and its several divisions, are the public interests connected with it. The court is not unmindful of the fact that the commonwealth of Virginia, in bestowing an expenditure of seven or eight millions of dollars upon the roads constituting this line, intended them to be more than local works, and especially intended that the Virginia and Tennessee road should be more than part of a line of north and south transportation for travel and light freights. This character of road was scarcely within the contemplation of the state. Her intention was to construct a line of east and west transportation that would bring the staple products of the Northwest, the West and Southwest across her territory to her principal cities, and at Richmond and Norfolk would place her merchants in connection with the large commercial operations of the world. The court keeps constantly in view this cardinal policy of Virginia, and has every assurance that the foreign bondholders are desirous to pursue, advance, secure, and render permanent this policy. As far as it lies within its jurisdiction, and as it may be done within the scope of its proper functions and may not impair the rights of parties in interest, the court will discourage separate accounts and separate sales of foreclosure in this suit; in order that, after disposing of the many interlocutory motions and petitions before it, it may enter a decree in foreclosure directing a sale of the whole line as one work under which this line of road may be rendered permanently intact and indissoluble. An order of court is, therefore, entered in accordance with the prayer of this petition.

The Dutch Bondholders' Petition.

The five-and-a-half million loan is held in nearly equal proportions by English and Dutch bondholders. The interests of each of these classes of creditors are in charge of a committee, respectively styled the "London Committee," and the "Amsterdam Committee." The complainants (the trustees in this suit) are thought by the Dutch to recognize only the English committee, and to act exclusively in sympathy with the English bondholders. The Dutch committee, accordingly, filed a petition in 1878, praying to be made formal parties defendant of record.

After full argument of the petition, in which the counsel for the complainants made earnest and strenuous resistance to the prayer of the petition, and after hearing the counsel for the Dutch bondholders (Mr. Ashbel Green and Samuel L. Parrish, of New York, and W. W. Henry, of Richmond), the court decided as follows, the opinion of Judge BOND prevailing, as the law of the case:

Parrish v. Skiddy, Duncan, and Barlow.

BOND, Circuit Judge. The defendants of record in this cause on the 9th day of September, 1871, executed a mortgage of their railroad and effects to the complainants to secure the payment of certain bonds mentioned therein and the interest thereon as it fell due. There was default in the interest, and the complainants, the mortgagees, brought suit to foreclose the mortgage. Everything has proceeded regularly from time to time without complaint on the part of the cestui que trusts under the mortgage until the filing of the petition now under consideration, which is a petition by certain of the bondholders alleging that they should be made parties to the suit. The reasons given for this request are:

1st. That the petitioners are a committee known as the "Amsterdam Committee" for the protection of the rights of the consolidated bondholders of the defendant company, by which is meant that they are bondholders under the mortgage to the complainants or their representatives. The petition then alleges that these proceedings on the part of the trustees were commenced by a minority of the bondholders, but it does not seek on that account to dismiss them, nor does it allege that the proceedings were taken against their objections or wishes. They allege that for the protection of their interests they have appointed counsel to represent them in this country, and that they hold one-half of the bonds, or nearly so, under the mortgage above mentioned, and that not being parties to the

suit upon record, they do not receive notice of the proceedings as they go on from the trustees or their counsel, and they pray that they may be made parties to the suit in order that they may take part in the proceedings in the cause as it progresses from time to time. This petition was filed on the 21st of December, 1877, and was signed by James C. Parrish, who was not alleged in it to be a bondholder nor the counsel for any such in this court.

Upon April 4th, 1878, another petition was filed, amending the first, already referred to. In this amended petition it is alleged, first, that certain proceedings have been had heretofore between the bondholders represented by a committee of the Amsterdam committee, with a like body representing English bondholders at London, and after a long recital of interviews between the parties of bondholders, the one in England and the other in Amsterdam, respecting the reorganization of the defendant company, it states that they could not agree upon a plan for such reorganization, and that the English bondholders had the aid of the counsel of the complainants in drawing up and advocating their plan of reorganization, in opposition to that of the German bondholders; and it further alleges that the English bondholders, through their agent, had advertised that their plan of reorganization had the approval of the receivers of the road and of the counsel of the trustees of the mortgage, the complainants in this suit. It is alleged that the agent of these European bondholders applied to the trustees under the mortgage to be supplied with copies of the papers filed from time to time in the cause, and that they have not done so, and have refused so to do. And it is charged that the trustees are carrying on the suit in furtherance of the plans of the English bondholders without reference to those of the German bondholders or their committee, and the prayer is that they may be made parties to the suit. It is nowhere alleged in this petition, original or amended, that the trustees or their counsel, so far as this suit has progressed, have not acted for the benefit of all the bondholders under the mortgage without partiality or prejudice. No single act of the trustees in the conduct of the suit is referred to as detrimental, or in antagonism to the interest of the petitioners. Nor is the court asked, on account of their negligence, fraud, or incompetency, to remove them and give to the petitioners or the bondholders the conduct of the suit.

The sole objection is that among the bondholders themselves there has arisen a dispute respecting the reorganization of the defendant company, and that the trustees or their counsel have, in consultation with such bondholders as they have had access to, given preference to the plan of one party of the bondholders rather than to that of the other. No allegation is made, however, that this preference has been expressed in any proceedings taken in court, or that it has influenced in any way the conduct of the suit on the part of the trustees.

Of course in every cause in equity all the parties in interest must be made parties to the suit, but in the case of Richards v. Chesapeake & O. R. Co. [Case No. 11,771], this court has already held that to foreclose a mortgage given by a railroad company to trustees to secure the payment of bonds and coupons mentioned in it, as they mature, the trustees are the only necessary parties to the suit; that the proper parties to be defendants are the parties who hold or claim in opposition to them, is equally clear. In order, therefore, to disturb the rights of the trustees to bring and conduct this suit, in which they represent every bondholder known to the mortgage, at the instance of such a bondholder, it must be shown to the court that the trustees have done, or contemplate doing, in the cause some act which will be detrimental to the interest of such bondholder or set of bondholders. This is not averred or proved in the matter of this petition. It is alleged that the trustees have approved a plan of reorganization proposed by one set of bondholders rather than another. But the court cannot consider any proceedings among the bondholders or trustees which are not the subject of proceedings in this court and this cause, so that until it is proved, as it is not now asserted, that the trustees under this mortgage, ought not, by reason of negligence, fraud, or incompetency, to conduct this suit, the petitioners have no right to ask that they be appointed plaintiffs to share in such conduct, or to conduct it wholly themselves. I know of no instance in a case of foreclosure of a railroad mortgage where the trustees have been displaced or required to take an adjutant bondholder to assist in the conduct of a suit, except where some malfeasance or incompetency is alleged on the part of the trustee. But the petitioners ask in the petition, as amended, at once to be made parties, whether plaintiff or defendant, and cite numerous instances where the courts have allowed bondholders of different interests or classes, who though represented by the same parties, had or thought they had, different interests to be defended or asserted, from others represented under the same mortgage or deed of trust. It seems to me none of these cases apply to the matter of this petition. There is but one class of bondholders under this mortgage. The interests of each bondholder are identical. Some of the bondholders have moved the action of the trustees and others have not. The one are active bondholders and the others are inactive. Some of them are represented by one committee and others are represented by another, but this does not constitute a class of bondholders; their interests are identical, and one might as well say that because bondholders under the same mortgage were represented in court by different counsel, that constituted them a

different class of bondholders, and that they were, because represented by different persons, entitled to be parties to the suit.

The moment a petition is presented to this court by any party interested in the conduct or result of this suit, which alleges that these trustees are derelict, incompetent, or partial in any action they propose to the court, that petition shall be, as it is entitled to be, respectfully heard, and if after consideration of the proof it shall be ascertained that the petitioner is correct the trustees will be removed, and the bondholders allowed to conduct the suit in their own way without the intervention of trustees, except so far as they may be nominal parties to it. And these petitioners who now ask to be made parties, plaintiffs or defendants, while we refuse them the conduct of the suit or to be made parties to it, are at liberty, whenever a motion is made in this cause which in their judgment is hostile to the interests of their clients, to oppose it, as they have done in this instance, by petition; if the circumstances show bad faith on the part of the trustees, they will be removed and others appointed to conduct the suit. This serves all the purposes of this petition, except that the bondholders represented, or alleged to be represented by the signers of it, may not have the right of appeal from any decree of the court which they think unfavorable to their specific and personal interests, unless made parties to the record. Under those circumstances, when they arise, we think any bondholder who feels that his rights are injured by the action of the trustees or of the court has a right to be put in such position, either as plaintiff or defendant, as will enable him to have them adjudicated by an appellate court. That case is not presented to us by this petition, and the prayer of it is therefore in this instance refused.

Judge HUGHES differed, in the following opinion:

HUGHES, District Judge. I have differed so seldom with the presiding judge (whose opinion is the law of the court) that it is with great reluctance that I now express a dissent from his ruling. In the result at which he arrives, in the decision just read, I concur substantially, as the petitioners can gain all they now desire, under the ruling of the court. I think that the bondholders who did not unite in directing the trustees to move in this cause for foreclosure, may of mere right be made parties defendant.

In considering the petition of the Dutch bondholders, I have been content to confine my view to the terms of the trust deed securing the bonds of the consolidated company. A provision of that deed authorizes the trustees to proceed for foreclosure at the direction of one-fifth of the bondholders secured. It thereby classifies these bondholders into those who move in the suit and those who fail or refuse to move. It has never appeared affirmatively in this cause how many of the bondholders united in instructing the trustees to proceed for foreclosure. That question, I believe, went by default at the commencement of the suit, which began (before suit was entered) with a consent order for the appointment of two receivers. This consent was afterwards withdrawn. It now appears that the holders of about two millions of the bonds are represented by the trustees; that the holders of another two millions are not in sympathy with the trustees, and are here petitioning for a standing in court with a view to looking after their own interests; and that the holders of still another million and a half of bonds are taking no part in the proceeding one way or the other. Thus the petitioners are neither actually nor presumptively complainants in this cause. Inasmuch as the trust deed itself classifies the bondholders into those by whose instructions the trustees are acting, and those who may see reason to dissent from that action; and inasmuch as actual objection to the policy of the trustees is made by the holders of the imposing amount of two millions of bonds, it seems to me that the court is bound to recognize the classification of bondholders made by the deed itself, and, of mere right, to let into the cause, in the person or persons of some authorized representative, as parties defendant, in the manner prescribed by rule 48 in equity, the petitioners for the Dutch bondholders. I should prefer that this should be done, and I have no doubt the petitioners themselves would prefer it to be done, under their original petition, in which they pray to be admitted as of mere right. This would relieve them from the necessity, which is doubtless an unpleasant one, of formally arraigning the trustees before the court for any sort of dereliction; and I suppose, if they were allowed, they would withdraw their amended petition and stand upon the mere right of being parties to the cause of the class contemplated by the trust deed, who did not move as plaintiffs, and who are not in sympathy with the policy of the trustees. None but those bondholders who gave instructions to the trustees to proceed for foreclosure are technically or theoretically complainants in this cause; and I see no technical irregularity and no violation of the theoretical or logical proprieties of equity practice in allowing to a large class of interested persons who, under the terms of the trust deed, cannot be presumed to be represented by the trustees or to be parties complainant in this suit, either in law or fact, a standing in court, as parties defendant.

The Stewart Petition.

One of the most important questions which arose in the case was that presented by the petition of D. K. Stewart, and which is fully exhibited and discussed in the following

opinion of Judge HUGHES. Judge BOND differed on the law involved, but it was so desirable that a conclusion should be reached that should not involve a certificate of divided opinion to the supreme court, that Judge BOND requested the opinion of Chief Justice WAITE, who was present when the question came on for decision. On full conference the Chief Justice concurred in opinion with Judge HUGHES. Judge BOND yielded his own opinion and the decree of the court was entered on that basis, Judge BOND signing the decree along with Judge HUGHES. The following opinion had been prepared by Judge HUGHES before this conference, and furnishes the reasons on which his own opinion was based. It is not to be accepted as embodying the reasons of Chief Justice WAITE, and of course does not express the opinions of Judge BOND.

HUGHES, District Judge. The two statements of agreed facts show the following case: In 1854 the board of directors of the Virginia and Tennessee Railroad passed a resolution authorizing the issue of stock, to be called "preferred stock," interest (not dividends) on which was agreed to be paid regularly, and was agreed to be a lien, or liability of the company, next in grade to the second mortgage bonds, and to take precedence of all indebtedness subsequent to the date of the resolution. The stock was issued and bought with that understanding, but no mortgage or trust-deed was executed for the sole purpose of creating this lien. Afterwards, in 1855, the company executed a mortgage, known as the income mortgage, in which the prior lien of the interest on this stock was recognized and protected. Again, just before the execution of the mortgage to the foreign bondholders, John Collinson, their attorney in fact, issued a prospectus setting forth the debts of the company that would be superior to the said mortgage, and naming the annual interest on this stock among them.

Just after the war, in 1866, the principal of a great deal of the debts of the company became due. Crippled as it had been by the war, the company was unable to meet these obligations at the time, and consequenty proceeded to fund them in new bonds at 8 per cent. interest. But for amounts under $1,000 it issued certificates bearing interest at the same rate. A great many coupons for interest past due, on the several mortgages of the road, were also funded in certificates of the same character. In no instance did the company require those who bought these certificates to waive the mortgage lien, nor did the company require them to accept these certificates in absolute payment of the coupons, etc., funded. In the prospectus of Mr. Collinson, mentioned above, these certificates were named as one of the debts superior in dignity to the mortgage bondholders, and the plaintiffs' trustees, by buying in a lot of them for the benefit of their cestui que trusts, paying in exchange therefor bonds secured by the mortgage to them, recognized their priority. The questions to be considered, therefore, are (a) whether the interest on the preferred stock ever was a lien? (b) whether, if a lien as between the original parties, the trustees and their cestui que trusts, have had sufficient notice, actual or constructive, to make it a lien as against them? (c) whether the acceptance of these certificates operated a waiver or satisfaction of the bonds, etc., which were surrendered in exchange for them? I will consider these questions in their order.

I have no difficulty in holding that the mode in which this preferred stock was issued created a lien as between the parties thereto. They were issued with the declaration that they were a lien; they were bought on the faith of that representation. A court of equity will raise equitable liens for the purpose of justice, and if a lien could not be created otherwise, could even make the company execute a conveyance for that purpose. But it is not necessary. A court of equity considers that as done which ought to be done in order more fully to effectuate the intention of the parties. It will, therefore, consider that as a lien which was so intended to be by the parties. And it will do so with special readiness in this instance, where it has been recognized and treated as such without dispute by all parties for more than twenty years.

I therefore pass to the consideration of the question whether it was a valid equity as against the mortgage to the plaintiffs' trustees. If they take with notice of the equity decided above to exist, they take subject to it. Of course it is not necessary that the holder of every bond secured by that mortgage shall have notice. Notice to their agents, the trustees, and John Collinson, is notice to them. I hold that not only their agents had notice, but that probably they themselves had sufficient notice at least to put them on inquiry. This notice was given: (1) By the income mortgage, a deed duly executed and recorded. That deed expressly recognizes the lien and the priority of the lien of this preferred stock. It is recognized in terms which admit of no ambiguity. (2) By the prospectus issued by John Collinson, their agent. This was widely circulated, and doubtless no one bought these bonds without reading it. And actual notice given in this manner is as effective as if given in any other. (3) The 14th section of the act of incorporation of the Atlantic, Mississippi and Ohio Railroad, providing for the classification, etc., of the debts and stock of the divisional roads, was itself calculated to apprise subsequent incumbrancers of the existence of those debts, etc., and to put them on in-

quiry in protection of their own interests. I therefore hold that the interest on this preferred stock is a liability of the company next in dignity to the second mortgage bonds of the Virginia and Tennessee Railroad, and superior in dignity and valid against the lien created by the mortgage to the plaintiffs' trustees. Nor have I any more hesitation in deciding in favor of the priority of lien of the registered certificates. I see nothing to show that a novation was contemplated by either party. A novation can only arise in pursuance of an agreement express or implied. A contract of such a character must be clearly proved, and the burden of proving it is on the one who alleges it. An intention on both sides to enter into such a contract must be proved.

There is no proof of such an intention in this case. That it was not intended by the company is shown by the resolution authorizing the perpetuation of the mortgage lien on the face of the certificates. And surely it cannot be held that such was the intention of those who received these certificates, when they were neither expected nor required to waive their lien. It cannot be held that they waived it voluntarily. It is well-settled law that the acceptance of different or additional evidences of debt is not a satisfaction of the former evidence or security, unless it is clearly shown to have been so intended. A debt is not paid by taking a note for it, nor is a mortgage paid by taking a certificate of indebtedness. A party may receive as many different securities for the same debt as he pleases, and the law will not hold that he waived his former securities unless it is clearly proved that he did so, and intended to do so. Those, therefore, who claim that these registered certificates were an absolute satisfaction of the mortgage lien to that extent must prove that it was so intended. There is no such proof in this case. On the contrary, everything points to the opposite conclusion. The purpose for which these certificates were issued is plain. At the time the interest or parts of the principal so funded became due, the company could not meet their payment. It wanted time, and in consideration of the time thereby granted, it increased the rate of interest, and funded interest as principal. Their consideration, therefore, was not the waiver of their lien. It was the additional time thereby granted. That, it is settled, is a sufficient legal consideration. Such funding operations are of daily occurrence. The Miller covenant was of a similar nature, and since the appointment of the receivers, in the fall of 1877, they obtained leave of court to issue somewhat similar certificates extending the time of payment of some of the divisional mortgages. Until this proceeding, these certificates have always been treated as liens. They were stated to be such by Mr. Collinson in his prospectus; they were recognized as such by the trustees themselves. Unless on the supposition that these certificates were a lien superior to their own mortgage, the trustees would hardly have bought in $40,000 of them, and surrendered in exchange for them an equal proportion of their own bonds. I, therefore, hold that their lien is not lost, and that they are of the same dignity as the interest coupons, etc., in exchange for which they were issued. Nor can I help feeling that the resistance of the prayer of their petition places the complainants in the attitude of bad faith to the petitioners.

The hearing of the foregoing matter was at the same term of the court at which a motion for a decree of foreclosure and sale was to be passed upon.

The Virginia and Tennessee Company.

A petition was presented at this term by the agents and counsel of the Dutch bondholders, praying that, before entering a decree of foreclosure and sale, the complainants should be required to make the president and directors of the Virginia and Tennessee Company a party defendant. The facts upon which this petition was based appear in the following opinion of Judge HUGHES on that subject, and need not be set out here. Judge BOND was opposed to the prayer of the petition on the ground that the company named was neither a necessary nor a proper party defendant to the cause. Chief Justice WAITE thought that the company was not a necessary party; and so the decision of the court was against the prayer of the petition. But Judge HUGHES thought the company named a necessary party, and filed the following opinion on the subject [page 290].

The Petition of Graham's Executors et al.

David Graham's executors, and others, owners of $24,800 of the old stock of the Virginia and Tennessee Railroad Company, suing for themselves and all other stockholders other than the Atlantic, Mississippi and Ohio Railroad Company (owning together about 3,389 shares), petitioned the United States court for leave to make the receivers, Charles T. Perkins and Henry Fink, parties defendant to a suit in equity, which said petitioners proposed to bring in the circuit court of the city of Richmond. They filed with their petition as part thereof, a copy of the proposed bill. In it they allege (among many other things) that the Atlantic, Mississippi and Ohio Railroad Company is, like themselves, only a stockholder in the Virginia and Tennessee Railroad Company, though owning a large majority of the stock, say 31,611 shares out of 35,000 shares, the chartered limit of the capital. They allege that the Atlantic, Mississippi and Ohio Railroad Company has never acquired in

any manner, any right or title to the railroad, the property or the franchises of the Virginia and Tennessee Company, and that the possession of the same by the president and directors of the Atlantic, Mississippi and Ohio Company was an unlawful usurpation. They insist that the deed of 9th September, 1871, the mortgage under which the plaintiffs claim, if valid, is operative only to convey the 31,611 shares of the capital stock of the Virginia and Tennessee Railroad Company owned and held by the Atlantic, Mississippi and Ohio Company. The proposed bill makes the plaintiffs in this suit the board of public works, the commonwealth of Virginia, the trustees in all of the Virginia and Tennessee deeds, the president and directors of the Virginia and Tennessee Railroad Company, and the Virginia and Tennessee Railroad Company itself, in its corporate name and character, parties defendant, and prays relief in the state court according to the facts stated.

The argument on the petition was heard at Norfolk, on Wednesday, May 7th, 1879. The court, composed at the time of WAITE, Chief Justice, and BOND, Judge, for the purpose of passing upon this question, denied the prayer of the petitioners. The Chief Justice from the bench said in substance: That there was no reason why Graham's executors et al. should not, if so advised, bring their suit in the state court against the plaintiffs here, and against the Atlantic, Mississippi and Ohio Railroad Company, and all other parties interested, and assert therein any right they may have in the premises. That these petitioners, not being parties here, could not be barred or affected by any proceeding or decree in this suit. That this court could only sell such estate in the premises as the Atlantic, Mississippi and Ohio Railroad Company actually owned, and by deed lawfully conveyed to the plaintiffs. That the purchaser at a sale made by this court would buy subject to all the rights of Graham's executors and others (whatever they may be), and that they, by supplemental and amended bill, might make the purchaser, whenever he came into being, a party defendant in their suit in the state court, and litigate their rights with him there. That it was neither necessary nor proper to make the receivers parties to any such contention. That they neither claim nor have any title to or interest in the subject-matter. They are merely the servants of this court; the hands with which the court preserves and manages the property pendente lite, and they must not be interfered with in the execution of the orders of this court.

Thereupon the said Graham's executors and others, by counsel, moved the court to permit them to appear as parties defendant in this suit, and to file their answer to the plaintiffs' original and amended and supplemental bills; and then to move and insist that the plaintiffs be required to amend and supplement their bills by making the Virginia and Tennessee Railroad Company a party defendant in this court. The court denied the motion. The Chief Justice said, in substance: That the rights of Graham's executors were not compromised or put in jeopardy by these proceedings. That this court could dispose of only such estate as legally belonged to the parties of record. That if the plaintiffs, and the principal defendant, the mortgagees and the mortgagor, after being warned by these public proceedings of claims adverse to their title, were still willing to proceed to foreclosure and sale, they were at liberty to do so, if they choose to take the responsibility and run the risk. In reply to a suggestion by counsel that the purchaser might be misled and embarrassed, the Chief Justice said he did not see how that could affect Graham's executors or their rights.

After the judgment of the court was pronounced, HUGHES, J., who was on the bench and heard the argument, though not sitting as one of the court on that question, said: that while he was of opinion that the prayer of this petition asking leave to sue in a state court should be denied, yet he thought that the Virginia and Tennessee Railroad Company, and also the Southside and Norfolk and Petersburg Railroad Companies ought all three to be made defendants. That the grantors in the several divisional deeds exhibited with the plaintiffs' bills were proper, necessary, and indispensable parties, as much so as the grantees in said deeds. That said three companies had rights affected by these proceedings, and they ought to be here to defend them. That the plaintiffs having neglected to make said companies parties, their suit was defective, and not ready for a decree of foreclosure. But inasmuch as his brothers were of a contrary opinion, and had so judicially decided, he would henceforth in this cause, as he was bound to do, consider the point as res adjudicata, and act accordingly.

The next day the representatives of the Dutch bondholders filed a petition, praying that the Virginia and Tennessee, Southside, and Norfolk and Petersburg Railroad Companies might be made parties, upon grounds similar to those insisted upon by Graham's executors the day before. After hearing further argument, the court (consisting of WAITE, C. J., and BOND, J.) adhered to its decision, that the plaintiffs would not be required to make the divisional companies parties.

HUGHES, District Judge. Among my objections to a decree in the present status of the case is the fact that the Virginia and Tennessee Company is not a party defendant to this suit. Various sections of the act of June, 1870, providing for the formation of the Atlantic, Mississippi and Ohio Company, contemplate expressly or impliedly the continued existence, for certain purposes, of the several original companies of which the Atlantic, Mississippi and Ohio was formed, after and not-

withstanding the formation of the consolidated company. One of the sections provides that no shareholder in an original company should be required to subscribe his shares to the stock of the consolidated company. Another section provides that the joint company shall arrange with the divisional companies for the use of their respective roads and properties upon such terms as the latter may agree to "in general meeting." Another provides that the property and franchises of the divisional companies should vest in the general company only as and when it shall absorb the whole of their shares respectively. Another keeps alive the divisional companies for the liquidation of their respective debts as long as the claims of their creditors and shareholders shall remain unsatisfied. Another provides that a separate account of the property, receipts, and expenses of each divisional company shall be kept, for the purpose of protecting the claims and preserving the rights of their respective creditors and shareholders until they are satisfied. In short, I gather from the whole tenor of the act of 1870, that the legislature contemplated a continued separate existence of each divisional company, for certain important purposes, as long as any of the shares of its capital stock were not subscribed to that of the Atlantic, Mississippi and Ohio Company, and as long as any debt which it had contracted remained. Moreover, the act of March 6th, 1872, entitled "An act to complete the organization of the Atlantic, Mississippi and Ohio Company," contemplated the existence of the divisional companies subsequent to the organization of the Atlantic, Mississippi and Ohio Company, and provided a method of extinguishing them by authorizing the condemnation of their stock. It does not appear that anything has been done under the authority given by this act towards extinguishing in the manner which it provides the Virginia and Tennessee Company, and it is a fact of record that that company remains extant as a legal corporation.

But there is nothing of record to show how much of the stock of the divisional companies is outstanding; and it seems to me that this is a matter of sufficient importance to be made the subject of reference to the master commissioner. In order to know, however, with approximate accuracy the state of things in this regard, I have obtained from the secretary of the divisional companies a statement from their books of the number of shares held in them respectively, which have not been subscribed to the Atlantic, Mississippi and Ohio Company. That number is as follows. In the

Norfolk and Petersburg Company	43	shares.
Southside Company	15	"
Virginia and Kentucky Company	605	"
Virginia and Tennessee Company	3398	"

Leaving out of consideration the three first-named companies, it seems to me that the court would not be justified in ignoring the existence of the Virginia and Tennessee Company, in which there is outstanding stock representing a capital of $340,000. Heretofore it has been possible for the court passively to shut its eyes to the existence of this company, but it can no longer do so; for since the last hearing of this cause a petion has been presented by a portion of the shareholders of this company asking leave to file a bill in a state court (a copy of which is attached to the petition), setting out facts to show its continued existence, and not only impeaching the validity of the organization of the Atlantic, Mississippi and Ohio Company (the defendant in this suit), but attacking as fraudulent the mortgage deed for satisfying which the court is now asked to decree a sale of the railroad which belonged to the Virginia and Tennessee Company. These petitioners are holders of unextinguished stock in a company which the law expressly keeps alive in respect to its debts and to this stock to the amount of several thousands of dollars.

It is a cardinal rule in equity that all persons should be parties to a suit who have an interest in a complete decree settling the title to the subject of the suit and determining all claims upon it; that is to say, it is an imperative rule, that all should be made parties, who, if parties, would be concluded by a complete decree. Our decree in this cause, in order to be complete, must determine the amount of all debts binding the property, and must settle the title of the property as against all claimants. The object of this suit is to procure the sale of a complete title, subject only to the claims of the divisional mortgages. We are to pass a title to the purchaser good against all the world except the lien of the divisional mortgages, and we are to determine the amounts due upon these mortgages. In order to such a decree, it is not only incumbent on us to bring all parties into the cause who have valid claims against this property, but all who have a right in law to litigate these matters, however barren of result that litigation might promise to be. We are to sell a title not only good against successful litigation, but as to which all parties in interest shall be estopped from vexatious litigation. We are not only to sell the property but to settle the title to it.

Among the debts we are ascertaining, by references to a commissioner and by solemn decree, are those of the original Virginia and Tennessee Company; and yet that company, which as to its debts is as certainly in existence as the Atlantic, Mississippi and Ohio Company itself, is not a party to the record. We are determining the debts which it owes in order to a sale of the property which it pledged, without making it a party to the proceeding for sale. What if we should sell to a highest bidder ignorant of the existence of the Virginia and Tennes-

see Company, and of its relations to the railroad sold; and what if that bidder, on hearing the facts of the case, should refuse to comply with the terms of sale because of these facts: would the court compel a compliance? I think it might well hesitate to do so.

In the present status of this cause our decree would not conclude the Virginia and Tennessee Company or its stockholders either as to the title of the Virginia and Tennessee Railroad, or as to the amount due on its divisional mortgages. Such a decree would have still another injurious effect. The act of assembly of March 6th, 1872, authorizing the condemnation and extinction of the stock of the Virginia and Tennessee Company not subscribed to the Atlantic, Mississippi and Ohio Company, was entitled "An act to complete the organization of the Atlantic, Mississippi and Ohio Company." It is an act of the class which are strictly construed. It is an act of which only the Atlantic, Mississippi and Ohio Company can avail itself upon a strict construction of the language of its title, and of the terms of its fifth section. But the sale of the Virginia and Tennessee road by this court will extinguish the Atlantic, Mississippi and Ohio Company, as a corporation; and with its extinction will lapse the right of condemning the outstanding stock of the divisional companies given by this act of 1872. So that our decree, if given in the present stage of this suit, instead of settling the title of the property to be sold, as against the Virginia and Tennessee Company's stockholders, will keep alive that company indefinitely, with power at any time to disturb the title which we sell. Whereas, if the Virginia and Tennessee Company were made a party to the suit, it would be concluded by the decree, and the sale of its property would, by operation of law, ipso facto extinguish that company, as it will extinguish the Atlantic, Mississippi and Ohio Company.

Final Decree of Foreclosure and for Sale of the Property of Defendants.

This cause came on to be further heard at this term upon the pleadings, and upon the evidence and papers, and master's reports heretofore filed therein, and was argud by counsel; and thereupon the court, upon consideration of the premises, orders, declares, and decrees:

1. That all the reports heretofore made and filed in this cause by the master, as modified by his report, filed on the 30th day of November, 1878, be, and the same are hereby confirmed, except as overruled or modified by this decree, and that the allegations and averments in the complainants' bill of complaint, so far as they are material to the relief prayed for, are true.

2. The court declares and decrees: That the deed of trust executed by the Atlantic, Mississippi and Ohio Railroad Company to Francis Skiddy, William Butler Duncan, and Samuel L. M. Barlow, trustees, complainants in this action, on the 9th day of September, 1871, and of which a true copy is annexed to the master's report, filed in this cause on the 30th November, 1878, to which reference is had, is a valid conveyance of the railroad franchises and property of the said corporation therein mentioned, for the security of the mortgage bonds therein set forth; that the said bonds were duly issued, and the same and the proceeds thereof lawfully disposed of, and dealt with under and according to the statute of the state of Virginia, in that behalf made and provided, approved June 17th, 1870; and that the said deed of trust vested in the complainants, as trustees for the purposes therein mentioned, and according to the tenor thereof, a good and valid title to all and singular the property and franchises therein described, subject only to the liens thereon hereinafter set forth.

3. The court declares and decrees: That the franchises and property conveyed by the said trust deed of September 9th, 1871, to the complainants, trustees, by the Atlantic, Mississippi and Ohio Railroad Company, by way of mortgage, described as near as may be, are as follows; that is to say, all the right, title, and interest of the said Atlantic, Mississippi and Ohio Railroad Company in and to the franchises of the said company, its entire line of railroad then constructed, or thereafter to be constructed; in fact extending from Norfolk, in the state of Virginia, to Cumberland Gap, in the state of Kentucky, together with all branches of the said line of railroad then constructed, or thereafter to be constructed, with the rolls, incomes, rents, issues, and profits thereof, and all real estate, rights of way, easements, fixtures, rolling stock, machinery, tools, and equipments, and all other personal property thereto belonging; and all property, real, personal, and mixed, and all corporate powers and franchises belonging or appertaining to the said Atlantic, Mississippi and Ohio Railroad Company, then possessed by the said company, or thereafter to be acquired by the said company. And for all the purposes of this decree the inventory of the receivers may be referred to for a more full and detailed description of the mortgaged premises. The description also includes all additions to the mortgaged property and premises made or to be made by the receivers; and also all railroad supplies which the receivers may have on hand at the time of sale, or may acquire thereafter before delivery of possession.

4. It is further declared and decreed: That the estate and interest of the complainants in the above-described premises, are, at the date of this decree, subject to the prior liens, stated in the master's report, and here-

inafter more particularly described, and subject to which prior liens, to the extent that they may be outstanding at the time of sale, with interest then accrued on the sums of money secured thereby, the premises must be sold as hereinafter directed.

5. The court declares and decrees: That there was a default on the part of the said corporation in the payment of the instalments of interest upon the said bonds, issued under the trust deed to the complainants, due and payable according to the tenor thereof, on the 1st day of October, 1874, and on the 1st day of April, 1875, and that since the last named date no part of such interest has been paid. That the amount of such interest which has become and remains due and payable, is at the date of this decree, the sum of $1,932,687.75, and that no part of the principal of said bonds has become payable.

6. The court declares and decrees: That of the bonds issued under the trust deed to the complainants, the 474 bonds mentioned in the master's report in this cause, filed on the 30th November, 1878, as delivered to the defendant, the Atlantic, Mississippi and Ohio Railroad Company, by the plaintiffs' trustees, before the appointment of the receivers in this action, and the 5026 bonds deposited by the receivers in the Safe Deposit Company of Baltimore, and the 4030 bonds obtained by the receivers from the Union Bank of London, and deposited with the Safe Deposit Company of Baltimore, all be cancelled by the receivers, and the fact of such cancellation be reported to this court. If for any reasons they shall not cancel the whole number of these bonds, let such reasons be reported.

7. The court declares and decrees: That the amount of indebtedness secured by the trust deed of the Norfolk and Petersburg Railroad Company to George Blood, Jr., and John M. Southgate, dated June 15th, 1857, and bearing interest at eight per cent., payable semi-annually, January 1st and July 1st of each year, is $309,500; that this indebtedness became due and payable on the 1st day of January, 1877; that under the authority of this court the receivers have, by an agreement with the holders, extended the time for the payment of $258,500 thereof, for the period of ten years, from the 1st day of January, 1878, leaving a balance of such indebtedness due and payable of $51,000. The above amount includes two bonds of $500 each, numbered 260 and 296, delivered to the receivers, at the time of their appointment, by the Atlantic, Mississippi and Ohio Railroad Company. That of the amount of the indebtedness secured by the last-mentioned mortgage, bearing interest at seven per cent., payable semi-annually, January 1st and July 1st of each year, there was due on the 1st of January, 1877, $181,500, of which amount the receivers have, by an agreement with the holders, extended the time for payment, under the authority heretofore conferred upon them by this court in that behalf, of $161,000 for the period of ten years, from the 1st day of January, 1878, leaving of the indebtedness secured by this deed of trust, and bearing seven per cent. interest, due and unpaid, $20,500. The above amount includes 44 bonds of $500 each, delivered to the receivers, at the time of their appointment, by the Atlantic, Mississippi and Ohio Railroad Company, which bonds constitute a part of the mortgaged property.

8. The court declares and decrees: That the amount of the indebtedness secured by the trust deed of the Norfolk and Petersburg Railroad Company, to John S. Tucker, dated September 11th, 1868, and bearing eight per cent. interest, payable semi-annually January 1st and July 1st, of each year, is $500,000, becoming due July 1st, 1893. Included in this amount are two bonds for $1,000 each, which came into the hands of the receivers, and also 40 bonds of $1000 each, which came into the possession of the receivers.

9. The court declares and decrees: That the amount of the indebtedness secured by the trust deed of the Southside Railroad Company, to W. T. Joynes, dated November 15th, 1854, is $1400.

10. The court declares and decrees: That the amount of the indebtedness secured by the trust deed of the Southside Railroad Company, to George W. Bolling (now deceased) and Richard G. Pegram, dated October 19th, 1868, is $1,870,000, of which $709,000 bears interest at the rate of eight per cent. per annum, payable semi-annually, January 1st and July 1st, in each year, and becomes due and payable as follows:

$100,000	on January 1st	1884
100,000	" "	1885
100,000	" "	1886
100,000	" "	1887
100,000	" "	1888
100,000	" "	1889
109,000	" "	1890

—The bonds representing said indebtedness being known as Southside first preferred eight per cent. bonds.

Included in this sum of $709,000 are bonds to the amount of $56,000, to which the receivers became entitled at the date of their appointment, subject to a lien by way of pledge; but the pledgees, in the exercise of their right so to do, sold $9,000 of the said bonds, applying the proceeds towards the payment of the debt for which they were pledged, leaving $47,000 still outstanding under pledge. This $47,000 is made of the following bonds: numbers 145 to 149, 155 to 158, 204, 427 to 430 inclusive, 151, 207, 212, 216, 219, 222, 238, 239, 249, 251, 255, 270, 431, 298, 144, 142, 143, 277, 289, 291, 299, 300, 399, 433, 434, 444, 446, 447, 448, 450, 482, 485, 498. And of said $1,870,000, $621,000 bears six per cent. interest, payable semi-annually, January 1st and July 1st in each year, and becomes due and payable as follows:

$93,000 on January 1st	....	1884
93,000 " "	....	1885
93,000 " "	....	1886
93,000 " "	....	1887
93,000 " "	....	1888
93,000 " "	....	1889
63,000 " "	....	1890

—The bonds representing said indebtedness being known as Southside second preferred six per cent. bonds. Included in this, $621,000 are bonds to the amount of $1,000, which the receivers at date of their appointment received from the defendant, the Atlantic, Mississippi and Ohio Railroad Company, and bonds to the amount of $16,700, which the receivers have since redeemed from pledge. This $17,700 is made up of the following bonds: numbers 709, 710, 680, 681, 682, 683, 684, 692, 664, 678, 595, 596, 723, 491, 602, 603, 609, 610, 611, 612, 615, 597, 731, 767, 768, 769, 770, 771, 799, 888, 889, 890, 934, 964, 970, 973, 978, 1162, 1213, 1214, 1216 and 1256 to 1266 inclusive; 729 for $500; 1239, 1234, 1238, 1329, 1330 for $100 each.

Also, included in this $621,000 are bonds to the amount of $22,000, to which the receivers became entitled at the date of their appointment, and which are subject to the lien by way of pledge, hereinafter referred to, the said bonds being in numbers and amount as follows: numbers 686, 687, 688, 689, 690, 695, 696, 697, 698, 699, 701, 702, for $500 each; 478, 479, 480, 481, 482, 489, 490, 582, 592, 703, 704, 705, 706; 1251, 1252, 1326, 1327, 1328, for $100 each—in all, $7,000; 619, 621, 622, 627, 630, 633, 634, 635, 637, 806, 807, 816, 820, 851, 854, 855, 879, 886, 887, 987, 988, and 1274—in all $8,000, and 587 and 593 for $500 each. And of said $1,870,000, $540,000 bears interest at six per cent., payable semi-annually, January 1st and July 1st in each year, and becomes due and payable as follows:

$100,000 on January 1st	....	1896
100,000 " "	....	1897
100,000 " "	....	1898
100,000 " "	....	1899
140,000 " "	....	1900

—The bonds representing said indebtedness being known as Southside third preferred six per cent. bonds.

Included in this sum of $540,000 are bonds to the amount of $43,000, which the receivers at the time of their appointment received from the defendant, the Atlantic, Mississippi and Ohio Railroad Company, and bonds to the amount of $6400, which they have since redeemed from pledge, making $49,400 and composed of the following bonds: numbers 717 to 747 inclusive; 764, 794 to 801 inclusive; that is to say, 40 bonds for $300 each—$12,000; 310 bonds, numbers 992, 1007, 1037 to 1049, 1056 to 1250, 1301 to 1400 inclusive, for $100 each—$31,000; 64 bonds, numbers 1005, 1008 to 1020, 1251 to 1300 inclusive, for $100 each—$6400. And also bonds to the amount of $37,800, to which the receivers became entitled at the date of their appointment, and which are subject to the lien by way of pledge hereinafter referred to, the said bonds being in numbers as follows: 842 to 900, 759 to 762, 765 to 773, 802 to 825, 827 to 841, 786 to 790, 775 to 784.

11. The court declares and decrees: That the amount of the indebtedness secured by the trust deed of the Virginia and Tennessee Railroad Company to Chiswell Dabney, Odin G. Clay, and Abram S. Hewitt, dated December 24th, 1852, bearing semi-annual interest at the rate of six per cent., payable January 1st and July 1st of each year, is $5,000, now due and payable, together with the amount of funded interest secured by the deposit of coupons of bonds of this mortgage, in accordance with the indenture mentioned in the fourteenth paragraph of this decree.

12. The court declares and decrees: That the amount of the indebtedness secured by the trust deed of the Virginia and Tennessee Railroad Company to C. W. Purcell, C. L. Mosby, and C. R. Slaughter, dated January 5th, 1855, bearing interest at the rate of six per cent., payable semi-annually January 1st and July 1st of each year, is $990,000, and the same falls due on the 30th of June, 1884, together with the amount of funded interest secured by the deposit of coupons of bonds of this mortgage in accordance with the indenture mentioned in the fourteenth paragraph of this decree. Also, that the interest at the rate of six per cent. per annum, payable semi-annually on the first day of January and the first day of July of each year, due and to become due upon the preferred stock issued by the Virginia and Tennessee Railroad Company, under and by virtue of the resolution passed by the board of directors of said company the third day of August, 1854, and referred to in the mortgage executed by said company to R. H. Maury, John O. L. Goggin, and Samuel Garland, trustees, dated the fifth day of December, 1855, constitutes a lien upon the property and franchises of said Virginia and Tennessee Railroad Company, next after the lien of the mortgage executed by said company to C. W. Purcell, C. L. Mosby, and C. R. Slaughter, trustees, dated the fifth day of January, 1855. And the court declares and decrees, that the amount of the preferred stock so issued is five hundred and fifty shares of the par value of $100 per share.

13. The court declares and decrees: That the amount of the indebtedness secured by the trust deed of the Virginia and Tennessee Railroad Company to R. H. Maury, Richard Makim, and John Early, dated March 1st, 1866, is $1,000,000, bearing interest at eight per cent., payable semi-annually, January 1st and July 1st of each year, and falling due March 1st, 1900, together with the amount of funded interest secured by the deposit of coupons of bonds of this mortgage in accordance with the indenture mentioned in the fourteenth paragraph of this decree. Included in this sum are bonds to the amount of $37,000, to which the receivers became entitled at the date of their

appointment, subject to a lien by way of pledge, but the pledgees, in the exercise of their right so to do, sold $6,000 of the said bonds, applying the proceeds towards the payment of the debt for which they were pledged, leaving $31,000 still out under pledge, and which are subject to the lien hereinafter referred to. This $31,000 is made up of the following bonds: Numbers 891, 147, 148, 149, 150, 155, 156, 157, 158, 179, 180, 979 to 983, 841 to 850, 882 to 886.

14. The court declares and decrees: That the amount of the indebtedness secured by interest coupons and certificates of interest on preferred stock deposited under the indenture of the Virginia and Tennessee Railroad Company to Decatur H. Miller, dated December 1st, 1869, referred to in the master's report as constituting a lien upon that part of the mortgaged premises heretofore known as the railroad of the said Virginia and Tennessee Railroad Company, of $267,600, heretofore bearing interest at the rate of eight per cent., payable semi-annually, January 1st and July 1st, and falling due July 1st, 1880, constitutes a lien upon the said Virginia and Tennessee Railroad to the extent of the said principal sum of $267,600, with interest thereon at the rate of six per cent. per annum, payable semi-annually as aforesaid. Included in this sum of $267,-600 are bonds to the amount of $700, which the receivers at the time of their appointment received from the defendant, the Atlantic, Mississippi and Ohio Railroad Company, and bonds to the amount of $5,000 which they have since redeemed from pledge, making $5,700, and composed of the following bonds: number 56, for $500; numbers 211 and 220, for $100 each; 212 to 216, inclusive, for $1,000 each. And also bonds to the amount of $35,-000, to which the receivers became entitled at the date of their appointment, which are subject to the lien by way of pledge hereinafter referred to, the said bonds being in numbers and amounts as follows: 217, $1,000; 204 to 211 for $,1000 each; 191 to 203, $1,000 each; 178 to 190, $1,000 each.

15. The court declares and decrees: That the certificates issued by the Virginia and Tennessee Railroad Company, amounting in the aggregate to $84,190.73 in lieu of surrendered mortgage bonds and coupons, and for interest on the preferred stock referred to in the twelfth paragraph, constitute a lien upon the mortgaged premises of the same rank and nature as the bonds and coupons and the interest on the said preferred stock, for which they were given, with interest thereon at the rate of six per cent. per annum, payable semi-annually, the first day of January and the first day of July, until paid.

16. The court declares and decrees: That the amount due in respect of so-called interest funding notes, issued from time to time by the defendant, the Atlantic, Mississippi and Ohio Railroad Company, and secured by a deposit in trust, of the coupons and mortgage bonds, representing such interest, and which coupons still constitute a lien upon the mortgaged premises, according to the tenor of the mortgages made to secure the same, is $134,584, bearing interest at the rate of six per cent. per annum, and due as to principal, as follows:

$3,160	January 1st	1877
131,324	" "	1879

17. The court declares and decrees: That the bonds of the Norfolk and Petersburg Railroad Company, to the amount of $40,000, hereinbefore declared to be subject to a lien thereon; the bonds of the Southside Railroad Company, to the amount of $47,000, hereinbefore declared to be subject to a lien thereon; the bonds of the same company to the amount of $22,000, hereinbefore declared to be subject to a lien thereon; the bonds of the same company to the amount of $37,800, hereinbefore declared to be subject to a lien thereon; the bonds of the Virginia and Tennessee Railroad Company to the amount of $31,000, hereinbefore declared to be subject to a lien thereon, and the bonds of the same company to the amount of $35,000, hereinbefore declared to be subject to a lien thereon, amounting in the aggregate to $212,800, are subject to liens for the payment of $143,800, less such sums as the receivers may have paid, under the authority of the court, towards the extinguishment of such lien.

18. The court declares and decrees: That under and in pursuance of the authority heretofore conferred upon them by the order of this court, the receivers have executed and delivered their certificates for the amount of the aforesaid indebtedness of $143,800, to the end of protecting and preserving for the benefit and advantage of the plaintiffs, the value of the above-mentioned bonds over and above the amount for which they stand pledged, as hereinbefore stated, and the certificates so made and delivered by the said receivers, will, until duly paid, constitute a lien upon the premises mortgaged to the complainants in and by the said trust deed, including the said bonds, superior to the lien of the indebtedness secured or intended to be secured thereby.

19. The court declares and decrees: That the bonds of the Norfolk and Petersburg Railroad Company to the amount of $43,000; that the bonds of the Southside Railroad Company to the amount of $4,000; the bonds of the Virginia and Tennessee Railroad Company to the amount of $488,000, and so-called registered certificates to the amount of $40,517.38, obtained by the receivers, under the order of this court, from Messrs. Duncan, Sherman & Co., and in pursuance of the order of this court, deposited with the Safe Deposit Company of Baltimore, no longer constitute a lien under the respective trust deeds under which such bonds were issued, which can be enforced in any other manner, or to any other extent, than is in that behalf provided by the third article of the trusts, uses, and purposes expressed by the said trust deed of September 9th, 1871, to the complainants, as trustees; that is to say, for the further security of the bonds issued under that trust deed or mort-

gage. and to be held by way of protection to the title of the purchasers of the property and franchises sold under and in pursuance of this decree; to which end the said bonds, after there shall have been put thereon, if there has not been so put already, such proper indorsement restraining their assignability or negotiability, as is provided for by the said third article of said trust deed, shall be delivered over to the purchasers of said property and franchises, at the time of the delivery to them of the deed, to be held by them and their assigns as a protection to their title in accordance with the third clause aforesaid.

20. The court declares and decrees: That the several trust deeds annexed to and forming part of the master's report, filed in this cause on the 30th day of November last past, are true copies of the originals thereof respectively, and that they are severally valid instruments of conveyance according to the tenor thereof.

21. The court declares and decrees: That the mortgage of the Southside Railroad Company to the board of public works of Virginia, to secure an indebtedness to the amount of $800,000, dated February 14th, 1853, delivered over to the president and directors of the Atlantic, Mississippi and Ohio Railroad Company, under the authority of a certain act of the general assembly of Virginia, approved June 17th, 1870, and in pursuance of a so-called covenant of the same date, made in pursuance of the said act, between the Atlantic, Mississippi and Ohio Railroad Company and the said board of public works, was by such transfer and by operation of law extinguished, and no longer constitutes a lien under the said mortgage of the 14th February, 1853.

22. The court declares and decrees: That the mortgage of the Virginia and Tennessee Railroad Company to the board of public works of the state of Virginia, dated March 26th, 1853, made to secure an indebtedness of the said railroad company to the state of Virginia to the amount of $1,000,000, which said mortgage was transferred to the Atlantic, Mississippi and Ohio Railroad Company, under and by virtue of the aforesaid covenant of June 17th, 1870, was extinguished by such transfer, and that the said mortgage and the said indebtedness no longer constitute a lien or incumbrance upon the premises in the said mortgage specified.

23. The court declared and decrees: That under and by virtue of the aforesaid act of the legislature of the state of Virginia, approved June 17th, 1870, and the aforesaid covenant of the said Atlantic, Mississippi and Ohio Railroad Company, made with the board of public works of the said state, and bearing date the day and year last aforesaid, there is now due to the state of Virginia the sum of $3,992,408.87, which indebtedness constitutes a lien upon the premises next after and subordinate to the lien of the said trust deed to the complainants.

24. The court declares and decrees: That the mortgaged premises cannot be sold in parcels without loss and prejudice to all parties interested therein, and that the nature and situation of the property is such that the interest of all parties requires that it should be sold as an entirety.

25. The court orders and decrees: That the receivers in this action sell so many of the aforesaid bonds of the Norfolk and Petersburg, Southside, and Virginia and Tennessee Railroad Companies, respectively redeemed by them from pledge, as it may be necessary for them to sell, in order to raise the amount paid or to be paid by them to redeem such bonds from pledge, with interest on such sum; such sale to be made of such bonds, and at such times, and in such manner, either at private or public sale, as to the receivers may appear to be most judicious and beneficial. All of the bonds of the said last-mentioned companies respectively, not required for such sale and reimbursement, together with such bonds as were surrendered by the defendant company to the receivers at the time of their appointment, as hereinbefore found and stated, the receivers are directed to cancel, and to report such cancellation to the court.

26. The court orders and decrees: That the defendant board of public works, or the defendant the state of Virginia, pay into the registry of this court, on or before the second Tuesday of January next, the amount of the debt ascertained and hereinbefore declared to be due from the defendant company to the complainants' trustees, and such further sum as may become due in the meantime for interest upon the bonds secured by the deed of trust to the complainants, and that, in default thereof, the said board of public works and the state of Virginia shall be forever barred and foreclosed of and from all claim, lien, and equity of redemption, of, in or to, the property and franchises embraced in or covered by the said trust deed of September 9th, 1871, from the Atlantic, Mississippi and Ohio Railroad Company, to the complainants as trustees hereinafter decreed to be sold.

27. The court further orders and decrees: That the defendant, the Atlantic, Mississippi and Ohio Railroad Company, pay into the registry of this court on or before the second Tuesday of January next, the amount ascertained and herein declared to be due by the said company to the complainants, under the said deed of trust, together with the costs in this cause.

28. The court further orders and decrees: That in the event of such payment and redemption as above provided for on the part of the defendant, the Atlantic, Mississippi and Ohio Railroad Company, or on the part of the state of Virginia, or the board of public works, this cause stands continued, with leave to the complainants to apply for appropriate relief in the event of any subsequent default in the payment of interest, and that

in the meantime all proceedings therein be stayed.

29. The court further orders and decrees: That all and singular the property and franchises of every kind described in the third paragraph of this decree be sold by a master hereafter to be specially appointed for that purpose (unless payment be made by the said board of public works, the state of Virginia, or the defendant company, as hereinbefore provided), subject to the amount of the prior liens and incumbrances found and stated in the fourth paragraph of this decree, as the same may exist at the time of sale, and subject also to all executory contracts made by the receivers under the authority of the court, of which the receivers are directed to give to the master, on his request, a full and accurate statement, which contracts, if any, must be publicly announced by the master at the time of sale, and subject, also, to any liability that may be thereafter established against the receivers growing out of any lawful acts done by them in their capacity of receivers, and such liabilities, if any, will remain a lien upon the premises until discharged. Such sale (unless stayed by such payment as provided for in the 26th and 27th paragraphs of this decree) shall be made at some convenient place in the city of Richmond, to be designated by the master. The master shall give notice of the time and place of sale by an advertisement thereof, to be inserted once in each week, for not less than ninety days before the sale, in a newspaper published in each of the cities of Norfolk, Petersburg, Lynchburg, Richmond, and Goodson, in the state of Virginia, and in the city of Baltimore, in the state of Maryland; in the city of Philadelphia, in the state of Pennsylvania; in the city of New York, in the state of New York; in the city of Boston, in the state of Massachusetts; in the city of London, England; and once in each month for the same period in one published in each of the cities of Amsterdam and Groningen, in the kingdom of the Netherlands.

The master shall also serve written notice, to the like effect, upon the attorney-general of the state of Virginia, and the board of public works of the said state, at least ninety days before the sale. The master shall sell the premises herein directed to be sold to the highest and best bidder, and he shall require such bidder, before making an adjudication to him, to pay in cash the sum of $100,000, and if the sale is confirmed by the court, the balance of the purchase-money must be paid within thirty days; but the purchaser shall have the right to anticipate the day of payment. After the payment by the purchaser of such sum in cash as may be sufficient to pay the costs, charges, and expenses of the complainants' trust and of this cause, and the indebtedness of the receivers, and for the payment of the pro rata dividend out of the net proceeds of sale for distribution that may be due to other beneficiaries under the said trust deed, the master may receive from the purchaser in part payment of the purchase-money such interest coupons as may have become due any payable of the bonds secured by the said deed of trust to the complainants, at such rate per centum of the par value thereof as the purchaser would otherwise be entitled to be paid in cash in respect thereof out of the net proceeds of the sale on distribution thereof among the holders of such coupons, and the percentage so applied in satisfaction of the purchase-money shall be treated as a payment of such coupons to the extent of such application. If any question shall arise as to the proportion of the purchase-money that must be paid in cash and the proportion thereof that may be paid in such coupons, application may be made to the court. In case of the failure of any bidder to comply with the terms of sale that are to be complied with on the day of sale, and before a final adjudication to the bidder, the master may reject the bid, and proceed at once, then and there, to make a resale, or he may then and there publicly announce that on some other day, to be then designated, and between certain hours of the day to be designated, he will, at the same place, make a sale of premises under the decree without further advertisement, and he may make the same accordingly. And the master shall have power to adjourn the sale from time to time in like manner for good cause, until a sale shall have been made in accordance with the provisions of this decree. In case of any such adjournment or adjournments, public notice thereof shall be given by publishing a note to the advertisement of sale to that effect, omitting, however, newspapers published in Europe.

30. The court further orders and decrees: That the master report the sale and proceedings under this decree to this court with all convenient speed, and give notice thereof to the complainants' solicitors, and the complainants' solicitors may present the said report to this court on thirty days' notice to the purchaser and the defendants' solicitors. If on presentation and consideration of the said report of sale, which shall be at a stated or special term, sitting in open court, the court shall confirm the sale, the complainants' solicitor must forthwith prepare and submit to the court a draft deed of conveyance from the master to the purchaser; and upon the settlement of the form thereof, and upon due compliance with the terms of sale by the purchaser, the master must execute and deliver such deed of conveyance to the purchaser, and the purchaser, or his successor or successors in interest, will then and thereupon be let into possession of the premises. The purchaser will also and at the same time, be entitled to receive all books, maps, plans, papers, records, and documents of the defendant company, of the said several divisional companies, and relating to all extensions or branch roads of the said com-

panies, and of the receivers, relating and appertaining to the franchises and property in question, and will likewise be entitled to receive, by way of further protection to the title, a transfer of all shares of the capital stock of the Norfolk and Petersburg Railroad Company, the Southside Railroad Company, the Virginia and Tennessee Railroad Company, and the Virginia and Kentucky Railroad Company, respectively, which were owned or held by the Atlantic, Mississippi and Ohio Railroad Company at the time of the filing of the original bill of complaint herein, and the Atlantic, Mississippi and Ohio Railroad Company is hereby directed to transfer over such shares of stock accordingly, and said purchaser will likewise be entitled to receive, by way of further protection to the title, the bonds mentioned in the nineteenth paragraph of this decree; and it is further adjudged and decreed, that by the sale and conveyance to be made as aforesaid of the property and franchises hereinbefore decreed to be sold by said master, the defendants in this action, and each and every of them, including the state of Virginia and the board of public works of said state, and all persons claiming under them, or any of them, subsequently to the commencement of this action, shall be absolutely and forever barred and foreclosed of and from all estate, right, lien, claim, and equity of redemption of, in, or to, or in respect of, said said property and franchises so sold and conveyed, and each and every part thereof.

31. The court further orders and decrees: That the receivers remain in possession of the mortgaged premises, and continue to operate the line of railroad after the sale, and until the conveyance thereof. They will keep a correct account of the earnings and income of the premises accruing after the date of sale, and if the sale should be confirmed, the purchaser, on delivery of possession by the receivers, will be entitled to receive the net income and earnings accruing subsequent to the date of sale, and the proceeds of such income and earnings.

32. The court further orders and decrees: That the master deposit all moneys coming into his hands under this decree, immediately upon the receipt thereof, in the Planters' National Bank of Richmond, Virginia, to the credit of this cause, to be paid out only in pursuance of the order of this court, and on the motion of, or on notice to, the complainants' solicitors. If the sale shall not be confirmed by the court, the amount of purchase-money paid by the purchaser to be refunded without deduction, unless the non-confirmation thereof shall be due to the fault of the purchaser, in which event such terms will be imposed as the court may think just and proper.

33. The court further orders and decrees: That the proceeds of sale shall be distributed as follows, that is to say: (1) To the payment of the costs and expenses of this cause, and of the execution of the trust on the part of the complainants, and all such fees to counsel as may hereafter be allowed and directed to be paid, and of all of the indebtedness of the receivers. (2) To the payment of the interest coupons, under the mortgage to the complainants, that have become due and payable before the day of sale, and that in computing the sum due in respect of such coupons, interest may be computed thereon, and in case the proceeds of sale shall be insufficient to pay such coupons in full, the same must be paid pro rata and without preference. Such interest coupons must be presented to the master for payment, who will be authorized to pay the same, in whole or in part, as the case may be, when the amount of the proceeds of sale, applicable to such payment, shall have been ascertained. Any surplus that may remain, after the payment of such interest coupons as aforesaid, will remain subject to the further order of the court, and all questions touching such surplus, and the distribution thereof, are reserved.

34. The court further orders and decrees, that all equities among the parties to this suit, all questions of cost, expenses and allowances, and fees of counsel, and all other questions not disposed of, or specially reserved in the foregoing decree, but properly arising under the same, or as proper subjects for further directions, are reserved.

Case No. 12,923.

SKIDMORE v. The POLLY.

[Anth. N. P. 200.]

District Court, D. New York. Sept. 20, 1808.

ADMIRALTY—JURISDICTION SHOWN BY LIBEL.

The admiralty court will entertain a libel where there is an apparent jurisdiction on the face of it, and no opposition.

This was a libel on a bottomry bond, executed to the libellant by one of the part owners of the sloop Polly. The libel set forth, that on the 1st day of April, 1808, at the city, and in the district of New York, A. B., owner of one-half of said sloop, &c., in consideration of a certain sum of money, paid to him by the libellant, executed to the libellant a certain bottomry bond, by which it was agreed, that the libellant should bear the hazard and adventure of the said sum on the one-half of said sloop, &c., during the space of two calendar months; and also set forth, that the said sloop was engaged in the North or Hudson river trade.

W. C. Mulligan, for libellant, having read the libel, and no claimant appearing, THE COURT suggested a doubt whether this was a case of admiralty jurisdiction, Hudson river being infra corpus comitatus, and the case was, therefore, laid over. Vide 2 Wils. 264; [Montgomery v. Henry] 1 Dall. [1 U. S.] 50.

At another day, however, THE COURT de-

cided, without argument, that as there was an apparent jurisdiction on the face of the libel, and as no one appeared in opposition, they would take cognizance of the case, and thereupon decreed a sale.

SKILLINGER, The R. W. See Case No. 12,-181.

SKILTON, Ex parte. See Case No. 1,459.

SKILTON (CLARK v.). See Case No. 2,834.

SKINNER (GAMMELL v.). See Case No. 5,210.

SKINNER v. The LULU. See Case No. 8,-604.

Case No. 12,924.

SKINNER v. McCAFFREY.

[2 Cranch, C. C. 193.] [1]

Circuit Court, District of Columbia. Dec. Term, 1819.

JURY—FEES—JURISDICTIONAL AMOUNT.

If the verdict be below the jurisdiction of the court, the jury is not entitled to the fee of twelve shillings.

[Cited in Hellrigle v. Dulaney, Case No. 6,343.]

In an action of assumpsit, the jury brought in a verdict for thirteen dollars. This court has not jurisdiction in cases under twenty dollars, and therefore could not render a judgment. It became a question whether a jury was entitled to the fee of twelve shillings.

THE COURT refused to order either party to pay the fee.

SKINNER (POTTS v.). See Case No. 11,-348.

SKINNER (UNITED STATES v.). See Case No. 16,309.

SKIPWITH (SHORT v.). See Case No. 12,-809.

S. K. KIRBY, The (UNITED STATES v.). See Case No. 16,310.

Case No. 12,925.

SKOLFIELD v. POTTER et al.

[2 Ware (Dav. 392) 394; 7 N. Y. Leg. Obs. 238; 12 Law Rep. 115; 7 West. Law J. 346; 2 Am. Law J. (N. S.) 385.] [2]

District Court, D. Maine. June 9, 1849.

SEAMEN—WAGES—CONTRACT BETWEEN OWNER AND MASTER—FREIGHT—CARGO.

1. When a vessel is let to the master, to be employed by him, and he to pay to the owners a certain portion of her earnings, the owners will be liable to the seamen for their wages, though by agreement the master is to have the entire control of the vessel, to victual and man her, and furnish supplies at his own expense; unless, at the time of shipping, this contract is made known to them, and they are informed that they are to look to the master as the only owner.

[Cited in Webb v. Peirce, Case No. 17,320; The Galloway C. Morris, Id. 5,204; The Horace E. Bell, Id. 6,702; The H. B. Foster, Id. 6,291; The Bowditch, Id. 1,717; The Montauk, Id. 9,717; The L. L. Lamb, 31 Fed. 33; Russell v. Rackett, 46 Fed. 201.]

[Cited in brief in Sims v. Howard, 40 Me. 277.]

2. The money, that is paid over by the master, is paid as freight, and the owners as receivers, and having an interest in the freight, are liable to the seamen for their wages.

[Cited in McCarty v. The City of New Bedford, 4 Fed. 829.]

3. The freight is hypothecated for the wages, and every part of the freight is liable for the whole wages. The owners, who have received freight under such a contract with the master, are liable for wages to the full amount of the freight in their hands, and not merely pro rata in proportion to what they have received.

[Cited in Poland v. The Spartan, Case No. 11,246.]

4. The merchandise is bound to the ship for the freight, and the freight to the seamen for their wages.

5. When the owners of the ship are also the owners of the cargo, the cargo owes freight to the ship, and this freight is pledged for the wages.

[Cited in Story v. Russell, 157 Mass. 157, 31 N. E. 754.]

6. The decision in the case Poland v. The Spartan [Case No. 11,246] reviewed and affirmed.

This was a libel in personam against the owners of the schooner Arrowsic, for seamen's wages. The libellant shipped at the port of Bath, as mate, on the 22d of September, 1848, on a general trading voyage, and continued on board, and did duty as mate of the vessel, in several voyages, two of which were to foreign ports, until the return of the vessel to Bath, on the second of May following. On his discharge, the master delivered to him a barrel of flour, part of the cargo belonging to the owners, and gave him an order on the owners for the balance of his wages due, amounting to $128, including the flour. The owners paid him $25 on the presentment of the order, and promised to pay him the residue in a few days. But after calling on them several times, and being put off from time to time, he sued out a libel. The owners, in their answer, not denying that the services have been rendered, set forth a defensive allegation, denying their liability for the wages. The defense relied upon is, that the vessel was let to the master on a verbal agreement; under which he was to have the use and control of the vessel, to employ her as he should choose, to victual and man her at his own charge, and to pay the owners for the use and charter of the vessel [one-half of her gross earnings, deducting] [2]

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

[2] [Reported by Edward H. Daveis, Esq. 7 West. Law J. 346, contains only a partial report.]

[2] [From 7 N. Y. Leg. Obs. 238.]

one-half of port charges. It was contended that having, by this contract, parted with the possession and control of the vessel, the master became owner for the voyage, or the term during which he employed her under this contract, and, as such, was exclusively liable for supplies and seamen's wages, and that they, as the general owners, were exempted from all liabilities for these charges.

J. M. Adams, for libellant.

P. Barnes, for respondents.

WARE, District Judge. It is admitted in this case, that the services have been performed, and that the wages are due. Some question was made on the evidence as to the balance that remains unpaid. Two charges of ten dollars each, made by the master for money advanced before the termination of the service, are objected to by the libellant. To prove these, the master produced his memorandum book, in which these sums were charged; and this, with his suppletory oath, would be sufficient as prima facie evidence even if the suit were against the master himself. They stand charged in the same book, which contains all the other charges, which are not objected to, and which agree with the account kept by the libellant himself. They are the two last charges in the account; and, at the time of his discharge, the parties came to a settlement, and a draft or order was given, and accepted by the mate, for the balance found due. In this settlement these sums were allowed, and it appears without objection at the time. I see no objection to their allowance now.

The important question in the case is, however, whether the respondents are liable for the wages. The schooner was let by a parol contract, by which the master, as hirer, was to have the possession and control of the vessel, was to navigate, to victual, and to man her at his own charge, and employ her in such business as he should choose, and to render to the owners, for the use of the vessel, one-half of her earnings. It was objected at the argument, that it was not competent to a party to prove such a lease of a vessel by parol evidence, at least to affect the rights of third persons. It is true that by the general maritime law, it is held that the title to vessels must be shown by writing—[The Sisters, 5 C. Rob. Adm. 159] 3 Kent, Comm. 130—and the contract of letting and hiring also should regularly be, and usually is, proved by a charter-party in writing. But it has been held by a variety of decisions in this country, that such a parol lease is valid, not only between the parties, but to conclude the rights of third persons, who are strangers to it. It seems also to be settled by the general current of the decisions, that under a letting of the vessel herself, whether by a written charter or parol contract, when the possession of the vessel is transferred to the hirer, and he appoints the master and crew, and sails her at his own expense, and has the entire control, that he is to be considered, with respect to third persons contracting with the master, as the owner, and that he succeeds to all the rights and liabilities of the owners. The general owners, or proprietors, have then no lien on the merchandise, for freight, nor are they personally liable for supplies furnished to the vessel on the contract of the master, but the hirer is substituted in their place, both as to their rights and liabilities. 3 Kent, Comm. 136; Conk. Jur. Law & Prac. Adm. 135. Nor does it make any difference, according to the decisions, though the charterer goes himself as master. Reeve v. Davis, 1 Adol. & E. 315. The cases in this country go further, and decide, when a vessel is taken by the master on the terms that this was, and he is to have the control, and direct the employment of her, and the earnings are to be divided between him and the owners, that this is to be considered as a lease or charter of the vessel. The master is held, under such an agreement, to be the special owner, and the general owners are not liable on his contracts for supplies furnished the vessels while thus employed. Taggard v. Loring, 16 Mass. 336; Emery v. Hersey, 4 Greenl. 407; Thompson v. Hamilton, 12 Pick. 425; Cutler v. Thurlo, 20 Me. 213; Thompson v. Snow, 4 Greenl. 264; Cutler v. Winsor, 6 Pick. 335.

But it is evident, when the owners put their vessel into the possession of the master on such terms, that the contract is of a mixed and somewhat ambiguous character. In one aspect, it may be considered as a charter of the vessel, and this as a mode adopted to determine the amount of the charter, or hire, to be paid. Viewed in another light, it partakes of the nature of a partnership, in which one partner furnishes the capital, and the other contributes his time and labor in the transaction of the business; and the profits to be divided. In a third view, it may be considered as a contract of hiring of the master, he to receive a share of the earnings of the vessel, instead of a certain and stipulated sum for his wages. In the various cases in which the subject has been brought before the courts for adjudication, it has been presented in these various lights; and without any great violation of legal analogies, or legal principles, the contract may be considered as belonging to one class or the other. In a case before Lord Ellenborough (Dry v. Boswell, 1 Camp. 329) the evidence, first offered, being that the owners and masters were to share equally in the profits, he declared that it was a partnership adventure, and that the master and owners were liable as copartners; a joint participation of profit and loss constituting a partnership; and when, on further evidence, it

appeared that the master was to have a share of the gross earnings, and not to be liable for losses, he pronounced it to be a contract of hiring of the master by the owners, and that this was only a mode of determining the amount of his wages. Generally, however, the courts have considered the contract as a charter of the vessel, and the master as owner for the voyage; and, as a corollary from this decision, it is held that the general owners are not liable for the master's contracts for supplies and repairs in the course of the voyage.

But though this is the general language of the authorities, there are exceptions. The case of Rich v. Coe, Cowp. 636, is a strong decision the other way. Lord Mansfield, in delivering the unanimous opinion of the court in that case, observed that whoever furnished supplies to a vessel, on a contract made by the master, has a three-fold security: 1. The person of the master. 2. The specific ship. 3. The personal liability of the owners; and, he added, that it makes no difference in the liability of the owners, that there is a private agreement between them and the master, by which he is to furnish the supplies and keep the ship in repair, unless the creditor has notice of the contract, and gives credit to the master individually.[3] The doctrine of Lord Mansfield seems to have been entirely satisfactory to Mr. Justice Story; for in his treatise on Agency (section 298), he states the law nearly in the words of this great master of maritime law, though the more recent decisions, which seem materially to qualify, if they do not directly overrule the doctrine, must have been quite familiar to his mind. Indeed, with respect to some of them, he has on other occasions not hesitated to express his doubts in very pointed terms. Arthur v. The Cassius [Case No. 564]; The Nathaniel Hooper [Id. 10,032]. And Chancellor Kent, though he seems to have yielded to the authority of the later decisions, expresses his own opinion in terms very nearly, if not entirely, agreeing with the doctrine of Lord Mansfield. "To whom was the credit given, seems to be the true ground on which the question ought to stand." 3 Comm. 135. Now, if this contract between the hirer and the owners is not known, the supplies are always furnished on the personal credit of the owners, as well as on that of the master. In the opinion, therefore, of Chancellor Kent, as well as of Judge Story and Lord Mansfield, although the owners have let the ship by a charter-party, under which the master, if he is their hirer, is bound to bear all the expenses of supplies, they ought to be held bound to third persons on the master's contracts, which fall within the scope of his ordinary authority as master, unless this private agreement is made known; for if it is not, supplies are always furnished on the credit of the owners. The owners, by putting the master in possession of the vessel, hold him out to all who are ignorant of the special contract, or at least enable him to hold himself out, as authorized to bind them personally, by all contracts relating to the usual employment of the vessel. And, if any one must suffer from his acts, it is more reasonable that the loss should fall on them than on strangers, who have given him credit on the ground of his official character.

It is admitted, however, that the current of judicial decisions is in favor of exempting the owners from their liability for ordinary supplies, while the vessel is employed under such a contract. But no decision has yet gone so far as to relieve them from their liability for seamen's wages. Curt. Merch. Seam. p. 336. The seamen have always this triple security, besides a direct hypothecary interest in the freight; and in all ages of the maritime law, their claim for wages has been highly favored, both on the ground of general commercial policy, and from the consideration of their own habits of carelessness and characteristic improvidence. They habitually enter into their engagements in reliance on these securities, and they ought not, on principles of public policy and natural justice, to be deprived of them by any refined and subtle distinctions of law, which are so alien from all their habits of thought and action.

This form of contract, of letting vessels to the master, to be employed on shares, has become very common in this part of the country, especially with respect to small vessels employed in the coasting trade. The master to whom the vessel is intrusted by the owners, is usually an enterprising and industrious young man, but ordinarily of limited pecuniary responsibility; for as soon as he acquires sufficient capital or credit, he becomes a part owner himself. These contracts are almost invariably by parol, and the terms are settled by a well-understood usage. The master, under the usage, is to bear the whole expense of victualing and managing her. The port charges in the various ports visited, are first to be paid from the gross earnings of the vessel, and the balance of the freight is to be divided in equal shares between the master and owners. The seamen often, and perhaps usually, have no knowledge of this private contract between the master and owners, and they engage their services in reliance upon the ordinary security, which the general marine law gives them. If this mode of letting the ship to the master, to be employed on shares, relieves the owners from their liability for wages, the contract will operate on the seamen, probably in a great majority of instances, as a perfect surprise. After the termination of his service, he finds one part, and an important part, of his security, the personal liability of the owner, is gone, under a private contract unknown to him; and that of the master may be, and often will be, worthless. There remain, it is true, the freight and

[3] In the case of Reeve v. Davis, 1 Adol. & E. 312, which seems directly to overrule this decision, the case itself was not referred to, either by the counsel or the court.

the vessel, but the freight is received from time to time, and there may be, and usually is, little remaining due at the end of his service. The ship is, indeed, an ample security. But since the act of March 3, 1847, c. 55 [9 Stat. 181], respecting costs in admiralty proceedings in rem, by which all costs are denied to the libellant, except for the payment of witnesses, unless he recovers more than one hundred dollars, the remedy against the vessel, for all useful purposes, is taken away, when the suit is for less than the sum named. And in these coasting and trading voyages, the balance of wages will rarely amount to so much as one hundred dollars. The consequence will be, that practically the seamen will have for their security nothing beyond the personal liability of the master. No judicial decision has yet extended this modern doctrine so as to deprive the seamen of their ancient right of recourse against the owners. The whole doctrine, in the cases to which it has been applied, is not free from difficulties on the principles of our law, except with the limitation mentioned by Lord Mansfield, that the creditor is notified of the non-liability of the owners at the time the credit is given. Because when he contracts with the master, he always has a right to believe that he is contracting with the owners, if he is not advised to the contrary. If he is informed, and then gives credit, he knows to what security he trusts. To extend the principle so as to bar the right of the seamen, would be repugnant to the general spirit of the maritime law, which has studiously provided in their favor the greatest security for their wages. I am unwilling to be the first judge to give it that extension. Indeed, the original doctrine of Lord Mansfield appears to me to be the most just, and most in harmony with the general principles of our law. The master, by the known rules of law, represents the owners as their agent, and is authorized to bind them by all contracts relating to the usual employment of the ship. The seamen enter into their engagements with the full confidence that the owners are bound for their wages. If it must be admitted that the decision of Lord Mansfield is overruled by the later decisions, these go no further than to exempt the owners from their liability for supplies, furnished by men who are in the habit of looking well to their securities. Rather than extend these decisions by analogy to the claims of the crew, unless I can clearly see that on principle the owners are exonerated, I am ready to say, "Malo cum Platone errare," —I will not add, "quam cum cæteris vera sentire," but,—sooner than follow the analogies of decisions, the soundness of which is so questionable, and carry them out, to the exclusion of the seamen from their recourse against the owners, unless, at the time of their engagement, they are plainly told that they are to look to the master as the only owner. The concealment of a fact of such importance, is a fraud on the men.

But I do not put the decision of the case on this ground alone. There is another, on which I think the owners are bound for the wages. By the ancient maritime law, the title of seamen to wages is made to depend on the issue of the adventure for which they are engaged. Unlike other contracts of hiring, their right to compensation does not depend alone on the fidelity and skill with which they perform the services for which they engage; but with whatever perseverance and courage they exert themselves, their right to compensation is suspended on contingencies, which may affect the ultimate result of the voyage; it is made dependent on what has been termed the fortune of the vessel. What, then, is this fortune to which the seamen must look? The ship, says Emerigon, in the condition in which she was at the time of her departure from the port of outfit, together with all the freight which is gained in the course of the voyage, form that fortune of the vessel, which constitutes the pledge to the seamen for their wages. Trait Des Assurances, c. 17, § 11. The privileged hypothecation, then, he adds, allowed to the mariners, comprehends every part of the ship, and every part of the freight, according to the nature of hypothecation, which is tota et in toto,—tota in qualibet parte. Their privileged lien is entire over the whole, and is entire in every part. The ship and the freight, with respect to wages, form one mass, and all that remains of either, at the end of the voyage, is pledged for their payment. The contract of the mariners, Emerigon goes on to say, is a species of copartnership. It is not indeed a partnership as to all the effects of that contract, but as to some of its consequences; for the seamen have no claim to a remuneration, but to the extent of the effects embarked in the enterprise, which they bring home. If all is lost, the mariners lose their wages, and they cannot then enforce the payent, by a personal action against the master or owners. But if all is not lost, whatever remains of the ship or freight, is specifically pledged for their payment. Freight earned and put ashore is saved from the effect of a supervening shipwreck, by which all that remains is lost. It is a partnership fund, that has entered the common chest, and is hypothecated to the seamen for their wages.

It is now more than twenty years since I was first called upon to examine this right of the seamen, to claim their wages out of the earnings of the vessel. It was in the very ably contested case of Poland v. The Spartan [Case No. 11,246]. In that case, it was held, that when goods of the owners themselves are shipped, they owed freight to the vessel; and though no stipulated freight could be agreed, that the seamen could proceed against the goods in specie, to enforce their rights to the amount of a reasonable freight, to be determined boni viri arbitrio. I am not ignorant that the doctrine was then considered, by some of the profession, as somewhat startling, for its supposed novelty and boldness. But

after ample time to review and reconsider the subject, I have seen no reason to retract or qualify the doctrine of that case. It is, in my judgment, a just and logical deduction from the peculiar character given by the law to the seamen's contract; and is supported by the highest authority in the maritime law. The owners, says Emerigon, who are shippers in their own vessel, have two qualities which ought not to be confounded. In quality of shippers, they owe a freight to the ship herself; and in their quality of owners, the ship owes a freight to them; and he adds, this freight is pledged to the crew. Des Assurances, c. 17, § 11, No. 2. It constitutes a part of that fortune of the vessel to which the crew are to look for their pay. To them, it makes no difference who owns the cargo. So far as they are interested, there is a freight earned, and, to the amount of their wages, it belongs to them.

I am aware of the dictum in the case of Sheppard v. Taylor, 5 Pet. [30 U. S.] 712, that "the cargo is not in any manner hypothecated or subjected to the claim of wages." This was but a dictum, and the point was not necessarily involved in the cause. It may be true that the cargo is not directly, but it certainly is indirectly bound for the wages. For it is a first principle of the maritime law, that the cargo is bound to the vessel for the freight, and another equally ancient and undoubted, that the freight is pledged for the wages. Indirectly, therefore, to the amount of the freight due upon it, the cargo is bound for the wages. The master is not obliged to deliver it until the freight is paid or secured, and if not paid, he may sell so much as is necessary to pay the freight. The seamen may, therefore, indirectly, through the master, proceed against the cargo itself, for their wages to the amount of the freight due. When the owners of the ship are the owners of the cargo, the seamen's claim on the freight can be enforced in no other manner but through the merchandise; and I see no objection in principle or convenience, to allowing the seamen to do that directly in their own name, which they may do indirectly through that of the master. Such was evidently the opinion of the English court of admiralty, in the case of The Lady Durham, 3 Hagg. Adm. 196. The court says that "a mariner has no lien on the cargo, as cargo. His lien is on the ship, and on the freight as appurtenant to the ship; and so far as the cargo is subject to freight, he may attach it, as a security for the freight that may be due." The doctrine maintained in the case of The Spartan seems also to have met the approbation of Judge Conklin. In his learned and valuable treatise on the Law and Practice of the Admiralty (pages 75, 76), he says that "it is recommended by persuasive considerations of justice, and supported by strong analogies in the undisputed principles of the maritime law."

It appears by the testimony of the master, who was examined as a witness in the case for the respondents, that he has paid over to them, at different times, $600, and that on a cargo of lumber carried for them the freight was $500, which has not been paid to him, but remains as a part of the earnings of the vessel in their hands. In addition to this, the freight, on the cargo brought home in the vessel on her return to Bath, was received and collected by one of the owners, and is now in their hands. Now every dollar of this money was hypothecated to the seamen, as soon as it was earned, for their wages. To the amount due to them, it was their own hard earnings, and whoever received it as freight, received it subject to their claims. As the freight, says Emerigon, is the fruit of the vessel, it is just that it should first be appropriated to pay the wages of those whose labor has produced it. This designation of freight is derived from the nature of things, while their privilege against the vessel is against common right. Assurances, c. 17, § 11, No. 3. It is true, that when the master pays to a creditor the money which he receives as freight, the seamen cannot follow it into the hands of such creditor. For it does not pass into his hands carrying with it the quality of freight. But to the owners, in this case, it is paid over as part of the earnings of the vessel, that is, as freight. It is said, indeed, that is paid to them, not as freight, but as charter for the hire of the vessel. But even admitting, under this contract of hiring on shares, that the master is to be considered as the special owner, that the general owners, as to contracts made by him with the seamen, as well as for supplies, are strangers to the vessel, and that these payments, made to them, are to be held as payments of charter, and not as payment of part of the freight, there will still remain in their hands all the freight earned on her return voyage to Bath, and $500 which they owe on the cargo of lumber. To this amount they have the earnings of the vessel in their hands, and the seamen might, in a suit against the master, have attached this as freight due.

It is said, if the owners are held liable for the wages on the ground that they have received freight, that they are liable only in the proportion which the amount they have in their possession bears to the whole amount earned. But if the decision were to be put on this ground alone, the consequence would not follow. The whole freight is hypothecated for the whole wages. And from the nature of the creditor's interest in the thing pledged, it is not subject to this division. Every part of the thing is pledged for every part of the debt, "propter indivisam pignoris causam." Dig. 11, 2, 65. And, therefore, if two things are pledged for one debt, and one chance to be lost or destroyed, the hypothecation or lien continues entire for the whole debt in that which remains. Domat, Lois Civiles, lib. 3. tit. 1, § 1, No. 13; Pothier, De L'Hypotheque, c. 3, 1; Pitman v. Hooper [Case No. 11,185]. But it seems to me, that the decision may more properly be put on a

broader ground. Where the owners put their vessel into the hands of a master, to be employed by him on shares, I am prepared to hold as a just deduction from the principles and general policy of the maritime law, that they will continue liable to the seamen for their wages, notwithstanding the entire control of the vessel may be surrendered to the master, unless the seamen, at the time of their engagement, are notified that the master is to be considered as the sole owner, and that they are not to be liable. The rights of the seamen ought not to be affected by this private agreement between the master and owners. Even if the doctrine of the modern decisions is admitted, and the owners are held not liable to merchants who furnish supplies, there are strong objections to extending the principle to the contracts of seamen. They enter into their engagements, in the confidence that they have the usual and legal securities for their wages. One of these, to which a seaman habitually looks, is the personal liability of the owners. But in this case, there will be in fact no owner, and the only personal security they have is that of the master. Another reason is, the freight, which is paid to the master, is the proper fund for the payment of the wages. In the hands of the master, the whole of it is liable for them. But here the freight is, from time to time, paid over for the hire of the vessel, and only one-half of it remains in his hands, at the close of their service, to respond for their claims. This private agreement, between the owners and master, operates as a perfect surprise upon them. My opinion is, that they ought to be held as owners. And further, in my judgment, they are liable for the wages as receivers of the freight. They have in their hands, according to the evidence, $1100 of the earnings of the vessel, besides all the freight received on the cargo she brought home to Bath. The money that was paid over to them was, by the very terms of their contract, paid as the ship's earnings, that is, as freight. In its quality of freight, it is liable for wages, in whosesoever hands it may be. It partakes too much of the character of subtlety, to call it charter, or the hire of the vessel. It is more consistent with justice, and I think quite as much so with the analogies of the law, to leave to it the name which the parties themselves have given it, and under that name the seamen have a right to receive their pay from it. If, indeed, the respondents were to be held liable simply as receivers of the freight, it might be necessary to amend the libel, by making the master a party, and then the services on them would operate as an attachment of the freight in their hands; and if I thought it necessary, I should not hesitate to allow an amendment to meet this posture of the case; but in my opinion it is not.

Independent of all these considerations, my opinion is that the respondents are liable on their express promise. When the libellant presented the order of the master, a part of it was paid, and a promise given to pay the residue. The libellant had a right to consider this as a distinct admission of their liability. If this order was to be considered as a piece of commercial paper, and the principles of the commercial law to be applied to it, they would be liable upon it as acceptors. For an acceptance may be by parol, or may be inferred from the conduct and acts of the party. Story, Bills Exch. § 243. In reliance on this promise, the libellant forebore to commence proceedings against the vessel, or the master. It is now too late for the owners to deny their liability. In every point of view, I think the libellant entitled to a decree for his wages.

Wages decreed, $103.12.

SKOLFIELD (ROBERTS v.). See Case No. 11,917.

Case No. 12,926.

In re SKOLL.

[16 N. B. R. 175;[1] 1 N. W. Rep. (O. S.) 108; 1 Month. Jur. 350; 9 Chi. Leg. News. 377; 6 Am. Law Rec. 15; 1 Tex. Law J. 42; 4 Law & Eq. Rep. 196; 24 Pittsb. Leg. J. 207.]

District Court, D. Minnesota. July 21, 1877.

BANKRUPTCY—ASSIGNMENT FOR BENEFIT OF CREDITORS—INJUNCTION.

Upon the institution of proceedings in bankruptcy an assignee for the benefit of creditors may be enjoined from interfering with the debtor's assets before an adjudication has been had.

Certain creditors of [Jacob] Skoll, a clothier at Minneapolis, claiming to represent one-fourth in number of his creditors, and one-third of the amount of his indebtedness provable under the bankrupt law, have commenced proceedings to have him adjudged bankrupt. On July 7th, Skoll made an assignment to one Clementson of his stock of goods for the benefit of his creditors equally. On filing the petition in bankruptcy, application was made for an injunction to restrain Clementson from making any transfer of the debtor's property, which was granted. A motion is now made to dissolve the injunction.

NELSON, District Judge. This assignment is a fraud upon the bankrupt law [of 1867 (14 Stat. 517)], and an act of bankruptcy. Such is the settled doctrine in this district. In re Burt [Case No. 2,210]. Clementson, the assignee, does not occupy the position of a bona fide purchaser. The assignment to him is voidable, and creditors can by bankruptcy proceedings set it aside. If they comply with the 39th section of the bankrupt law of 1867, as amended, the debtor will be adjudged a bankrupt, and the assignment having been

[1] [Reprinted from 16 N. B. R. 175, by permission.]

made by him when admittedly insolvent, his assignee in bankruptcy may recover the property or the value thereof. The bankrupt law contemplates a distribution of the debtor's assets in the federal court and a full administration in that jurisdiction; and provides that transfers or conveyances defeating its operation shall be void. It is manifestly then my duty to protect the right of creditors to have the property thus distributed, and to that end restrain, by injunction, the assignee under the state law, seeking to take the property from the control of the bankrupt court, and compel him to desist from disposing of it before an adjudication in bankruptcy. In that way only can full effect be given to the operation of the bankrupt law. Motion denied.

SKOOK (NORTHRUP v.). See Case No. 10,-329.

SKOOK (WELLS, FARGO & CO. v.). See Case No. 17,406.

Case No. 12,927.

SKRINE v. The HOPE.

[Bee, 2.] [1]

District Court, S. D. Carolina. Aug. 29, 1793.

SHIPPING—MASTER—HYPOTHECATION—SALE—CONDEMNATION AND SALE.

Owners of ships would be exposed to great and unjust loss, if much circumspection were not used previously to the condemnation and sale of their property. The master of a ship may hypothecate under certain circumstances; but cannot sell the ship.

[Cited in Tunno v. The Betsina, Case No. 14,236; The Annie H. Smith, Id. 420; Coyne v. Caplis, 8 Fed. 640.]

BEE, District Judge. The libellant, as part owner of this sloop, prays the court to decree a sale thereof, in order to have a division of the property. The libel charges that on the 7th July, 1791, the libellant purchased one half of this vessel from one Snetzar, who was then owner of the whole; that said Snetzar, on the 24th of December, 1792, made a fictitious sale of the sloop to Pitcher, who afterwards relinquished his purchase; that Snetzar induced two of the seamen belonging to the vessel to make a claim of wages, and to procure a sale of the sloop in Georgia, to William Tyler for £50, which sum was paid to Judson, who was, or pretended to be, a constable acting under legal authority. Libellant prays a sale as above, and also that he may be paid out of the proceeds what may appear due to him on account of the vessel. The answer of Tyler, who now claims the sloop, states that he bought her at public auction of the sheriff of Camden county in Georgia. That he paid a valuable consideration, and did not then know of any claim of said Skrine. Snetzar's answer was in court, but the proctor for the actor objected to it; and it was agreed that he should be examined viva voce. He was reluctant in answering particular questions, and prevaricated much. In some points he was directly contradicted by Magwood, the agent employed by Skrine and himself to draw a proper bill of sale. This witness saw Skrine pay the money, and receive formal possession. The sale in Georgia is also proved; by which it appears that Tyler also was a fair purchaser for valuable consideration. There was no evidence to shew that Skrine had forbidden the sale openly; though he had given notice of his claim to the constable who advertised the sloop for sale.

No proof was adduced of the proceedings of the court in Georgia, under which the vessel was said to be sold. The defendant's proctor rested his defence entirely on a defect of title in Skrine, arising from the eleventh section of the act of congress of 1st September, 1789 [1 Stat. 58], for registering and clearing vessels, &c. The intention of this was to relieve American owners of vessels from the duties on tonnage; but this advantage could not be claimed, unless they complied with certain regulations. Of these the regulation contained in the eleventh clause is one. It declares what transfers or sales shall be void, and that vessels so transferred or sold shall not be entitled to the advantages secured to vessels of the United States. But it is unnecessary to observe further upon this law, as it was repealed (with a few exceptions not relative to this case) by act of congress of 31st December, 1792 [1 Stat. 287], and 18th February, 1793 [Id. 305]. The fourteenth clause of the act of December, 1792, which was substituted for the eleventh clause of the act of 1789, shews what the framers of that law meant, and completely destroys the ground of defence principally relied on.

Proof of condemnation in a court of competent jurisdiction in Georgia might have vested a legal title in Tyler, who purchased for a valuable consideration, and have set aside the right of the libellant to his moiety. But no such proof has been produced. Great circumspection must be observed in all that relates to the condemnation and sale of vessels; for, otherwise, owners would hold their property by a very precarious tenure. Hence the master of a ship, though possessed of extensive powers, cannot sell the ship. His contracts with seamen must, if necessary, be fulfilled by hypothecation of the vessel to raise money, if other means fail; and supplies in a foreign port will justify a similar step; but they cannot wholly divest the owner of his property.

In this case, I am satisfied of Skrine's right, and therefore decree the sale prayed for in his libel; so far as to effect a division. As to profits, they do not appear to have been great, and there have been expenses which may be set against them. Tyler, the pres-

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

ent proprietor, appears to the court in a fair point of view. And, indeed, I have doubts of my power in a court of admiralty, to assess damages, or investigate these accounts. Let the sloop Hope be sold by the marshal of this court after due notice of fifteen days in one of the gazettes. After payment of the expenses of this suit, let one half of the net proceeds be paid to the libellant, and the other half to Tyler, one of the defendants.

Case No. 12,928.

The SKYLARK.

[2 Biss. 251;[1] 3 Bench & Bar (N. S.) 38; 5 Leg. Gaz. 336; 18 Int. Rev. Rec. 164, note.]

District Court, N. D. Illinois. Feb., 1870.

ADMIRALTY — DISTRIBUTION OF SURPLUS — EQUITY POWERS OF COURT—EXECUTION FROM STATE COURT — MARITIME LIENS.

1. The district court in admiralty has the right to exercise equity powers in the distribution of a surplus arising from a sale under decree to the parties entitled to such surplus, whether by federal or state law; and it is immaterial whether these parties have maritime liens.

2. The reason is, because there is a fund in court which cannot be taken out except by its order, and parties having rights in the vessel can only exercise them by coming into this court.

3. A purchaser under execution from a state court has no rights as against a decree in this court enforcing a maritime lien.

4. If he became the purchaser, the amount which he bid must be applied on his debt, and the balance only can be proved as a claim in this court.

5. It seems, that no claim would be valid as against a mortgage duly recorded under the act of July 29, 1850 [9 Stat. 440], except the lien by bottomry therein excepted.

6. Also, that a state legislature, by declaring a claim to be a lien upon a vessel, cannot override a mortgage duly recorded according to the law of congress.

[Cited in The Favorite, Case No. 4,699; The William T. Graves, Id. 17,759; The J. E. Rumbell, 148 U. S. 17, 13 Sup. Ct. 502.]

In admiralty. The Skylark belonged to the Lake Michigan Transportation Company in 1868, during which season various claims against the vessel were created. On the 16th of October, John Barker sued out an attachment against her in the state court at Chicago, obtained judgment, and at the sale under execution, bought her in for about $300. Subsequently a libel for wages of seamen was filed in this court, upon which a decree was obtained, and on the 14th of March, 1869, she was sold for $4,150, the money brought into court and all the maritime claims paid. Barker then filed a claim to the surplus as owner of the vessel, and other parties filed claims as material men, for supplies, etc.

[See Case No. 12,929.]

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

DRUMMOND, Circuit Judge. These claimants, it is conceded, have not what are termed maritime liens. Their liens are under the laws of the state—either of Illinois or of Michigan. The question of distribution came before the court at a former day, between Barker, the purchaser under the attachment, and the assignee in bankruptcy of the company—the original owner of the vessel. The question arose whether the vessel belonged to Barker or to the assignee. The court held that as between these two parties Barker was the owner, because he had purchased at a sale on a final process, issued before the commencement of the proceedings in bankruptcy, and that he had acted in good faith so far as the court could see, and, therefore, his right was paramount. The present, however, is not a controversy between two parties claiming to be owners of the vessel, but between two parties claiming a right to the surplus remaining after sale under a decree which overrides all other rights, as well claims under the state law, as under the attachment at the instance of Mr. Barker.

There can be no doubt of the right of this court exercising equity powers as a court of admiralty always exercises them in a proper case, to distribute the surplus to the parties who are entitled to it, either by federal or state law, and it is immaterial whether the parties thus claiming the surplus have maritime liens or not. It is not on that account that the court exercises this power as a court of admiralty, but because there is a fund in court which cannot be taken out of court except by its order. Parties having rights to this vessel cannot exercise them, except by coming into this court. The vessel has been sold under a paramount right, and the party who holds under the sale in admiralty, has, of course, a perfect title; therefore, they must come into this court that their rights may be adjudicated.

The point is, what are their claims upon this fund? It is insisted that because the court held as it did, between Barker and the assignee, that it must now hold—these parties having no maritime liens—that Barker's right is superior to theirs. It by no means follows. That was a question between two parties claiming to be owners. This is between creditors; and Barker as against this decree has no right whatever. It is also insisted that as this court decided in the case of The Grace Greenwood [Case No. 5,652], that a mortgagee holding a ship under a mortgage recorded in conformity with the act of congress of July 29, 1850, had a prior right as against parties who had claims declared to be liens by the state law, that therefore the court must hold that Barker has a prior right. That is a non sequitur for the reason already stated. The question in that case was whether claims for supplies created after the mortgage was recorded, should override the rights of the

mortgagee. In the absence of any special equities in favor of those claimants, it was held that the mortgage was a superior right.

The language of the act of 1850 is, that "no bill of sale, mortgage, hypothecation or conveyance of any vessel or part of any vessel of the United States shall be valid as against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, etc., be recorded in the office of the collector of the customs where such vessel is registered or enrolled: Provided, that the lien by bottomry on any vessel created during her voyage by a loan of money, etc., shall not lose its priority, or be in any way affected by the provisions of this act." 9 Stat. 440. Bearing in mind the language of the supreme court in the Reed Case (Pratt v. Reed, 19 How. [60 U. S.] 359), which is familiar to all admiralty lawyers, it is doubtful whether any claim, except in the character mentioned in this proviso, would be valid as against a mortgage properly recorded under this act of congress.

I wish it distinctly understood that I shall not hold, unless told so to do by the supreme court of the United States, that every claim which a state legislature may declare to be a lien against a vessel, shall override a mortgage properly recorded under the law of congress. These were the reasons that produced the decision in the Grace Greenwood Case [supra], to which decision I adhere.

These parties stand, so far as their claims in equity are concerned, upon an equal footing. Barker bid in the Skylark at his own risk, obtaining no other title than the judgment, execution and sale gave him, and, as against the decree of this court, no title whatever. As a creditor, he has no superior right to these claimants. If the judgments obtained by him were for supplies, so are these claims for supplies. It is simply a question of how this fund is to be distributed, and what are the equities operating upon its distribution. I believe the sum bid for the vessel by Barker was much less than the amount of the judgment. The amount for which he obtained his title, of course, must stand as a satisfaction upon the debt, but the balance, provided it has the same equity that the claim of these other parties have, shall be treated in the same way. The claim of Mr. Stevens will be disallowed altogether. He was a stockholder in the company, and superintendent in the management of its business, and in the running of its boats. I think it would be unjust that he should have the same advantage as third parties, who furnished supplies on the faith of his contracts. I shall allow Barker to come in, and if he is on the same footing as the rest, I shall order the balance to be distributed among them pro rata.

Decree accordingly.

NOTE. See The John Richards [Case No. 7,361], and cases there cited; also Ashbrook v. The Golden Gate [Id. 574]. That a state law cannot impair a maritime lien, see decision of Wells, J.,—district of Missouri,—in case last above cited. In the case of Marsh v. The Minnie [Id. 9,117],—district of South Carolina,—Magrath, J., held that a maritime lien for repairs in a case of necessity must be preferred to a mortgage duly recorded, but that the mortgagee's lien was prior to all other parties. That seamen's lien for wages is not divested by sale of vessel on execution against owner, see Foster v. The Pilot [Id. 4,980]. A general maritime lien cannot be divested by the legislature of a state. An admiralty sale alone can judicially pass the title to a vessel, discharged of liens. Hill v. The Golden Gate [Id. 6,491]. Where a vessel was mortgaged in Maine, and afterward went to New Orleans, where she was attached by an ordinary creditor, and the mortgagee intervened and claimed the vessel under his mortgage, held the attachment should be set aside, the suit dismissed, and the mortgagee declared the owner. Dobbin v. Hewett, 19 La. Ann. 513. See The N. W. Thomas [Case No. 10,386], and authorities there cited.

Case No. 12,929.

The SKYLARK.

[4 Biss. 388; [1] 6 Chi. Leg. News, 239.]

District Court, N. D. Illinois. July 7, 1869.

RIGHTS OF EXECUTION CREDITOR — CANNOT SELL BANKRUPT'S PROPERTY—LIEN—HOW ASSERTED—CREDITOR CANNOT SELL SECURITIES — COURT WILL RESTRAIN.

1. An execution creditor, without leave of the bankrupt court, has no right to sell under his writ after the filing of a petition in bankruptcy against the debtor; and a sale so made passes no title.

2. The creditor may assert his lien in the bankrupt court, but cannot control the property as against the assignee.

3. A creditor holding security has not an absolute power over his securities, and the court will, on application of the assignee, restrain the creditor from selling them.

In admiralty. In October, 1868, the propeller Skylark was owned by the Lake Michigan Transportation Company. She was attached in the state court, under the foreign attachment law of Illinois, the company being a corporation of Michigan. On the 11th of November, 1868, the Lake Michigan Transportation Company having been served with process in an attachment suit, a judgment in personam was rendered against the company, and a general and special execution was placed in the hands of the sheriff. The Skylark had been attached upon the mesne process, but was then held upon the final process or execution. The execution did not show any new seizure, but the sheriff sold by virtue of the execution. The company having been adjudicated a bankrupt prior to the sale, the assignee claimed the propeller.

Chas. Hitchcock, for judgment creditor.

As matter of law, when this general execution went into the hands of the sheriff, it

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

became a lien upon all the property of the corporation. On the 11th of November, 1868, the execution went into the hands of the sheriff, and subsequently proceedings were instituted in bankruptcy, but the attachment having matured into an execution lien prior to the filing of the petition, the proceedings in bankruptcy do not divest the lien of the execution.

R. Rae and Samuel W. Fuller, for assignee.

DRUMMOND, District Judge. I do not think the sale was valid. There might have been a lien, but I think the proceedings in bankruptcy vested in the bankrupt court the property of the bankrupt. The creditor could go into the bankrupt court and claim the lien. That should be done, admitting that the lien was a valid one. The assignee has a right to the property subject to the lien. The creditor may hold on to the lien, and require the payment of the money before he relinquishes it, or he may proceed with the execution, with the consent of the bankrupt court, but he cannot control the property as against the assignee.

Where a party has property in his possession, stocks, notes, or securities of any kind, upon which he has made an advance, and undertakes to sell it, the assignee can stop the sale, and prevent the property from being sacrificed. But the court would require the holder to be repaid his advances on the property, whatever they might be. He has not an absolute but a qualified power over the property.

There is force in this consideration; there might have been a very small claim against this vessel under the attachment. It was sold after the petition in bankruptcy was filed. Now by that sale, if the absolute control over the property is acquired, it might be for a very inconsiderable portion of her value.

The sale being invalid, the title still remains in the assignee, subject to the lien of the judgment creditor. Decree accordingly.

[See Case No. 12,928.]

NOTE. If there is a valid lien under the state laws, it will follow the property into the court of bankruptcy, and will be there recognized, protected and enforced. The principle, supported by authority, seems to be that whenever the law gives a creditor the right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of the debt; but the assignee, not the creditor, must determine what course shall be pursued in regard to it. In re Wynne [Case No. 18,117].

Where the sheriff has made a levy on execution, before the commencement of the proceedings in bankruptcy, and the validity of the judgment upon which the execution issued is not questioned, he may be allowed to sell, unless the sale would be injurious to the general creditors. Pennington v. Sale [Case No. 10,939]; Jones v. Leach [Id. 7,475]; In re Bowie [Id. 1,728]; In re Wilbur [Id. 17,633].

The commencement of proceedings in bankruptcy transfers to the bankrupt court the jurisdiction over the bankrupt, his estate, and all parties and questions connected therewith, and operates as a supersedeas of the process in the hands of the sheriff, and as an injunction against all other proceedings than such as might be had under the authority of the bankrupt court, until the question of bankruptcy is disposed of. Jones v. Leach [supra].

The jurisdiction of a district court of the United States, sitting as a court of bankruptcy, is superior and exclusive in all matters arising under the state statutes. No court of an independent state jurisdiction can withdraw the property surrendered, or determine, in any degree, the manner of its disposition. In re Barrow [Case No. 1,057].

Where the property would be sacrificed by a sheriff's sale, but by proper management could be sold for a sum sufficient to pay the judgment creditor in full and leave a balance for the general creditors, an injunction will be granted. In re Schnepf [Case No. 12,471].

The bankrupt court has power, where a judgment was obtained in a state court, and execution issued thereon, and levy made by the sheriff on debtor's property before he filed his petition in bankruptcy, to allow the goods to be sold under the execution, or to enjoin proceedings thereunder, and to order the assignee to take possession and sell the goods, with leave to the judgment creditors to apply for an order to have their liens satisfied out of the proceeds. In re Schnepf, supra.

A mortgage creditor may, however, upon notice of the assignee, apply to the court to have the mortgaged property sold. In re Bigelow [Case No. 1,396]; In re Davis [Id. 3,618]; In re Ruehle [Id. 12,113]; In re Smith [Id. 12,984]; In re Frizelle [Id. 5,133].

Some of the state courts have held that where a sheriff had seized the property under final process, the ordinary bankruptcy proceedings do not interfere with the proceedings by the sheriff, and that the sheriff should proceed to sell the property unless prevented by some proceeding instituted in the bankruptcy court. Sharman v. Howell, 40 Ga. 257; Fehley v. Barr, 66 Pa. St. 196. Such, however, is not the ruling of the federal courts.

A sale made, whether under judgment or mortgage, without the consent of the bankruptcy court, is subject to be set aside by that court. Davis v. Anderson [Case No. 3,623]. But where execution on final judgment has been levied prior to the commencement of bankruptcy proceedings, the possession by the officer cannot be disturbed by the assignee; he is only entitled to the residue after satisfying the execution. Marshall v. Knox, 16 Wall. [83 U. S.] 551.

Case No. 12,930.

The SKYLARK.

[1 Brown, Adm. 36.] [1]

District Court, E. D. Michigan. Feb., 1872.

AFFREIGHTMENT—BILL OF LADING—STONE PURCHASED AS CARGO.

A document purporting on its face to be a bill of purchase by a vessel of certain stone, and signed by her master (the stone being delivered to her as cargo), has none of the elements of a bill of lading, and cannot be interpreted as such. Nor is the vessel holden for stone purchased by her master as cargo.

Libel for breach of contract of affreightment.

The libel alleged the shipping by libellant

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

of a quantity of building and limestone on board the schooner at Marblehead, in the state of Ohio, on the 23d day of July, 1867, consigned to William Becker, of New Baltimore, in the state of Michigan, and that the libellant received "from the master of said schooner a bill of lading, a receipt and a contract whereby the said master charged the said vessel with the performance of said contract." The libel further alleged a breach of the contract and a conversion of the stone by the master to his own use, and that the same was worth $111 50, for which amount, with interest, the libellant claimed a decree against the vessel. All the material allegations of the libel were denied by the answer; and it was averred that claimant became the purchaser of the schooner in good faith after such alleged contract and breach, and for a valuable consideration, and that libellant's claim, if he ever had any, had become stale by lapse of time, and ought not now to be enforced.

H. B. Brown, for libellant.
W. A. Moore, for claimant.

LONGYEAR, District Judge. The shipping of the stone and the bill of lading and contract being denied, it was incumbent on the libellant to sustain the same by a preponderance of proof. The libellant Conrad was sworn as a witness, and after testifying to the shipping or placing on board the schooner a load of stone, produced as and for the "bill of lading, receipt and contract" mentioned in the libel the following document:

"Marblehead Island, O., July 23, 1867.
Schooner Skylark, of New Baltimore, Bought of Michael Groh & Co., Dealer in Building, Blockstone and Limestone.
To W. Becker.
25 cords lime and building stone.

16 cords of building stone, $5 not paid, amount to	$ 80 00
And $3 50 for limestone	31 50
9 cords limestone	$111 00

"(Signed) Porter Chortie."

This document is partly printed and partly written, and the written portion bears upon its face strong evidence of having been written at different times. The words "To W. Becker" (inserted in the manner above indicated), in pencil, especially have that appearance. It is due, however, to Conrad to state that he testified that those words were there when Chortie signed it. But this paper bears no resemblance to and contains none of the elements of a bill of lading or contract of affreightment. It is quite unnecessary to specify what it lacks, because it lacks everything going to make up such a document. It is not even signed by Chortie as master, although it was proven that he was master and owner of the schooner at the time. It is simply an acknowledgment by Chortie, in plain and explicit terms, that he had bought the stone of libellant at the prices named, and that the same was not paid for. It is true that Conrad testified that they usually took their bills of lading in that form, although he produced none, but even if that is so, it does not make it a bill of lading, or entitle libellant to use it as such for any purpose whatever. And then what he said to Warwick, the claimant, as testified to by the latter, that he had sold a load of stone to Chortie, and that he must have his pay for it from Chortie or from Warwick, is consistent with the document as it reads, and is therefore entitled to much weight. And the circumstance that libellant did not send a bill of lading or any notification whatever to the person to whom it is now claimed the stone was shipped, taken in connection with the fact testified to by that person, that he had not ordered the stone, is utterly inconsistent with the idea that the transaction was considered a shipment as freight at the time. To my mind it looks very much like this: that the transaction was a sale of the stone to Chortie, and that the libellant supposed that by making out the bill of sale to the schooner by name and obtaining the signature of Chortie, the master and owner at the time, the vessel would be holden for the purchase price; but having ascertained that no such result would follow, he now seeks a change of base by treating the transaction as one of affreightment. This, of course, cannot be allowed to be done. The preponderance of proof, instead of being in favor of the libellant, I think is largely against him.

Libel dismissed.

Case No. 12,931.

SKYREN v. LINDO.

[Cited in Short v. Wilkinson, Case No. 12,810. Nowhere reported; opinion not now accessible.]

SLACK (FRANCIS v.). See Case No. 5,041.
SLACK (JOHNS v.). See Case No. 7,363.
SLACK (MAY v.). See Case No. 9,336.
SLACK (METROPOLITAN R. CO. v.). See Case No. 9,506.
SLACK (MICHIGAN CENT. R. CO. v.). See Case No. 9,527.
SLACK (TUCKER v.). See Case No. 14,226.

Case No. 12,932.

SLACK et al. v. WALCOTT et al.

[3 Mason, 508.] [1]

Circuit Court, D. Rhode Island. June Term, 1825.

EQUITY — BILL OF REVIVOR — DEVISEE — WILLS — DEVISE — PROBATE — LAND IN ANOTHER STATE — PLEADING.

1. A devisee cannot maintain a bill of revivor, but he may maintain an original bill in the na-

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

ture of a bill of revivor, and thus obtain the benefit of the original proceedings, as well before as after there has been a decree in the original suit.

[Cited in Chester v. Life Ass'n of America, 4 Fed. 489; Sharon v. Terry, 36 Fed. 353.]

2. The fact, that by the lex loci, where land lies, a probate of a will is conclusive, does not enable a devisee to maintain a mere bill of revivor; for none can maintain it but a privy in representation, as an heir, or executor.

3. Where a suit in one state brings incidentally in question the title to land held under a devise in another state, it is not necessary that there should be a probate of the will in the state where the suit is brought, before it can be used as evidence of a title.

[Cited in The Boston, Case No. 1,669.]

[Cited in Mannville Co. v. Worcester, 138 Mass. 89. Cited in brief in Wooster v. Great Falls Manuf'g Co., 39 Me. 247.]

4. Quere, whether a devisee of land, in a state where the probate is conclusive, is bound to make the heirs at law parties to an original bill in the nature of a bill of revivor to revive a suit against third persons respecting the land.

5. Semble, that the exception, that a devisee cannot sue out a bill of revivor may be taken by answer as well as by plea or demurrer.

This was a bill in equity by the plaintiffs, citizens of Massachusetts, who are owners of a mill in Massachusetts, on the east side of Pawtucket river, against the defendants [Edward Walcott and others], citizens of Rhode Island, who are owners of mills, &c., in Rhode Island, on the west side of the same river, the river forming the boundary between the two states. The bill was brought to establish the title of the plaintiffs to a prior use of the water for the purpose of supplying their mill, and alleged an obstruction of the accustomed course of the water to their mill by the defendants, by withdrawing it to the use of the defendants on the Rhode Island side of the river; it prayed for an injunction and for further relief, &c. After the answers had come in and the cause was at issue and nearly ready for a hearing, one of the plaintiffs died, having made his will, and by it devised his interest in the mill to one Edward Walcott. The will was duly proved and approved in the proper probate court of Massachusetts, by the laws of which state a probate of a will is equally conclusive upon real and personal estate. The devisee, Edward Walcott, and the other plaintiffs, now brought a bill of revivor to revive the suit, not making the heirs at law of the testator parties, nor assigning any reason for the omission.

The cause came on for argument upon the question, whether, under all the circumstances, a bill of revivor, such as was here brought, was a proper proceeding by a devisee.

Mr. Whipple, Thomas Burges, and Mr. Webster, for plaintiffs and devisee.

Searle & Cozzens, for defendants.

STORY, Circuit Justice. The question in this case is, whether, under all the circumstances, the devisee is entitled to revive this suit by a simple bill of revivor, in this court. I say, in this court, because it seems admitted in the reply, that in the chancery of England a devisee is not entitled to a bill of revivor. If, indeed, this were controverted, the authorities are so numerous and uniform, that the point must be considered by this court as settled, if any point can ever be deemed settled by constant practice or adjudication. Backhouse v. Middleton, 1 Ch. Cas. 173, Freem. Ch. 132; Mitf. Eq. Pl. 66; Coop. Eq. Pl. 69, 77; Bart. Suit in Eq. 153, note; Wyatt, Pract. Reg. 90; 1 Harris, Pr. c. 11, pp. 71, 73; Jones v. Jones, 3 Atk. 110, 216; Gilb. Forum Rom. c. 9, p. 172; Blake, Ch. Prac. 42; Beames, Pl. Eq. 282, 291, 292; Osborne v. Usher, 6 Brown, Parl. Cas. 20; Huet v. Lord Say, Sel. Cas. Ch. 53; 2 Eq. Cas. Abr. p. 2, pl. 7; 4 Vin. Abr. "Chancery," H, a, pl. 17, p. 432; Mos. 44. If a bill of revivor is brought, where it does not properly lie, there is no doubt, that the objection may be taken by plea or demurrer. Beames, Pl. Eq. 296; Coop. Eq. Pl. 211, 302; Merrywether v. Mellish, 13 Ves. 161, 435; Mitf. Eq. Pl. 164, 229. It is indeed suggested in Harris v. Pollard, 3 P. Wms. 348, 2 Eq. Cas. Abr. p. 2, pl. 4, that it can be taken in this mode only, and not by answer. But if this proposition be true at all, it is true only sub modo and to a very limited extent; for if the plaintiff does not at the hearing shew a good title to revive, he can take nothing by the suit. Lord Redesdale in his treatise (page 229) evidently considers it in this light; and Lord Eldon, in Merrywether v. Mellish, 13 Vez. 161, 163, seems to have thought the objection might be taken either by plea or answer, where it did not appear on the face of the bill.

It is more important to examine the cases, in which a bill of revivor will lie, and to ascertain, what are the reasons upon which a devisee is held not entitled to revive. The general rule is, that no person can revive a suit abated by the death of a party, unless he is in by privity with the deceased. But it is not sufficient, that he may in a legal sense be a privy in estate; he must be a privy in representation. Lord Coke, in 1 Inst. 271, says, there are four sorts of privies, viz. privies in estate, as donor and donee, lessor and lessee; privies in blood, as heir and ancestor; privies in representation, as executors and administrators; and privies in tenure, as lord and tenant; which are all reducible to two heads, privies in law, and privies in deed. Now the right to revive is not applicable to all these different sorts of privies; but by the authorities is expressly confined to persons, who are in privity by representation, such as heirs in relation to the real estate, and executors and administrators in relation to the personalty. There is, indeed, the case of Dunn v. Allen, 1 Vern. 426, in which it is supposed, that Sir John Trevor, the master of the rolls,

permitted a purchaser to maintain a bill of revivor. If this decision be correctly reported, it is inconsistent with the current of authority, and must be deemed to have been repudiated. It has been often determined, that purchasers, assignees, devisees, and other persons coming in privity of estate, but not of representation, are not competent to bring a bill of revivor. Backhouse v. Middleton, 1 Ch. Cas. 173, 174; Freem. Ch. 132; Huet v. Lord Say, Sel. Cas. Ch. 54; Clare v. Wordell, 2 Vern. 548; Minshull v. Lord Mohun, Id. 672; 2 Eq. Cas. Abr. p. 2, pl. 7; Harrison v. Ridley, 2 Comyn, 589; Hind. Ch. Prac. 47, 69; Coop. Eq. Pl. 63, 64, 77; Wyatt, Pract. Reg. 90; Mitf. Eq. Pl. 66, 88; 1 Harris, Ch. Pr. Ch. 11, 71, 74; 1 Atk. 88, 571; 3 Atk. 216; Toth. 174; Com. Dig. "Chancery" F. But in such cases they are not without remedy to obtain the benefit of the former proceedings; for by an original bill in the nature of a bill of revivor, they may draw to themselves the advantages of the former suit, in whatever stage it may be at the time of the abatement; and if that happens before a decree, they may carry on the suit to a final decision. It has been intimated in the argument at the bar, that such an original bill lies only, where there has been a decree; but this is founded in a mistake. That it lies in all stages of the proceedings is clearly laid down by Lord Redesdale, in his excellent treatise on Pleadings in Chancery (pages 66, 88). See, also, Hind, Ch. Prac. 69; Bart. Eq. Prac. 154, note; Coop. Eq. Pl. 69, 77; Merrywether v. Mellish, 13 Ves. 161, 435; Fallowes v. Williamson, 11 Ves. 306. The same doctrine is recognised by Lord Hardwicke in an anonymous case in 1 Atk. 88, 571, and was acted on in Harrison v. Ridley, 2 Comyn, 589, and Huet v. Lord Say, Sel. Cas. Ch. 53. In short, privies in estate by deed are entitled to the same benefit of the proceedings upon an original bill in the nature of a bill of revivor, as privies in law are upon a bill of revivor.

The argument then addressed to the court upon the insufficiency of the reason assigned in the books for confining bills of revivor to heirs and representatives, viz. that they are in privity of title, does not meet the whole difficulty. The rule does not affect to give the right upon mere privity of title, but upon privity of title derived by act of law, in contradistinction to that from the act of the party. Whether the distinction was originally founded in good sense or not, it is now too late to inquire. It will be sufficient for the court, that it is established, if its applicability to our jurisprudence and practice is not overcome by some controlling propriety. But it does not seem at all difficult to comprehend the origin and principle of the rule. When a party plaintiff dies, whose interest is transmitted to some other person, if the title be that of mere representation in law, there is no change in the title itself, and the only question, that arises, is, who is the person entitled to take as representative, that is, in respect to real estate, who is the heir, and in respect to personal estate, who is the executor or administrator. When this fact is ascertained the person succeeds by operation of law to the whole title of the deceased. A bill of revivor in such case merely substitutes the representative in lieu of the deceased, and states no new fact as to title, except that of transmission by operation of law. The title of representation, or heirship, at least in a court of chancery, is not disputable; but the person, in whom it is vested, is alone to be ascertained. Coop. Eq. Pl. 63, 64; Mitf. Eq. Pl. 63, 64; 2 Eq. Cas. Abr. p. 2, pl. 7; Gilb. Forum Rom. 173. But when a party plaintiff claims a title by purchase or devise, he introduces a new title not previously in the case, and which is controvertible, not merely by the defendants in the bill, but also by the heirs at law. As to these parties the suit is original; it does not merely revive the old suit, but it states new supplementary matters calling for an answer. So far then as it states such matter, it is an original bill; and so far as it seeks to revive upon that matter, it is in the nature of a bill of revivor. The practice conforms to this view of the doctrine. In the case of a bill of revivor the defendant may for his own benefit by plea, answer, &c., show cause against the revivor, as that the plaintiff is not heir, &c.; but no answer is absolutely necessary, if the heirship is not intended to be denied; for upon mere motion without answer, when the time for it is out, the cause will be revived as of course. The omission to answer is deemed a virtual admission of the heirship. Hind, Ch. Prac. 48, 49; Coop. Eq. Pl. 71, 72; Harris v. Pollard, 3 P. Wms. 348; Wyatt, Pract. Reg. 90, 91. And in the subsequent progress of the suit no claims are litigated, which did not remain undecided at the time of the abatement.

Lord Chief Baron Gilbert in his Forum Romanum (chapter 9, p. 172), states the reason of the rule in the following manner: "This subpœna (ad revivendum) is only for the heir, executor, or administrator, who come in in privity, as they call it, that is, in immediate representation to the party litigant deceased; for a devisee or assignee of any plaintiff cannot have a subpœna ad revivendum after the decease of such plaintiff; and this for two reasons. First, because they looked upon a suit to be a chose in action, which was not assignable over for fear of maintenance; but this reason has been long since obsolete in the court of chancery, where they allow the assignment of such interest. But the second and better reason is, because where the party devises or assigns his interest and dies, if the devisee or assignee were to bring his bill of revivor against the defendant, the heir or executor would be pretermitted, who might have a right to contest such disposition; and, therefore, he must bring his original bill, and make the heir or executor a

party." It will be at once perceived, that the reason here assigned does not proceed upon mere privity of title, but upon the title being by act of the party, and liable to contestation by third persons, whose interests are or may be affected. If they are to be brought before the court, it can only be by an original bill, since they are not parties to the old suit.

But the argument pressed upon the court is, that the reason here assigned, however correct and proper to regulate the practice in chancery in England, is inapplicable to the present case, because the probate of the will in Massachusetts is conclusive as to the real and personal estate, and cannot be controverted by any person whatsoever; and being conclusive there, it ought, as to real estate devised by it, to be held equally conclusive in the tribunals of every other jurisdiction. But of what is the probate of the will conclusive? Certainly of no more than the sanity of the testator, his competency to make the will, and its actual lawful execution. As to the construction of the terms of the will, the estates devised by it, and the parties to whom they are devised, these are things, which the probate does not assume to touch, or to decide. They remain open for contestation in every suit, in which they may be legally put in issue. The probate does not show, that the present plaintiff is the person named in the will as devisee of the intestate's interest in the mill; nor what estate he is entitled to. It establishes no more than that the will has been lawfully executed, and as such, is, according to its true import, conclusive upon all persons claiming as heirs or representatives, or devisees under him, as well as upon strangers. If the present suit were pending in Massachusetts, instead of Rhode Island, perhaps the heir might be entitled to say, that he ought to be made a party upon the English principle, because he might contest the sufficiency of the devise to the plaintiff, though not the conclusiveness of the probate. I do not say, that the heir is an indispensable party in such a case, or in the present case. If he lived out of the jurisdiction, and that fact were properly charged in the original bill in the nature of a bill of revivor, it would not, upon principles already asserted in the federal courts, be difficult to hold, that his being a party might be dispensed with. But whether living within the jurisdiction he ought to be made a party, the probate of the will being conclusive, constitutes an inquiry of considerable delicacy and importance. In England the will may always be contested by the heir, unless it has been proved in chancery against him. See Ogle v. Cook, 1 Ves. Sr. 177; Potter v. Potter, Id. 274; Grayson v. Atkinson, 2 Ves. Sr. 454; Bootle v. Blundell, Coop. t. Eld. 136. When so proved, if in an ejectment at law he attempts to contest it, the court of chancery will grant an injunction. Ogle v. Cook, 1 Ves. Sr. 177. But the decree establishing the will in such case does not seem to be evidence, except as between the parties to the bill and their privies, exactly as in other cases of decrees. It would not be conclusive against the heir in any suit with other parties. In this respect it differs from the probate of a will in Massachusetts. I shall leave this point, whether the heir is a necessary party to the new bill, to be decided, when it comes regularly before me. At present it is not presented in such a shape as calls for the judgment of the court; and I should feel extreme reluctance to decide it without further consideration. I am not prepared, however, to accede to the argument of the defendant's counsel, that the will in this case is not admissible in evidence until after probate in the state of Rhode Island. It does not strike me, that any such probate for the purposes of this suit is necessary. The mill in controversy is situated in Massachusetts; the river, the use of whose waters is claimed as appurtenant to the mill, is the boundary of the two states, and the waters, therefore, partly flow in each state. The right, however, is not a distinct right to the water, as terra aquâ coöperta, or as a distinct corporeal hereditament, but as an incident to the mill, and attached to the realty. It passes by a grant of the mill, and has no independent existence. It is not real estate situated in Rhode Island. It is an incorporeal hereditament annexed to a freehold in Massachusetts. And a conveyance of the mill, good by the laws of the state, where the mill is situated, conveys all the appurtenances. The wrong done by stopping the flow of the water by any obstruction or drain in Rhode Island is an injury done to the mill itself in Massachusetts. In a just sense, the wrong may be said to be done in both states, like the analogous case of an injury to land lying in one county by an act done in another county. See Com. Dig. "Action" N, 11, cites 3 Leo. 141; Bulwer's Case, 7 Coke, 2 b.; Fitzh. Abr. "Action on Case," pl. 36. The devisee is entitled to the remedy also by the laws of Massachusetts as the owner of the mill. His title, when unimpeachable by the law of Massachusetts, does not by the general principles of public law require any new probate in Rhode Island. It could receive no new validity from such probate. It could lose none without it. Suppose an ancient house situate on the boundary line of a state, and a person in the adjacent state obstructs its ancient lights, would it be contended, that the right to use such ancient lights was real estate in the adjacent state? And if the title were derived by grant, or by will, would it be contended, that a registry of the deed or a probate of the will would be necessary in each state before any redress could be obtained by the owner? If necessary at all, it would be equally so, whether the suit were brought in one state or the other. In such a case, if the law respecting grants or wills were different in the different states, a purchaser might rightfully succeed to the propriety of the house, but lose its ancient privileges. The

public law, which declares, that the title to real estate can pass only according to the law of the place, where it is situated, supposes the thing to be tangible and fixed, and the situs clearly intraterritorial. But where is the situs of an incorporeal right? The right to flowing water is no more real estate, than the right to flowing air or light. The very nature of these things forbids durable, fixed, and absolute, territorial possession. It is true, that a state has jurisdiction over the waters of the rivers, which flow within its boundaries, and may by its laws regulate the title, enjoyment, and use of them awhile, and so long as they flow within its boundaries. But its authority stops here; the right to the use of the same waters, when they flow beyond its boundaries, is not within its control. The title is not acquired under the laws of such state. If the waters flow to a mill in another state, and the use becomes annexed to it, the use and the title are exclusively to be governed by the laws of the latter state. What authority has Rhode Island to control the water, which flows to a mill in Massachusetts? The right to the use of such water, whether it be deemed real or personal estate, is a right exercised under the jurisdiction of Massachusetts, and is to be governed by its laws. Rhode Island might indeed refuse to recognise in her courts the title to such property, unless it passed in some special manner prescribed by her laws. And so she might the title to lands in Massachusetts coming incidentally in question in her courts. But this would not change such title, or give the state a right to annul it. It would be a refusal of that national comity and justice, which the civilized world is accustomed to allow for great public purposes of policy and convenience. Beyond this the authority would have no operation. There is no pretence to say, that Rhode Island has as yet legislated to such an extent. Her laws for the probate of foreign wills go no farther, than to provide for such cases, where they affect property lying or being within the state. If the argument indeed goes the length of affirming, that in all cases, where rights to property are to be maintained in Rhode Island, these rights, though derived exclusively under the laws of a foreign state, are to be proved and established in the same way, as though these rights affected property in Rhode Island, it is in my judgment founded in mistake. The law justifies no such broad and sweeping doctrine. If the title to real estate situated in Massachusetts, and devised under a will made there, comes incidentally into question in a suit in Rhode Island, as upon a bill in equity for a specific performance of a contract for sale, or an action for damages for the breach for such contract, it cannot be, that the will must undergo a probate in Rhode Island before the title can be recognized, or the right enforced. Vide Doe v. M'Farland, 9 Cranch [13 U. S.] 151. If a coach specifically bequeathed by will in Massachusetts were, after due probate of the will, and delivery to the legatee, driven into Rhode Island, and there wrongfully withheld from the legatee by a third person, it cannot be, that there must be a probate and administration in Rhode Island before the legatee can maintain an action of trover for the coach in the courts of that state. The right to the property would be ascertained by the same means, as if the ownership had been by any other conveyance in Massachusetts, that is, by ascertaining the lex loci by competent evidence, and adjudging upon such proofs.

The rules of evidence, by which courts of justice ascertain the titles to property derived under foreign laws, are probably different in different countries, founded upon different views of public convenience and upon municipal usages. But in the United States the constitution has declared, that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and congress, in the exercise of its delegated authority, has prescribed the manner, in which such acts, records, and proceedings shall be proved, and the effect thereof. The act of 26th of May, 1790, c. 11 [1 Stat. 122], enacts, that "the records and judicial proceedings of the courts of any state shall be proved by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given them in every court within the United States, as they have by law or usage in the courts of the state, from whence the said records are, or shall be, taken." Whether the will and probate in the present case be admissible in evidence depends upon the point, whether it is authenticated according to the statute. The effect of such probate being conclusive, to the extent already asserted, in Massachusetts, must be so far conclusive in this court as to property within the same state. Mills v. Duryee, 7 Cranch [11 U. S.] 481.

There were some other points suggested at the argument, upon which at present it is unnecessary to express any opinion. Upon the whole the bill for a revivor is to be dismissed. But this dismissal is to be without prejudice to the plaintiffs to file an original bill in the nature of a bill of revivor for the purpose of obtaining the benefit of the former proceedings upon the original bill; and the plaintiffs are to be at liberty to make all such parties thereto, as they may be advised.

Bill dismissed accordingly.

Case No. 12,933.

SLACOM v. WISHART.

[3 McLean, 517.] [1]

Circuit Court, D. Ohio. Dec. Term, 1844.

NOTES — FRAUD — BONA FIDE ASSIGNEE WITHOUT NOTICE.

1. Fraud may be set up as a defence by the maker against the payee of a note.

2. The same defence may be made against an assignee who had notice of the fraud before the assignment. Or it may be set up by an assignee after the note was due, or if assigned without consideration.

3. But against a bona fide assignee, for a valuable consideration, before the note was due, such a defence cannot be made.

At law.

Mr. Starr, for plaintiff.

Spalding & Chase, for defendant.

LEAVITT, District Judge. This suit was brought by the plaintiff as the indorsee of two promissory notes, each for the sum of $666.66, dated the 23d of August, 1838, drawn by the defendant, payable to the order of Joseph H. Benham, at the Franklin Bank of Cincinnati; one, due in twelve—the other, in eighteen months from date. The defendant set up, as a defence to the action, that these notes were obtained by fraud, and without consideration; and that they were transferred to the plaintiff after maturity, and, therefore, in a suit in his name, are subject to the same exceptions, and open to the same defence, as if sued in the name of the payee.

The material facts proved were as follows: In the early part of August, 1838, Benham, the payee of the notes, then being the editor and publisher of a newspaper at Cincinnati, called the Kentucky and Ohio Journal, wrote to the defendant, residing at St. Clairsville, in this state, expressing his desire to sell the paper, and advising the defendant to purchase it, for his son, a printer. In this letter, Benham gave a very favorable account of the condition and prospects of the paper, representing, among other things, that there were then about fourteen hundred paying subscribers in the county, besides several hundred in the city; and, assuring him, that five hundred subscribers could be at once obtained, in the city, to a daily paper; and, that the concern could be made worth eight or ten thousand dollars per annum. Soon after the receipt of this letter, the defendant visited Cincinnati; and, after examining the office-book, subscription list, &c., purchased one half of the paper, at two thousand dollars, and executed the two notes above described, together with another, not now in controversy. The notes were drawn in the usual form of joint and several notes, commencing, we or either of us promise, &c.; and it was the intention of the parties that the name of the defendant's son should be added, but they were never executed by him. It is proved, by Mr. Fisher, a witness for the defendant, that, a few days after the above sale, he purchased from Benham the other half of the concern, at one thousand dollars. This witness states, that he was induced to make this purchase by the flattering representations of Benham as to the patronage and prospects of the paper; that he soon became satisfied these representations were false and deceptive; that, in fact, the entire subscription list, including exchanges, did not exceed twelve hundred names; that the paper was unpopular, and subscribers were constantly ordering discontinuances, while many, to whom the papers were sent, refused to take them from the post-offices. This witness gives it as his opinion, that the whole number of paying subscribers did not exceed four hundred; that to one acquainted with the true condition of the paper, it could not have been sold for five hundred dollars; and that its patronage did not justify the continuance of its publication. He published it for a few weeks, when it was discontinued, and united with and merged in another paper. He also states, that it was impossible, at the time of the defendant's purchase, by any investigation, to ascertain the real state of the paper. The witness also states, that neither the defendant, or his son, took possession of the concern, or in any way exercised any acts of ownership or control over it; and that the contract for its purchase was abandoned a few days after the date of the notes.

To repel the inference of fraud, from the foregoing facts, the plaintiff introduced Mr. Flinn as a witness, who testified that, at the time of the sale to the defendant, he was in the employment of Benham, as a clerk in the newspaper office; that he gave the defendant all the aid in his power, in examining the books and subscription list; that Benham was not a practical printer, and referred the defendant to persons employed in the office for information concerning the paper. This witness also says, he considered the subscription list a good one; but that, in his opinion, Benham had lost money by the publication of the paper. It appears that Benham died in the summer of 1839. It is in proof, that the plaintiff is the brother of Mrs. Benham, and is now, and has been for eight or ten years, the consul of the United States, at Rio Janeiro. There is no evidence that he has been in the United States since the date of the notes; or that he ever saw the notes, or paid any consideration for them. It does not appear from the evidence at what time they were indorsed by Benham. Doctor Lukin, whose deposition has been read, says, that in the year 1839, and shortly prior to Benham's death, he had some conversation with him in relation to these notes. This was after one of the notes had become due.

Upon the law applicable to the case, THE COURT charged the jury as follows:

It is a well settled principle, that in a suit

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

by the payee against the maker of a promissory note, the latter may set up, as a legal ground for refusing payment, that it had its inception in fraud; or, that there has been a total failure of the consideration for which the note was given. It is equally well settled, that where a negotiable note is indorsed, before it become due, either in payment of a pre-existing debt, or for a good consideration paid, without notice of any fraud in its origin or execution, the indorsee is regarded as an innocent holder; and, as against him, the maker cannot set up fraud, as a defence. This doctrine has been long established by the adjudication of the courts in this country and in England, and is based upon the hypothesis, that the interests of a commercial community require that every possible facility should be afforded to the free and unobstructed circulation of negotiable paper. But, if a note is negotiated after maturity, the indorsee receives it subject to all the rights and equities existing between the payee and the maker, before the indorsement. The fact that the note is overdue, and thus dishonored by non payment, is sufficient to put the indorsee on his guard; and if he takes it, he does so at his peril. He occupies the same position as the payee; and any defence that the maker could assert as against the payee, may be set up against the indorsee.

The first important inquiry arising in this case is, whether a fraud was practised upon the defendant by Benham, in the sale of the newspaper to the defendant. It is insisted by the counsel for the defendant, that Benham's letter, in connection with the testimony of the witness Fisher, clearly establishes the fraudulent conduct of Benham in this transaction. On this point, it will be sufficient to remark, that if the evidence satisfies the jury there was a wilful suppression, or a false statement, of any material facts, in reference to the actual condition or future prospects of the printing establishment, calculated to mislead and deceive the defendant, and which influenced his mind in making the purchase and giving the notes in question, Benham was guilty of a fraud. It is contended on the part of the plaintiff, that the testimony of the witness Flinn repels the presumption of any fraudulent design on the part of Benham, and shows that the defendant did not only rely on the statements and representations contained in Benham's letter, but, after a personal examination of the office, and from information derived from other sources, entered into the contract, and executed the notes. Applying the law, as stated by the court, it will be for the jury to decide, whether the imputation of fraud rests upon the conduct of Benham.

If the jury shall be led to the conclusion, that the evidence merely establishes the fact, that, in agreeing to pay two thousand dollars for an interest of one half in the newspaper, the defendant unwisely and inconsiderately gave his assent to a hard bargain, this will not be sufficient to impeach these notes. That the owner of property has insisted upon, and the buyer has agreed to give, an exorbitant price for it, will not, in the absence of fraud or unfair dealing, vitiate the contract. It is true, an entire failure of the consideration for which a note is given, is a legal bar to a recovery upon it; but a failure in part only of the consideration, will not protect the maker from liability. If the jury shall believe the transaction to be infected with fraud, another important inquiry will present itself for their consideration, namely, were these notes indorsed to the plaintiff, in the usual course of business, and before they arrived at maturity? If thus indorsed, in accordance with the law already stated, the plaintiff is an innocent holder, and is not chargeable with the consequences of any fraud attaching to them in their inception.

The absence of the plaintiff from the United States, and the want of testimony on his part, proving any business transactions between him and Benham, are urged by the counsel for the defendant, as sustaining the presumption that the notes were not transferred in the usual course of business. And the testimony of Dr. Lukin, it is insisted, is sufficient to conduct the jury to the conclusion, that the notes were over due when indorsed by Benham; at least, that they were in his possession and under his control, till after they arrived at maturity. If the jury shall think this conclusion warranted by the evidence, they may properly presume the plaintiff received the notes on the credit of the indorser; and if so, he stands in the situation of the payee. And any defence which could be set up in an action against the payee is available in a suit by the indorsee.

The jury returned a verdict for the defendant.

Case No. 12,934.

SLACUM v. BROWN.

[5 Cranch, C. C. 315.][1]

Circuit Court, District of Columbia. Oct. Term, 1837.

LANDLORD AND TENANT — RIGHT OF TENANT TO ABANDON FOR WANT OF REPAIRS—SUBLEASE.

A lessee cannot abandon for want of repairs, if he has underlet a part of the premises for a year not yet expired, although the premises are in a ruinous condition. The receipt by the lessor of rent from an under-tenant of part of the premises, is no evidence of the lessor's consent to the lessee's abandonment.

[Cited in brief in Prior v. Kiso, 81 Mo. 242.]

Debt for two quarters' rent on a demise at ——— per annum due November, 1832, and February, 1833.

[John M.] Brown, the lessee, underlet part of the premises to one Thomas, for a year ending on the 1st of November, 1833, who paid Mrs. [Jane H.] Slacum for the two first quarters of the year at $50 a quarter, and tendered to her the rent for the two next quarters.

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

Mr. Semmes, for defendant, offered evidence to prove that the premises were very much out of repair, so that he had a right to abandon them, and did abandon them before the rent accrued for which this action was brought, and prayed the court to instruct the jury "that if they believed, from the evidence, that the premises were so much out of repair as to do damage to the tenant's goods and chattels; and the landlord, on notice thereof, refused or neglected to repair; then that the tenant was not responsible for rent after quitting the premises, although no notice of quitting was given to the landlord;" and cited Edwards v. Etherington, 1 Ryan & M. 268; Com. Landl. & Ten. 304; 6 Law Lib. 304, 450.

Mr. Taylor, for plaintiff, contended that if the premises were so out of repair, yet, as the defendant had underlet a part of them for a year ending on the 1st of November, 1833, he could not in the meantime abandon so as to put an end to the demise, which was from year to year; and that Mrs. Slacum's receipt of rent from the under-tenant of part of the premises, is not evidence of her assent to the abandonment by the lessee.

THE COURT (nem. con.) refused to give the instruction prayed by Mr. Semmes, being of opinion that Mr. Brown could not abandon after underletting a part of the premises for the year. That in such a case the ruinous state of the premises, so that the defendant's goods were liable to be injured thereby, is not sufficient to justify the abandonment; and that the receipt by Mrs. Slacum of rent from the subtenant of part of the premises, is not evidence of her assent to such abandonment.

SLACUM (POMERY v.). See Case No. 11,-262.

Case No. 12,935.

SLACUM v. SIMMS et al.

[1 Cranch, C. C. 242.] [1]

Circuit Court, District of Columbia. June Term, 1805. [2]

INSOLVENCY—DISCHARGE—FRAUD.

An insolvent, who obtains a warrant of discharge by fraud, is not discharged in due course of law.

Debt [by Slacum] against [Jesse Simms and Peter Wise, Jr.] the principal and surety on a prison-bounds bond; plea, covenants performed; replication, did not keep in the bounds, but departed without being discharged in due course of law; rejoinder, discharged in due course of law; and issue thereon.

C. Lee, for defendant, contended that a warrant of discharge by the magistrates is conclusive evidence that Simms was discharged in due course of law, and is as much a discharge of the bond, as it would be to the sheriff, if the prisoner was in actual custody. In an action for an escape, the warrant of discharge would be conclusive evidence. There is no difference between that case and an action on the prison-bounds bond.

Mr. Swann, contra. The issue is, whether Simms was discharged in due course of law. It does not follow that the surety is discharged because the sheriff is discharged. The sheriff is indemnified, because the act of assembly expressly makes the warrant an indemnification. The surety is not discharged unless the principal is discharged. But Simms would not be protected against this bond if his discharge was obtained by fraud.

THE COURT was of opinion (FITZHUGH, Circuit Judge, absent) that the warrant of discharge is not conclusive evidence that Simms was discharged in due course of law.

Mr. Jones, for defendants, then prayed an instruction to the jury, that if they should be of opinion, from the evidence, that the warrant of discharge was obtained by the fraud of Simms alone, without the participation of the magistrates, or of the defendant, Wise, (the surety,) the warrant was not void so as to enable the plaintiff to recover against the defendant, Wise, in this action. Which instruction THE COURT refused to give; but instructed them that such fraud, if proved, would render the warrant void, and therefore the issue could not be supported on the part of the defendants.

Bill of exceptions taken. Verdict for plaintiff, $1600.

Reversed by the supreme court, 3 Cranch [7 U. S.] 300.

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

[2] [Reversed in 3 Cranch (7 U. S.) 300.]

Case No. 12,936.

SLACUM v. SMITH.

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

Circuit Court, District of Columbia. Dec. 9, 1818.

SLAVERY—HIRING AS SEAMAN—FORFEITURE OF WAGES.

The owner of a slave, may hire him as a mariner to the master of a vessel for a foreign voyage, and may authorize the slave to sign the shipping articles, and the owner will be bound thereby; and the wages will be forfeited by any act of the slave, which would forfeit his wages if he were a free man; but his wages are not forfeited by his quitting the vessel after the voyage is ended, and before the cargo is discharged.

Indebitatus assumpsit [by Jane H. Slacum against Amos Smith] for the hire of a slave.

At the trial, it was contended on the part of the defendant, that the slave had forfeited his wages by his misconduct at Lisbon, and by absenting himself. The jury found a special verdict, which was submitted to the court without argument. The special verdict stated, that the plaintiff hired

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

to the defendant, a negro slave, named David, her property, to serve as a mariner on board the brig Virginia commanded by the defendant on a voyage from Alexandria, D. C., to Lisbon, and thence back to a port in the United States; that in pursuance of the said contract the said slave, with the plaintiff's approbation and consent, subscribed shipping articles for the said voyage, in these words: (The articles were in the usual form, and are omitted.) That the plaintiff received from the defendant $25 for one month's wages in advance. That the brig sailed on the voyage and arrived at Lisbon; and while there the slave was confined nine days in prison, for disorderly conduct, as noted by the proper officer on the brig's log-book. That the brig sailed from Lisbon to New York, where she arrived on the 29th of April, 1813; on which day the said slave absented himself from the said brig, without leave of the master or commanding officer on board, and has not since returned. That entries thereof were made in the log-book on that day, and for three days successively, by the mate having charge of the log-book. That the brig had a cargo which was not discharged at the time of his so absenting himself. That the defendant issued his warrant to apprehend the said slave on the 3d of May, 1813, and that he was apprehended under the said warrant, but again escaped on the same day, and has never returned or been reclaimed. If the law be for the plaintiff, the jury assess the plaintiff's damages at $86; if the law be for the defendant, they find for the defendant.

Mr. Swann, for plaintiff.
Mr. Taylor, for defendant.

CRANCH, Chief Judge. The 1st question is, whether the slave can be considered as a mariner, within the act of congress [2 Stat. 426], or the maritime law, so as to forfeit the wages; and whether the plaintiff is bound by the shipping articles? 2. If so, then are the wages forfeited, either by the disorderly conduct at Lisbon, or by the absenting at New York?

1. The plaintiff was competent to make what contract she pleased. By her assent to his signing the articles, and by receiving the month's wages in advance, under those articles, she bound herself that her slave should conduct himself as a seaman, agreeable to the articles, and under the penalty of the articles and the act of congress. I am of opinion, therefore, that the wages might be forfeited by the act of the slave.

2. Has there been any act of the slave which would have forfeited his wages if he had been a free man? The jury find that he was confined nine days in prison at Lisbon for disorderly conduct. It does not appear what was his offence; nor whether he was confined at the request of the master, or of the civil authorities of the place. It does not appear to amount to desertion, and if it did, the forfeiture is waived by receiving him again on board. The absenting himself from the vessel after the voyage was ended, and before the cargo was discharged, is not a forfeiture of wages. See the case of Swift v. The Happy Return [Case No. 13,697].

I therefore think that judgment should be entered up for the plaintiff. Judgment for plaintiff.

THRUSTON, Circuit Judge, dissenting on the first point, and MORSELL, Circuit Judge, dissenting on the second point.

SLACUM (UNITED STATES v.). See Case No. 16,311.

SLADDIN (EMMONS v.). See Case No. 4,-470.

SLADE (LUCY v.). See Case No. 8,595.

Case No. 12,937.

SLADE v. MINOR.

[2 Cranch, C. C. 139.] [1]

Circuit Court, District of Columbia. April Term, 1817.

MARSHAL—ACTION AGAINST FOR ILLEGAL LEVY—JUSTIFICATION—PRESUMPTIONS.

1. In an action of trespass against the marshal of the District of Columbia for levying a distress for a militia fine, it is only necessary for him, in his justification, to prove those facts which give jurisdiction to the military court, and that it was regularly constituted, and imposed the fine.

2. The acts of such a court are presumed to be correct, and it is not competent for the plaintiff to show their irregularity.

3. An alien is not liable to militia duty.

4. Naturalization cannot be proved by parol.

[Cited in Charles Green's Son v. Salas, 31 Fed. 111.]

[Cited in Bode v. Trimmer, 82 Cal. 518, 23 Pac. 187. Cited in brief in Rump v. Com., 30 Pa. St. 477.]

This was an action [by Richard Slade] against [Daniel Minor] the deputy marshal of the District of Columbia, for levying a distress for a militia fine, imposed by a battalion court of inquiry, under the acts of congress of the 3d of March, 1803, and 1st of July, 1812 (2 Stat. 215, 769), "more effectually to provide for the organization of the militia of the District of Columbia."

E. J. Lee, for plaintiff.
Mr. Taylor, for defendant.

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion, that it was only necessary for the defendant, in his justification, to prove those facts which gave the battalion court of inquiry jurisdiction, and

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

which showed that the tribunal was regularly constituted; and that having shown this, the acts of that court were to be presumed to be correct, and that it was not competent for the plaintiff to show their irregularity.

THE COURT also decided that an alien was not liable to militia duty, and that the naturalization of Charles Slade, the plaintiff's father, could not be proved by parol.

Verdict for plaintiff, $56.

SLADE (SUCKLEY v.). See Cases Nos. 13,587 and 13,588.

SLADE (UNITED STATES v.). See Case No. 16,312.

SLAFTER (OXFORD IRON CO. v.). See Case No. 10,637.

SLATER (ALRICKS v.). See Case No. 259.

SLATER (CALVERT v.). See Case No. 2,326.

SLATER MUT. FIRE INS. CO. (HIDDEN v.). See Case No. 6,463.

Case No. 12,938.

The SLAUGHTER HOUSE CASE.

[See Case No. 8,408.]

SLAUGHTER HOUSE CO. (BUTCHERS' ASS'N v.). See Case No. 2,234.

SLAYMAKER (UNITED STATES v.). See Case No. 16,313.

Case No. 12,939.

The S. L. DAVIS.

[6 Blatchf. 138;[1] 2 N. B. R. 3.]

Circuit Court, S. D. New York. May 29, 1868.[2]

SALVAGE—CARGO—PROPERTY OF UNITED STATES.

A cargo of cotton belonging to the United States, on transportation, on freight, under bills of lading, on board of a vessel, from Savannah, Georgia, to New York, is liable to contribute, in a suit in rem against vessel and cargo, toward compensation for salvage services rendered to the vessel and cargo.

[Cited in The Siren, 7 Wall. (74 U. S.) 161.]

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

This was a libel in rem, filed in the district court, against the schooner S. L. Davis and a cargo of cotton, on transportation by her from Savannah, Georgia, to the city of New York, to recover for salvage services. The cotton belonged to the United States, and was shipped by a treasury agent of the United States, under bills of lading, which provided that he should pay freight at the rate of fifteen cents per ton per day, registered tonnage, dangers of the seas excepted. The cotton was attached, in this suit, before its delivery to, or acceptance by, the agent of the United States at New York. The district court dismissed the libel as to the cotton, holding that it was not liable to contribute [case unreported], and, from such dismissal, the libellant appealed to this court.

Charles Donohue, for libellant.

William M. Evarts, for the United States.

NELSON, Circuit Justice. The only question in this case is, whether the cotton is liable to contribute. The salvage service is not in dispute, and was exceedingly meritorious, and saved the vessel and cargo, the former valued at $8,000, and the latter at $150,000. The court below allowed $19,500 for salvage, which I think not unreasonable, regarding the condition and imminent peril of the vessel, and the value of the cargo on board.

The mere fact of the ownership of the cotton by the government, in the act of being carried to its port of destination for the purposes of a market, as merchandise, did not, I think, exempt it from the lien in case of salvage service. I shall not enter into an argument in support of this position, as the subject, or rather a kindred one—the liability of property of the government for general average—and the present question incidentally, have been most elaborately examined by Mr. Justice Story, in U. S. v. Wilder [Case No. 16,694]. I am inclined, also, to the opinion, that, it is the doctrine of the admiralty in England (The Marquis of Huntly, 3 Hagg. Adm. 246,) and of the most approved modern elementary writers on the subject in this country (1 Pars. Mar. Law, p. 324, bk. 1, c. 9; 2 Pars. Mar. Law, p. 625, bk. 3, c. 7; Marv. Wreck & Salv. § 122. See, also, The Santissima Trinidad, 7 Wheat. [20 U. S.] 283).

The decree below dismissing the libel as to the cotton is reversed, and a decree will be entered charging it with contribution, with costs.

[On appeal to the supreme court the above decree was affirmed. 10 Wall. (77 U. S.) 15.]

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

[2] [Affirmed in 10 Wall. (77 U. S.) 15.]

SLEEPER (JONES v.). See Case No. 7,496.

SLEEPER v. PING. See Cases Nos. 12,940 and 12,941.

Case No. 12,940.

SLEEPER et al. v. PUIG et al.

[10 Ben. 181.][1]

District Court, S. D. New York. Dec., 1878.[2]

SHIPPING — CHARTER — DEMURRAGE — DISPATCH — EXPENSE OF DISCHARGE— COMMISSION ON ADVANCES.

1. Where a vessel is to have "dispatch for discharging," the time to be allowed is meas-

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

[2] [Affirmed in Case No. 12,941.]

ured by the capacity of the vessel to deliver the cargo.

2. Under a charter containing such a clause a vessel arrived at Havana with a cargo of paving stones, which, by the rules of the port, were to be discharged at the mole. Her master reported to the consignees on April 4, but, by reason of its being Passion Week and the crowded state of the mole, she was not brought up to the mole till April 14, when she was moored bows on, and the stones discharged on a staging. The master could have discharged the cargo over the side of his vessel in five days, but, in consequence of discharging over the bow and of custom house regulations as to discharging, the vessel was not discharged till April 24th. The master of the vessel claimed demurrage and that some errors in the vessel's account should be corrected, which was refused by the consignees, and the vessel remained in port pending this dispute till May 3d: *Held*, that the vessel was not entitled to demurrage after the discharge was completed.

[Cited in O'Rourke v. Tons of Coal, 1 Fed. 621; Gronstadt v. Witthoff, 15 Fed. 268.]

3. The vessel was entitled to demurrage for all the time after she was reported till she was discharged, less five days.

4. The vessel was not chargeable with the expense of the staging or extra expenses caused by discharging over the bow, because the charter agreed that the cargo should be received within reach of the vessel's tackles.

5. The consignees, having made an advance to the master which by the charter was to be free of commission, could not claim a commission on it by reason of their having made the advance before they were required to do so.

[This was a libel by Henry J. Sleeper and others against Emilio Puig and Santiago Puig.]

Beebe, Wilcox & Hobbs, for libellants.
Coudert Bros., for respondents.

CHOATE, District Judge. This is a libel by ship owners to recover demurrage and a balance due under the charter party from the charterers. The charter was for a voyage from New York to Santa Cruz (Canary Islands) and thence to Havana, Cuba, to carry from Santa Cruz to Havana "a cargo of stone or other lawful merchandise." The freight was to be $4,000, gold, for the round voyage and the vessel's port charges at Canary Islands, "one-half payable on discharge of cargo at Santa Cruz in cash or in approved sixty days bills of exchange on London at $4.84 to the £ sterling, charterers' option, balance on delivery of cargo at Havana, free of all commissions." The clause relating to demurrage was as follows (words in italics being printed): "*It is further agre'd that the said party of the second part shall be allowed for the loading and d scharging of said vessel,* dispatch for loading at New York and discharging at Havana, thirty running days for discharging and loading at Santa Cruz. *And in case the vessel is longer detained by said party of the second part, or* their *agents, demurrage is to be paid the vessel's agent at the rate of* thirty-five *silver dollars per day, for every day so detained.*" This charter also provided that the "cargoes shall be delivered and received alongside within reach of the vessel's tackels."

The vessel having proceeded to Santa Cruz and there taken on board a cargo of paving stones, arrived at Havana on the 2d of April. On the 4th of April the master entered his vessel at the custom house and reported to the consignees, the charterers' agents. The rules of the port required that cargoes, such as this, should be discharged at the mole. The vessel having arrived during Passion Week, the charterers claim that they are excused from getting her a berth or proceeding with the work of discharging the ship till April 9th, and in consequence of the crowded state of the mole she was not brought up to the mole till the 14th. At the mole she was moored bow on, ana at such a distance that, in order to discharge the cargo, it was necessary to build a staging from the hatchway forward to the bow, along which the stones were carried on trucks and then they were slid down an incline to the mole, where the consignees received them. The discharge was not completed till the 24th of April. It is proved that the master could, with the force at his command, have delivered the cargo over the side of his vessel in five days, but in consequence of delays in receiving the cargo on the part of the consignees, and the regulations of the custom house which forbade the discharge of cargo before nine in the forenoon without a special permit, and after two in the afternoon without a special permit, and in consequence of the neglect of the consignees to obtain such permit till several days after the discharge of the cargo commenced, the discharge was protracted as above stated till the 24th of April. After the discharge of the cargo, a misunderstanding arose between the master and the consignees as to the settlement of the ship's account, the master claiming demurrage and insisting on the correction of several alleged errors in the account. After several interviews, which did not result in an agreement, the master received the balance admitted by the consignees to be due to the ship, but without consenting to the correctness of the account, and sailed on the 3d of May. The delay in sailing from April 24th to May 3d was wholly by reason of this dispute. The libellants claim demurrage for twenty-three days from April 4th, to May 2d, allowing five days as a proper time for discharging the cargo.

As to the delay while the cargo was being discharged between April 14th, and April 24th, it is clear that they are entitled to five days' demurrage. The term "dispatch," means "without delay." It does not mean "with diligence," nor does it refer to, nor is it controlled by, any usages, customs or rules of the port. It is a term that does not need construction by reference to extrinsic circumstances. A charterer, who stipulates for dispatch in discharge, takes all risks of being able to effect such discharge; and though without his fault, as by reason of stress of weather, ice, the impossibility of obtaining the necessary hands to receive the cargo, or

other cause, he is obliged to detain the ship, he must pay the stipulated demurrage. The time allowed by this phrase for receiving the cargo is measured by the capacity of the ship to deliver it. This is well settled by authority. Davis v. Wallace [Case No. 3,657]; Kearon v. Pearson, 7 Hurl. & N. 386. The libellants are therefore entitled to five days' demurrage on account of the delay after the discharge commenced. As to the delay from the 24th of April to the 2d of May, it appears not to be within the stipulation of the charter party as to demurrage. The ship was not during this period detained by the consignees but by the master himself. It was not a delay in discharging for which demurrage is agreed to be paid. If the master thinks it for the interest of his owners to stay in port for the purpose of settling a dispute with the consignees, he may properly do so, but I do not see how he can charge the damage caused by the loss of time in the use of the ship to the consignees as demurrage. If the consignees refuse to pay a balance due to the ship, the owners can recover interest from the time it became due and should have been paid, but the voyage is ended, and there can be no demurrage for such delay. It did not appear that the master was unable to sail by reason of the refusal of the consignees to settle the ship's account. What might be the effect of such inability is not now in question.

Whether the charterers are liable for demurrage between the 4th of April, when the ship arrived at her anchorage, and the 14th of April, when she was moored at the mole, is a more difficult question. It has been said that "lay days by the general rule do not commence until the vessel has arrived at the usual place for unloading." 1 Pars. Shipp. & Adm. 313. But this does not necessarily mean the very place where the cargo is to be discharged, although it is doubtless the duty of the master, where no place of discharge is designated, to proceed to the place to be designated by the consignee or charterer, provided it be a usual and proper place for discharge within the port of destination. Brown v. Johnson, 10 Mees. & W. 331. Thus in the case last cited where by the charter the voyage was to London with a cargo usually discharged in the docks, it was held that the lay days commenced with the arrival of the ship in the docks and not from the time of her arrival at the particular place in the docks where she was to discharge. This question of delay between arrival in the port and arrival at the place of discharge was touched upon in Davis v. Wallace, supra, but not decided, the court having found that the delay was acquiesced in by the master, which precluded the claim for demurrage; but, from the claim being dismissed on this ground, it may perhaps be inferred from the opinion that such delay if unexcused is a proper subject for demurrage. In the present case the vessel appears to have been brought into the usual place of anchorage near the mole, where vessels await their return for discharging at the mole. The consignees evidently assumed the entire control of the matter of finding a place for the discharge of the cargo. They thereby affirmed their duty under the contract, as they understood it, to take charge of the ship. It is evident that a delay in finding a place to discharge is as much within the mischiefs sought to be obviated by the requirement of "dispatch for discharging" in the charter party as a delay in receiving the cargo after the ship reached the wharf. I think upon the whole the case is within the rule laid down in Brown v. Johnson, supra, and that the charterers are liable for all delay from the time of the reporting of the vessel at her anchorage near the mole in readiness to deliver her cargo, and that the libellants are entitled to demurrage for fourteen days in all, allowing for one Sunday, which would have fallen within the period of the discharge if immediately commenced, and amounting to $490—silver money.

The consignees charged the ship a commission on advances of $42.25. This was in direct violation of the charter party and is not excused by the fact that the advance was made sooner than the charter party required. They might have refused to make the payment till required by the charter, but having made it they were bound by the stipulation that it should be free of all commissions.

The charges for building the staging to the bow, $37.10, for extra men in trucking cargo from the hatch to the bow, $68.00, and for two trucks for same service, $8.50, making in all $113.60, were improper, because it was agreed in the charter that the cargo should be delivered within reach of the ship's tackles and no part of this expense would have been necessary if it had been so delivered.

The expense of towage and pilotage to and from the mole appears to have been a proper charge against the ship. The expense was necessary to the delivery of the cargo. The fee of ten dollars paid as a gratification to a custom house officer is not shown to have been either necessary or proper and was improperly charged.

On the evidence there was an overcharge of five cents a ton for tonnage dues, amounting to $13.15, gold, and also an error in computing the value of eagles, amounting to $13.38, gold.

The above items for staging, fee to officer, extra men and trucks are computed in Spanish currency, which was to gold or silver as 240 to 100, and these items are therefore equivalent to..................$51 50, gold. The other items are:

Demurrage	$490 00
Tonnage dues..............	13 15
Commissions	42 25
Error in eagles.............	13 38
Total	$610 28

—For which sum, with interest from May 2,

1874, and costs, the libellants are entitled to a decree.

[On appeal to the circuit court, the decree of this court was affirmed, with costs. Case No. 12,941.]

Case No. 12,941.

SLEEPER et al. v. PUIG et al.

[17 Blatchf. 36; 8 Reporter, 357.] [1]

Circuit Court, S. D. New York. Aug. 12, 1879.[2]

SHIPPING—DEMURRAGE—DISCHARGE—DISPATCH.

1. A charter-party for the voyage of a vessel from New York to Santa Cruz (Canary Islands), and thence to Havana, Cuba, provided that the respondents were to be allowed, for the loading and discharging of the vessel, "dispatch for loading at New York and discharging at Havana; thirty running days for discharging at Santa Cruz;" and that, if the vessel should be longer detained by the respondents, demurrage, at so much per day, should be paid, day by day, for every day so detained. *Held*, that the customs and rules of the port of Havana were not to control as to the time for discharging there, but that the respondents were bound to take the cargo, at Havana, as rapidly as the vessel could deliver it.

[Cited in O'Rourke v. Tons of Coal, 1 Fed. 621; Lindsay v. Cusimano, 10 Fed. 305; McLeod v. Sixteen Hundred Tons of Nitrate of Soda, 55 Fed. 530.]

2. By the rules of the port the cargo could be delivered only at the mole. The vessel came to anchor and was ready to deliver her cargo. There was no room for her at the mole. She was delayed till room was found. *Held*, that, under the terms of the charter-party, the risk of delay in obtaining a place of discharge at the mole, was on the respondents, and not on the vessel.

[Cited in Moody v. Five Hundred Thousand Laths, 2 Fed. 608.]

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

[This was a libel by Henry J. Sleeper and others against Emilio Puig and Santiago Puig to recover demurrage and a balance due under a charter part. From a decree in favor of libelants (Case No. 12,940), respondents appealed.]

Beebe, Wilcox & Hobbs, for libelants.
Coudert Brothers, for respondents.

BLATCHFORD, Circuit Judge. By the charter-party the vessel was chartered to the respondents for a voyage from New York to Santa Cruz (Canary Islands) and thence to Havana, Cuba. The cargo from Santa Cruz to Havana was to be stone or other lawful merchandise. The charter money was to be $4,000 gold for the round voyage, and the vessel's port charges at the Canary Islands; one half of the charter to be "payable on the discharge of the cargo at Santa Cruz, in cash, or in approved sixty days' bills of exchange on London, at $4 84 to the pound sterling, charterers' option; balance on delivery of cargo at Havana; free of all commissions." The respondents were to be allowed, for the loading and discharging of the vessel, "dispatch for loading at New York and discharging at Havana; thirty running days for discharging and loading at Santa Cruz;" and, in case the vessel should be longer detained by the respondents or their agents, demurrage was to be paid the vessel's agent at the rate of 35 silver dollars per day, day by day, for every day so detained. It was further provided, that the cargo or cargoes should be delivered alongside, within reach of the vessel's tackles; and that the vessel should "be consigned to charterers' friends at Santa Cruz and Havana, free of commission."

The libel alleges that the vessel took on cargo at Santa Cruz and arrived at Havana; that her master duly reported his readiness to discharge cargo on the 4th of April, 1874; that the agents of the respondents did not give the vessel dispatch in discharging, but neglected to discharge the cargo for 17 days over the necessary lay days, under the terms of the charter-party, so that there became due to the libellants, for demurrage, $672.35; that $212.24 is due to the libellants for balance of freight on the cargo discharged at Havana; and that the libellants paid for the respondents, at Havana, for extra expenses in discharging cargo, $49.26.

The answer sets up that the charter money was fully paid; that, when the vessel arrived at Havana, the consignees of the respondents, as soon as they were notified of her arrival, immediately proceeded to assist her master in procuring a wharf and in unloading the vessel; that, when she arrived, there was no berth unoccupied at the wharf, nor was it possible to procure one; that, by the laws and usages prevailing in the harbor of Havana, the control of wharves and berths, as well as the number of hours per day allowed for the discharge and loading of cargo, is not with the merchants or other private individuals, but with the government officials, who dispose of said matters as they deem proper; that, as soon as it was possible, the said officials provided a proper and suitable berth for the vessel; that the master thereupon proceeded to discharge and was allowed the full and usual number of hours per day wherein to effect said discharge, but, owing to the insufficiency and inability of her crew, the discharge was unusually slow; that thereupon and at the request of the master, the consignees of the cargo supplied him with extra men to enable the crew to discharge more rapidly; that, if there was any delay in unloading the cargo, it did not proceed from any negligence or default of the respondents, or of their consignees or agents; and that the usual dispatch in the port of Havana was used for the unloading of the cargo.

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 8 Reporter, 357, contains only a partial report.]

[2] [Affirming Case No. 12,940.]

The district court awarded to the libellants $490 for 14 days' demurrage, at $35 per day, and also $120.28 for balance due on charter-party. The respondents have appealed. The only question raised, in this court, is as to the demurrage. The district court held that the word "dispatch," in the charter-party, means, "without delay;" that it does not mean "with diligence," nor does it refer to, nor is it controlled by, any usages, customs or rules of the port; that it is a term that does not need construction by reference to extrinsic circumstances; that a charterer who stipulates for dispatch in discharge takes all risks of being able to effect such discharge; that though, without his fault, as, by reason of stress of weather, ice, the impossibility of obtaining the necessary hands to receive the cargo, or other cause, he is obliged to detain the ship, he must pay the stipulated demurrage; and that the time allowed, by this phrase, for receiving the cargo, is measured by the capacity to deliver it. It is contended for the respondents, that, if such is the correct view, there is no difference between the legal consequences attached to the word "dispatch" and those which follow where a fixed and determined period of time is stated; that the term "dispatch" is to be construed according to the surrounding circumstances; and that there is nothing showing, or tending to show, that the parties ever understood or intended that they should be bound on the one side, or entitled on the other, to any more than diligent efforts on the part of the charterer to discharge as rapidly as circumstances would allow. Attention is called to the fact that the charter-party allows 30 running days for loading and discharging at Santa Cruz, while the expression "dispatch" is used in reference to loading at New York and discharging at Havana, and from this it is argued, that the respondents did not intend to bind themselves to the same rigid rule which the courts have applied where a determined number of days is stated.

If it had been intended that the customs and rules of the port of Havana should control as to the time for discharging there, it was very easy to have so provided. In the absence of such a provision, and by the use of the word "dispatch," it must be held that the respondents were bound to take the cargo as rapidly as the vessel could deliver it. Keen v. Audenried [Case No. 7,639]; Davis v. Wallace [Id. 3,657]; Thacher v. Boston Gas Light Co. [Id. 13,850]. The court below decided that five working days was a proper and reasonable time for discharging the cargo; that it could have been delivered by the vessel in five working days; and that the vessel was entitled to insist on such dispatch. In these conclusions that court was correct.

The vessel arrived at Havana on Thursday, April 2d. Friday, April 3d, was Good Friday. On Saturday, the 4th, the vessel came to her anchorage, and on the same day she was entered at the custom house, and was reported by the master to the consignees of the respondents, as ready to discharge. The rules of the port required that her cargo should be discharged at the mole. She was not brought up to the mole until the 14th. The mole was crowded with vessels and a place there could not be obtained for her before that day, the custom being to give berths to vessels there in the order of their arrivals, and the assignment of berths being in the control of the captain of the port. The vessel was at anchor in the usual place of anchorage near the mole, where vessels await their turn for discharging at the mole. The respondents' consignee, Morales, to whom also the vessel was consigned, in accordance with the charter-party, testifies, that the vessel was at anchor when he was informed by the master of her arrival, and that the wharf clerk of his house undertook thereupon to procure a berth for her at the wharf. It is contended for the respondents, that their liability for demurrage commenced only when the vessel arrived at the mole; that then, and then only, could delivery be made of the cargo; that the vessel could not be discharged until that time; that the risk in the interval was the master's; and that, until the master placed the respondents' consignees in a position to receive the goods, he could not hold the respondents for demurrage. It was held, by the court below, that the respondents' consignees assumed the entire control of the matter of finding a place for the discharge of the cargo; that they thereby affirmed their duty, under the contract, as they understood it, to take charge of the vessel; that a delay in finding a place to discharge is as much within the mischief sought to be obviated by the requirement of "dispatch for discharging," in the charter-party, as a delay in receiving the cargo after the vessel reaches the wharf; and that the respondents are liable for all delay from the time of the reporting of the vessel at her anchorage near the mole in readiness to deliver her cargo. The obligation of the vessel, by the charter-party, was to deliver the cargo at Havana, and the second half of the charter money was payable on the delivery of the cargo at Havana. The respondents contracted for "dispatch" in discharging at Havana, and for the stipulated demurrage per day, day by day, for every day the vessel should be detained by the respondents or their agents, longer than the time thus provided for. The vessel, from the 4th of April, was at her anchorage ready to deliver her cargo. She did not get aground, or in any manner become disabled or prevented from going to the mole or from delivering her cargo, except by the fact that there was no room for her at the mole. Under these circumstances, and in view of the terms of this charter-party, the risk was on the respondents and not on the vessel, of any delay in

obtaining a place of discharge at the mole. Brown v. Johnson, 10 Mees. & W. 331.

The defence that there was delay in discharging because of the insufficiency and inability of the crew of the vessel is not made out. The discharging of the cargo was not completed until the 24th of April. Of the 20 days from April 4th to April 24th, the district court excluded Sunday, April 5th, and allowed the five days next ensuing for discharging, and charged the respondents with 14 days' demurrage. This was correct. There is no satisfactory evidence that any one of such five days was a holiday or a day on which servile labor was not permitted. For every day from April 10th to April 24th, including the Sundays in that time, the vessel was entitled to demurrage, and the sum awarded, $490, was correct. There is no complaint as to the allowance to the libellants of the items amounting to $120.28.

The libellants are, therefore, entitled to a decree for $610.28, with interest at 6 per cent. per annum from May 2, 1874 (the date fixed by the court below), and for $75.49, their costs in the district court, and for their costs in this court, to be taxed.

Case No. 12,942.

In re SLEVIN.

[4 Dill. 131.] [1]

Circuit Court, E. D. Missouri. 1877.

BANKRUPTCY—COMMISSIONS TO ASSIGNEE.

Certain real estate of the bankrupt had been mortgaged by him prior to the bankruptcy, with a power of sale in a trustee: the district court ordered that the trustee sell the property and that the assignee join in the sale: the property was sold to the mortgagee and the amount of the bid was credited on his debt: no money was received or paid out by the assignee: *Held*, under the Revised Statutes, sec. 5100, that the assignee was not entitled to commissions on the amount for which the property was sold.

[In review of the action of the district court of the United States for the Eastern district of Missouri.]

The district court allowed Mr. Player, the assignee in bankruptcy of Mr. Slevin, $169.-09 commissions on a sale of real estate, and ordered that the same be paid by Mr. Scudder, a mortgage creditor of the bankrupt. [Case unreported.] It is to reverse this order that the present petition for review was brought by Scudder.

The facts were these: Mr. Scudder held certain notes made by Mr. Slevin, secured by a deed of trust on real estate. Before the notes became due Slevin was thrown into bankruptcy, and when they became due and were not paid, an order of the court was prayed that the trustee should sell the property and that the assignee should join in the sale. The order was made and the property was sold, but did not sell for enough to satisfy the deed of trust. The register, however, allowed the assignee $169.09 for commissions, which was approved by the district court. It is this allowance which is sought to be set aside by means of the bill of review. For Mr. Scudder, it was contended that neither Slevin nor the assignee had any interest in the real estate except for any excess there might be above the amount of the deed of trust, and that as there was no such excess, and as the property had never come into possession of the assignee, there was nothing for him to have commissions on. For the assignee, it was contended, on the other hand, that as the assignee was ordered to join in the sale, the whole proceeds passed as much through his hands as through the hands of the trustee. The bankrupt act (Rev. St. § 5100), provides that "the assignee shall be entitled to an allowance for his services on all moneys received and paid out by him,"—a specified commission.

Mr. Normile, for Mr. Scudder.

Mr. Myers, for the assignee.

MILLER, Circuit Justice, in rendering his judgment, observed that he was compelled to differ with the district court. The assignee was not, under the circumstances, entitled to commissions. He was allowed a reasonable sum for what he actually did in signing the deed. Of this no complaint is made. But the assignee claims also a commission on the amount bid at the sale by the mortgagee. To this he is not entitled. All that the assignee did was to sign his name to the deed of sale, for which service he had been already paid. The trustee had made the sale, and the only claim the assignee could have under the law (Rev. St. § 5100) was for money actually received and paid out; and he had neither received nor paid out a dollar. It was claimed that, constructively, the whole amount had passed through his hands, but the fact was that no money had passed at all, as the creditor had bought in the property, which was credited on his debt. The bill of review must, therefore, be sustained, and the order of the district court reversed and set aside. Reversed.

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

Case No. 12,943.

In re SLICHTER.

[2 N. B. R. 336 (Quarto, 107).] [1]

District Court, D. Minnesota. 1869.

HUSBAND AND WIFE—WIFE ENGAGED IN TRADE—DEBTS—STATE STATUTE.

A feme covert engaging in trade must do so in accordance with the statute of the state. Not having done so, and being incapacitated to make contracts, she may avail herself of her coverture to defeat the debt which is the basis of bankruptcy proceedings.

[Cited in note to In re Goodman, Case No. 5,540.]

[1] [Reprinted by permission.]

The testimony showed that David P. Slichter and Catharine H. Slichter, his mother, a feme covert, were trading under the name of Slichter & Son.

NELSON, District Judge, said: That married women in this state had been relieved of many of the disabilities of coverture in regard to the use, enjoyment, and disposal of their property acquired as provided in the statutes; but that the law still imposed many restrictions upon their actions in regard to their separate property. That Mrs. Slichter, being a feme covert, could make no contract in the course of the business and trade of Slichter & Son, legal and binding upon her, unless authorized to engage in business by the laws of Minnesota. That under section 5, p. 500, Rev. St. Minn., a married woman could engage in trade, in her own name, so as to be bound by contracts entered into by her in the course of her trade, only when her husband abandons her, or neglects to make adequate provision for her maintenance or that of his family. In such a case license can be obtained from a judge of probate to trade, and all contracts made in the course of her business are valid and binding upon her as if she was sole; the issues and profits are held by her free from the control or interference of her husband or his creditors; and the husband is not liable for any indebtedness incurred in the course of her business. There being no evidence that Mrs. Slichter was engaged in business by virtue of any authority conferred by the statute, she could avail herself of her coverture to defeat the debt which was the basis of bankruptcy proceedings.

SLICK, The SAM. See Cases Nos. 12,282 and 12,283.

Case No. 12,944.

Ex parte SLOAN et al.

[4 Sawy. 330;[1] 23 Int. Rev. Rec. 354; 10 Chi. Leg. News, 26.]

District Court, D. Nevada. Sept. 21, 1877.

COURTS—CRIMINAL JURISDICTION—INDIAN RESERVATIONS.

After a state has been admitted into the Union, the fact that within its boundaries land, the fee of which is in the United States, is set apart as an Indian reservation, is not enough, of itself, to give a United States court jurisdiction to try a person for a murder committed within the limits of such reservation.

The prisoners [Jerry Sloan and others] having been committed to answer indictments charging them with the murder of two men, were brought up on a writ of habeas corpus, and asked to be discharged from custody, upon the ground that the indictments showed upon their face that the circuit court of the United States had no jurisdiction to try them. Both indictments describe the place where the crime is alleged to have been committed in the same words, as follows: "At and within the boundaries of the Moapa Indian reservation of the United States of America, in the district aforesaid" (Nevada). The indictments are found under section 5339 of the Revised Statutes, which provides that "every person who commits murder within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States," shall suffer death. The constitution of the United States (article 1, § 8) gives congress power to exercise exclusive legislation "over all places purchased, by consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings," and, in another clause, power to "regulate commerce with the Indian tribes." Nevada was admitted into the Union on an equal footing with the original states, October 31, 1864 (13 Stat. 749). By the act of May 5, 1866 (14 Stat. 43), there was "added to and made part of" the state other territory upon which the present Moapa Indian reservation is situated. The reservation was set apart by the president on March 12, 1873. It is admitted that when Nevada became a state, and when the act of May 5, 1866, was passed, the fee of the land now covered by the reservation was in the United States. It is, perhaps, also worthy of notice that the Revised Statutes of the United States do not contain the definition of "Indian country" found in the act of June 30, 1834 (4 Stat. 728), nor that section of the same act which provided that the laws of the United States, for punishment of crimes committed within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country. The marshal's return to the writ shows that he holds the prisoners, by virtue of a commitment issued out of the circuit court, to answer the indictments in question.

Robert M. Clarke and Thomas H. Wells, for petitioners..

Charles S. Varian, U. S. Atty., and Ellis & King, opposed.

HILLYER, District Judge. Upon this state of facts the inquiry is, how and when, if ever, the United States has acquired exclusive jurisdiction over this reservation, or the power of exclusive legislation, which is the same thing. U. S. v. Bevans, 3 Wheat. [16 U. S.] 336.

Nevada, having been admitted into the Union upon an "equal footing with the original states," must have the same jurisdiction over the territory within her limits that those states have over their territory.

Before the establishment of the United States government, the original states possessed full sovereign power; they retain it

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

now, except so much as they have parted with for national purposes.

Within the original states the only mode by which the government can acquire exclusive jurisdiction over a piece of land is by purchase, with the consent of the state, for certain specified purposes. Mere occupation of land, of which it owned the fee, within a state could not give the United States the power of exclusive legislation. How the United States is to acquire exclusive legislation over lands of which it is the owner when the state is admitted, may be a question; but it seems plain that in such case there must be a cession of its ordinary jurisdiction by the state in some way.

In the case of People v. Godfrey, 17 Johns. 225, a murder committed by one soldier upon another within Fort Niagara was held to be clearly within the jurisdiction of the state, although that fort had been occupied as a fortress since 1759; first by the French, then by the British, and lastly by the United States. Such occupation was held not at all inconsistent with the rights of the state to exercise its ordinary jurisdiction within the fort.

Jurisdiction to legislate over a district of country has no necessary connection with the ownership of the fee-simple of the soil; in fact, the two are seldom united. Com. v. Young, Brightly, N. P. 302.

Nearly all the land within Nevada was, and indeed still is, the property of the United States. By admitting the state upon the terms it did, the United States consented to occupy the position of a private proprietor of the lands it owned within the new state, only stipulating to be exempt from taxation and interference in disposing of its lands. By its admission, and by the act of May 5, 1866, Nevada acquired the same jurisdiction over the land now embraced by the Moapa reservation as over any other portion of its territory. That an executive order made long afterward could not, proprio vigore, take away the power of the state to legislate for this territory and confer it exclusively on the United States is a plain proposition.

The fee of the land covered by the reservation is still in the United States, and the land is occupied by the government as an Indian reservation.

In this respect, this case is like that of U. S. v. Stahl [Case No. 16,373], in which Mr. Justice Miller held that such ownership, together with the occupation by the United States as a fort, did not oust the state of Kansas of its ordinary jurisdiction, acquired by its admission into the Union on an equal footing with the original states, to punish murder committed within the fort. And in another case, the same justice held that the circumstance that the homicide was committed on an Indian reservation was not enough, of itself, to give a United States court jurisdiction. U. S. v. Ward [Id. 16,639]. See, also, U. S. v. Rogers, 4 How. [45 U. S.] 567; U. S. v. Bailey [Case No. 14,495]; People v. Lent, 2 Wheeler, Cr. Cas. 548; and U. S. v. Sa-Coo-Da-Cot [Case No. 16,212].

The authorities, both national and state, are uniform, and are unequivocally against the jurisdiction of a United States court in a case like the present. I have no doubt that, the land now constituting the Moapa Indian reservation having been made a part of the state of Nevada, without any reservation of jurisdiction in favor of the United States, the only way which that government can get exclusive jurisdiction over it must be by cession from the state.

The fact that the persons killed were employed at the time by the United States can, of itself, make no difference. There is no law of the United States, if congress has the power to make such an one, declaring the killing of a government employee, without reference to the place where he is killed, a crime against the United States.

Nor is there any question here as to the extent of the power of congress to regulate commerce with the Indian tribes. The courts of the United States have no criminal jurisdiction, except such as is given to them by some law of the United States, and congress has not yet attempted to create the crime of murder under the power given it to regulate commerce with the Indian tribes.

The district attorney insisted that the allegations of the indictments in reference to the place where the crime is charged to have been committed were defective at most, and did not show such an entire want of jurisdiction as would justify a discharge of the prisoners upon habeas corpus. The language of the indictments has been given above, and it shows the crime to have been done on the "Moapa Indian reservation." No laws or resolutions of congress or the state of Nevada, or other matters which affect the question of jurisdiction, have been brought to my notice, either by the return to the writ or the argument, nor is it seriously urged that any such matters do, in fact, exist. Under such circumstances, I do not feel justified in restraining the petitioners of their liberty, because it is possible to suggest facts which would give the court jurisdiction, but which are neither set out in the indictment nor the return, nor shown in any way to be anything more than creatures of the prosecuting officer's imagination.

The return of the officer shows that he holds these men by virtue of a commitment to answer these indictments. In such a case it becomes a duty to look into the indictments, and if neither of them charges an offense within the jurisdiction of a court of the United States, the prisoners are entitled to their discharge. In my judgment, neither of these indictments does charge the prisoners with the commission of a crime triable in the courts of the United States. The prisoners are, therefore, to be discharged from the custody of the marshal.

It was suggested at the hearing that, in case of the discharge of the prisoners upon this writ, the state authorities desired to take and prosecute them for these homicides. In accordance with this suggestion, and finding higher authority for such a course, the marshal will be directed, when he releases the prisoners, to deliver them to any state officer in readiness to receive them. U. S. v. Sa-Coo-Da-Cot, supra; U. S. v. Cisna [Case No. 14,-795].

Ordered accordingly.

Case No. 12,945.

In re SLOAN.

[13 Blatchf. 67;[1] 12 N. B. R. 59.]

Circuit Court, N. D. New York. June 29, 1875.

BANKRUPTCY — APPLICATION FOR DISCHARGE — WHEN MUST BE MADE.

1. The provisions of the twenty-ninth section of the bankruptcy act of March 2, 1867 (14 Stat. 531), that, "at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts," require the application for a discharge to be made in all cases within one year from the adjudication of bankruptcy, whether there are debts provbd or assets received, or not.

[Followed in Re Wood, Case No. 17,936. Cited in Re Brockway, 23 Fed. 585.]

2. The district court has no power, in any case, to grant a discharge, unless it be applied for within one year from the adjudication of bankruptcy.

[Followed in Re Wood, Case No. 17,936.]

[In review of the action of the district court of the United States for the Northern district of New York.]

Upon the return day of an order to show cause why the bankrupt should not be discharged from his debts, certain of his creditors appeared, and, upon showing to the district court that no assets had come to the hands of the assignee, objected, that, inasmuch as the application was not made within one year from the adjudication of bankruptcy, no discharge could be granted. The court (Wallace, District Judge,) refused the discharge, and delivered the following opinion: "The grammatical construction of the twenty-ninth section of the act of March 2, 1867 (14 Stat. 531), which controls the decision of the question now involved, has been the subject of conflicting decisions in several cases where it has been passed upon by the courts. For the purposes of the present application, however, a construction must be adopted in conformity with that adjudged to be correct in cases which have been decided in both the district and the circuit courts for this district. It was held by my learned predecessor, that, in all cases, an application for a discharge must be made within the year from the adjudication. In re Wilmott [Case No. 17,778]. A different conclusion was reached, however, by Judge Nelson, in the circuit court, upon review of a decision of the district court for the Southern district of New York; and it was held by him, that it is only in cases where the application can be made after sixty days from the adjudication that it must be made within a year. In re Greenfield [Id. 5,773]; In re Martin [Id. 9,153]. I confess I am unable to appreciate any reason that prompted a distinction to be made in the section, for the purpose of compelling one class of bankrupts to apply for a discharge within a year, while granting to another class an unlimited period. There is great propriety in requiring the privilege to be exercised within a reasonable time, because, a creditor who desires to oppose can only do so when the bankrupt chooses to move; and, if an unlimited time is permitted the bankrupt, he can wait until the absence of witnesses, the destruction of evidence, and the mutations of time have deprived the creditor of the means of efficient opposition. And it would seem that the reason for the limitation applies with equal force to all classes of bankrupts. These considerations go far to sanction the construction given by Judge Hall. but, for the purposes of this motion, it is unnecessary to adopt that construction. It is quite apparent, that a bankrupt whose estate has assets, and whose creditors have interposed to protect their rights, by proving their debts, should not be permitted to obtain his discharge until he has been subject to the orders and supervision of the court sufficiently long to enable the assignee to avail himself of all the advantages which those orders afford for obtaining information and assistance from the bankrupt, and which, in many cases, are essential to the satisfactory administration of the estate. It was this view, probably, that influenced the framers of the law to provide, that, in such cases, no application shall be made for the discharge until the expiration of six months from the time of the adjudication of bankruptcy. The section under consideration provides, that such application may be made after sixty days, where either debts have not been proved, or assets have not come to the hands of the assignee. Inasmuch as assets did not accrue to the assignee in this proceeding, the bankrupt might have applied for his discharge at any time after sixty days from his adjudication and within one year. As held in Re Woolums [Id. 18,034], it is only when both debts have been proved and assets have come to the assignee, that the discharge cannot be applied for until after the expiration of six months. Within the construction adopted by the circuit court in Re Greenfield [supra], as he could have applied prior to the expiration of six months, he was required to apply within one year from his adjudication. Not having applied within the

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

year, he has not availed himself of the condition which, as I have heretofore held, is not permissive only, but imperative, if he desires to apply at all. The objections of the opposing creditors are, therefore, well taken, and the discharge must be denied. An order to that effect is, accordingly, directed."

The bankrupt applied to this court for a review of the order.

John H. Martindale, for bankrupt.
Charles F. Durston, for creditors.

HUNT, Circuit Justice. I agree in all respects with the opinion of Judge Wallace in this case. The authority to apply for a discharge rests entirely upon section 29. It must necessarily be taken with the limitations in that section contained. The only right to apply, there given, is to be exercised within one year from the time of the adjudication. In my judgment, this applies to all cases, whether there are debts proved, or assets received, or not. It is a case of limited authority, and there is no power to grant a discharge unless it is applied for within the time prescribed. The excuse of the bankrupt for the delay is a reasonable one, and, if there was power, I should accept it as satisfactory.

If it be assumed that the distinction made by Judge Nelson, that the limitation of one year applies only to cases where there are no assets, or no debts are proved, is a sound one, the result here must be the same. No assets in this case have come to the hands of the assignee.

Holding the limitation to be imperative, and not subject to the discretion of the court, there is no power to grant the discharge. In my view of the law, the district judge was compelled to deny the application for a discharge, and his order to that effect is affirmed.

Case No. 12,946.

SLOAN et al. v. The A. E. I.

[Bee, 250.][1]

District Court, D. South Carolina. Jan. 18, 1808.

BOTTOMRY—FOREIGN PORT—NECESSITY.

Hypothecation can only be in a foreign port, and under circumstances of absolute necessity, where relief cannot be had but by pledging the ship.

[Cited in The Hunter, Case No. 6,904; Joy v. Allen, Id. 7,552.]

[Before BEE, District Judge.]

This ship, belonging to Thomas Wright, James Bixby, and the captain, sailed from hence to Liverpool, with a cargo belonging to Sloan & M'Millan (the actors in this cause,) the freight of which amounted to £1878 sterling. The cargo having been delivered, it was found necessary to repair the ship. The actors advanced the money for this purpose, and a further sum to the captain, for all which the latter drew a bill of £1362 sterling. He was, himself, half owner of the vessel; and the bill was drawn on Wright, another part owner, and on Nathaniel Bixby, who appears to have had an interest in the cargo. James Bixby, the other part owner, is not noticed in the bill, which was protested on the 9th of December last. On the 23d of that month, Haley signed a paper, in Charleston, purporting to be an hypothecation of the ship for £938. 15s. and states therein that the hypothecation had been dispensed with in Liverpool, from a persuasion that the money advanced would be repaid on the ship's arrival here. The claimants, in their plea and answer, state that Haley did not apply to the libellants to advance money for these repairs, till after the ship had discharged her outward bound cargo, and they, as consignees, had received the freight.

The judge said that the principles of the law of hypothecation were fully laid down in Hopkinson's Rep. 163 to 199, inclusive. That he had been guided by those principles in several former decisions, and should continue to be so, till a decision of the supreme court of the United States should furnish a different precedent. In this case the paper pretending to be a deed of hypothecation had not been entered into until the vessel had got back to this port, and the bill drawn on the owners had been protested. No distress on the part of the captain had been proved; money was advanced as he wanted it, evidently on personal credit, and not on that of the ship. The libel was dismissed with costs.

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

SLOAN (NEW ENGLAND SCREW CO. v.). See Case No. 10,158.

SLOAN (SINGER v.). See Cases Nos. 12,898 and 12,899.

SLOANE (GIBBONS v.). See Case No. 5,382.

SLOANE (WEIMER v.). See Case No. 17,363.

SLOAT (GROVER & BAKER SEWING-MACH. CO. v.). See Case No. 5,846.

Case No. 12,947.

SLOAT v. PATTON.

[1 Fish. Pat. Cas. 154;[1] 24 Jour. Fr. Inst. (3d S.) 23; 9 West. Law J. 550.]

Circuit Court, E. D. Pennsylvania. April 8, 1852.

PATENTS—RESULT—MODE OF OPERATION—PROPERTY OF PATENTEE.

1. A difference in the result of the action of two devices is evidence that their mode of operation is different.

2. The invention which is set forth in letters patent belongs to the inventor as rightfully as

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

the house he has built, or the coat he wears. It can not detract from his title, that the subject of it is of his own creation, his thought, conceived and developed and matured in the recesses of his own mind.

[Cited in Buchanan v. Goodwin, 57 Fed. 1040.]

This was a bill in equity [by George B. Sloat against James M. Patton] filed to restrain the defendant from infringing the letters patent for "a new and useful improvement in the method of planing, tongueing, grooving, and cutting into moldings, or either, plank, boards, or any other material, and for reducing the same to an equal width and thickness, and also for facing and dressing brick, and cutting moldings on or facing metallic, mineral or other substances," granted to William Woodworth, December 27, 1828; extended by the board of commissioners for seven years from December 27, 1842; extended by special act of congress, passed February 26, 1845, for seven years from December 27, 1849, and reissued July 8, 1845. There were several suits involving substantially the same question of infringement.

Harding, Campbell & Keller, for complainant.

Taylor, Hubbell & Cuyler, for defendant.

KANE, District Judge. The effort to smooth boards and reduce them to a uniform thickness, by the rotary action of cutter-knives, set in the face of a disc, and made to revolve in the plane of the intended surface, is of ancient date. But from the time of Bramah, half a century ago, until now, it has never been successful.

If it were practicable to construct a machine, mathematically accurate in all its parts, and of inflexible material, so as to prevent all possible vibration; and if, besides, the wood to be operated on could be first deprived of all its elasticity; then each cutter, as it passed on its way, removing a certain portion of the board, would leave the surface absolutely finished behind it; and the other cutters and the same cutter returning in its revolution, all following in absolutely the same plane with the first, would pass over the finished surface, neither abrading it nor compressing it, yet in contact with it.

But these conditions involve mechanical impossibilities. The strongest engine that ever came from the shop, vibrates sensibly when it encounters an intermitting resistance, and there is no such thing as a non-elastic. The practical consequence is, that the cutters, after finishing their work, still continuing to revolve over the smoothed surface, will sometimes be impelled for the instant below the plane of their normal action; and on the other hand, the board, partially compressed when under the action of each cutter in succession, but rising again immediately afterward by its own elastic force, will present a new surface to be acted on by the next cutter, that surface varying in height according to the varying density and consequent elasticity of the board. This is illustrated by the "back lash," an irregular trace made on the finished surface by the cutters that continue to pass over it.

Woodworth was the first to propose a remedy for this, by placing his cutters on the periphery of a rotating cylinder, while he presented the face of the board in the tangent plane of their revolution. He thus prevented the cutters, while the board was moving from touching it a second time, and gave the dip and lift cut, which has been so often recognized as the characteristic of his patented machine.

It is obvious, that to make this cut it is not necessary to place the cutters on a true cylinder. A cone, or even a dished-wheel, scarcely deviating in appearance from a true disc, will produce the same effect, provided the board approaches and leaves the cutters in the tangent plane of their revolution. I had no difficulty, therefore, when the cases of Plympton and Mercer and others were before me some years ago, in holding that a cone or dished-wheel, so arranged, was simply a mechanical equivalent for the cylinder of Woodworth; and the rulings then made have, on more than one occasion since, received the sanction of both the judges of this court.

Strange to say, in three of the cases now before me, the principal dispute has been as to the fact whether the machine used by the defendant is or is not a disc, or, as it has been spoken of in the argument, a Bramah wheel. Numerous witnesses, some of them highly respectable, have testified that it is nothing else, and that its cutters move of course in the same plane and parallel with the lower face of the board; in other words, that the cutting disc coincides in its revolutions with the finished surface. But it is as certain as any truth in the philosophy of mechanics, that in this they are mistaken; for the machine in its ordinary working leaves no back lash, and the boards, that were passed through it by one of the gentlemen who inspected it under the court's order, show unequivocal marks of the dip and lift cut.

Neither witness nor the counsel has explained how a disc, which all describe to be like Bramah's wheel, and worked as his was, can produce results so different from his; nor how it happens that the results produced by it are so precisely those which would be produced by cutters revolving on a flattened cone. On the contrary, all admit that the machine does vibrate, and that the boards which it commonly works on are damp, if not wet, and of course easily compressed under the cutters. It is to exact more than a reasoning faith in human testimony, to assure us that such a machine, acting on such a material, will, in

the hands of these defendants, renounce the mechanical law which it has been exemplifying every-where else for the last fifty years.

It is true that upon tramming the disc with the bed-plate in order to test their parallelism, the defendant's witnesses observed no deviation from the disc form. But, though this were so, yet on just such a disc the cutters might be arranged in such a manner as to describe a cone when revolving; and Mr. Patton's cutters were not and probably could not be trammed. Besides which the axis of the disc was so adjusted at its upper extremity as to give it at pleasure the oblique action which is adapted to the revolving cone, and yet to restore it again in a few minutes with the disc parallel to the bed-plate.

When we consider that the machine, while at rest, can have its character thus easily modified, so as to give proof for the time of parallelism of its parts, if such proof be desirable; and that while in motion, it defies all scrutiny, revolving it may be some three thousand times in a minute, and its three cutters, therefore, following each other with an interval between them of but the one hundred and fiftieth part of a second; and that an obliquity in the disc, not exceeding the one-sixteenth of an inch on its cutting diameter, would be sufficient to change its effective action; we can apprehend without difficulty that the defendant's witnesses may have fallen very honestly into error. But it is enough for us to know, that according to the laws of matter and motion, which are the condensed expression of all mechanical experience, the machine as they describe it can not produce the effects, which we see that the machine produces in fact. The footprint on the sand indicates with less certainty the form and pressure of the foot that made it, than a curved cut on the face of a flat board proves a corresponding curvature in the path of the cutting tool.

It is in vain to refer us, for an explanation, to the abnormal influences of vibratory or semi-elastic forces, without showing us what those influences are, and how they resolve for the time a disc into a cone, or enable the machinist to trace a regulated curvilinear surface by the rectilinear movement of a plane. This is only to reassert the paradox, in more general language, to prove the controverted fact by reference to an unknown theory.

I must hold, therefore, that the planing machines of Mr. Patton, Ashton, and Winslow, and Ashton and Beers, are essentially the same with the planing apparatus of the Woodworth patent.

The machine employed by Mr. Patton, and, as it is said, invented by him, for cutting the tongue and groove, is spoken of as an elliptical saw; it consists of a revolving saw-plate of lozenge shape, set at such an oblique angle as to make all the teeth on its periphery equidistant from its axis of motion. In revolving, it describes, of course, a cylinder, and its action is that of a rasp. It does not divide the board, as a saw does; but performs the office of Woodworth's duck-bill cutter, somewhat less perfectly, and apparently at greater cost. The only points of difference are: that what would be the one cutter disc of Woodworth is in Mr. Patton's machine effectively divided into several, so as to form a series of cutting discs or saws; the teeth of which abrade in succession the portions of the board to be removed, leaving the edge rough in consequence, instead of giving them the comparatively smooth surface of the Woodworth machine; and that while a broken cutter can be removed from the Woodworth disc, and a new one substituted, a tooth broken from Mr. Patton's saw destroys it. Whatever, therefore, may be the supposed interest or novelty of the elliptical saw, it must in its adaptation to this particular use be regarded as embodying the principle, and constituting, but for its inferiority, the mechanical equivalent of Woodworth's cutting-wheel.

The tongueing and grooving apparatus of the Ashton and Winslow and Ashton and Beers machines are confessedly those of Woodworth's patent.

The same is true of Snowden's; and his planing machine is an equally direct piracy of the Barnum patent, now held by the complainant.

I have not in this opinion discussed the question of the validity or extent of Woodworth's patent. These have been so often before almost all the courts of the United States, as to make them inappropriate topics for interlocutory argument. There must be at some time or other an end of controversy, as to the character of a patentee's property in his invention; and now that twenty-three years have gone by since the Woodworth patent was issued, and passed into litigation, I am disposed to recognize its parting claim to repose: salve senescentem. I therefore limited the discussion at its outset to the single question of infringement.

I have one more remark to make: it is prompted by a review of the devices employed by these defendants, and those who have gone before them in similar controversies. I can not but think that the time has come, when in this district at least the attempt to mask an infringement of this particular patent should be almost regarded as a waste of ingenuity. It is a truth of large acceptation, both in policy and morals, that it is better in the long run to strive patiently for a legal property of one's own, than to persist in trespassing on the property of others. The invention which is set forth in letters patent belongs to the inventor as rightfully as the house he has built, or the coat he wears. It can not detract from the dignity of his title, that the subject of it is of his own creation, his thought, conceived and developed and matured in the recesses of his mind—that it has cost no man else any thing, and he asks nothing in return for the contribution it makes to the general wealth and happiness, but that security of enjoyment during a limited period, which the laws engage for all

other property without limitation of time, and without stipulating a price. It would be a reproach to the judicial system if an ownership of this sort could be violated profitably or with impunity.

The complainant's counsel will prepare the draught of decretal orders in the several cases in accordance with this opinion.

[For other cases involving this patent, see note to Bicknell v. Todd, Case No. 1,389.]

Case No. 12,948.

SLOAT v. PLYMTON.

Circuit Court, E. D. Pennsylvania. Oct., 1846.

PATENTS — PRELIMINARY INJUNCTION — ACQUIESCENCE—PRESUMPTION.

An absolute acquiescence by a patentee in the adverse possession and enjoyment of his rights by a stranger would, under ordinary circumstances, for a period much less than six years, offer a strong argument against the grant of the injunction before a final decree.

Before KANE, District Judge.

[Cited in 2 Whart. Dig. 415, to the point as stated above. Nowhere reported; opinion not now accessible.]

Case No. 12,948a.

SLOAT v. SPRING et al.[1]

Circuit Court, E. D. Pennsylvania. April 23, 1850.

PATENTABLE INVENTION—COMBINATIONS—ANTICIPATION—UNSUCCESSFUL EXPERIMENTS—ORIGINAL AND REISSUE PATENTS AS EVIDENCE—VALIDITY OF REISSUE—INFRINGEMENT, WHAT CONSTITUTES—MECHANICAL EQUIVALENTS.

[1. It is when speculation is reduced to practice, when experiments have resulted in a contrivance or machine, new and useful, not previously known or used by others, that the discovery or invention is entitled to a patent.]

[2. If experiments made are unsuccessful and useless, and are abandoned, and not followed up by a successful machine, until a successful machine has been made and patented by another, then the right of the latter to his patent is not affected by such prior experiments.]

[3. A patent is prima facie evidence that the patentee was the first and original inventor of the improvements described in the specifications; and a reissue patent granted under authority of the act of 1836 is prima facie evidence that the machine described in the specifications thereof is substantially the same as the machine intended to be patented by the original patent.]

[4. The drawings are a part of the description of the thing patented, and are to be considered in connection with the specifications.]

[5. Although the various combinations and mechanical means and instruments of which a machine is composed have been previously invented or described, a part in one improvement and a part in another, yet the contriver of that machine is the original and first inventor, if he was the first to discover the mode of combining these different inventions and instruments together in one organized machine adapted to the purposes mentioned in his patent.]

[Cited in brief in Pitts v. Edmonds, Case No. 11,191.]

[1] [Not previously reported.]

[6. The fact that one who claims to be the first and original inventor of a machine has taken into partnership with himself the assignees of another, who also claimed to be the original inventor, instead of litigating with them the question of priority, is not to be regarded as an admission by the former patentee of the validity of the patent obtained by the latter, if the arrangement was induced either directly or indirectly by fraud or misrepresentation.]

[7. The power to grant an amended patent under the statute (Act July 4, 1836, § 13; 5 Stat. 122) is given to the commissioner only where there is an error in the patent which arose through inadvertency, accident, or mistake, without any fraudulent or deceptive intention; and of this the commissioner must be the judge, and his judgment is generally considered as conclusive on that point.]

[8. A renewed patent issued under this provision must be for the same invention or machine as that described in the original patent, and not for a different machine; but the description or specifications of the renewed patent will necessarily be different from that of the original, as the renewal is granted only upon the ground that the other was defective and insufficient.]

[9. Neither the substitution, in a reissued patent, of one known mechanical equivalent for another, nor the more perfect adjustment of the different parts of the same combination, will make the specifications substantially different so as to invalidate the reissue, provided that there is not included therein any new discoveries, inventions, or improvements, capable of being patented as such.]

[10. Infringement involves substantial identity. A machine is an infringement if it incorporates in its structure and operation the substance of the invention; that is, by an arrangement of mechanism which performs the same service, or produces the same effect in the same way, or substantially in the same way. Merely colorable alterations or evasions, by substituting one mechanical equivalent for another, do not avoid infringement.]

[Cited in brief in Pitts v. Edmonds, Case No. 11,191.]

[11. If a change, made by an alleged infringer, is the substitution of a mechanical equivalent, and besides this accomplishes some other advantage beyond the effect or purpose accomplished by the patentee, then there is an infringement as respects what is covered by the patent, although the further advantage may be patentable as an improvement on the former invention.]

[This was a bill in equity by George H. Sloat against Charles A. Spring, Peter Boon, and David R. Garrison for infringement of a patent. The cause was tried before a jury upon issues prepared and sent out of the chancery court.]

St. Geo. T. Campbell and Charles M. Keller, for plaintiff.

Henry J. Williams and Theodore Cuyler, for defendants.

GRIER, Circuit Justice (charging jury). I congratulate you that we have at last got so near what I hope is the end of our labors in this case. You have observed that this is not the usual common law action brought for the infringement of a patent right, in which, if the plaintiff is successful, the jury assess damages, and render a verdict which

is the foundation of a judgment at law. But this case had its origin on the equity—the chancery—side of this court. The plaintiff, in his bill, prayed for an injunction against the use of a certain machine in the possession of the defendants, which he alleged was an infringement of the patent to Woodworth, of which plaintiff was the assignee. The defendants, in their answer, denied—First. That Woodworth was the original inventor of the machine patented by him in December, 1828. Second. They alleged that the patent re-issued in July, 1845, is not for the same invention intended to be patented by the first patent of 1828. And thirdly. That admitting the validity of the plaintiff's patent, the machine invented and used by the defendants did not infringe upon it.

As the questions in issue on the equity side of the court were all matters of fact, affirmed by one party and denied by the other, which would probably be the subject of much contradictory testimony of facts, and conflicting opinions on questions of mechanics, we thought it best to have them tried by a jury—the proper tribunal for trying questions of fact—when the witnesses and the machines themselves can be brought into court, where the one may be subject to careful inspection, and the other to rigid cross-examination; the only sure method of eliciting the truth in such cases as the present. Courts of chancery examine all questions by depositions, not by witnesses, and in depositions every man may be just six feet long, and you cannot compare them. It will be your duty, therefore, gentlemen, to carefully examine and weigh the testimony which has been laid before you, on each of the three several points stated, and according as you find the truth to be, to return an affirmative or a negative answer to the three following propositions. You will observe that they are stated in the interrogative form; your verdict will be made by changing them into the affirmative or negative form.

The first is—Was Wm. Woodworth the original inventor of the machine patented by him, December 27th, 1828? Your answer will be, either he was the original inventor or he was not. The second—Is the re-issued patent of July, 1845, for the same invention, intended to have been patented by the patent of December 27th, 1828? Your answer will be either that the patent of July was for the same invention as that of 1828, or it was not. So with the third—Does the machine of the defendants infringe upon the said amended patent of July, 1845? Your answer will be either that it is or it is not. So that you are not to be troubled with any other extraneous questions; they will be settled when we get your answers to these.

The first point for your consideration is, was Wm. Woodworth the original inventor of the machine patented by him, December 27th, 1828? Now without pretending to sum up the whole evidence on any one of these points—a thing that has been done with great ability by the learned counsel on both sides, I must confess, with uncommon ability—it will be necessary for the court only to make a few remarks on the points of law that bear on each of these points, and especially on those which the counsel have requested us to instruct you. To entitle a man to a patent, the law requires that a machine must be new and useful. You will observe that this first question admits the machine to be useful; it does not question that; it only denies its novelty so far as Woodworth is concerned in it. Was Woodworth the first inventor of this machine for planing, tonguing and grooving boards at one operation? "The intellectual production, or that which, when perfected, constitutes the thing invented, differing from all other things by some substantial peculiarity, which gives it a distinct character, is what the law means to protect with an exclusive privilege." That is what is meant by an invention. It is usually the case, when any valuable discovery is made, or any new machine of great utility has been invented, that the attention of the public has been turned to that subject previously; that many have been making researches and experiments. Philosophers and mechanicians may have in some measure anticipated, in their speculations, the possibility or probability of such discovery or invention; many experiments have been unsuccessfully tried, coming very near, yet falling short of the desired result. Yet all these speculations and experiments have produced nothing really beneficial. The invention, when perfected, may be truly said to be the culminating point of many experiments, not only by the inventor, but by many other persons. It is when speculation is reduced to practice, when experiments have resulted in a contrivance or machine, new and useful, not known or used by others before, that such discovery or invention is entitled to a patent. It has happened that adroit speculators may steal the inventions or discoveries of others, and be the first to obtain a patent. But it more generally happens that when an inventor has successfully produced a new and useful machine, that dozens of others rise up to claim a priority. Never has a useful invention been patented, that witnesses could not be found to swear that they had seen it in use many years before, either in New or Old England; and yet, strange to tell, the invention, though most valuable, has been left to drop into obscurity, both by the inventor and the public, burnt up, or had some other accident, so that neither the public nor the inventor received any advantage from it. Such testimony ought to be received with suspicion, as it carries improbability on its face. You will inquire,

then, whether any person had previously invented the machine patented by Woodworth in 1828, or whether he was the first inventor of that compound machine used for the planing of boards, for which he obtained a patent. The evidence on the affirmative of this question, is: First—the patent, which is prima facie evidence; it is founded on the oath of the applicant, and is sufficient until those alleging he is not the inventor prove the contrary. You know that is the meaning of prima facie evidence, sufficient to prove a fact until the contrary is proved; but it is liable to be rebutted. That is the difference between prima facie and conclusive evidence. Second—the testimony of witnesses that such a machine was not known before 1828, when Wm. Woodworth put it into successful operation at the dry dock in New York.

Has the force of this testimony been overcome by that offered by the defendants? They allege, First. That Woodworth is not the first inventor, nor entitled, as such, to a patent, because his machine had been described in a public work, anterior to his patent. Certain volumes of an English publication, called the Repertory of Arts, have been put in evidence to show that one Samuel Bentham had described such a machine in the specifications of certain patents granted to him as early as 1793, or before that time. And they have shown you a patent granted to one Bramah. It must strike you as strange, that if either Bentham or Bramah had invented a machine of such immense value, no person could be found who had ever seen it in operation. It is true, that if a machine substantially the same with that patented to Woodworth, in 1828, is described in books as long ago as 1793, the patent to Woodworth is void, and you should find this question in the negative. But I must say—although it is a question of fact for you—that I am unable to discover anything like the description of such a machine in those books. Second. A machine, said to have been used by one Judge, in 1822, at the navy yard in Washington, for grooving timber for the coffer dam, is alleged to be the same in substance with that now in controversy. Of this you will be the judge; the learned counsel did not seem to insist upon it much. I may say, I have not been able to discover that it contained any combination of machinery, by which a board or plank could be planed, tongued and grooved at the same time. Third. Then comes Robert Wollcott, who swears, that in 1822, he made the iron for a machine substantially the same with the present, which was erected and used in Baltimore. Is this true or false? The witness has stated circumstances which forbid the idea of a mere mistake as to date, and yet several witnesses have been brought to contradict him most directly as to many circumstances. If the shop or manufactory mentioned by Wollcott, be the same as that described by the other witnesses, his testimony must be a fabrication from beginning to end, though I must confess it was delivered with such an appearance of truth and circumstantial accuracy, that would, in most cases, demand our confidence in its truth. It will be for you to judge. In judging of it, you should look to probabilities. How does it come, if it is true this invention, so valuable, was made in 1822, no other man in Baltimore has lived to tell anything about it, or that the mere accident of the burning up of so valuable a machine would have caused it to be abandoned altogether? In connexion with this point, I may observe that the patent law requires that a person who claims a patent should have invented or discovered some useful art, manufacture, engine, machine or device, or an improvement therein not before known or used; and as a general rule the patent is void where the machine or device patented can be shown to have been before known or used. But it has been decided that in case of a lost art, (such as embalming, painting on glass and certain arts that the ancients had, which we have not,) where the previous inventor had never brought his invention into use, and the knowledge of it has become lost, a new inventor of the same thing may have a valid patent. Fourth. It is contended that Mr. Emmons was the first inventor of this machine. A patent to him for the same, dated April 25th, 1829,—a few months after that to Woodworth,—has been read in evidence. This patent, it is contended, describes the machine now before you, while that of Woodworth does not. It is alleged that he commenced his experiments in 1824—before Woodworth—at Syracuse, where he contrived a machine for jointing plank with a revolving cutter. It has been shown also, that Woodworth, instead of contending with Emmons, took his assignees into partnership, adopted his patent, and thereby admitted an equal, if not a better right, in Emmons, to the original invention of the machine. On the contrary, it is alleged, and testimony has been given to support the allegation: First, that Emmons had never invented anything but a machine called the "flim flam," which was wholly inoperative and worthless, and abandoned as such by him and the person for whom he constructed it; second, that the patent to Emmons was got up by certain speculators, (plain spoken people would call them swindlers,) not too good to commit a fraud, for the purpose of imposing upon Woodworth; that the specification was taken from Woodworth's machine, which was before their eyes in operation in New York, and that if it contains a better description of the machine, it is because rogues may be more skilful in drawing a specification than the honest inventor.

Of the truth of these allegations, on both sides, you must judge. One remark only I would venture to make. If Mr. Emmons,

after the rude and unsuccessful contrivance called the "flim flam," made in 1824, had proceeded to perfect the machine by after continued experiments, and really ever did devise and construct such a machine as is described in his specification, how does it come that not a single witness can be found to prove the fact, while so many persons survive who have seen his flim flam and Woodworth's machine? It will be proper here to notice the various instructions respectively requested on this point proposed for your investigation. The defendants' counsel request us to instruct you as follows: "That if the jury believe that Emmons experimented in 1824, and produced a machine which embodied the substantial principles of the Woodworth machine, and then, in 1829, perfected his invention by patenting a machine which is perfect and capable of use, and at the same time embodies the principle of the Woodworth machine in the same organized form, then he is the first inventor, and his patent will defeat that which was granted to Woodworth." This instruction, so far as it states the general principle, that if Emmons invented a machine, in 1824, substantially the same as that invented by Woodworth, in 1828, his patent gave him the better title, is undoubtedly true, as it is the date of the invention, not of the patent, which gives the prior and better right. But if the experiment of 1824 was unsuccessful and useless, as proved by the witnesses; if it was abandoned, and not followed up by success in making a machine which would plane, tongue and groove boards before Woodworth completed his invention successfully, then the patent of Emmons, if it embodies the principles of the Woodworth invention, is worthless and void; it was a mere attempt of certain men to get up a thing to defraud Woodworth. The plaintiff's counsel have also requested the following instructions on this point, which the court give, as requested: "First. The patent of 1828 is prima facie evidence that Wm. Woodworth is the first and original inventor of the improvement described in the specification; and the patent of 1845 is prima facie evidence that the machine described in the specification, is substantially the same with the one intended to be patented in 1828, and the burthen of proving the contrary is upon the defendants. Second. The drawings are a part of the description of the thing patented, and to be considered in connection with the specification. Third. If the jury find that, although all the various combinations and mechanical means and instruments of which this machine is composed, had been so previously invented or described, but that a part is in one improvement and a part in another, yet William Woodworth is the original inventor, if he was the first to discover the mode of combining these different inventions together in one organized machine, adapted to the purposes mentioned in his patent. Fourth. That a previous experiment, made and abandoned, and never rendered practically useful or operative, will not affect the validity of a patent subsequently obtained. Fifth. That if the arrangement made in November, 1829, between Emmons and Woodworth, was induced, directly or indirectly, by fraud or misrepresentation, it cannot be held or regarded as an admission by Woodworth, of the validity of the Emmons patent." I think it is unnecessary to make any further remarks on the Emmons patent, or on this first point.

The second point proposed for your consideration, is as follows: Is the re-issued patent of July 8th, 1845, for the same invention, intended to have been patented by the patent of December 27th, 1828? The authority under which this second patent of 1845 was issued on the surrender of the original, is to be found in the 13th section of the patent act of July 4th, 1836. It was new in our patent laws. Previously, if a man had drawn a patent and specification unskilfully, so as to include more than he intended, or did not describe what his invention consisted in, he forfeited all. By the act of 1836, the system was remodeled, and a more competent board appointed; previously, patents were generally issued to any man that asked for them, and allowed to run their risk in the courts. I will read the 13th section of the act. (Reads.) Observe, "for the same invention." Experience has shown that many persons have the talent to invent, who are not able sufficiently to describe their invention in a specification. Indeed, the ability to do this requires such a knowledge of the principles of mechanics, of previous inventions, and of legal principles, that few persons are competent to the task, although many put themselves forth to do it. It would be unjust that a meritorious inventor should lose the benefit of his invention, when by inadvertency, accident or mistake, he has been unable sufficiently to set forth, on his specification, the true nature and extent of his invention. It was to remedy this evil, that the 13th section of the act was devised and enacted. You will observe—First. That this power to grant an amended patent is given to the commissioner, only where the error has arisen through inadvertency, accident or mistake, without any fraudulent or deceptive intentions. Of this the commissioner must be the judge, and his judgment is generally considered conclusive on that point. Second. The commissioner is authorized to grant this amended patent only in two cases: (1) Where the patent is inoperative or invalid by reason of a defective or insufficient description or specification; or (2) by reason of the patentee claiming more than he had a right to claim as new. From this it follows—First, that the renewed patent must be for the same invention or machine as that described in the first patent,

and not for a different machine; second, that the description or specification in the one will necessarily be different from that in the other, as the first is defective and insufficient, and the second is not. Your inquiry will not be to take the two specifications and compare them together. That is not the thing. The court can do that. It is because the first specification has been ignorantly and mistakenly drawn, and insufficient, that a new one has been made to set forth the real principles in the machine. The only question is whether the invention, the machine described in the last patent, is the same intended to have been patented in the first. Your inquiry then on this point will be, "Was the invention or machine invented and intended to be described in the first specification that which is described in the last specification?" or does it describe a different combination of instruments and devices to plane, tongue, and groove boards? Does the amended specification and patent merely correct the defects and insufficiency of the first? or does it describe a new and different or improved machine, differing substantially from that described in the first? As you find these facts, your verdict will be the affirmative or negative of this proposition. If you find that Woodworth had actually invented a valuable machine for planing, tonguing, and grooving planks at one operation, it is but fair to presume that he intended to describe it in his patent if he could, and though that description may be defective or erroneous,—and if the amended patent correctly describes the machine he first had invented, if it describes the same combination of instruments to produce the same effect, then the case is within the province of this section of the act, and the patent of 1845 was properly issued. On the contrary, if the amended specification describes a machine substantially different from that invented in 1828,—a different combination of tools to produce the effect,—if it includes improvements and inventions of Woodworth or others, discovered or invented since 1828, the amended patent would not then be for the same machine or invention. If it is not substantially for the same invention or machine, your verdict should be in the negative. The question is not whether the specifications agree, as some seem to think, but whether the last patent is for the same combination of instruments, or the same machine originally invented by Wm. Woodworth, and intended to be patented by him for planing, tonguing, and grooving boards at one operation.

On this point the plaintiff's counsel requested the following instructions: "First. That a difference in the description in these two patents does not necessarily make them describe different inventions, as the inventor is authorized by law to correct, in the re-issued patent, the errors or deficiencies in the first, and make the second what he might have made the first; neither will the substitution of one known mechanical equivalent for another, nor the more perfect adjustment of the different parts of the same combination, or means, or instruments make the specification substantially different." The first proposition in this point is undoubtedly correct, and the second also, when construed with this proviso, that the amended patent does not include new discoveries, or inventions, or improvements, capable of being patented as such, which are not included in the first. "Second. That if the jury believe that the model produced from the Franklin Institute was made by Woodworth, as representing the machinery made by him prior to his application for a patent therefor, and was the invention intended to have been patented, and if they believe that substantially the same mechanical combination to produce the same results are described in the patent of 1845—that then said patent of 1845 is not invalid by reason of its containing a modification of the description in the patent of 1828." This instruction is given as requested.

The third and last point for your consideration is as follows: Does the machine of the defendants infringe upon the said amended patent of July 8th, 1845? An infringement of a patent takes place whenever a party avails himself of the invention of the patentee, without such variation as will constitute a new discovery. A man may improve a patented machine so as to entitle him to a patent for his improvement, but that will not give him a right to use the invention of the first patentee without his license. An infringement involves substantial identity, whether that identity be described by the terms "same principle," same "modus operandi," or any other. "A machine is an infringement of another if it incorporates in its structure and operation the substance of the invention: that is, by an arrangement of mechanism which performs the same service, or produces the same effect in the same way, or substantially in the same way." Mere colorable alterations, or adroit evasions by substituting one mechanical equivalent for another in the combination which constitutes the machine, should never be allowed to protect a party. But if the difference is not a difference of form, if there is a material alteration of structure, if there are substantially different combinations of mechanism to effect the same purpose by means which are really different, and not the same in substance, then the one will not be an infringement of the other. "The question whether one thing is a mechanical equivalent for another, is a question of fact depending on the testimony of experts, or an inspection of the machines, and it is an inference to be drawn from all circumstances of the case, by attending to the consideration whether the contrivance used by the defendants is used for the same purpose, performs the same duties, or is applicable to the same object as the contrivance used by the patentee. The question to be determined is, whether under a variation of form,

or by the use of a thing which bears a different name, the defendant accomplishes in his machine the same purpose, object, or effect as that accomplished by the patentee, or whether there is a real change of structure and purpose." If the change introduced by the defendants constitutes a mechanical equivalent in reference to the means used by the patentee, and if, besides being an equivalent, it accomplishes some other advantage beyond the effect or purpose accomplished by the patentee, it will be an infringement as respects what is covered by the patent, although the further advantage may be a patentable subject, as an improvement on the former invention. The defendants' patent of July, 1840, is "for an improvement in the arrangement of the pressure and feed rollers in planing machines." This patent is prima facie evidence that the defendants have made an improvement as regards pressure and feed rollers in planing machines. There is not the slightest evidence that it does not infringe on the Woodworth patent of 1845. It would seem rather to admit that it does use pressure rollers, if it patents an improvement on them.

We shall conclude by stating to you the different instructions requested by the counsel, affecting the question. The plaintiff's counsel pray the following: "First. That the claims in the patent of 1845, are set forth in plain, intelligible and unambiguous words." There is no doubt of that. "Second. That if the defendants employ in combination rotating planes and rollers, to prevent the board from being drawn up by the planes when cutting upwards, or from the planed to the unplaned surface, then they infringe on the first claim in the said patent, and the third issue must be found for the plaintiff." That is correct; you are so instructed. "Third. Or, if the defendants employ a combination of rotating planes with cutter wheels for tonguing and grooving, for the purpose of planing, tonguing and grooving at one operation, then they infringe the second claim of said patent, and the third issue must be found for the plaintiff." That is also correct. "Fourth. That if the rollers, used by the defendants in combination with rotating planes, do so operate 'as to prevent the boards from being drawn up by the planes when cutting upwards,' it is immaterial whether they also operate as feed rollers, and although used for such double purpose, they would infringe upon the plaintiff's patent, and the third issue must be found for the plaintiff." That is already stated as correct. "Fifth. That although the defendants may have invented a peculiar and improved device for feeding the plank or altering the position of the cylinder, such improvement will not justify them in using any of the combinations claimed in said patent of 1845." That is so instructed already. These instructions are given as requested. The defendants' counsel have also requested us to give you the following instructions: "First. That although modes or mechanical methods of giving effect to well known material principles in machines are patentable; yet the principles themselves are not patentable." That is true. "Second. That the Woodworth machine is a combination of old and well known things for the production of a new result." That is correct. "Third. That said machine will not be infringed by a machine which combines one of its elements with a new, original and substantially different thing from the other elements of the Woodworth combination." That is perfectly correct. "Fourth. That a combination of old and well known things will not be secured by a patent which does not specifically describe that identical combination." That is also correct. "Fifth. That the sufficiency of the description in the specification, and the identity of the two machines described in the original and re-issued patents, are hereby questions of fact to be submitted to the jury." These instructions are also given as requested, except, as to the last, we would say the identity of two machines is a question of fact for the jury. The construction of a specification is for the court. But whether it describes a certain machine before the jury, is a question for them to determine.

To sum up the whole case in a few words and apply the abstract principles, we have stated, more immediately to the several points proposed for your investigation. On the 1st point: If you find from the evidence that Wm. Woodworth was the first to invent and perfect a machine, or combination of known instruments or devices for planing, tonguing and grooving boards at one operation, substantially such as is described or intended to be described in his patent of 1828, you should find this proposition in the affirmative, notwithstanding other persons may have made unsuccessful experiments, or come near it, or made contrivances something like it, which had been abandoned and never perfected or prosecuted to a successful result. On the contrary, if you find from the evidence that William Woodworth was not the person who first perfected such a machine, and brought it into successful operation, but that some other person had successfully perfected such a machine before Wm. Woodworth, you will find this proposition in the negative. In examining the second proposition, you will inquire, not whether the two specifications agree in their claims, for that is not the question; but you will inquire what was the machine invented by Wm. Woodworth, and which he intended to secure by his letters patent in 1828. If you find that this model from the Franklin Institute is a fair representation of it, (which is, I think, fully established by uncontradicted testimony,) you will take this patent of 1845 and compare the claims of it, as set forth in the specification. You will find what combination of mechanical powers, instruments or devices is claimed as constituting the machine patented, as the principle or modus operandi of his invention; not merely whether the

mere details or accidents described in it as the best mode of building a machine are the same, or whether the form or propositions may differ, (one being horizontal and the other perpendicular,) or whether one well known mechanical equivalent or analogous device for effecting a particular purpose, is substituted for another; but you will examine what the party claims as the combination of instruments or devices which constitute his invention. First. Do you find in this model of the machine of 1828 "the employment of rotating planes" (I quote from the specification of 1845, claiming what is the invention) "substantially such as are described, in combination with rollers, or any analogous device to prevent the boards from being drawn up by the planes when cutting upwards, or from the reduced or planed to the unplaned surface?" Here they have defined their invention. Now do you find these things in that model? That is bringing the question down to the testimony. Second. Do you find in that model which we take as the representative of this invention, "the combination of rotating planes with the cutter wheels for tonguing and grooving for the purpose of tonguing and grooving boards at one operation?" That is the second claim. If you find that the machine invented in 1828 (or this model which represents it) contains this combination of mechanical tools, instruments or devices, forming a machine which will plane, tongue, and groove boards successfully at one operation, then you will find this second proposition in the affirmative. If, on the contrary, you find that the machine, described in the patent of 1845 (and represented by this mahogany model,) is a machine differing in principle or mode of operation from the other, (and not merely in its mode, form, or accident,) if the combination of instruments and devices be not the same in substance as in the first, if it is a different machine or invention, not producing the same effect, substantially in the same way, you will find the proposition in the negative. Third, and lastly. You will compare the defendants' machine with the claims in the specification of 1845. First—Has it "the employment of rotating planes with rollers, or any analogous device, to prevent a board from being drawn up by the planes when cutting upwards, from the reduced or planed to the unplaned surface"? That is what is claimed in the patent of 1845. If that is to be found in the defendants' machine you will find this proposition in the affirmative, that it is an infringement. Second—Or, if you should not find the first, if you find in the defendants' machine rotating planes, with the cutter wheels for tonguing and grooving, for the purpose of planing, tonguing and grooving boards at one operation, you will find this proposition in the affirmative. Third—Or, if you find in the defendants' machine either the tonguing or grooving cutter wheels, combined with pressure rollers to keep the board steady, and prevent the cutters from drawing the boards towards the centre of the cutter wheels, whilst it is moved by the machinery, you will find this issue in the affimative. If you find any one of these three points, you will find the issue in the affirmative, that it is an infringement. And in considering these points, it will not be material that the rollers may perform another function, or may be improved so that the improvement itself may be patentable, provided that they operate to prevent the board from being drawn up by the cutters. And I may here observe, also, that if the machine of the defendants operates as described in their own specification, it is a palpable infringement of the patent of 1845. You have seen the machine —I have not—and you can say whether it operates as the defendants have themselves described in their specifications. If, on the contrary, you find that the defendants' machine, first, uses rotating planes alone, not in combination with rollers or other analogous device, (such as straight edge or the like,) to prevent the board from being drawn up to the plane when cutting upwards; and if you find, second, that the defendants do not combine rotating planes with cutter wheels for tonguing and grooving, for the purpose of planing, tonguing, and grooving boards at one operation; and, third, that they do not use either the tonguing or grooving cutter wheels for tonguing and grooving boards, in combination with pressure rollers,—you will return a negative answer to these propositions.

To conclude, gentlemen: You will give an affirmative or negative answer to each of these several questions proposed for your investigation, according as you shall find the truth to be, as shown by the evidence before you, and in accordance with the principles of law which we have stated to you as plainly as we can, without any regard to notions or opinions entertained by yourselves or others, as to the propriety or justice of the act of congress extending this patent—the relative situation of the parties—the particular hardship of the result of the case, or any other consideration, save the truth of your answers to the several propositions submitted to your consideration. Suffer me to remark that it is of great importance, not only to the parties, but to the public, that you should agree on a verdict, and that all this labor and time of the court, and expense to the government and the parties, should not be lost. Jurors can generally agree when each brings an unprejudiced mind to the examination, seeking only for truth, and not stubbornly advocating a preconceived or hasty notion, taken up without sufficient examination. You will have sufficient time for this, as the court will be in session probably for a month to come. If you should agree after the court has adjourned, you can seal up your verdict and separate.

Verdict for plaintiff.

[For other cases involving this patent, see Cases Nos. 1,389, 1,944, 1,953, 5,402, 9,884, 10,480, 11,191, 12,947, 12,948, 13,078, 17,214, 17,786, 17,787.]

Case No. 12,949.

SLOCOMB et al. v. LURTY et al.

[1 Hempst. 431.][1]

Circuit Court, D. Arkansas. June, 1841.

PAYMENT—BY DRAFT—PRINCIPAL AND AGENT—ASSUMPSIT—NEW TRIAL—COSTS.

1. A draft of a third person does not discharge the original consideration, unless it is received unconditionally as payment.

2. Consent may be implied from circumstances and from silence.

3. Where H. drew a draft as agent for L. and B., to cover the purchase-money for goods, and the latter persons received the goods, and refused to pay the draft, on the ground that H. was not authorized to draw it, *held*, that the plaintiffs may abandon the counts in the declaration on the draft, and recover the value of the goods on the common count, for goods sold and delivered.

4. A verdict against evidence will be set aside and a new trial granted, the costs to abide the event of the suit.

Assumpsit [by Cora Ann Slocomb, Robert Richards, and Romanzo Montgomery against Beverly H. Lurty and Reason Bowie.]

F. W. Trapnall and John W. Cocke, for plaintiffs.

A. Fowler, for defendants.

OPINION OF THE COURT (JOHNSON, District Judge). This was an action of assumpsit brought by the plaintiffs against the defendants, upon a bill of exchange, for goods sold and delivered, and on an account stated. The defendants filed the plea of nonassumpsit sworn to, the effect of which was to deny the execution of the bill of exchange as well as the whole cause of action.

It may be admitted that the plaintiffs failed to prove the execution of the bill of exchange, and cannot recover upon the counts founded upon it. Can they recover on the evidence on the count for goods sold and delivered? From the evidence it appeared that John J. Bowie, as the authorized agent of the defendants, purchased the goods from the plaintiffs, and the defendants afterwards received the goods. John J. Bowie expressly stated that Littlebury Hawkins did not assist him in purchasing the goods; he alone purchased them for the defendants, as their authorized agent. He also stated that when he purchased the goods from the plaintiffs, he perhaps told them that he was doing business for the defendants; but informed them that Hawkins was to pay them by a draft on Turman, Curdy & Co. He further stated that he believed that the draft declared on was drawn by Hawkins in liquidation of the amount of the purchase-money of the goods, and that he was present at the time; but did not know that Hawkins signed any other name than his own. It is, then, apparent from the evidence of John J. Bowie, that he, as the authorized agent of the defendants, purchased the goods from the plaintiffs, and at the time informed them that Hawkins was to pay, by a draft on Turman, Curdy & Co.; that Hawkins, in the presence of John J. Bowie, did draw such a draft and deliver it to the plaintiffs; but that he drew it as agent of the defendants, and not in his own name. Bowie does not say whether Hawkins was to draw in his own name, or as agent of the defendants; but the latter in fact drew as agent of the defendants in the presence of John J. Bowie, and delivered the draft to the plaintiffs. It is highly improbable that John J. Bowie should have been ignorant of the character in which Hawkins drew the draft; but admitting that he was, still his presence gave sanction and approval to the bill of exchange as drawn by Hawkins. The plaintiffs received it with the approbation of John J. Bowie, because he was present; was cognizant of the matter, and did not object. [Bank of U. S. v. Lee] 13 Pet. [38 U. S.] 119; Allen v. McKean [Case No. 229]; 2 Starkie, Ev. 21.

Take another view of the case. Suppose the contract between the parties to be, that the plaintiffs would take the draft of Hawkins in his own name, as payment for the goods; does that discharge the defendants in case Hawkins does not give such a draft? I apprehend not. If Hawkins had given such a draft, and the plaintiffs had received it unconditionally as payment, it might have operated to discharge the defendants, whether the draft was afterwards paid or dishonored. 1 Salk. 124; 2 Ld. Raym. 929; [Sheehy v. Mandeville] 6 Cranch [10 U. S.] 253, 264; 5 Johns. 72; 9 Johns. 311. But there is no proof that Hawkins ever gave such a draft, and on the contrary there is full proof by John J. Bowie's deposition that Hawkins drew a draft as agent of the defendants, in their names and in the presence of John J. Bowie, and delivered it to the plaintiffs. This draft the defendants have refused to pay, and have denied the authority of Hawkins to draw in their names. There is full proof that the plaintiffs sold and delivered the goods to the defendants; and the latter having failed to show payment for the goods, it follows that they are entitled to recover on the common counts therefor. From the testimony it is clear enough that the goods were purchased on the credit of the defendants, and not on the credit of Hawkins, who cannot be held responsible for them, in any manner, or in any form of action.

I am satisfied that the verdict of the jury in favor of the defendant, is contrary to the evidence, and a new trial must therefore be granted, the costs to abide the event of the suit. Ordered accordingly.

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

Case No. 12,950.

In re SLOCUM et al.[1]

Circuit Court, D. Vermont. Dec. 16, 1879.[2]

BANKRUPTCY—PARTNERSHIP—CREDITORS.

[In the matter of A. M. Slocum & Co., bankrupts. See Case No. 12,951. Heard on petition of review.]

BLATCHFORD, Circuit Judge. I have carefully examined the facts and questions in this case, and the authorities cited by the petitioners for review, and concur in the conclusion of the district court, following that of the register, that the firm creditors are entitled to share pari passu with the individual creditors of A. M. Slocum in his individual estate. The petitioners for review claim in their petition that the $146.40, excess of expenses in collecting the $124.25 should not come out of the private creditors, but should come out of the firm creditors in the dividend. I do not understand that the court below, or the register, decided otherwise; and it is now admitted before me by the counsel for the firm creditors that the firm creditors, in sharing in the individual estate of A. M. Slocum, should reimburse to that estate the $146.40. The court below will doubtless so order. The prayer of the petition of review is denied, with costs.

Case No. 12,951.

In re SLOCUM et al.[1]

District Court, D. Vermont. Oct. 4, 1879.[3]

BANKRUPTCY OF PARTNERSHIP—RIGHTS OF FIRM CREDITORS IN INDIVIDUAL ESTATE.

[In an ineffectual attempt to collect firm claims, only a small sum was realized, which was not sufficient to cover the expenses of the suits brought, and these expenses were more than sufficient to exhaust the firm assets: but if they were included in the general expenses of the bankruptcy, and paid from the assets of both firm and individual estates, there would remain a small amount of firm assets for distribution to the firm creditors. *Held* that, under these circumstances, the firm creditors were entitled, under section 36, of the act of 1867, to share in the individual estate pari passu with individual creditors.]

[In the matter of A. M. Slocum, a bankrupt.]

By JOHN L. EDWARDS, Register:

At the second and third meetings of creditors in the above bankruptcy, certain questions arose in relation to the distribution of the estate, which I am requested by the creditors to report to said court for determination. On the 5th day of October, 1878, P. P. Pitkin, assignee in said bankruptcy, sold, as the property of the copartnership, one horse for $130, one carriage for $65, and one harness for $10,—making in all the sum of $205. It was claimed before me, at said meeting of creditors, on the coming in of the assignee's account, by certain creditors, that said horse, carriage, and harness were not the property of the copartnership, but that they belonged to the individual estate of A. M. Slocum, one of the bankrupts. I find that, soon after the proceedings in bankruptcy were instituted, and after the election of the assignee, certain of the creditors, through their attorney, C. W. Porter, Esq., claimed that said property belonged to the copartnership estate, and it was also claimed by J. C. Slocum, one of the bankrupts, that he was the owner of said property, and that it belonged to his individual estate. And the said A. M. Slocum also claimed it as his property, and that it belonged to his individual estate, and also claimed that the assignee should set out the horse to him as exempt property, but the assignee declined to do this, and claimed that said property belonged to the copartnership estate, and as such he sold it as above stated, and placed the proceeds as assets to the copartnership estate.

A full hearing was had before me in relation to which estate said property belonged, whether to the copartnership estate, or to the estate of A. M. Slocum, no claim being made at the hearing that said property belonged to the individual estate of J. C. Slocum. I find, from the evidence introduced before me, that the property, at the time of the bankruptcy, belonged to and was the property of A. M. Slocum, individually, and as such belonged to the individual estate of A. M. Slocum, one of the bankrupts, and I have directed the assignee to place the proceeds of said sale to the assets of A. M. Slocum, in his individual estate,—to which decision and order of the register, Mr. Wing, attorney for certain of the creditors, objected. Should the finding of the register be sustained, there will remain, as returned by the assignee, $124.25 of copartnership estate, under circumstances hereinafter detailed. Should the register's finding be set aside, there will be $329.25 of the copartnership assets, subject to modification by facts hereinafter stated. The assets of the estate of A. M. Slocum, before deducting expenses of the bankruptcy, amount to $5,105 22, including the $205 above named, which I have ordered placed to A. M. Slocum's estate, as above stated. No claims have been proven against J. C. Slocum, and he has no individual estate.

The assignee incurred expenses in the state of New York, in endeavoring to collect claims due to the copartnership solely, to the amount of $270.65. From this undertaking he received the said sum of $124.25. The amount sought to be recovered in the state of New York was quite large, amounting to many thousands of dollars. He failed to prosecute his claims there for want of funds, and only obtained from this

[1] [Not previously reported.]

[2] [Affirming Case No. 12,951.]

[3] [Affirmed in Case No. 12,950.]

undertaking said $124.25, which, it will be seen, was far less than the expenses incurred in getting it. A question arose before me whether the copartnership estate should bear the burden of the above-named expenses in New York, and thus absorb the $124.25, or whether these expenses should be mingled with the other expenses of the bankruptcy, and all the expenses of the bankruptcy, including those in New York, above named, be deducted from the total amount of assets of both estates, and thus leave the net proceeds of each estate for distribution among the creditors of the estates, respectively. Should the whole of the expenses, including those in New York, be deducted from the total assets of both estates, some $60 or $70 would remain of the copartnership estate for distribution. If the copartnership estate bears the burden of the expenses in New York, as above stated, then there will be nothing of the copartnership estate for distribution, and the copartnership creditors, in that event, as I understand, would be entitled to come in and share in the estate of A. M. Slocum pari passu with the creditors of the individual estate of said A. M. Slocum; but, if the expenses in New York are placed with the other expenses of the bankruptcy, and as a part thereof, then there will be a small sum for distribution in the copartnership estate to copartnership creditors, and in that event the copartnership creditors would not share in the individual estate of A. M. Slocum.

The question involved depends, as it seems to me, upon the construction to be given to section 36 of the bankrupt act [of 1867 (14 Stat. 534)], which is the same as section 5121 of the General Statutes. This section has been discussed in the case of In re McEwen [Case No. 8,783]; also in Re Smith [Id. 12,987]. In the case of In re McEwen, Judge Hopkins refers to Story, Partn. § 380, as follows: "If there is any joint estate, however small it may be, if it is an available joint fund, and not purely a nominal joint fund, then the joint creditor is excluded. For example, if the joint fund is absolutely worthless, from the expenses of any attempt to get it in, or if it is pledged beyond its real value, it will be deemed a nullity." Judge Hopkins further says, in the same case: "I think this language plainly indicates that a joint fund, to exclude the firm creditors, must be beneficial to them. If it costs more than it comes to to get it, it is in no sense an available joint fund within the authorities." It is said by the lord chancellor in Ex parte Peake, 2 Rose, 54, where the answer to the petition of the firm creditors was that there were joint effects of £1. 11s. 6d., "that joint effects to the value of five pounds or five shillings would be an answer to the application, but if the property alleged to exist was in such a situation that any attempt to bring it within the reach of the joint creditors must be deemed a desperate, or in point of expense, an unwarrantable, attempt, that would authorize a departure from the rule, and allow said creditors to prove notwithstanding such property."

From the facts above stated, the register decides that the firm creditors are entitled to share pari passu with the individual creditors of A. M. Slocum in his individual estate.

Certain creditors, by their attorney, J. A. Wing, having excepted to the rulings of the register, the questions arising upon this report are referred to the district court for adjudication. All which is respectfully submitted.

WHEELER, District Judge. Decision of register, in all respects, approved.

[The decision of this court was affirmed, upon review, by the circuit court. Case No. 12,950.]

Case No. 12,952.

SLOCUM et al. v. HATHAWAY.

[1 Paine, 290.][1]

Circuit Court, D. Vermont. May Term, 1820.

PRINCIPAL AND SURETY—PRISON BOUNDS BOND—ESCAPE—ASSENT OF PLAINTIFF.

The obligors on a bond for the jail limits are not discharged from their liability for an escape by the subsequent assent of the plaintiff. Such assent to have any effect must have been given prior to the escape.

At law.

C. Marsh and H. Allen, for plaintiffs.

C. P. Van Ness, for defendant.

LIVINGSTON, Circuit Justice. This action is brought on a bond executed on the 15th day of November, 1805, by the defendant, together with Silas Hathaway and two others, to the marshal of this district, the condition of which is, that Silas Hathaway, who had been taken on a ca. sa., which had issued on a judgment obtained against him by the plaintiff, should remain within the limits of the jail, and should not depart therefrom until he should be lawfully discharged, without committing any escape before such discharge, nor do any act by which the marshal should be damnified. There is no dispute between the parties that an escape took place on the 10th of September, 1814, so as to render the defendant liable to an action on this bond; but he contends, that he is exonerated from a liability which, it is admitted, then attached, by an act of the plaintiffs themselves, or their assignees.

It appears by the pleadings, that after the commencement of this action, which was commenced in September, 1814, a separate suit was brought on this same bond, for said escape, against Silas Hathaway, the original

[1] [Reported by Elijah Paine, Jr., Esq.]

debtor, in which a judgment was obtained against him. On a capias issued on this judgment, S. Hathaway was arrested, and remained in prison until he escaped therefrom on the 6th of February, 1818. That a little better than three months after the last escape, the marshal, on fresh pursuit, took him into custody, for the purpose of recommitting him to prison on the aforesaid execution, when he produced the following note in writing from the assignee of the plaintiffs, which had been obtained after the escape, and previous to the recapture aforesaid: "Silas Hathaway is now here," (that is in the city of New-York,) "and has informed me he has broke jail in order to get his affairs settled. It is not my wish that he should be again confined on account of the debt due me, brought against him by William and Christopher M. Slocum, until after next term, when the trial comes on, in order to give him an opportunity of attending court and making arrangements towards a settlement by our getting a judgment against his bail." This act on the part of the plaintiff, it is contended, discharged the marshal from any liability he might have been under for the escape of Silas Hathaway, and for the same reason the present defendant alleges that he is exonerated.

To determine on the sufficiency of this defence, it will be necessary to look to the situation of the parties at the time when this note or memorandum was given by the plaintiffs' assignee; and then inquire what ought to be its effect on the present action. There is no doubt that the condition of the bond on which this action is brought, was broken on the 10th September, 1814, and that the responsibility which thereby devolved on the defendant in common with the other obligors, continued in full force at the time of the second escape of Silas Hathaway, and down to the 23d day of May, 1818, when he was retaken by the marshal; and that if he had then been committed to jail, and remained there without any interference of the plaintiffs, the defendant would still be liable to this action. But although this be not denied, it is supposed that the plaintiff, by assenting to Silas Hathaway's continuing at large for a certain time after his last escape, has thereby deprived himself of a recourse against the sheriff for such escape, and also of a remedy on this bond against any of the obligors.

It has been long and well settled, that if there be a joint and several obligation for the payment of money, and judgment be recovered against one of the obligors, who being in execution thereon, escapes, or rather goes at large by permission of the sheriff, under a command or license of the plaintiff, not only is every remedy against such obligor gone for ever, but all the other parties to the bond are also discharged. But there is no case on this subject which does not make a precedent consent on the part of the plaintiffs a sine qua non in giving effect to such discharge. This was decided in 1 Salk. 271, and Baron Comyns, who is an authority in himself, reports this decision as law, and says that if a sheriff permits a voluntary escape with the plaintiff's consent, the defendant can never be retaken by the sheriff or the plaintiff, if such consent of the plaintiff be precedent to the escape; but otherwise if it be subsequent. So in a case in 1 Term R., Mr. Justice Ashurst observes, that when a prisoner is discharged with the consent of the party who put him in execution, he cannot be retaken. The reason of this distinction is obvious. If the party who confines another on execution, orders him to be liberated, as he has a right to do, it is the duty of the sheriff to let him go at large, and the plaintiff thereby acquires no right of action against any one. But if the party escapes, by the permission or negligence of the sheriff, without any previous interference on the plaintiff's part, a right of action has accrued against the officer, which the law will not allow to be discharged by any subsequent loose consent, and probably by nothing but a release under seal, or by some agreement founded on valuable consideration. This was recognised as law in a very recent decision in 16 Johns. Nor can it make any difference whether in the given case, the sheriff has a right of recaption or not; or, in other words, whether the escape be negligent or permissive, the reason of the rule applying as much to the one case as to the other, there being in both at the time of the supposed consent a vested right of action against the party from whose custody the escape was effected. It is not a sufficient answer to say that the posterior consent shall have relation back to the time of the escape, and that subsequent ratification of the acts of another renders it as valid as if it had been preceded by a regular letter of attorney. Whatever may be the effect of such ratifications in particular cases, it is sufficient to say, that in the one before the court, the law has decided that no after consent, a right of action having already accrued, shall have the same effect as one given antecedently, or contemporaneously with the discharge of the prisoner.

It has thus far been supposed that the writing subscribed by Mr. Bowne, is a subsequent assent on his part to the escape which had taken place; but it contains in terms no such thing. It is not even an expression of a wish or desire that Hathaway may not be arrested again; but merely that he has no wish on the subject, which might very well be the case, especially if he thought that by the escape he had obtained a remedy for his debt against the marshal. Certain it is, that it imposed on the marshal no obligation to abstain from retaking his prisoner, and committing him to jail; and if such recaption took place, as it did, the writing contained no authority to discharge the debtor from custody. It is not perceived how the present defendant could be defrauded by Silas Hatha-

way's continuing at large until after the then next term of the court, or how it would facilitate the obtaining of a judgment against the defendant in this suit; for whether he were in confinement or not on the judgment which had been obtained against him on the jail bond, the liability of the defendant to the action would be precisely the same, provided he had not been discharged from confinement on the judgment on the jail bond by order of the present plaintiffs. The court is of opinion there must be judgment for the plaintiffs.

Case No. 12,953.

SLOCUM et ux. v. MARSHALL et al.

[2 Wash. C. C. 397.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1809.

EQUITY — RELIEF FROM DEED — RECONVEYANCE — PROCEEDS OF PART SOLD.

Where a conveyance had been made of her real estate by a daughter to her father, immediately before her marriage, under a belief that she would be benefited by the same, and that the property conveyed by the deed would become hers after the decease of her parent; and where the operation of the conveyance was to deprive the daughter of the estate; the court decreed a conveyance of the property, and an account of the proceeds of the part which has been sold, so as to effect the justice of the case, and to give to the daughter the property to which she would have been entitled, had not the conveyance been made.

[Cited in Taylor v. Taylor, 8 How. (49 U. S.) 201.]

[Cited in Bowen v. Hughes (Wash.) 32 Pac. 99. Cited in brief in Fletcher v. Jackson, 23 Vt. 588; Greene v. Harris, 10 R. I. 385; Hershey v. Weiting, 50 Pa. St. 243; Miller v. Simonds, 72 Mo. 683. Cited in Munson v. Carter, 17 Neb. 301, 27 N. W. 211. Cited in brief in Rankin v. Patton, 65 Mo. 382. Cited in Troll v. Carter, 15 W. Va. 582. Cited in brief in Walker v. Walker, 25 Mo. 374.]

The bill states, that the female plaintiff was the only child of Christopher Marshall by his first wife Elizabeth, who died in 1781 shortly after the birth of this daughter, entitled to a considerable real estate; of which, a tract of land in Bucks county, about twelve or thirteen acres of meadow land near Philadelphia, and a house and lot in Southwark, were parts. In 1781, a day or two before her death, Mrs. Marshall, by deed, conveyed the above-mentioned tract of land in Bucks county, and the meadow tract, in trust for her husband in fee, and the residue of her estate in trust for her daughter; but this deed was not accompanied by the private examination of Mrs. Marshall, and of course was invalid. Mr. Marshall, however, not aware of this defect, made his will in 1799, and devised to the female plaintiff both of the tracts of land to which he supposed himself entitled under the above deed. The bill then states, that the female plaintiff was, in June, 1805, prevailed upon by her father to convey to Z. Collins these two tracts of land, to the use of her father, in fee, but with a parol declaration of trust by the father, that it was intended for the benefit of his daughter, the plaintiff. That this conveyance was made after the addresses of the plaintiff, Slocum, to the female plaintiff, had been made, and favourably received in the family of Mr. Marshall; but that this conveyance, as well as another made by the female plaintiff to her said father, of the house and lot in Southwark, the day before her marriage, was unknown to the plaintiff, Slocum, until after his marriage. The prayer of the bill is for an account of the proceeds of the Bucks county land, which the father, Mr. Marshall, had sold for about 8000 dollars, and for a conveyance of the meadow land, and the Southwark property. The answers of the executors of Christopher Marshall, and of his children by the second marriage, admit the conveyances as stated in the bill, but deny the trust, except in relation to the Southwark lot, which they say they are willing to convey. They admit, however, that Christopher Marshall died intestate, as to the Bucks county and meadow land, and other property, to the value of about 5000 dollars; all acquired subsequently to the making of his will, to one-fourth of which the plaintiffs are entitled. Some witnesses were examined in court, on the hearing; and upon their testimony, the amount of which will be noticed in the opinion, the cause turned.

WASHINGTON, Circuit Justice (PETERS, District Judge, absent), delivered the opinion of the court.

The first question in this cause, is, whether the complainants are entitled to be relieved against the deed executed by the female complainant on the 26th of June, 1805, either upon the ground of a parol declaration of trust, inconsistent with the absolute nature of the conveyance; or upon the ground of fraud, in reference to the circumstances under which it was given, as they respected the grantor, or the subsequent rights of her husband? It is sufficient to say, in answer to the first question, that there is no evidence of a declaration of trust, either written or parol, by which the nature of that trust can at all be understood; and the attempt to create and to enforce a specific trust, from the loose and equivocal expressions of the parties, made at different times and upon different occasions, would be inconsistent, not only with the spirit and policy of the statute of frauds, but with the general rules of evidence. In this case, it is true, the statute of frauds is not pleaded, or relied upon; but it is still

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

necessary that the parol declarations of a trust should be plain and unambiguous, before the court can change the absolute nature of the conveyance, and decree an execution of a trust not expressed in the deed. It is impossible for this court to say, whether any agreement upon this subject took place between the father and daughter; or if any, what it was. From Mr. Collins's testimony, it would seem, that the intention of Mr. Marshall was to dispose of the Bucks county land; and after bestowing a part of the purchase money upon his daughter, who was about to be married, to invest the residue in some productive fund. As to the meadow tract, that his design was to give her that by his will. Hill confirms by his testimony this evidence, in relation to an intended gift to the daughter; but would lead us to suppose, that instead of money, it was the intention of Mr. Marshall to bestow upon his daughter a house, in case she and her husband should determine to live in Philadelphia. The testimony of Weir & Beisley affords very little satisfaction upon this subject, as it is quite uncertain whether the re-conveyance which Mr. Marshall declared he meant to make to his daughter, referred to the property conveyed by her to him in June, 1805, or to the Southwark lot. From the whole of this evidence, then, it does not appear, whether Mr. Marshall had bound himself, or not, by any promises to his daughter, to re-convey, or to devise this property to her, or to dispose of it in any other manner for her use; or, whether his different conversations with the witnesses extended any further than to express his own intentions in relation to the property. If, then, the court were called upon to enforce the execution of any specific agreement between the father and daughter, I should consider the evidence too uncertain and indefinite on which to found a decree.

Taking this deed, therefore, as an absolute one, the next question is, can it be supported as such? Consider the situation of the parties to it. The grantor, a young lady who from her birth had but on one occasion, and that for a short period, left the paternal roof, bound to him by the strong ties of filial affection, duty, and respect—accustomed, at all times, to repose in his advice and opinion the most unbounded confidence, and to consider even the request of such a parent as equivalent to a command,—is informed by him that a certain portion of her property, about two-fifths in value, had been conveyed to him by her mother; but that the same, from some legal objection, had failed to take effect. She is then requested to confirm this title, and is at the same time assured by the father, that his design in obtaining this confirmation, is to promote her interest as well as his own. She reflects upon the proposal, and, influenced by the double motive of promoting her own interest and that of her father, and at the same time fulfilling the intentions of her dead mother, she consents to execute the conveyance. It does not appear that the daughter had any distinct idea of the manner in which this conveyance was to benefit herself, or to fulfill the intentions of her mother; because, it must at once have struck her, that an unqualified confirmation of her mother's grant would be completely destructive of her own interest, and consequently that the two objects she had in view, were incompatible with each other. It is obvious, therefore, that her conduct in this affair was altogether influenced by the declaration and by the advice of her father, in which she appears to have placed the most implicit and respectful confidence. A transaction attended by such circumstances, will naturally excite the jealousy of a court of equity. I know not what conversations passed between the father and daughter; nor whether any, and what particular inducements were held out to her, for parting with so great a portion of her fortune. But this is certain, beyond all doubt, that she had been impressed, generally, with the belief that her interest was to be consulted; and that she acted under that impression. Yet nothing could be more inconsistent with her interest, than the deed which she was prevailed upon to execute. That a fraud or imposition of any kind, was at any time meditated against this lady by her father, the fairness and purity of his character forbid me for a moment to suspect. Independent of his general character, the cause furnishes abundant evidence to repel any insinuation to his disadvantage in this respect. And from this evidence, it is not difficult to conjecture in what manner the conveyance was intended to promote the interest of the two parties to it, and at the same time to gratify the laudable wish of the daughter to fulfil her mother's intentions. It is to be remarked, that more than two-thirds in value of this property was entirely unproductive, and of course could add nothing to the revenue of the father, whose interest was only that of a tenant for life. By converting it into money, and investing that in other property of a more active nature, this inconvenience would be remedied. But the father had no power to sell the fee simple interest in the estate, without being enabled by his daughter to do so. The plan suggested to her was adequate to the purpose, and was therefore adopted. In this way the interest of the father was promoted. On the other hand, he had devised the whole of this property to his daughter; and not knowing, as is highly probable, that the estate would not pass by this devise, but would be considered as a lapsed devise, he at once perceived that his daughter could not be injured by the conveyance. The deed from the mother was intended to give him the absolute control over the property, and

that from the daughter gave effect to that intention. The daughter was to be benefited in two respects—by an advance of money as an outfit on her marriage, and by the protection which her father would be enabled to afford her, in the event of any misfortunes which might befall her intended husband. That these were the objects contemplated by the father, is strongly supported by the evidence; and it is not improbable that they were communicated to the daughter. But the will of the former having proved ineffectual for securing to the latter the consideration which induced her to make the deed, a court of equity can do nothing less than to set aside the deed, as having been made under a mistake, and for a consideration which has failed. But in doing this, I am clearly of opinion, that the intention of Mr. Marshall would be frustrated, by considering any part of the advances made by him to his daughter as a gift, in addition to her own fortune. I wish I could feel satisfied in depriving her also of any part of his other estate, in which it was decidedly his intention she should not participate. Upon this subject, however, my opinion is not yet conclusively formed; and for the purpose of hearing the counsel upon that point, in case it should not be compromised in the meantime, I shall reserve it for future consideration.

I shall decree a conveyance to the complainant, Elizabeth F. Slocum, of the meadow tract and the Southwark lot; and an account of the money received for the tract in Bucks county; and of all advances made by Christopher Marshall for his daughter, since the 26th of June, 1805, or towards the improvement of her property before or since that period.

Case No. 12,954.

SLOCUM v. SWIFT et al.

[2 Lowell, 212.][1]

District Court, D. Massachusetts. March, 1873.

EVIDENCE — PAROL — WRITTEN CONTRACT — SHIPPING—WHALING VOYAGE—DURATION—PASSAGE MONEY — FREIGHT — COMMISSIONS.

1. In the absence of fraud, a contract between the master and owners of a whaling-ship cannot be varied by parol evidence.

[Cited in The Elvine, 19 Fed. 528.]

2. A contract between owners and master for a whaling voyage not exceeding five years' duration does not mean several voyages extending through five years, but ends when the object of the voyage is fulfilled; that is, when a full cargo is obtained.

3. When the voyage was to end at New Bedford, and the parties afterward agreed to end it at San Francisco, the master was allowed the expenses of his passage to New Bedford.

4. The owners were allowed freight on oil from San Francisco to New Bedford.

5. A master was allowed a commission for selling oil after the voyage was ended; but was not allowed extra pay as cooper for eighteen days, when the cooper was ill.

6. Commissions charged for sales by the owners were disallowed.

The libellant [G. W. Slocum] was master of the bark Louisa, which, by the articles, was "bound from the port of New Bedford, on a voyage not exceeding five years in duration." By the first article it was agreed "that the term of service of any of the undersigned shall not end, nor shall any one be entitled to a discharge, until the expiration of said term, unless said ship shall sooner return to said port of New Bedford, and the voyage be terminated." The libel propounded that the voyage was begun May 4, 1869, and was prosecuted in the Atlantic and South Pacific Oceans until March, 1872, when the libellant received orders to take the ship to San Francisco and fit her for a cruise in the Arctic Ocean; that the libellant was not bound to serve in the Arctic, but he took the vessel to San Francisco and delivered her to the owner's agent, and spent eighteen days in fitting out the ship for the new service. It was admitted that the libellant's pay, if due, was nearly $6,000, and a considerable part of this was paid him before the hearing. The respondents [Jireh Swift and others] denied that the libellant had any right to refuse to go to the Arctic, or any strict title to be paid before the return of the ship to New Bedford. Several items of charge on the one side and the other were disputed, as is sufficiently explained in the opinion of the court.

T. M. Stetson, for libellant.

G. Marston, for respondents.

LOWELL, District Judge. In the absence of fraud, the contract of the master of a whaling-ship with his owners cannot be varied by parol evidence. The only authority cited for the libellant is The Cypress [Case No. 3,530], in which Judge Betts says, that seamen have, in numerous cases, been permitted to prove that the articles did not set forth correctly the agreement entered into by them, and that, even without evidence, the court will set aside agreements injurious to the seamen. The cases which the learned judge gives in this connection are all in support of the latter clause of his proposition, or rather of his second proposition, that the admiralty court will set aside unreasonable clauses. Mr. Justice Curtis examines the question with great ability, and cites many cases against the admission of the evidence, though he differs from them, and admits the parol proof, on the ground that the statutes of 1790 [1 Stat. 131], and 1840 [5 Stat. 394], and especially the tenth clause of the latter, make void a contract with seamen, if it does not state the voyage truly; and he holds that parol evidence may always be

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

given to show illegality as well as fraud in a contract. Page v. Sheffield [Case No. 10,-667]. That case settled the law for this circuit, upon an intelligible, if debatable, ground; but it has no application to the libellant's contract, because a whaling voyage is not within those statutes, and because the master is not a seaman by those laws. They require the master to make a written contract with the men, but leave the owners to make their own arrangements with their agent, the master; and if these parties make a written contract, it must be construed and acted on like all other written contracts made between parties of equal standing. All the cases, therefore, which Mr. Justice Curtis distinguished from the case before him, become valuable in deciding this controversy.

The learned judge who decided the case of The Cypress, above cited, reconsidered the point twenty years afterwards, and in a careful opinion laid down the doctrine that seamen bound themselves conclusively by the articles in the absence of fraud or deception. The Atlantic [Case No. 620]. One of the head-notes to Willard v. Dorr [Id. 17,680], is, that the shipping articles are evidence of the terms of hire, even of the master or his apprentice, but are not conclusive. On turning to the judgment, we find that the objection was taken by the owners that the master usually made the contract himself behind the backs of the owners, and therefore it could not be used as evidence in his own favor in a suit against them. Story, J., decided that the articles were, prima facie, presumed to import verity, and to be as well known to the owners as to the master, and that if the owners intend to contest them, they should give evidence of fraud, mistake, or interpolation. His course of reasoning clearly goes to hold the master himself bound, unless he, on his side, can show like grounds for setting aside the written contract.

Leaving out of view the parol evidence, what is the meaning and effect of this contract? The libellant contends that the description, "a whaling voyage not exceeding five years in duration," means that he is bound to serve until he obtains a full cargo of oil, but in no event more than five years. The owners read it that he is to serve for five years, if they choose to order him to remain abroad so long, no matter what may have been his success, and that they can order him to pursue the business of whaling in any seas to which they may choose to order him. Although, as I have said, the master is supposed to be sui juris, and not to be under the care of the court to the same extent as the seamen, yet, as we know that the articles in a whaling voyage are always, in fact, drawn up by the owners, or by their order and direction, they ought to be taken most strongly against the owners. If they intend a series of voyages to any and all parts of the world, they ought to be careful to express this clearly in the contract. The words, "a voyage," seem rather to imply that when the object of the voyage has once been accomplished the ship is to return home. Such is the opinion of Judge Ware in Gifford v. Kollock [Case No. 5,409]. Whether the articles in that case contained the provisions, which are found in these, for the master to ship oil home or elsewhere, "during the voyage," I do not know. This is the only part of the contract that seems much to favor the respondent's construction. This clause was introduced into the form of articles used in New Bedford; and I have upheld the stipulations of the crew to allow the charge and freight on oil so shipped, upon evidence that it was beneficial to both parties, and necessary to the successful prosecution of the business as now conducted, especially if ports on this coast would compete with others nearer the whaling-grounds.

But I have never before been called upon to say whether that permission modified the contract by implication in respect to the voyage itself. I do not think it ought to have that effect. It would undoubtedly aid in construing an ambiguous agreement, and the effect of taking advantage of it may sometimes be that the ship will, on the whole, send and bring home more than a full cargo; but its primary purpose in such a contract as this, which is for one voyage, must be held to be of a secondary character, intended to relieve the ship of the trouble and risk of carrying her oil about wherever there may be occasion to cruise before the voyage is completed.

It is very difficult to reach any satisfactory conclusion from the letters between the parties, whether they understood the articles in the one way or the other. There are expressions both of the master and of the owners, which tell against the construction they now set up respectively. But I think it results from the whole correspondence, that whatever may have been thought to be the strict rights of either in the matter, which were in no sort made a question at that time, the contract was so far modified by consent of both, that a return to New Bedford was abandoned, and the voyage was ended at San Francisco. This being so, I think the libellant is fairly entitled to have his passage home paid by the owners; because this is the general rule, and ought to be implied, where nothing is agreed to the contrary. He had offered to pay his passage home from New Zealand, but under different circumstances, and that offer was never acted on.

It does not follow that the defendants were bound to transport the oil to New Bedford at their own expense. Oil has no domicile; although the contract undoubtedly is, that the crew are to make the oil, and the owners are to transport it, yet, so far as these parties are concerned, the question of freight depends upon the contract as modified by common consent. When they had agreed upon

San Francisco as the terminus, the owners might have sold the oil there, if that course would have been for the best interests of the parties; or they might have shipped it to New Bedford "or elsewhere," in the language of the shipping articles, provided no delay of settlement was caused thereby, and a higher price was obtained, after deducting freight and other necessary charges. They were bound to exercise their best skill and judgment in disposing of the oil and bone at the best accessible market. I understand that the course they took proved to be the best.

For the oil that was sold at San Francisco for the convenience of the defendants, to enable them to refit the ship without sending out funds for the purpose, the master should be allowed the same price as was obtained for that which was sent home, less the proportionate freight. If the libellant performed services at the port of discharge beyond what were in the line of his duty, such as selling oil for the prosecution of the new enterprise, he ought to be paid for them. His lay covers every thing he would have been bound to do, or might choose to do, in relation to the voyage itself, and no more. The owners have charged him a commission on the sales which he effected; this charge must be rejected, and the same or some equivalent charge be transferred to the other side of the account.

The commissions at the home port were never allowed by Judge Sprague. He thought the custom to charge them was not reasonable, because it appeared to be a charge by the owners for performing their part of the contract. I see no reason to depart from this course of decision. Indeed, I believe I have followed it before. The owners in many cases do not sell the oil, if they prefer rather to pay the cash market price and take the chance of a rise. I do not say that the master might not compel a sale of so much as would establish the market price, but I have never known this to be insisted on; and the commission, so far as it is charged for selling the oil, is not only for work which the owners do as part of their contract, but which they in fact, in the majority of cases, do not do till after the settlements are made. So far as the commission is intended as compensation for the services of agents, the case must stand precisely as if there were but one owner. If the sole owner sold the oil and made up the accounts, then, according to the decisions, he is merely doing what is necessary to ascertain the lays, and should not charge for it; and it is no concern of the master and men whether the owner finds it convenient to employ an agent or not.

In asking pay for doing the cooper's work for eighteen days, the libellant appears to be standing on what he considers his strict legal rights. One who ships in any capacity takes the chance of extra labor, care, and responsibility which may devolve on him by any accident of the voyage. If the mate had fallen ill for a short time, the master could not, I think, have claimed mate's pay in addition to his own for an increase of work; nor could the mate, if the master had been ill for a short time. On the other hand, it has often been decided that a man or a mate, who is promoted de facto or de jure during a voyage, is afterwards to have the wages of the higher station. There are many cases of meritorious conduct and arduous service, in which no legal title to extra pay can be recognized, but reliance must be placed on the liberality of owners or underwriters. It is not easy, perhaps, to lay down the precise limits of the strict right. Each case must be decided on its own facts. Here I decide that there was no such service performed as requires the owners of this ship to pay the master any wages as cooper, though it may be he would have had a legal claim on the cooper.

This opinion will enable the parties to settle the account, I suppose, without reference to an assessor.

Interlocutory decree for the libellant.

Case No. 12,955.

The SLOGA.

[10 Ben. 315.][1]

District Court, S. D. New York. Feb., 1879.

SHIPPING—DAMAGE TO CARGO—BURDEN OF PROOF—STOWAGE AND DUNNAGE.

1. A brig having taken on board at Pernambuco a quantity of mats of sugar to be brought to New York, under a charter and bills of lading which excepted perils of the seas, the sugar on her arrival at New York was found to have been washed entirely out of some mats and partly out of others. The consignees filed a libel against the brig to recover the loss as being occasioned by bad stowage and lack of sufficient dunnage. The sugar was green sugar and liable on that account to excessive drainage, but it appeared that twelve per cent was the limit of drainage usual in such sugars on such a voyage, which was much less than this had lost. It appeared that the brig met with severe weather on the voyage, but the log showed that she was kept pumped during the voyage and that the pumps were able to keep her free all the time, and she made no more water after the heaviest gale than at first. *Held*, that the burden was on the brig to show that the loss was occasioned by a peril of the sea, the consequences of which could not have been guarded against by the master and crew with the means available to them.

[Cited in The Chasca, 23 Fed. 160; The Queen, 28 Fed. 757; F. O. Matthiessen & Wiechers Sugar Refining Co. v. Gusi, 29 Fed. 795.]

[See Bearse v. Ropes, Case No. 1,192.]

2. The comparatively good condition of the top of the cargo showed that the loss was not occasioned by the vessel's having taken in water through the seams of the deck.

3. As appeared from her log, the crew had been at all times able to control the leak, and

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

the water did not appear at any time to have been as deep in her as the platform on which the sugar was stowed, and the injury to the sugar was caused by the water reaching it in the bilges when the vessel rolled.

4. On the evidence, the vessel did not have sufficient dunnage under the cargo in the bilges to protect the cargo from such injury. Such lack of dunnage was bad stowage and the vessel was liable for the damage to the cargo therefrom.

[Cited in The Charles J. Willard, 38 Fed. 762; The Centurion, 57 Fed. 415.]

In admiralty.

Geo. H. Forster, for libellants.
W. R. Beebe, for claimants.

CHOATE, District Judge. This is a libel by Edward F. Davison and others against the brig Sloga for failure to deliver in good order and condition a cargo of sugar shipped at Pernambuco under charter and bill of lading, which excepted only "all the dangers and accidents of the seas and navigation of whatsoever kind." The vessel left Pernambuco on the 13th of November, 1873, having shipped 5,100 bags of green sugar consigned to the libellants. Her voyage was from Pernambuco to Hampton Roads for orders and thence to her port of discharge. She arrived at Hampton Roads and there received her orders for New York and arrived in this port January 19, 1874. Upon the delivery of her cargo, it was found that 59 bags were entirely empty and 329 bags slack and greatly reduced in the quantity of their contents, and it is to recover damage for this loss that the suit is brought. The libel, after alleging the failure to deliver according to the bill of lading, charges that the loss was caused by the "careless, negligent and improper manner in which the said merchandise was stowed and the absence and want of proper dunnage and the want of proper care on the part of the master, his officers and crew and persons employed by him or them, and by reason of their careless and negligent failure to furnish proper, or any dunnage, in the bilge, and between the sugar and sides of the vessel many bags of sugar were sweated and stained by sea water and the heat of the vessel, by reason of such want of proper dunnage, whereby the sugar ran out of many of the bags entirely, and partly out of other bags, from leakage and from sea water blown through the ceiling in heavy weather." The answer avers that the sugar was shipped in bad condition; that it was new and raw sugar, dripping with molasses when shipped; that the sugar was stowed by a stevedore exclusively employed and controlled by the shipper, and that therefore the ship is not responsible for any fault in the stowage; that the cargo was, in fact, well and properly stowed and strictly in accordance with the custom of the port of Pernambuco; that the loss of weight was caused by the raw and green condition of the sugar and the great quantity of molasses that drained out of it; that the vessel encountered heavy gales, losing spars and sails, having her decks swept many days by the sea; that though the brig was tight, staunch and strong, she was strained by the violence of the wind and sea, and took in water through her seams, and that by the rocking and pitching on the sea the pressure of the cargo was increased and by this pressure the molasses was more and more pressed out, and that this was the cause of some of the bags being found empty and others greatly reduced in weight.

As to the defence that the ship is not responsible because the shippers undertook to stow the cargo themselves, it is enough to say that by the terms of the charter party the ship was clearly bound to receive and stow the cargo, and there is no evidence that by any other or subsequent agreement she was ever released from this obligation. And I do not understand that the testimony of the master is that he did not receive and direct the stowage of the cargo. At any rate, if it will bear that construction, it is not sufficient proof of the fact against the evidence of the charter party and bill of lading and the testimony taken at Pernambuco.

The cargo consisted of green or unclayed sugar, and the proof is clear that such sugars are subject to a considerable loss of weight: but the evidence is positive and sufficient to show that this cargo consisted of bags of sugar in good order and condition, for this class of sugars, when shipped, and while the ship must have the benefit of a full allowance for loss of weight, so far as it can be probably attributed to the dripping of the molasses from such sugar, yet there is nothing in the evidence which warrants the conclusion that from the mere character and nature of the sugars, even when submitted to the heavy pressure caused by the superincumbent weight of cargo or the rocking and tossing of the ship at sea in heavy weather, the bags would be entirely emptied of their contents or shrunk, as the bags were in this case. So far as evidence has been given on that point, twelve per cent loss of weight is about the limit to be ascribed to this cause. The fact that the bill of lading contained the words "weight and contents unknown," is of no importance in this case, first, because these words, being part of the printed blank used for making out the bill of lading, are controlled by the written parts of the bill which give the number of bags of sugar received and their weight, and, secondly, because the proof is sufficient as to the actual weight and condition of the sugar delivered to the ship.

There is some confusion and contradiction in the testimony as to where in the ship these empty and slack bags were found, but the weight of the evidence is that they were found in the bottom of the cargo, some on the platform on which the cargo was laid and along the keelson, but the greater part of them in the bilges of the vessel. It is proved by the testimony of both sides that the upper part of the cargo was found to be in good or-

der, somewhat stained by the sweat of the hold or by sea water blown in about the hatches, but not appreciably injured or showing any marks of having been so wet from above as to be reduced in weight from that cause. I take this to be conclusive evidence that while there is no possible explanation of the condition of the empty and slack bags except that the sugar was washed out by sea water, the water which did the damage did not come from above through the deck or hatches and find its way thus through the mass of the sugar to the bottom. It also appears that the inner ceiling of the ship was well caulked and that after the discharge hardened sugar was observed upon the sides of the ceiling where the bags had rested. It would be contrary to the evidence, therefore, to conclude that the sea water which did the damage was blown through this inner ceiling, as seems to be suggested in the libel, or that it found its way down along this ceiling from above to the lower part of the hold. At the bottom of the hold, and raised fourteen inches above the bottom the ship at the keelson, was a permanent platform of planks, running athwart-ships at a very slight incline upwards and joining the side at the bilge keelson where the caulked inner ceiling stopped. This platform was of planks laid close together but not caulked, nor was it water-tight, and the effect of all the evidence is that the sea water which did the damage reached the cargo through this platform from the bottom of the ship.

The rule of law to be applied to this case is too well settled to require any extended comment. The ship is bound by its contract to deliver the cargo in good order and condition, unless prevented from doing so by the excepted peril. If the cargo is delivered in a damaged condition, the burden is on the ship to show that the case comes within the exception contained in the bill of lading. If, then, the ship shows that it has encountered a sea peril to which the injury can be properly attributed, and that peril is shown to have been adequate to produce the injury, and it does not appear that there were at the command of the master sufficient means to overcome the peril or prevent the damage likely to result therefrom to the cargo, then the ship will be held to have made out a prima facie defence and it will be incumbent on the libellants to produce further evidence of negligence. Clark v. Barnwell, 12 How. [53 U. S.] 270; The Niagara v. Cordes, 21 How. [62 U. S.] 7; Transportation Co. v. Downer, 11 Wall. [78 U. S.] 129; The Shand [Case No. 12,702]. But the ship does not excuse damage to the cargo as caused by a peril of the sea if the damage could have been prevented, notwithstanding the peril encountered, by the utmost exertions of the master and crew and the full use of all the resources at the command of the ship. Same cases.

Now, in this case, the defence attempted is that the damage, so far as it is not attributable to the intrinsic character of the sugar itself, was caused by perils of the sea—that the cargo, being properly stowed and dunnaged, was injured by sea water taken in during violent storms and heavy weather at sea, and which washed the cargo and melted and washed the sugar, in spite of the necessary diligence and care of the master and crew. This defence is to be determined by the decision of two questions: First, did the ship, through stress of weather and the violence of the winds and seas, take in so much sea water as can account for the damage done to the cargo, and which damage the utmost exertions of the ship's company were unable to prevent and resist? And, secondly, was the injury caused in whole or in part by bad stowage of the cargo and insufficient dunnage? As to the first of these questions, the evidence is chiefly to be drawn from the testimony of the master, officers and crew, and from the log of the vessel. By the log and all the testimony, it appears that the brig was a remarkably tight ship. The fact has already been referred to, that though she encountered very rough weather, and her decks were swept by the seas, she took no water in, in that way, of any consequence. The log and testimony show that, while she was lying at Pernambuco receiving her cargo, she made almost no water, her pumps bringing up molasses which drained out of the sugar. On the day she left port the entry in the log is "pump gave five inches molasses every twelve hours," and on the second day out with smooth sea, "three inches water mixed with molasses every eight hours," and the same entry occurs on the 26th of November and afterwards at intervals till the 5th of December, and again on the 19th and 21st of December. It was not till the 23d of December that the vessel met any rough weather. On that day the weather became bad towards night, and by the log at midnight the wind blew a gale from the S. E. and the sea began to wash the deck. The log contains the entry: "Pumping is done every two hours, making three to four inches water." On the 24th, the sea was very rough, "causing her to roll fearfully," "three to four inches water pumped." At noon of the 25th, "a fearful gale breaks out, with such a heavy sea that the deck is filled with water, washing several things, the kitchen, the fowl basket, etc. The pump is at work every hour and fear is entertained that the cargo has been damaged by the rolling of the vessel." On the 26th, "a furious gale and deck continually under water. About 2 p. m. the wind nearly oversets the vessel, rendering her steerless," "pumping done every hour to avoid damage to cargo." For the next four days the log shows strong winds and heavy seas, the pumps being worked with "usual rate of water," and that without further noticeable weather or any observable leak she arrived at Hampton Roads on the 2d of January. She left Hampton Roads January 11th. On the 12th, by the log, with

pretty rough sea, "pumping was done every six hours, making always water mixed with molasses." On the 13th, "pumping was done every four hours." On the 15th, "every two hours." The next two days were clear and pleasant. On the 17th "pumping done every twelve hours, making water mixed with molasses." On the 18th they took the pilot and a tug to bring them to an anchorage in this port. The testimony of the master and crew certainly adds little or nothing to the strength of the evidence to be gathered from the log as to the perils of the sea encountered upon this voyage. The captain testified that they had good weather during the earlier part of the voyage; that they pumped every twelve hours, pumping out molasses, but very little water; that they had very hard weather by Cape Hatteras, commencing about the 23d of December, the first gale lasting about twenty-four hours, so that they had to lay to, losing some sails, the kitchen, etc., and some of the bulwarks; that on the 26th and 27th they had a still heavier gale, and he says that in the heavy weather they pumped every hour and found she was leaking three inches an hour, but he says they kept her free, that they pumped up molasses with water. After that, till they arrived at Hampton Roads, the weather was more moderate, and they pumped every two, every four, and every six hours. As to the weather after leaving the Roads, he says that for the first few days it was very rough weather, a gale continuing two days with a rough cross sea. It is to be observed that the pumping up of molasses mixed with water was an incident of the entire voyage and not noticeably increased after the greatest gale they encountered, on the 26th and 27th of December. One of the crew testifies that during the fine weather after leaving Pernambuco they pumped every six or every twelve hours, according to the weather, that it took ten to twenty minutes to free her, and that during the rough weather when they pumped once an hour, it took ten to fifteen minutes to free her. The mate testified that during the gale of the 26th of December, she was on her beam ends ten or fifteen minutes, and that the carrying away of her sails righted her. Giving all proper credit to this evidence, it is apparent that the vessel, although she met several days of very rough weather, and at least one gale of exceptional violence, yet at no time had any leak which was not entirely under the control of the crew, nor was the weather such at any time as prevented the regular working of the pumps and keeping the vessel free of water. If the pumps were diligently attended and she was kept free, as the officers and crew swear, it is difficult to account for so large damage by sea water as is proved in this case, provided the cargo was properly stowed and dunnaged. While a vessel is not to be expected to stow and dunnage her cargo to keep it out of the reach of the water if she springs a leak which cannot be controlled by the pumps, it is not too much to require her upon an Atlantic voyage in winter to stow and dunnage it so that if her pumps work well and she does not spring a leak which they cannot control, the cargo shall be safe from damage by sea water from the mere rolling and pitching of the vessel in the sea in heavy weather, and an occasional severe gale. And upon the whole testimony I do not think I should be warranted in holding that the ship has shown that she encountered such perils of the sea, adequate to account for the damage, and uncontrollable by the resources at the command of the ship, as will account for the damage and throw upon the libellants the burden of making out a further case of negligence. In this posture of the case it is not for the libellants to prove affirmatively how it was that the water rose in the ship so as to submerge the cargo. Negligence of the ship is presumed from the fact that the damage was done and that the means of preventing it were at hand. The ship has on this point failed to make out her defence.

On the other question, whether the ship was imperfectly dunnaged in the bilges, the evidence is very conflicting. The claimants take the ground, first, that the ship was of such a build that she needed no dunnage in the bilge except the very slight layer of bamboo mats and palm leaves which are admitted to have been there; that she was so sharp that in fact she had no bilge, and, secondly, if she had a bilge and needed dunnage, she was well dunnaged with wood, boards and planks below the palm leaves and mats. The grounds thus taken are somewhat difficult to reconcile. And it is not obvious why the master should have taken the trouble to dunnage with wood and plank, if no dunnage was necessary. As to this claim, it is enough to say that the weight of evidence is very strongly against the claimants; that the evidence does not warrant the conclusion that any thing was used to keep the bags of sugar from the skin of the ship at the bilges except mats and palm leaves and a few bamboo sticks, so laid and at such intervals as not to prevent the bags of sugar from being closely pressed down against the skin of the vessel. On the other question, whether the build of the vessel was such as to require dunnage at the bilges, there is a great deal of testimony of experts, conflicting, of course, and much of it very unsatisfactory. The result of the testimony is I think, that she was a sharp vessel, but not so sharp as to carry her cargo safely without several inches of additional dunnage in the bilges, such as the claimants attempted but failed to prove was there. The most satisfactory evidence on this point is the behavior of the vessel herself and the condition of her cargo when she arrived. It cannot but be admitted that in arranging the dunnage it should be so proportioned as to protect, with an approach to an equality, the different parts of the cargo. The object of dunnage in the bilges is to protect the cargo in that part when the ship rolls

over or is on her beam-ends, whereby this shall be brought to be the lowest part of the ship to which all the water in her will run. Now, in this case the great disproportion of the damage at the bilges seems to me to indicate that she was not proportionately well dunnaged there and this strongly confirms what I think is the weight of the evidence that she required more dunnage there. Of course the wetting of the bags of sugar in the bilges and the collecting of the water there and the drainage from these wet bags would have a strong tendency when the vessel was thrown over the other way to carry the water back along the planks of the platform towards the keelson, and in this way the washing out of the sugar in the bags along the keelson can be accounted for, even if the water was not allowed to rise so high under the platform as to have otherwise washed this part of the cargo. The water in the bilges would not all immediately find its way through the cracks of the platform, especially as the bags of sugar were not raised from the platform at all, except by the thickness of the mats and leaves.

On the ground, therefore, that the ship has failed to show that the damage to the cargo was caused by a peril of the sea, and that it is proved that it was caused in whole or in large part by insufficient stowage and dunnage, there must be a decree for the libellants, with costs, and a reference to compute the amount of the damages.

Case No. 12,955a.

SLOMAN v. WYSSMAN.

[19 Betts, D. C. MS. 165.]

District Court, S. D. New York. Jan. Term, 1852.

PRACTICE IN ADMIRALTY—REHEARING—TERM.

[A rehearing or review cannot be had after the term at which the decree was rendered.]

[This was a libel by Robert L. Sloman against Frederick Wyssman. Motion for rehearing and review.]

BY THE COURT. In August term, 1851, a decree was rendered in this cause against the libellant, and, not being appealed from, became final the same term. [Unreported.] In January term, 1852, the libellant moved upon affidavits for a rehearing of the case, and for leave to file a bill of review, on the ground of newly-discovered evidence.

The general authority of the United States courts to grant a rehearing or allow a bill of review to be filed has been fully considered in repeated cases. The rule is irrevocable that a rehearing or review cannot be had in a cause after the term at which sentence was rendered. [Hudson v. Guestier] 7 Cranch [11 U. S.] 1; The Avery [Case No. 672]; The New England [Id. 10,151]; [Sibbald v. U. S.] 12 Pet. [37 U. S.] 489; [Whiting v. Bank of U. S.] 13 Pet. [38 U. S.] 6; [Bank of U. S. v. Beverly] 1 How. [42 U. S.] 148, 149; [Kennedy v. Bank of State of Georgia] 8 How. [49 U. S.] 609. The standing rule of this court in no way relaxes that doctrine. It limits the application of the privilege to a narrower sphere than is necessarily defined by the cases quoted, for the application will not be entertained in this court in cases where the subject of dispute is less in amount than $50, nor unless made before the enrollment of the decree or return of final process issued in the cause, both of which may well happen within the period of the term in which the decree is pronounced. The 40th rule of the supreme court allows ten days to a party to move to rescind a decree against him by default, but that indulgence has no relation to the condition of a party against whom a final decree is rendered on hearing. Motion denied, with costs.

Case No. 12,956.

SLOO v. LAW et al.

[1 Blatchf. 512; [1] 7 West. Law J. 310.]

Circuit Court, S. D. New York. Oct. Term, 1849.

TRUSTS—CONTINGENCY—REMOVAL OF TRUSTEES—INJUNCTION—DELAY—ASSENT.

1. Where, by a contract between several parties, a trust was created and trustees were appointed, the trust not to take effect, however, till the happening of a certain event: *Held*, that until the happening of the event the trust was passive, and that before that time the court would not, at the instance of one of the parties, interfere to remove the trustees for alleged misfeasance.

2. Where the joint interest of the parties to a contract in its subject matter has not commenced, the court will not, on the allegation of one party that he is injured by the acts of the others, interfere by injunction against the latter.

3. Where one party to a contract assents to and acquiesces in a delay by the other party in fulfilling the contract, such delay affords no ground for the interference of the court to relieve the former from the consequences of the delay.

In equity. This was a motion for a receiver and an injunction. The bill was filed on the 2d day of November, 1849, for the purpose of rescinding a contract entered into between the plaintiff and George Law, Marshall O. Roberts, Prosper M. Wetmore, and Edwin Croswell, four of the defendants, on the 17th day of August, 1847, by which the latter agreed to build the steam-ships provided for in the fourth section of the act of congress, entitled "An act providing for the building and equipment of four naval steam-ships," passed March 3d, 1847 (9 Stat. 187); or, in case the court should refuse to rescind the contract, that then a specific performance might be decreed, ac-

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cording to the terms and conditions therein stipulated; and it prayed an account between the parties, &c.

The fourth section of the act in question authorized the secretary of the navy, on behalf of the government, to contract with the plaintiff, for the transportation of the United States mail from New-York to New-Orleans, twice a month and back, touching at Havana and other intermediate ports, and from Havana to Chagres and back, twice a month; the mail to be transported in at least five steam-ships of not less than fifteen hundred tons burden, and propelled by engines of not less than one thousand horse power each, to be constructed under the superintendence and direction of a naval constructor in the employ of the navy department, and to be so constructed as to render them convertible, at the least possible expense, into war steamers of the first class. The section contained a proviso that the secretary, at his discretion, might permit a steamer of not less than six hundred tons burden, and engines in proportion, to be employed in the mail service between Havana and Chagres. It also provided, that the compensation for the service should not exceed the sum of $290,000 annually.

On the 20th of April, 1847, the plaintiff entered into a contract with the secretary of the navy under this act, for the construction of these ships, by which he bound himself to construct and complete them upon a plan and after a model particularly set forth and described in the agreement. It provided, that if the secretary should determine to employ a steamer of not less than six hundred tons burden for the service between Havana and Chagres, in lieu of one of the five ships of fifteen hundred tons burden, the plaintiff should build one of that description. The first two ships were to be completed and in readiness for the service on or before the 1st of October, 1848; and the remaining two of fifteen hundred tons burden, on or before the 1st of October, 1849, with such improvements in model, engines, boilers, and finish, as should be agreed upon by the parties to the contract. There was no limitation as to the time within which the fifth steam-ship, in respect to which the secretary reserved the right to reduce the size, should be completed and ready for service. The secretary, on behalf of the government, in consideration of the premises, agreed to pay to the plaintiff, as a compensation for the full performance of the service in carrying the mail, the $290,000 per annum, payable quarterly. It was further provided, inasmuch as the ships would be completed at different periods within the time limited, that each of them should commence the service as soon as she should be in all respects ready therefor according to the terms of the contract; that a proportionate part of the compensation stipulated for the whole service, should be paid for the partial service thus rendered; and finally, that the contract should continue in force for the period of ten years, the term to commence from the actual commencement of the service as specified.

On the 17th of August, 1847, the plaintiff entered into an agreement with the defendants Law, Roberts, Wetmore, and Croswell, by which, in consideration of an assignment of his contract with the government to three trustees, of whom Law and Roberts were two, and the defendant Bowes R. McIlvaine the third, they covenanted and agreed to construct, finish and completely equip the five steam-ships, in such manner and at such times as were or might be required by the navy department, and to provide and pay all moneys necessary therefor, and in all things to fulfil and perform all the duties and services which the plaintiff had agreed should be done and performed, in his contract with the government; the ships and their machinery to be built, and the vessels equipped, under the superintendence and control of Law. It was also covenanted and agreed, that the assignment of the plaintiff's contract to the three trustees should be upon the following trusts: 1. That the trustees should cause the steam-ships, as they should from time to time be built, to be registered in their names, and should have the sole management and direction of the ships, and of each of them, and of their employment; should appoint and pay all such officers, agents, and other persons, as should be deemed necessary and proper, either for the sailing or navigating of the vessels, or for the management of the business thereof at the various ports and places at which they might trade or stop, on such terms, for such times, and with such powers and duties, as to them might seem fit and proper; should make all necessary contracts and agreements for the employment of the vessels; and should exercise and perform all such powers and duties in the premises, as might be necessary for performing the duties and services required by the navy department, or for the advantage and profit of the parties concerned. 2. That the trustees should collect and receive all the freights and earnings of the vessels, and all sums to be paid by the government for transporting the mail, or which might become due or payable on account thereof, and make all disbursements of every kind incurred in the employment of the vessels. 3. That the trustees should render to the parties to the contract respectively, quarter yearly, an account in writing of all their receipts and expenditures in the discharge of their trust, the first account to be rendered at the expiration of three months from the commencement of the service by the steam-ships or any of them; and should apply the nett earnings which should remain at the expiration of every quarter, after paying all disbursements of the vessels, charges, and expenses of every kind to which the trustees might be subjected, in the first place to the payment of $12,500 quarterly, one half to the plaintiff, and the other half to the other contracting parties, and the residue to the repayment of all other advances made by the latter, ratably, in proportion to the

amounts advanced by them respectively in building, equipping, and finishing the ships, together with legal interest, and a commission of ten per cent. on all sums so advanced. 4. That when all the moneys so advanced pursuant to the agreement, in building and completing the ships, with interest, and commissions, and all expenses and responsibilities incurred by the defendants, parties to the contract, or by the trustees, should be satisfied and paid, then the trustees should divide the nett earnings, including those from the mail service, quarterly, into two equal parts, whereof one should be paid to the plaintiff, and the other to the other contracting parties; and then the vessels to be held by the trustees, in trust for the plaintiff and those parties in equal shares. It was further provided, that the trustees might consent to any modification of the contract which the navy department should require, and which, in their opinion, might be for the advantage of the parties; and that any modification, renewal, or continuance of the mail contract, at any time obtained from congress or the navy department by either of the parties, should enure to their joint benefit.

The bill of complaint, which was founded upon these several agreements, and particularly upon that of the 17th of August, 1847, charged, that the contracting defendants undertook the construction of two steam-ships, in pursuance of their contract, to be called the Ohio and the Georgia, but, in the summer of 1848, became unable to proceed to the completion of the same for want of funds; that thereupon the trustees, to prevent the entire suspension of the work, and the forfeiture of the plaintiff's contract with the government, assumed upon themselves the building and completion of the two ships, in their character as trustees, and for that purpose procured a modification of the contract, and an advance of money from the government, in pursuance of the act of congress of the 3d of August, 1848 (9 Stat. 267), to wit, the sum of $290,000; and that, in order to secure the repayment of the moneys so advanced, and in conformity with the provisions of the act, the trustees, on the 9th of September, 1848, executed a mortgage of the two ships to the defendant Wetmore, as trustee for the government. The bill further charged, that the trustees procured a further modification of the contract, whereby it was agreed, that the steam-ship Falcon should be received in lieu of the smaller ship contracted to be built; that said ship had been employed in carrying the mails between New-York and New-Orleans, and Havana and Chagres, since the month of December, 1848, and also freight and passengers, under the direction of the trustees; that they had been receiving from the government a compensation under the contract at the rate of $5,000 per month, and for freight and passengers at the rate of $10,000 per month; that the trustees, by the aid of these funds, and the advance from the government, had completed the steam-ship Ohio, with the exception of coppering her, and were proceeding to finish the Georgia; that Law, Roberts, and Wetmore, for the purpose of defrauding the plaintiff, and depriving him of his interest in the Ohio and the benefit of his contract, did, on the 19th of September, 1849, register the Ohio in their names as individual owners, against the remonstrance of the plaintiff; that the Ohio was so far completed that she had been put upon the line, and was employed in the service of carrying the mail from New-York to New-Orleans, but that the contracting defendants denied that she had been accepted by the government, or was employed in that service under the trust; that Law and Roberts refused to co-operate with the other trustee, McIlvaine, in managing the affairs of the ship, or to permit McIlvaine to participate in their management, according to the express terms and conditions of the agreement; that Law, who had the management of the construction of the steam-ships, neglected and refused to copper the Ohio, though often requested, by reason whereof the plaintiff was in danger of having his contract with the government declared to be broken and forfeited, and of suffering irreparable loss and damage; that the contracting defendants had broken their contract with the plaintiff, had failed to construct and finish the two ships ready for service by the 1st of October, 1848, had put but one into the service, and that not till the month of September, 1849, and then unfinished for want of coppering, and had advanced for the construction of the two ships, the Ohio and Georgia, not to exceed $190,000, though the construction must have cost over $400,000; that the balance required to be advanced had been realized from the government and the earnings of the Falcon; that the two ships which were to have been built by the 1st of October, 1849, had not yet been commenced; that the plaintiff was in danger of having his contract forfeited, by the neglect and refusal of those defendants to proceed and construct those ships according to the requirements of the navy department; and that, by reason of the fraudulent conduct of Law and Roberts, two of the trustees, as well as of the other contracting defendants, the property of the plaintiff in the ships constructed, as well as the benefits and advantages of his contract with the government, were in danger of being lost and destroyed, to his great and irreparable damage, unless a receiver should be appointed to take charge of the ships, their freight, mail pay, and other earnings, and to copper the Ohio, and comply in all other respects with the conditions of the plaintiff's contract with the government. The bill then prayed for an account; that Law and Roberts, two of the trustees, be removed from their trust; that it be referred to a master to appoint two other fit persons as trustees; that, in the meantime, a receiver be appointed to take charge of the contract with the government,

to take possession of the ships Ohio and Georgia, and to finish them under the direction of the court, to take charge of the Falcon until her place could be supplied by another vessel to be built, and to receive the earnings of these ships, and appropriate the same as the court might direct; that the registry of the Ohio might be set aside, and the ship be registered in the name of the receiver, or of the trustees when appointed; that the contract of the 17th of August, 1847, be annulled, and an account taken of the advances made by the contracting defendants towards the construction of the ships, and, on those advances being refunded by the plaintiff, the property of said ships be transferred to him, subject only to the mortgage to the government; or, that a specific performance of the contract be decreed by the court, and if the contracting defendants should neglect or refuse to proceed and forthwith construct said ships, then the plaintiff be permitted to construct and complete them at his own expense, and to stand in the place of the contracting defendants, in respect to the benefits and advantages of the contract; that an injunction issue against the contracting defendants, to restrain them from conveying away the Falcon, and from interfering with the Ohio and Georgia, and from conveying away the Ohio under the fraudulent registry, and from preventing the return of the Ohio and Falcon to the port of New-York; that the receiver to be appointed be directed to proceed forthwith and construct and complete the ships in fulfilment of the contract with the government, at the cost and expense of the plaintiff, and out of the funds to be furnished by him for that purpose, and out of the earnings to be received from the employment of the ships; and that Law, Roberts, and Wetmore, the defendants in whose names the Ohio was registered, be restrained from conveying her away or preventing her return to the port of New-York, and from interfering with the receiver to be appointed to take charge of her.

Daniel Lord, for plaintiff.
George Wood, for Law.
Francis B. Cutting, for Roberts.
Charles O'Conor, for Wetmore.
James R. Whiting, for Croswell.

NELSON, Circuit Justice. The grounds of complaint in this case arise out of alleged infractions of the contract of the 17th of August, 1847, by which the defendants Law, Roberts, Wetmore, and Croswell bound themselves, for considerations therein stated, to construct and complete the five steam-ships, and to perform in all other respects the duties and obligations of the plaintiff under his contract with the government of the 20th of April in the same year. There are also charges and grounds of complaint against the trustees of that contract, and of the ships to be constructed and completed ready for service; all of which is put forth as the foundation for the summary interposition of the court, to prevent great and irreparable loss and damage to the plaintiff. To this end we are asked: 1. To remove two of the trustees, and, in the meantime, until others are appointed in their places according to the ordinary course of the court, to appoint a receiver to take charge of the contracts with the government and with the defendants, and to take possession and charge of the ships constructed or in the process of construction, and to complete the same, and to proceed in all other respects under the direction of the court and carry into complete execution the terms and conditions of the aforesaid contracts. 2. To enjoin the defendants from interfering with the receiver thus appointed, or with the ships or their earnings, and from conveying away either of them so as to prevent the receiver from taking them into his possession.

The grounds upon which we are asked to remove the trustees are: 1. That two of them, Law and Roberts, who are also parties in interest in the construction of the ships and in the fulfilment in all other respects of the plaintiff's contract with the government, have excluded their co-trustee McIlvaine, who represents the plaintiff's interest in the ships and their earnings, and in the proper management of the joint concern, from any participation in the same; that they have denied the plaintiff's interest, and the right of his trustee to act in the premises, and are collecting and appropriating to their own use and benefit the earnings of the ships, and the moneys received from the government for the mail service. 2. That they have repudiated the trust, by fraudulently procuring the ship Ohio to be registered in their own names individually, and not as trustees, excluding the name of the other trustee, McIlvaine. 3. That they have neglected and refused to render to the plaintiff an account of the moneys received from the earnings of the Falcon and Ohio, including compensation for the mail service, and are appropriating the same to their own benefit, in disregard of the trust.

These are the grounds mainly relied on in support of this preliminary motion to remove the two trustees and appoint a receiver; and it is apparent that, in order to comprehend the force and effect of them for the purposes claimed, we must first ascertain the precise powers and duties belonging to the trustees under the contract, and whether it confers upon them those in respect to which a breach and misfeasance have been charged. Their powers and duties are prescribed in the contract of the 17th of August, and to that, therefore, we must apply ourselves in endeavoring to ascertain their character and the extent of them.

Upon a careful examination of this contract it will be seen, that the trustees have nothing to do with the construction of the

ships, either in respect to the contracts for building, the funds to be provided, or the superintendence and direction in the process of construction and equipment. These are obligations and responsibilities resting exclusively upon the other defendants, which they assumed upon themselves and are bound to discharge; and the principal consideration for which is their interest, as stipulated, in the assigned contract with the government, and in the other earnings of the ships while engaged in the mail service. There are other advantages provided for, which doubtless had their influence; but these are the main considerations for the undertaking. Those defendants took the place of the plaintiff as the contractor with the government, so far as related to the construction and equipment of the five ships, and were subject only to the superintendence and direction of the naval constructor in the employment of the navy department—a power reserved by the secretary. The trust remains entirely passive until the ships or some one of them are constructed and ready to enter upon the mail service; and it is provided that then the trustees. to whom the government contract had already been assigned, shall cause them to be registered in their names, and shall thereafter have the sole management and direction of the ships and of their employment in the mail service and in carrying freight and passengers, of the collection and receipt of the earnings, including the moneys received from the government, and of the disbursement of the expenses, and shall account and pay over the nett earnings, according to the directions and in the proportions specially pointed out in the trust.

Now, in view of the provisions thus referred to, and some others which we shall hereafter consider, we have been unable to resist the conclusion, that, according to the plain and obvious import of the contract of the 17th of August, the trust therein created does not begin to operate or become active until the ships or some one of them have been built and completely equipped, ready for the mail service, and have been accepted by the navy department; and that, down to that time, it is passive and inoperative, as no power is conferred, or duty enjoined, upon the trustees in respect to the ships, until they are accepted and prepared to commence the mail service.

There is another view arising out of the provisions of the contract, and bearing upon this construction, which seems to be equally decisive. The joint interest in the ships between the parties does not arise until they are accepted under the government contract. There is no stipulation or arrangement for the employment of the ships out of that service; on the contrary, the whole agreement is based upon it. If the vessels are not accepted, they are thrown back upon the hands of the defendants, and remain their property, subject to the mortgage. The ships are the only security they have for their outlays in the construction. If a loss is sustained in the building, they alone must bear it. Neither the plaintiff nor the trustees are at all concerned.

It was supposed on the argument, that the advance of money by the government, under the act of the 3d of August, 1848, operated to vest an interest in the ships in the plaintiff. But this is an obvious misapprehension. The only security for the repayment of that advance is the ships; and, in the event of their not being accepted by the government, the defendants stand alone responsible. The money advanced must be repaid by them, or be realized, if at all, out of the ships, which are their property.

Again. The interest of the plaintiff in the earnings of the vessels, and which it is admitted creates an equitable right in the ships themselves and a direct interest in their proper management, does not begin until they are accepted and have entered upon the performance of the mail service. Till then, by an express provision in the government contract, no compensation is to be paid; and the provisions in the contract with the defendants, regulating the receipts and disbursements of the earnings, and the duty of the trustees to account therefor, are all based upon the employment of the vessels in that service. There are no joint accounts or joint interest spoken of or provided for, until that begins; then the partnership interest commences, and is placed under the active management and control of the trustees.

This conclusion is also supported by the general structure and arrangement of the articles of agreement. The plaintiff brings into the common stock the government contract, which was and is, doubtless, regarded as very valuable; the defendants, the steam ships; and, when the ships are accepted in fulfilment of the contract, the common interest commences, and the whole of the capital—the government contract, the ships, and their management—is placed in charge of the trustees. This is the foundation of the arrangement between the parties. The additional provisions relate chiefly to the manner of carrying on the enterprise, for the common benefit, of disposing of the profits, and of winding up the concern at the end of the partnership.

The plaintiff might have provided for an accruing interest in the ships, and also for the vesting of the title to the same in the trustees, while they were in the process of construction; thereby acquiring additional security for the fulfilment of the contract on the part of the defendants. But no such provision has been made. He chose to take their personal responsibility: and very naturally, as they had become his security to the government for the performance of this very service. It is but just to add that, for

anything appearing in the case or disclosed on the hearing, they are quite competent and able to perform their engagements.

The act of the parties, in securing the advance made by the government towards the construction of the two ships, by a mortgage upon them, was very strongly urged, on the argument, against this construction. The mortgage was executed in the name of the three trustees. The act of congress provided that the advance should be secured by a lien on the ships, in such manner as the secretary of the navy should require. With all our respect for the judgment and intelligence of that officer, we must still construe the contract and give effect to it according to the convictions of our own judgments. No doubt all parties, as it respects the government, are estopped from controverting the validity of the lien. If the ships should never be accepted, and the advance not be refunded by the discount of the mail compensation, the ships would remain in the hands of the defendants subject to the lien, and to a sale under the mortgage, unless they should discharge it by payment. Neither the mode of executing the mortgage, nor the mortgage itself, can in any respect, or on any principle or rule of construction, vary or modify the contract of the 17th of August. That is between different parties, and involves different interests and rights.

The conclusion at which we have arrived upon this branch of the case, disposes of the question as to the removal of the trustees, and, as a necessary consequence, of the application for the appointment of a receiver, and the granting of an injunction. It also disposes of the question arising upon the registry of the Ohio. As that vessel has not yet come under the trust, the registry was properly entered in the names of her builders and owners.

In respect to the delay in the construction and equipment of the steam-ships, and the action of the court prayed for in this preliminary proceeding to be founded thereon, it is a sufficient answer to say, that, from the affidavits read upon the hearing, it appears that the delay has been assented to and acquiesced in by all the parties concerned, and has been occasioned by the very great enlargement of the tonnage and capacity of the ships. This has not only been assented to by the plaintiff, but was adopted by the defendants upon his urgent solicitation. Four of the ships provided for in the contract were to be of fifteen hundred tons burden, and to have machinery in proportion. The two nearly completed, the Georgia and Ohio—the latter entirely, with the exception of coppering—are almost equal in tonnage to the four, with machinery in proportion, and, as stated in the opposing affidavits, will cost an amount nearly equal to the cost of the four. Some indulgence on the part of the government might therefore be naturally expected. The plaintiff is as deeply interested in the enlargement of the capacity of the ships, as the defendants. The government is also interested, as one of the objects of the act of congress providing for their construction, was an eventual employment of them in the naval service of the country. For this reason, the act provides that they shall "be so constructed as to render them convertible, at the least possible expense, into war steamers of the first class." The contract contains a similar provision, and also one for taking them into the exclusive service of the government.

In respect to the preliminary arrangement with the government, by which the Ohio and Falcon are employed in the mail service between New-York and New-Orleans, and Havana and Chagres, and the equitable interest of the plaintiff in the earnings of those vessels, no questions arising out of those matters are enquirable into in this stage of the proceedings. They will properly come up when the case is ready for a final hearing on pleadings and proofs.

The motion for a receiver and an injunction must be denied.

[For the subsequent proceedings in this cause, see Case No. 12,957.]

Case No. 12,957.

SLOO et al. v. LAW et al.

[3 Blatchf. 459.][1]

Circuit Court, S. D. New York. May 16, 1856.

CONTRACTS—ACT OF CONGRESS—TRUSTEES—RIGHT OF A PART TO ACT—PUBLIC AND PRIVATE TRUSTS — DEALING WITH TRUST PROPERTY — INJUNCTION.

1. The act of March 3, 1847 (9 Stat. 187). to provide steamships for carrying the mails to California by the way of Chagres, expounded.

2. The various contracts entered into under that act, explained.

3. Where a strict trust is created, and two or more trustees are appointed to execute it, if it is a private trust, in which the public have no interest, and if it does not appear from the instrument creating it, or from some other instrument modifying the power given, or by fair and necessary implication, that it may be executed by a less number of the trustees than the whole number named, the powers conferred must be executed by all of them.

[Cited in brief in Morville v. Fowle, 144 Mass. 113, 10 N. E. 766.]

4. If a trust is created, and two or more trustees are appointed to execute it, and it is a public trust—a trust for the benefit of the public, in which the public are interested—and if it does not appear from the instrument creating it, that it must be executed by the whole number of trustees named, it may be executed by a majority of them.

5. When a private trust is created, and it appears from the instrument creating it, that the powers conferred are to be executed by a less number than the whole of the trustees named, they can be lawfully executed by such less number.

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6. If a public trust is created, and it appears from the authority creating it, that the powers conferred are not to be executed except by the joint act of all the persons named as trustees, they must be executed by all of the trustees unitedly.

7. In both classes of trusts, the intention of the authority creating the trust must govern; but the presumption of law as to what such intention is, differs in the two classes of trusts.

8. These principles applied to the trust created by the various contracts entered into under said act.

9. A private mercantile enterprise, conducted for profit, having been entered into by said contracts, and the management of the affairs thereof having been confided to three trustees, the presumption is that the intention of the parties was that a majority of the trustees might conduct the business.

10. And such presumption is strengthened by various provisions in the contracts.

11. A trustee will not be permitted to take advantage of his situation, to obtain any personal benefit to himself at the expense of his cestui que trust.

[Cited in Petrie v. Badenoch (Mich.) 60 N. W. 450.]

12. Where two of such three trustees, without the assent of the third trustee, made a contract between themselves as trustees, and themselves and other individuals, from which they derived a great profit, to the prejudice of one of their cestuis que trust, an injunction was granted, restraining them from doing any act of the kind for the future, without the assent of the three trustees, the third trustee being the representative of such cestui que trust.

13. One of the trustees having refused to permit another of the trustees to have access to the books and papers of the trustees, an injunction was granted, restraining him from withholding such books and papers from the examination of such trustee.

[Bill in equity by Albert G. Sloo and Elwood Fisher against George Law and others.] This was a motion for a provisional injunction.

Edward N. Dickerson and Elwood Fisher, for plaintiffs.

Benjamin F. Butler and Francis B. Cutting, for defendants.

INGERSOLL, District Judge. By an act of congress, passed on the 3d of March, 1847 (9 Stat. 187), it was made the duty of the secretary of the navy, to contract, on the part of the government, with A. G. Sloo, one of the plaintiffs, for the transportation of the United States mail from New York to New Orleans and back, twice a month, touching at Charleston, (if practicable), Savannah, and Havana, and from Havana to Chagres and back, twice a month; and it was provided, that said mail should be transported in at least five steamships of not less than fifteen hundred tons burthen, to be propelled by engines of not less than one thousand horse power each, and to be constructed under the superintendence and direction of a naval contractor in the employ of the navy department, and to be so constructed as to render them convertible, at the least possible expense, into war steamers of the first class; that the said steamships should be commanded by officers of the navy not below the grade of lieutenant, who should be selected by the contractor, with the approval and consent of the secretary of the navy, and who should be suitably accommodated without charge to the government; that each of said steamers should receive on board four passed midshipmen of the United States navy, who should serve as watch-officers, and be also suitably accommodated without charge to the government; and that each of said steamers should also receive on board and accommodate, without charge to the government, one agent to be appointed by the postmaster general, who should have charge of the mails to be transported in said steamers. It was also provided, that the secretary of the navy might, at his discretion, permit a steamer of not less than six hundred tons burthen and engines in proportion, to be employed in the mail service between Havana and Chagres. The compensation for the whole of said services was not to exceed the sum of two hundred and ninety thousand dollars; and good and sufficient security was required to be given for the fulfilment of the stipulations of the contract to be entered into by Sloo. It was also made the duty of the secretary of the navy to provide, in the contract authorized by the act to be made, that the navy department should at all times exercise control over the steamships, and have the right to take them at any time for the exclusive use and service of the United States, and to direct such changes in their machinery and internal arrangements as the secretary of the navy might require, and to make in the contract due provision for the mode of ascertaining the proper compensation to the contractor therefor.

In passing this act, congress appears to have had two great objects in view. One was to secure the transportation of the public mails; the other was to secure the construction of five steamships, which could at any time, at the least possible expense, be converted into war steamers of the first class, to be taken, in case of need, at any time, at the option of the United States, for their exclusive use and service, upon their paying a proper compensation for the same.

Before Sloo could secure to himself the benefit of any portion of the money authorized to be paid by this act, he had heavy responsibilities to enter into, and important duties to perform. He was, among other things, obliged to contract with the government, for building the five steamships mentioned in the act, for the performance of the mail service required; to contract, also, to perform the mail service as required by the provisions of the act; and to give good and sufficient security for the faithful performance of the stipulations of the agreement so to be entered into by him. To do this, required aid from some source. The act itself required that he should have aid from some one; for it

provided that good and sufficient security should be given for the fulfilment of the stipulations which, by the act, he was obliged to enter into. It could, therefore, in no respect, be any disparagement to him, to apply for aid to those who might be able to render it, and who could be induced to render it by a participation in the benefits promised to Sloo by the act, upon his compliance with the terms upon which such benefits were to be realized.

On the 20th of April, 1847, Sloo and the secretary of the navy entered into a contract, by which Sloo agreed to build the five ships according to the provisions of the act, and to perform the mail service therein required, two of the ships to be of the burthen of fifteen hundred tons, and to be completed and ready for service on or before the 1st of October, 1848, and two of them, of the like description, to be completed and ready for service on or before the 1st of October, 1849; and Sloo agreed, by the contract, that the line of steamships should be kept up during the time the contract was to continue, by alterations, repairs, or additions (of approved character) fully equal to the exigencies of the service, and the faithful accomplishment of the purposes recited in the act, and that he would perform the services required by the act according to its true intent and meaning, and that the line should be in full and entire operation on or before the 1st of October, 1849. The secretary of the navy agreed, on behalf of the United States, to pay to Sloo, for the services stipulated to be performed, the sum of two hundred and ninety thousand dollars per annum, payable in quarterly payments, upon the full performance by Sloo of the services required, according to the meaning of the act. The contract was to continue in full force for the term of ten years, to commence from the actual commencement of the services specified; and the secretary reserved the right to take the ships at any time for the exclusive use and service of the United States, the proper compensation for their value, when so taken, to be ascertained by appraisers to be mutually chosen by the parties. There were other stipulations in the contract, which it is not necessary to mention.

It will thus be seen, that Sloo, among other things, not only agreed to build the five steamships according to the requirements of the act, but also agreed that, during the time the contract had to run, the line should be kept up by alterations, repairs, or additions of approved character, so that the purposes of the act could be faithfully accomplished. One of those purposes was to provide five steamships which could, at any time during the continuance of the contract, be taken by the government, upon their paying a proper compensation for the same, and, with the least possible expense, be converted into war steamers of the first class, to become part of the naval armament of the United States. To effect this purpose, it was necessary, not only that the five steamships should be properly built, but that they should at all times be kept in proper repair, and fit for the service to which they were or might be appropriated. The contract was executed without security for the faithful performance of the stipulations on the part of Sloo. But at a subsequent period Robert C. Wetmore, Marshall O. Roberts, George Law, and Edwin Croswell became sureties for the fulfilment of the terms thereof.

Sometime between the date of the execution of the above mentioned contract with the secretary of the navy, and the 17th of August, 1847, as appears by an indenture executed on the last mentioned day, Sloo applied to George Law, Marshall O. Roberts, Edwin Croswell, and Prosper M. Wetmore, for aid to enable him to fulfil the terms and conditions of the contract entered into by him with the secretary of the navy. Law and his associates, the persons above named, agreed to aid him, as expressed in the indenture on that day entered into, upon his executing an assignment of the said contract to certain parties, upon the trusts and for the uses and purposes in the said indenture of the last mentioned date named. Accordingly, on the 17th of August, 1847, an indenture was entered into by and between Sloo of the first part, Law, Roberts, Croswell and Wetmore, of the second part, and Law and Roberts and Bowes R. McIlvaine, of the third part, by which Sloo assigned to the parties of the third part the contract which he had entered into with the secretary of the navy, upon the trusts in the said indenture mentioned. By this indenture, Law and his associates of the second part agreed with Sloo, that they would build, construct, finish and completely equip the steamships which, by the contract with the secretary of the navy, were to be built by Sloo, according to the terms of the said contract, and that they would perform all the duties and services which, by the contract with the secretary of the navy, were to be performed by Sloo; and it was provided that the ships and their machinery should be built, constructed, equipped, and repaired under the superintendence, direction and control of Law.

The assignment of the contract made with the secretary of the navy was upon certain trusts, among which were the following: that the trustees should cause the ships which were to be built to be registered in their names; that they should have the sole management and direction of the same and of their employment, subject to the provisions of the contract, and should pay all officers and agents; that they should make all necessary contracts for the employment of the ships; and that they should receive and collect all the freights and earnings of the ships, and all the mail pay, and render to the parties quarter-yearly an account of all receipts and expenditures. They were to apply the nett earnings, at the exp'ration of each quarter, in the first place to the payment of the sum of twelve thousand five hundred dollars quarterly, one half to Sloo,

and the other half to Law and his associates of the second part, and the residue to the repayment of all advances made for the building, equipping, and finishing the ships, together with lawful interest, and a commission of ten per cent.; and, when all such advances were paid, with the interest and commissions, then the nett earnings of the ships and the mail pay were, at the end of each quarter, to be divided equally, one half to be paid to Sloo, and the other half to Law and his associates of the second part; and the ships were to be held by the trustees in trust for the party of the first part and the parties of the second part, in equal shares. At the expiration of the contract with the secretary of the navy, the trustees were to sell the ships, and divide the nett proceeds, and pay one half thereof to the party of the first part, and the other half to the parties of the second part.

By the indenture, Roberts and Croswell were appointed joint agents in the city of New York, for the transaction of the business of the ships, under the direction and control of the trustees. Roberts was to receive, as a compensation for acting as such agent, the sum of ten thousand dollars per annum, and Croswell was to receive, as a compensation for acting as such agent, the sum of five thousand dollars per annum, such payments to be made out of the joint funds. Law was to receive, as a compensation for his services in constructing, repairing and equipping the ships and their machinery, five thousand dollars per annum, also to be paid out of the joint funds. The compensation of McIlvaine was to be paid out of the profits of Sloo. In the event of the death of either Law or Roberts, or of their resignation of the office of trustee, it was made the duty of the parties of the second part to fill the vacancy. In the event of the death of McIlvaine or of his resignation, Sloo had the power to appoint another trustee in his place. It was not his duty so to do. Law and his associates of the second part had the right to associate any other persons or parties in interest with them, who should, by being so associated, be entitled to all the benefits of the contract and of the trust created, in like manner as if they had been originally named as parties. The trustees were not to be liable for the acts, defaults, or misconduct of each other, but each only for his own acts, defaults and misconduct.

On the 7th of February, 1850, another indenture was entered into, by and between Sloo, of the first part, and Law, Roberts, Croswell and Wetmore, of the second part, which in some respects modified the terms of the above mentioned indenture. Differences had arisen between the parties, growing out of the obligations entered into by the indenture of the 17th of August, 1847. The contract with the secretary of the navy was, that the whole of the five steamships should be finished and ready for service by the 1st of October, 1849. Law and his associates had become obligated to Sloo to perform that contract. Two of the ships contracted to be built by that time had not been commenced, and none of the ships which had been finished had as yet been placed in the hands and under the control of the trustees. To settle the matters of difference, this indenture of the 7th of February, 1850, was entered into. By this indenture, Law and his associates agreed to deliver and place three of the ships, to wit, the Ohio, Georgia, and Falcon, in the immediate possession, management, and control of the trustees, and cause the same to be registered in their names. By the indenture first entered into, Law and his associates were to make advances for the building of the five steamships, and have them completed by the 1st of October, 1849. By the indenture of the 7th of February, 1850, they were absolved from the obligation to make advances for the building of the two remaining steamships, in the way provided for in the indenture of the 17th of August, 1847, and, in substitution for that obligation, they agreed to commence the building of the remaining two steamships as soon as the sum paid to them by the trustees, in reimbursement of the cost of the first three ships, should amount to fifty thousand dollars. There are other provisions in the indenture of the 7th of February, 1850, which, so far as it respects the motion now under consideration, it is not necessary at present to notice.

The United States Mail Steamship Company was incorporated by the legislature of the state of New York in April, 1850. Law, Roberts, Croswell and Wetmore, were the original corporators of that company. On the 8th of July, 1850, an indenture was entered into by and between Law, Roberts, Croswell and Wetmore, of the first part, and the United States Mail Steamship Company, of the second part, by which Law and his associates assigned and transferred to the steamship company their interest in the three ships already built and placed in the hands of the trustees, and in the said agreement between Sloo and the secretary of the navy, and in the said indentures of the 17th of August, 1847, and the 7th of February, 1850, and in all the benefits of the last mentioned two indentures, and all their rights and powers under the same, reserving to Law, Roberts and Croswell their respective salaries, provided for and agreed to be paid according to the last mentioned two indentures, the same as if the indenture then executed had not been entered into, and reserving to them their rights and privileges—that is to say, to Law, the right to superintend the construction, building and repairing, under his own sole control, of all the ships which had been or might be built, and the right to Roberts and Croswell to be agents of such ships in the city of New-York, and to receive their respective salaries therefor. It was also agreed, by said indenture, that the trustees should account to the company, instead of accounting to Law and his associates, the company succeeding to all their rights, ex-

cept so far as the same were reserved; and the company agreed to build, construct, finish and completely equip all the steamships which, by the contract with the secretary of the navy, were to be built, in such manner and at such times as were or might be required by the navy department of the United States; and the company agreed, that they would in all things perform all the duties and services which, in the contract with the secretary of the navy, were to be performed by Sloo, and perform all the stipulations contained in the indentures of the 17th of August, 1847, and the 7th of February, 1850, and which were, by said indentures, to be performed and fulfilled by Law and his associates; and the company agreed to indemnify Law and his associates for being sureties for Sloo for the faithful performance of his contract with the secretary of the navy. At the time the indenture of the 8th of July, 1850, was entered into, Law was president of the steamship company, and Roberts and Croswell were two of the directors.

On the 21st of January, 1851, there was another indenture entered into by Sloo, of one part; Law, Roberts, Croswell and Wetmore, of another part; the United States Mail Steamship Company, of another part; the Pacific Mail Steamship Company, of another part; and Howland & Aspinwall, of another part. By this indenture, an arrangement was made for the purchase of five additional steamships, and for placing them in the hands of the trustees, upon the trusts contained in the indenture of August 17, 1847; thus increasing the trust ships to ten. They were to be paid for by the United States Mail Steamship Company in the stock of that company; and it was agreed that Howland & Aspinwall should sell, under the control and instructions of the United States Mail Steamship Company, all through passage tickets issued by said company, and should receive all passage money for through tickets, and all freight money for through freights of every description, by any of the steamers of the said company or of the trustees, from New York to any port on the Isthmus of Panama, from New Orleans to any port on said isthmus, from any port on said isthmus to New York, and from any port on said isthmus to New Orleans; and it was agreed by them that they would, without delay, deposit all moneys so received, to the credit of the trustees, in such bank as the trustees might from time to time designate, reserving out of such receipts a commission of two and one-half per cent. upon the gross amount of such passage and freight monies. There are a great many other provisions in this last mentioned indenture, which, so far as it respects the motion now under consideration, it is not necessary at this time to notice.

George Law has resigned his office of trustee, and James Van Nostrand has been appointed in his stead. His resignation took place in the spring of 1854. Bowes R. McIlvaine, in the spring of 1855, resigned his office of trustee, and thereupon Elwood Fisher, one of the plaintiffs, was appointed in his stead.

The bill in this case was filed in May, 1855. The parties defendant to it are George Law, Marshall O. Roberts, James Van Nostrand, Edwin Croswell, Prosper M. Wetmore, William H. Aspinwall, John L. Aspinwall, William E. Howland, Samuel W. Comstock, the United States Mail Steamship Company, and the Pacific Mail Steamship Company. In the bill are various charges of fraud and other wrongful acts of omission and commission. The prayer is, among other things, that Law, Roberts, Croswell and Van Nostrand may be decreed to account for the monies by them received, or which they might have received, on account of the trust, and pay the same over to the trustees; that Law and Roberts be decreed to pay over to the trustees certain sums of money charged to have been fraudulently received from the trust; that Howland & Aspinwall render an account of the monies which they have received, and pay what is due from them to the trustees; that they be enjoined from any interference with the affairs of the trust; that they and the Pacific Mail Steamship Company be enjoined from selling tickets and collecting freights, or having any connection with any steamer or line of steamers running in opposition to, or in the line of the trustees, and that they be decreed to pay back to the trustees certain monies, charged in the bill to have been withheld under a partnership charged to have been established with the Nicaragua Company; that the United States Mail Steamship Company be decreed to refund certain monies, charged in the bill to have been received under certain pretexts; that Roberts be removed from the office of trustee, and that some fit person be appointed as trustee in his stead; that Roberts and Croswell be removed from their positions as agents, and that fit persons be appointed in their stead; and that Roberts and Croswell be enjoined from receiving any of the trust funds and from interfering with the trust affairs, and that they deliver up all the books of the agency to the trustees. There is no prayer that Van Nostrand be removed from his office of trustee.

A motion is now made, founded on the bill and the affidavits of Bowes R. McIlvaine and Elwood Fisher, for an injunction restraining Roberts and Van Nostrand from acting as trustees without the concurrence or assent of the three trustees; and enjoining Roberts and Croswell, as agents, or in any other capacity, from the management of the steamships belonging to the trustees, and from the appointment or payment of any officers or other persons concerned in them or their business, and from making any contracts or agreements for the employment of any vessels, and from doing any business or acts of the trustees, under their appointment as agents, or otherwise,

without the consent of the three trustees, and restraining Howland & Aspinwall from retaining any monies collected by them for passages, freights, or otherwise, and from depositing it anywhere, or to any account, except to the account of the three trustees; and restraining the United States Mail Steamship Company from landing any of their steamers at the wharf or pier of the trustees, and from employing them in their business, except under the direction of the three trustees; and restraining Roberts and Croswell and the United States Mail Steamship Company from withholding the books and papers of the trustees from their inspection, or that of either of them, during the usual hours of business.

There are many charges set out in the bill, both of omission and commission, which, upon the final hearing upon the bill and proofs, will require an investigation, and which, if found to be true on such final hearing, will entitle the plaintiffs to relief, which are not material to be considered upon the motion now pressed upon the court. Among these charges is the charge that George Law has fraudulently obtained and appropriated to his own use large sums of money which of right belong to what is called the trust fund. Law is not a party to this motion, although he is a party to the bill. Upon this motion, he is not called upon to answer any of the charges of fraud brought against him. He should, therefore, not be in the least prejudiced by any determination which the court may now make; and any intimation of an opinion upon any of the charges in the bill which are not material to the questions now presented on motion for a preliminary injunction, founded upon the ex parte affidavits which have been presented, however important it may be to have those charges investigated upon the final hearing, would not be conducive to the due administration of justice. I shall, therefore, consider only such questions as seem to me to be necessary to a just and equitable disposition of the motion now made.

The plaintiffs found their claim to have a preliminary injunction issue as prayed for on this motion, upon the ground that, by the indentures of the 17th of August, 1847, the 7th of February, 1850, and the 21st of January, 1851, a trust has been created in the mail contract entered into between Sloo and the secretary of the navy, in certain steamships which have been built and procured by virtue of the provisions of the said indentures, and in the management of the same, which is to be executed by the so-called trustees named in the indenture of the 17th of August, 1847, or by their successors duly appointed; that the trust so created can only be executed lawfully by the joint concurrence of all the trustees named; and that the business relating to the trust, and for which the trust was created, is managed and directed by the two trustees appointed by Law, Roberts, Croswell, and Wetmore (or by the United States Mail Steamship Company, which has succeeded to the rights of Law and his associates), without the concurrence of the trustee appointed by Sloo, and often in opposition to his express wishes and directions. They also claim that, if the trust powers can be executed by a majority of the trustees, without the concurrence of the third, such powers have been so wrongfully executed by the majority, and that there is such danger that they will continue to be so wrongfully executed, that the interposition of the court is required to protect Sloo in his equitable rights.

Where a strict trust is created, and two or more trustees are appointed to execute it, if it is a private trust, in which the public have no interest, and it does not appear from the instrument creating it, or from some other instrument modifying the power given, or by fair and necessary implication, that it may be executed by a less number of the trustees than the whole number named, the powers conferred must be executed by all the trustees named. A less number than the whole cannot lawfully execute the trust powers. And, if a trust is created, and two or more trustees are appointed to execute it, and it is a public trust —a trust for the benefit of the public, in which the public are interested—then, if it does not appear from the instrument creating it, that it must be executed by the whole number of trustees named, and not by a less number, it can be executed by a less number than the whole number named. It may be executed by a majority of the trustees named. This is the general rule. In the application of the rule, there is difficulty sometimes in determining whether the case under consideration is a private trust or a public trust. But, when a private trust is created, and it appears from the power of appointment—from the act and deed of the party or parties creating it—that the powers conferred are to be executed by a less number than the whole of the trustees named, then they can be lawfully executed by such less number. And, if a public trust is created, and it appears from the power of appointment—from the authority creating it—that the powers conferred are not to be executed except by the joint act of all the persons named as trustees, then the trust powers of such public trust cannot be executed but by all the trustees unitedly. In both classes of trusts, the intention of the party or parties, or of the authority creating the trust, is to govern. In the one class of trusts, the presumption of law is, where nothing appears to the contrary, that it was intended, by the parties creating the trust, that the powers conferred should be executed only by the joint act of all the trustees named. That presumption must govern, unless a different intent appears. And,

if such different intent does appear, then such different intent must govern, in the execution of the trust powers. In the other class of trusts, the presumption of law is, where nothing appears to the contrary, that it was intended by the party or the authority which created the trust, that the powers conferred might be executed by a less number than the whole number of the trustees named. And that presumption also must govern unless a different intent appears. And, if such different intent does appear, then such different intent must be carried into effect. The object is to ascertain the intent of the parties, or of the authority creating the trust. That object may be gathered from the language used and the purposes to be accomplished. And, in ascertaining and carrying out the intent of the parties, or of the authority creating the trust, courts are inclined, especially in equity, to vest in the trustees such powers as are necessary to effectuate the wishes of the party or parties creating the trust.

In the present case, the objects to be accomplished by the several indentures by which the trust was created, and which gave the powers and prescribed the duties to the trustees, in the management of the business confided to them, were not only to carry the mails of the United States in compliance with the contract made with the secretary of the navy, and to build five steamships according to the terms of that contract, and to keep the same in repair, so that they could be converted at any time into war steamers of the first class, and be taken and appropriated by the government for that purpose, but also, by means of such five steamships, and five other steamships which were brought into the concern and placed in the hands of the trustees, to engage in and prosecute with success a great commercial business. Without such business, the enterprise which the parties entered into would be a ruinous one. To pursue it with success, (and success was desired by all,) required promptitude, skill and energetic action. One object being to engage in such great commercial business, it is fair to presume, and is a necessary implication, that the parties intended that it should be conducted as other mercantile enterprises of a similar character are conducted, when prosecuted with success under the charge of more than two persons—that is, that in the management of the business of the concern, the judgment and action of the majority should not be overruled and thwarted by one of their associates. The indenture of the 17th of August, 1847, was, in substance an agreement entered into between Sloo, Law, Roberts, Croswell and Wetmore, to engage in and pursue a great commercial and mercantile undertaking, for their mutual advantage and profit. The business to be pursued was pointed out. Each agreed to advance a portion of capital to the common stock or fund. The capital which Sloo agreed to advance was a mail contract. The capital agreed to be advanced by the other parties was five steamships. The motive which led to this arrangement was profits. A mode was pointed out, how the expected profits were to be divided, and how the capital or common stock should be divided when this mercantile business arrangement should expire. And the parties stipulated to place the capital which they agreed to advance for this great commercial business, in the hands of two of their number and of another individual, as managers, directors, or trustees, to manage for them, to pursue the business contemplated by the indenture, to make profits out of the same, and to divide the profits, and in time the capital, as had been agreed by the articles of partnership, or deed of association, or by whatever other name the indenture might be called. The nature of the indenture or agreement cannot be changed by calling it by any particular name. Call it by what name you will, it was an association of individuals for the transaction of a great commercial business, with the view to divide the profits, after paying expenses, in certain proportions, among the different members who had advanced or agreed to advance the needful capital, and for whose common benefit the business was to be conducted. It has been called by the defendants a partnership, and it has been insisted by them that it was such, and was to be governed, in its direction, by the rules which apply to copartnerships, as they are generally conducted. The contract evidenced by the indenture has certainly the chief elements of a partnership. It was a contract between two or more persons to place their money, effects, property and articles of value in a common stock, and, with such common stock, and by its means and aid, to engage in a lawful commercial business, with the agreement to have the profits of such commercial business divided among them in certain proportions. In one respect it was different from an ordinary copartnership. The business contemplated was not to be under the control of the parties in interest as such, but such control was to be directed by the trustees appointed and to be thereafter appointed. It is not necessary to determine whether it was or was not a partnership in the strict technical sense of the term. It was a contract in the nature of a partnership, having in view the objects for which a commercial partnership is formed, and designed to effectuate those objects, and, by means of the trusts created, made indissoluble by the act of any one of the parties during ten years, the period that it was to continue and be in operation. And, in appointing the three managers, directors, or trustees, to manage the business, it is not to be presumed that the parties for whose benefit

this commercial business was to be conducted, intended, when other commercial business enterprises carried on by the instrumentality of ships are conducted and directed by the will of the majority, that a different rule should govern in the management of the commercial business in which they were about to engage. And, when we consider that the mail contract, if performed, would yield in ten years the sum of $2,900,000, and that Law, Roberts, Croswell and Wetmore were sureties to the government, in the sum of $500,000, for the faithful performance of that contract, the presumption is strengthened, that they never intended to put it in the power of one of the so-called trustees, who had no pecuniary interest in the business of the enterprise, other than to realize the salary provided for him by the indenture, and who was under no responsibility to the United States, to stop by his veto the sailing of the ships at the times appointed by the other two managers or trustees, and thereby forfeit the benefits secured by the contract, and subject the parties in interest to the heavy responsibility which they had incurred to the government.

Aside from this presumption, certain provisions in the indentures which the parties entered into, show that the united and joint action of the three trustees was not required in the management of the business. In case of the death or resignation of McIlvaine, or in case he should become incapable of acting, there was no necessity of appointing a trustee in his place. Sloo had the power to appoint; but there was no duty imposed on him or any one else to appoint. The trustees were not responsible for the acts, defaults, or misconduct of each other, but each was responsible only for his own acts, defaults, or misconduct. And, in the indenture of the 7th of February, 1850, which was entered into to settle the differences which had arisen, it appears very satisfactorily, by necessary implication, that the business contemplated could be conducted without the joint concurrence of the three trustees. On account of certain differences which existed in the year 1849, a suit was commenced by Sloo against the other parties to the indenture of the 17th of August, 1847. In that suit, Sloo claimed that the business of the concern should not be conducted except with the joint concurrence of all of the trustees. While that suit was pending, the parties came to a settlement of their matters in dispute. The terms of the settlement appear by the indenture of the 7th of February, 1850. By that indenture, the joint concurrence of all of the trustees was expressly required to only one act. That act was, to give a mortgage of the ships. Before the settlement, Sloo had insisted that a united concurrence was required in all cases. The other parties had insisted that no such united concurrence was required in any case. They settled their matters in dispute, and, in the settlement, a united concurrence of all of the trustees was expressly required in only one case, thereby, by necessary implication, admitting that, in all other cases, no such united concurrence was required.

It appears, then, fairly, from the indentures which the parties entered into, that the business contemplated by the indenture of the 17th of August, 1847, can be rightfully conducted and directed without the united concurrence of the three trustees —that such was the intention of the parties. It is, therefore, unnecessary to consider the question, whether the trust created by that indenture was technically a private trust or a public trust.

The next question is—have the fiduciary powers and duties been so wrongfully executed by the majority of the trustees, or by one acting in behalf of the majority, and is there such danger that they will continue to be so wrongfully executed, that the inter position of the court can be justly required to protect Sloo in his equitable rights?

It is one of the settled principles of courts of equity, that a trustee shall not take advantage of his situation, to obtain any personal benefit to himself at the expense of his cestui que trust. Upon this principle it is, that a trustee is not permitted to purchase the trust estate, or to make a contract with himself individually, or one in which he is personally interested, and from which he may derive a profit, to the prejudice of his cestui que trust. Such transactions are discountenanced by courts of equity, as they afford a great temptation for the violation of fiduciary duties, and often lead to fraud, by which the rights of cestuis que trust are violated. The lord chancellor, in the case of Broughton v. Broughton, 31 Eng. Law & Eq. 587, 590, says: "The rule that a trustee is not to be allowed to make a profit of his trust, is not, in my opinion, stated in a sufficiently stringent manner. The rule is based on a rule of human nature, that no person having a duty to perform shall be allowed to place himself in a situation in which his interest and his duty may conflict. And such is the case where a trustee, though he might employ others to do certain things, and pay them out of the trust fund, does them himself, and takes payment from the trust fund. Therefore, it is an obvious corollary, flowing from the rule, that no person from whom fiduciary duties are expected shall be enabled to make a profit of the trust by employing himself." Law was the first president of the United States Mail Steamship Company. He has been succeeded in that office by Roberts, who is now the president of the corporation. The capital, as sworn to by Roberts, is two millions of dollars, and of that capital he owns an amount of about six hundred thousand dollars. Law took, in the stock of the company, when it

was formed, an amount of over seven hundred thousand dollars. Croswell and Wetmore are also stockholders in the corporation. Sloo is not a stockholder.

It is, among other things, charged in the bill, that Law and Roberts, two of the trustees named in the indenture of the 17th of August, 1847, in conducting the business contemplated by that indenture, and others having agencies therein, have so managed as wrongfully to permit the ships of the trust to remain unemployed, and, from time to time, to substitute in their place ships of the United States Mail Steamship Company, to carry on the business contemplated by that indenture, at enormous rates of pay, in violation of the equitable rights of Sloo, and in violation of the trusts confided to them, by which Sloo has been defrauded and his rights put in jeopardy. It should be borne in mind, in considering this part of the case, that Law was a trustee until the spring of 1854, when he was succeeded by Van Nostrand; and that, during the whole of the time, the building and repairing of the ships belonging to the trust were under his superintendence, direction and control, for which he received five thousand dollars per annum.

In September, 1853, the steamship United States, belonging to the United States Mail Steamship Company, was, by Law and Roberts, without the approbation or authority of either Sloo or McIlvaine, contracted for to perform, in part, the business contemplated by the indenture of the 17th of August, 1847. She was kept in the employ of the trust for the period of twelve months. The price paid for her charter was $10,000 a month, making in the whole $120,000. She was chiefly employed between New Orleans and Aspinwall. At the expiration of the twelve months, she was sold by the United States Mail Steamship Company, for $60,000. At the time she was so employed, there were nine steamships which belonged to what is called the trust, one of the ten having been destroyed by fire a short time previously. The services of five ships, and no more, were required to fulfil the mail contract entered into with the government.

Upon this state of facts, as set forth in the bill, unless they are denied, excused, or justified by the opposing affidavits, there would be a clear breach of trust on the part of Law and Roberts—a clear violation of duty, prejudicial to the rights of Sloo, and of which he would have a right to complain. Upon this state of facts, the steamship United States was brought into the service of the trust, by virtue of a contract between Law and Roberts, in their fiduciary capacity, and the United States Mail Steamship Company, Law or Roberts being president of the same, and in which they had a controlling pecuniary interest as stockholders, by which they were enabled to make a large profit to themselves, under the pretext of performing a fiduciary duty. The transaction, unexplained, was, in substance, a contract between themselves, as trustees, on the one part, and themselves and other individuals, on the other part, from which they derived a great profit, to the prejudice of their cestui que trust, Sloo.

The facts, as above set forth, in relation to the steamship United States, are not denied by the opposing affidavits. Her employment is attempted to be justified by the allegation of facts which are not set forth in the bill. Roberts, in his affidavit, says, that there was a necessity for the employment of the United States; that, at the time she was employed, and for the whole time she continued to be employed, there were not ships enough belonging to the trust in repair, to perform the service required by the mail contract; and that, to save that contract, was one reason why the United States was employed for the period of twelve months. At the time this contract was entered into, as has been before remarked, there were nine steamships which belonged to the trust. I received the impression, upon the first examination given to the affidavit of Roberts, that, at the time the United States was chartered, the steamship George Law, one of the ships of the trust, was not completed. He says that, in the month of August, 1853, she "was not yet fully completed." But, it appears clearly, from the documents which accompany that affidavit, that, when that charter for the United States was effected, the George Law was fully completed; or, it appears that that charter was effected on the 27th of September, 1853, and that the George Law was fully completed before the 15th of September, 1853, on which day she made her first trip in the business of the trust. It required five ships, and five only, to perform the mail service. The inquiry is naturally suggested, why it was, that for the period of twelve months, five of the ships belonging to the trust (a majority of them), were in such a bad state of repair that they could not be employed in the service required, when Law, one of the trustees, had the superintendence of the repairs and the control thereof, and was paid out of the trust fund, for such superintendence and control, the sum of five thousand dollars per annum; and when he and his associates were under an obligation to the government, in consideration of the mail pay received, to keep at least five of them in repair, so that they could at any time be taken by the United States, and, with the least possible expense, be converted into war steamers of the first class. The mail contract, as entered into with the secretary of the navy, did not require the transportation of the mail direct from New Orleans to Aspinwall, though, by a subsequent arrangement, with the government, it was so transported, in substitution of the mail service between Havana and Aspinwall. This arrangement, however, terminated early in the summer of the year 1854, and the United States was employed between New Orleans

and Aspinwall for two or three months after, at a great loss to the trust.

But it is not necessary to pursue the subject of the employment of the United States any further. Grant that the facts existed upon which the contract for the employment of the United States is attempted to be justified. It was a contract made by persons acting in a fiduciary capacity, with themselves and the other corporators of the United States Mail Steamship Company, in which they were personally interested, and from which they were to derive a pecuniary profit, to the prejudice of Sloo, one of the cestuis que trust, and made without his sanction, approval, or authority. Such a contract is always discountenanced by a court of equity. The temptation to fraud, and to the violation of trust duties, is too great, to permit such a contract to receive its sanction. In such a transaction, interest conflicts too much with duty.

Early in the year 1854, serious controversies having arisen between the Accessary Transit Company and Mr. Vanderbilt, the latter established a line of steamships communicating between New York and San Francisco, via the Isthmus of Panama, called the "Independent Line for California." As a part of that line, the steamship North Star plied between New York and Aspinwall. Competition ensued. To put an end to that competition, the United States Mail Steamship Company purchased the North Star from Mr. Vanderbilt, agreeing to pay for the same the sum of $400,000. Immediately after this purchase was made, Roberts, in behalf of himself and his co-trustee Van Nostrand, entered into an arrangement with the United States Mail Steamship Company, whereby the North Star took the place of one of the trust ships, between New York and Aspinwall, and carried the mail. She was taken into the line by Roberts as early as the 20th of September, 1854; for, on that day she made her first trip to Aspinwall in the trust line. She continued in the line, supplying the place of one of the trust ships, as late as the 8th of February, 1855. She was therefore employed by Roberts at a time during which the charter of the United States was in force; for the United States did not return to New York, and leave the business of the trust, until the 6th of October, 1854. The North Star was run on account of the United States Mail Steamship Company, and was to receive a portion of the mail pay. That was the arrangement entered into by Roberts. McIlvaine declined to enter into that arrangement, and he at all times declined to give his assent to the purchase of the North Star for the trust.

When the purchase of the North Star was made by the United States Mail Steamship Company, it was stipulated in the contract, that three-fifths of the gross receipts of her business should be applied, from time to time, in discharge of the $400,000 debt to Vanderbilt, and that the balance not paid in that way should be paid within two years. Sloo never agreed to the arrangement which Roberts made in regard to the North Star. The arrangement in regard to her, as made by Roberts, is attempted to be justified on the same grounds urged for the employment of the United States, to wit, that there were not sufficient ships belonging to the trust in repair, to perform the service required by the mail contract, and that the arrangement was made to save the mail contract. For the reasons given when considering the case of the employment of the United States, the arrangement by Roberts, in opposition to the views of Sloo and McIlvaine, for permitting the North Star, navigated and employed for the benefit of the United States Mail Steamship Company, to take the place of one of the trust ships, cannot receive the sanction of a court of equity. It was a breach of trust—a violation of duty—on the part of Roberts, and of which Sloo has good cause to complain; and against the repetition of which he has a right to ask the interposition of the court. Such transactions, by any one acting in a fiduciary capacity, put in jeopardy the rights and interests of cestuis que trust, and stringent measures should be adopted to prevent a repetition of them, particularly as Roberts now insists that he has a right to do the same thing again, and has, since the bill was filed, employed another ship belonging to the United States Mail Steamship Company, the Grenada, in the same service.

The Grenada, belonging to the United States Mail Steamship Company, took the place of one of the trust ships on the 17th of April, 1855. When this motion for an injunction was made, in January, 1856, she was still in the line. She was run on account of the United States Mail Steamship Company, they taking the whole of her receipts. It will thus be seen that, during the whole time from the 27th of September, 1853, to the 28th of January, 1856, when this motion was made, with the exception of the period from the 8th of February, 1855, to the 17th of April, 1855, a ship of the United States Mail Steamship Company was employed, by either Law or Roberts, in the place of one of the trust ships, under the pretext that, for that period, there were not ships enough belonging to the trust in repair, to perform the service required by the mail contract. How much was received by the United States Mail Steamship Company under this arrangement, does not appear by the documents presented. They received for the charter of the United States $120,000. As the North Star and Grenada were run on account of the company, the amount which the company received for their employment cannot be ascertained from the documents presented, and it has not been stated in any of the affidavits. It must have been large; for, during their employment, the business appears to have been prosperous. Roberts says, that in the year 1854, when the

competition occasioned by the establishment of the Vanderbilt line existed, the prices of passage to California were comparatively low; and that, from about the month of March, 1854, to the month of September, of the same year, and until the North Star was purchased by the company, the price of a single steerage passage from New York to California was only thirty-five dollars. During this period of losing prices, the United States Mail Steamship Company were paid by Roberts a round sum for the charter of the United States. He says, that immediately after the purchase of the North Star, the price of a steerage passage from New York to San Francisco rose from thirty-five dollars to one hundred and twenty-five dollars. As soon as the period of high prices returned, one of the ships of the United States Mail Steamship Company (the North Star) was employed by him to take the place of one of the ships of the trust line, not upon a charter, as was the case with the United States during a period of low prices, but to run upon the account of the company, and the North Star was succeeded by the Grenada, which was run in the same way.

There are many other charges set forth in the bill and affidavits, upon which the plaintiffs rely to have an injunction issue against Roberts. After the view taken of the transactions in relation to the United States and the North Star, it is unnecessary to consider them, in disposing of this motion. They will all be proper subjects of investigation on the final hearing. By the exhibits produced, the balance of the construction account for the building of the ships, as kept and made out by the trustees, was, on the 1st of July, 1853, exclusive of the steamship George Law, the sum of $1,093,747.21. The construction account at a later date has not been presented. The plaintiffs insist that this is a false account; that there are charges in it, to a large amount, which have been inserted by the fraudulent procurement of certain parties; and that now the whole amount advanced for the building of the ships has been paid. It is not necessary, in disposing of this motion, to determine that question. The proper time to determine it will be upon the final hearing. The motion now made is for an injunction to prevent future abuses in the future management of the business of the trust, and not to settle rights which are dependent upon the correct adjustment of past charges on the books of the trustees.

Under the views above expressed, an order must pass to restrain the employment of any of the ships belonging to the United States Mail Steamship Company, or to any stockholder in that company, or to any or either of the trustees, or in which they or either of them have an interest (excepting the ships of the trust), in the business entrusted to the management of the trustees, without the concurrence or assent of the three trustees. The facts in the case, on this part of it, will not warrant an injunction to a greater extent. Sloo does not ask, that for the employment of such ships his assent should be obtained.

By the indenture of the 21st of January, 1851, it was agreed that Howland & Aspinwall should sell, under the control and instructions of the United States Mail Steamship Company, all through passage tickets issued by that company; that they should receive all passage money for through passages, and all freight money for through freight of every description, upon all voyages made by steamships belonging to the trustees, from New York to any port on the Isthmus of Panama, from New Orleans to any port on said isthmus, and from any port on said isthmus to New York or to New Orleans; and that they should, without delay, deposit all monies received, to the credit of the trustees, in such bank as the trustees should designate, reserving out of such receipts a commission of two and one-half per cent. upon the gross amount so received. It appears that a portion of the money so received by Howland & Aspinwall has been, from time to time, paid by them to the Nicaragua Company, in pursuance of an agreement made between that company, and the Pacific Mail Steamship Company, and the United States Mail Steamship Company. There is no good reason to doubt that such payments were made by Howland & Aspinwall honestly. But Sloo has a right to demand that the contract of the 21st of January, 1851, by which they were authorized to receive the money, shall be kept and performed. An order must, therefore, be passed, requiring Howland & Aspinwall to deposit the money which they may receive under and by virtue of the contract of the 21st of January, 1851, deducting two and a half per cent., to the credit of the trustees, in such bank as the trustees may designate.

After the plaintiff Fisher was appointed a trustee in the place of McIlvaine, he went to the office of the trustees and agents, to examine their books. The books were exhibited to him by Croswell, one of the agents, for examination. While he was examining the same, and while they were being explained by Croswell, Roberts entered the office and closed the books, refusing to permit them to be examined by Fisher. One pretext for such refusal was, that they belonged to the United States Mail Steamship Company, of which Roberts was president. Fisher had a right to examine the books, and the refusal by Roberts to permit him so to do was a wrong. In this transaction, nothing exceptionable is found in the conduct of Croswell, and no order should be passed against him in regard thereto. But an order should pass enjoining Roberts and the United States Mail Steamship Company from withholding the books and papers of the trustees from the inspection and examination of Fisher, or of any trustee, at any reasonable time during the hours of business.

No further order is deemed necessary on this motion.

Case No. 12,958.

SLOO et al. v. LAW et al.

[4 Blatchf. 268.] [1]

Circuit Court, S. D. New York. Feb. 11, 1859.

ATTORNEY AND CLIENT—SUBSTITUTING NEW SOLICITOR—FEES DUE—CONDITIONS.

1. A party will not be permitted to substitute a new solicitor in place of one who has had charge of the cause, without the consent of the court.

[Distinguished in Isaacs v. Abraham, Case No. 7,094. Cited in Wilkinson v. Tilden, 14 Fed. 780.]

2. Circumstances stated, under which the court will give its consent that the solicitor be changed, and order that he deliver up the papers, without the payment of his fees.

3. Where, after a party had notified his solicitor, who had faithfully discharged his duties, that his services as solicitor in the cause were no longer wanted, and that his fees for his past services would not be paid, and had attempted to substitute another solicitor in his place, the solicitor sued out an attachment against the party for his fees: *Held*, that the bringing of the attachment was no ground for ordering the solicitor to be discharged from the cause without the payment of his fees.

This was a suit in equity [by Albert G. Sloo and others against George Law and others], in which George D. Sargeant, Esq., was the solicitor for the plaintiffs. A motion had heretofore been made to the court, by the plaintiffs, for an order to substitute another solicitor in the cause, in the place of Mr. Sargeant, and to compel him to deliver to the plaintiffs the papers in the cause. Upon that motion, Mr. Sargeant signified a willingness that such substitution should take place, and also a willingness to give up all the papers in the cause, upon the payment of his fees. To this the plaintiffs objected, and they insisted that such substitution should be ordered without a previous payment of such fees. Thereupon, it was ordered that such substitution might take place upon the payment of the fees due to Mr. Sargeant, and not before, and that a reference be had to ascertain the amount of the fees due to him. The report of the referee had been filed with the clerk. A motion was now made by the plaintiffs to vacate such former order of the court, and for an order that Mr. Sargeant be discharged from the cause as solicitor for the plaintiffs, without the payment of his fees, and also that he deliver up the papers in the cause to the plaintiffs, or to such solicitor as they might substitute in his place, upon the ground that Mr. Sargeant, a few days before the former order was made, sued out an attachment against the plaintiffs, in the supreme court of New York, for the fees which he claimed to be due to him from the plaintiffs, and that the bringing of such attachment was unknown to the plaintiffs at the time the former order was made, and had only just come to their knowledge.

S. Weir Roosevelt, for plaintiffs.
George D. Sargeant, in person.

INGERSOLL, District Judge. A party will not be permitted to substitute a new solicitor in the place of one who has had charge of the cause, without the consent of the court. That consent is sometimes given upon terms, and sometimes without terms; sometimes upon condition that the fees of the first solicitor be paid, and sometimes without such condition. When a solicitor has abandoned the cause of his client or when he is not faithful to such cause, or when he acts in a manner that is inconsistent with the trust reposed in him, the court will give its consent that the solicitor be changed, and order that he deliver up the papers, without the payment of his fees. The bringing of a suit against the client, by the solicitor, for his fees, may, under certain circumstances, be such an act as will justify the client in substituting another solicitor in his place, and will authorize the court to consent to such substitution without the payment of his fees.

In the present case, the suit by attachment in favor of Mr. Sargeant, for his fees, did not precede the efforts of the plaintiffs to substitute another solicitor in his place. The attempt to make such substitution was before such suit was commenced. It was not caused by such suit, or by any unfaithful act on the part of Mr. Sargeant, or by any act on his part that was inconsistent with the trust reposed in him as the solicitor for the plaintiffs. The suit was commenced after the attempt was made by the plaintiffs to substitute another solicitor in his place, after they had notified him that his services as solicitor in the cause were no longer wanted, and after they were endeavoring to substitute another in his place, without paying his fees. He had faithfully attended to the duties imposed upon him as solicitor. Under these circumstances, the suit by Mr. Sargeant was not either a voluntary abandonment of the cause of his clients, or a voluntary withdrawal from the same. It was not an act faithless to the cause of his clients, or inconsistent with the trust originally reposed in him as the solicitor for the plaintiffs. When the suit was commenced, he had been notified that his services, as solicitor were no longer wanted, and that the plaintiffs refused to pay him for his past services. He had, in effect, been notified by them, that, if he received anything, it must be by means of a suit. It is the duty of the court to protect solicitors and other officers of the court, when they have faithfully performed their trust, and that duty should be faithfully executed.

There is no fact now brought to the knowledge of the court, to induce it either to vacate the order heretofore made, or to change

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

or alter it in any respect. The court will consent that a solicitor be substituted in the place of Mr. Sargeant, when his fees are paid, and not before. The motion now made must, therefore, be denied.

SLOOP.

[NOTE. Cases cited under this title will be found arranged in alphabetical order under the names of the vessels; e. g. "The Sloop Marchant. See Marchant."]

SLOUGH v. HATCH. See Case No. 13,499.

Case No. 12,959.

SLOUGHTON v. HILL.

[See Case No. 13.501.]

SLYE (CRAWFORD v.). See Case No. 3,371.

SLYE (KEZIAH v.). See Case No. 7,752.

SMALE (FORSYTH v.). See Case No. 4,-950.

Case No. 12,960.

SMALL v. KING.

[5 McLean, 147.] [1]

Circuit Court, D. Ohio. Oct. Term, 1850.

COURTS—FEDERAL JURISDICTION — CITIZENSHIP — NOTES.

1. This court can exercise no jurisdiction in a case where the maker and indorser of a note, at the time of the assignment, resided in the state where the action is brought.

2. If the indorser be an accommodation indorser, and the note never went into his possession or ownership, it can make no difference.

[This was an action on a promissory note by William Small against Thomas W. King.]

Mr. ——, for plaintiff.
Mr. King, for defendant.

OPINION OF THE COURT. This action is founded on a promissory note given by Thomas W. King, payable to Rufus King, who assigned it to the plaintiff. The defendant filed a plea to the jurisdiction of the court, on the ground that the assignor and maker both lived in Ohio, at the time the note was given and indorsed. The plaintiff replied that Rufus King was an accommodation indorser, and that the note never passed to him. To this plea a demurrer was filed. The court sustained the demurrer to the replication, and held that there was a want of jurisdiction, under the 11th section of the judiciary act of 1789 [1 Stat. 78].

SMALL (BOONE v.). See Case No. 1,644.

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

SMALL (DUER v.). See Case No. 4,116.

SMALL (HOLBROOK v.). See Cases Nos. 6,594-6,596.

Case No. 12,961.

SMALL et al. v. The MESSENGER.

[2 Pet. Adm. 284.] [1]

District Court, D. Pennsylvania. 1807.

SALVAGE—GOODS TAKEN FROM WRECK—COMPENSATION.

1. Goods taken from a wreck, libelled for salvage, and one-third of the gross amount decreed by the court.

[Cited in Williams v. The Adolphe, Case No. 17,712.]

[2. Cited in Browning v. Baker, Case No. 2,-041, to the point that slaves may receive compensation as salvors.]

The libellant [William Small], master of the brig Catherine of Norfolk, on the 5th of September last, in lat. 37 deg. N. and long. 68 deg. W. fell in with the wreck of the schooner Messenger of Baltimore, White, master, having lost both her masts, sails and rigging; the captain, mate, and eight hands remaining alive, seven of her crew having perished. After a vain endeavour to put the schooner in a condition to proceed on her intended voyage from Baltimore to Vera Cruz; the libellant and crew took out of the wreck and saved from destruction, sundry articles in the libel mentioned. The hardships of the officers and crew of the Messenger are described, and it is said in a deposition, not admitted as legal proof of all the facts, that the captain of the schooner, the mate, and one hand, were taken on board the brig, and the rest of the surviving crew were admitted into the ship Unicorn, bound to Bremen, which ship saved, and carried on her voyage, a more considerable quantity of the cargo of the schooner. The articles saved by the brig Catharine were carried to Madeira, and brought from thence to Philadelphia, occupying the room of about fifty barrels freight, valued at one hundred and twenty dollars, the cargo of the brig being displaced to receive the goods so saved. These facts are agreed by John Craig, one of the owners of the vessel and cargo of the schooner Messenger—and that the schooner was abandoned and left at sea.

[Before PETERS, District Judge.]

BY THE COURT. There is no claim by the owners of the cargo of the brig Catharine, nor does there appear any very peculiar merit in this case, to distinguish it from the common cases of saving goods out of vessels (under like circumstances) in the labour or difficulty of saving: but it is, among others, a striking instance of the impediment to saving goods out of a perishing vessel, interposed by the cargo of the vessel employed in the salvage. Much more of the Messenger's cargo would have been saved, if it could have been

[1] [Reported by Richard Peters, Jr., Esq.]

admitted into the brig Catharine. This is not a circumstance favourable to the arguments advanced for rewarding owners of the cargo of the saving ship; when, in general, a vessel in ballast is most capable of, and commodious for, receiving goods out of perishing vessels; and it relieves me from some difficulty as there is no claim, on this account, by the owners of the cargo.

Under all the circumstances, I think it right to allow as salvage, one-third of the gross amount of sales, clear of all costs and charges. This is to be divided between the owners of the ship and the officers and crew of the brig Catharine, in like manner as was directed in the case of Taylor and others against the brig Cato, heretofore decreed in this court.

Therefore, I adjudge, order and decree as follows, to wit: The gross amount of sales, as appears by the marshal's return, is two thousand eight hundred and sixty-four dollars, and thirty-nine cents. Of this sum I adjudge, order and decree, that the libellant, on behalf of himself and all others concerned, have and recover in full satisfaction, for and as salvage, the one-third part, or nine hundred and fifty-four dollars, and seventy-nine cents, to be apportioned as follows:

Messrs. Olivera, Fomandey & Co. of Norfolk, owners of the brig Catharine, shall receive and take one-half of the said sum of nine hundred and fifty-four dollars, and seventy-nine cents, or			$477 39
The remaining half of the said sum of nine hundred and fifty-four dollars, and seventy-nine cents, shall be divided amongst the officers and crew of the said brig Catharine, as follows, to wit: The same shall be divided into twenty parts or shares, whereof,			
William Small, the master, shall have eight shares, or..	$190 96		
Samuel Wilson, the mate, shall have four shares, or..	95 48		
James Parker and Robert Sennett, white men, and negroes William, Joe, Europe, Lewis, Jerry and Peter, slaves, all seamen, shall each have one share, or twenty-three dollars, and eighty-seven cents........	190 96		
		477 40	
			$954 79

The negroes William, Joe, Europe, Lewis, Jerry and Peter, being slaves, are nevertheless to receive their proportion of salvage, as mariners on board the brig Catharine, for their own separate use. And all costs, duties and charges are to be deducted from and paid out of the remaining two-thirds of the gross amount of sales, and the balance to remain in court, subject to further order and decree.

SMALL (UNITED STATES v.). See Case No. 16,314.

SMALL, The S. & B. See Case No. 12,291b.

SMALLWOOD (BEAN v.). See Case No. 1,-173.

SMALLWOOD (UNITED STATES v.). See Cases Nos. 16,315 and 16,316.

Case No. 12,962.

SMALLWOOD v. VIOLET.

[1 Cranch, C. C. 516.] [1]

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

RECORDS—UNDER SEAL OF STATE COURT — JUDGMENT—PROOF OF.

1. Records certified under the seals of the respective state courts are admitted, under the agreement of the bar, without other authentication.

2. An execution is not the best evidence of a judgment.

This was an action upon a judgment of J. Franklin, a justice of the peace of Charles county, in Maryland.

Mr. W. D. Simms, for plaintiff, offered in evidence a paper purporting to be an execution issued by J. Franklin, against the defendant, and in favor of the plaintiff, upon which there was a certificate of the clerk of Charles county, that J. Franklin was a justice of the peace.

Mr. E. J. Lee, for defendant, objected that the commission of the justice should be produced.

But THE COURT (CRANCH, Chief Judge, absent,) reminded him of the agreement of the members of the bar of the 17th July, 1807, "that copies of records of any state court should be received in evidence if certified and authenticated in such manner as would make them evidence in the courts of the state from whence they are brought;" and overruled the objection.

Mr. Lee, then objected, that the execution is not the proper evidence of the judgment; and that a copy of the judgment ought to be produced.

And THE COURT, being of that opinion, the plaintiff became nonsuit.

Case No. 12,963.

SMALLWOOD v. WORTHINGTON.

[2 Cranch, C. C. 431.] [1]

Circuit Court, District of Columbia. Oct. Term, 1823.

EVIDENCE—PAROL—WRITTEN CONTRACT — PLEADING AT LAW—BREACH OF PROMISE.

1. When the assignment of the time of service of a servant is in writing, parol evidence of a promise that the servant had a certain time to serve cannot be admitted.

2. A count averring that the defendant promised that a servant, whose time the plaintiff had bought of the defendant, had three years to serve; and that the defendant, not regarding

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

his said promise, but contriving and fraudulently intending to injure the plaintiff, craftily and subtilely deceived the plaintiff in this, that the servant had not three years to serve, is not a count founded upon fraud, but upon the breach of the promise.

Assumpsit, charging that the defendant [William Worthington] promised that the servant, whose time of service the plaintiff [H. Smallwood] had bought of the defendant, had three years to serve, when, in truth, she had only one year to serve. The declaration does not aver fraud, or a knowledge on the part of the defendant that she had only one year to serve. The plaintiff, upon the call of the defendant, produced a written contract, by which one Lowe hired the servant to the defendant, stating that she had seven years to serve from that date, November, 1815. In 1819, the defendant transferred his right, by a written assignment, to the plaintiff, which assignment did not contain any warranty. The plaintiff offered parol evidence to prove that the defendant affirmed, at the time of the contract, that she had three years to serve.

THE COURT (nem. con.) rejected the parol evidence.

Mr. Key, for plaintiff, then contended that one of the counts was for deceit, and that the parol evidence was admissible to show the deceit. The count averred that upon the sale of the time of the servant, the defendant promised that she had three years to serve, yet the defendant not regarding his promise, but contriving and fraudulently intending to injure the plaintiff in this behalf, craftily deceived the plaintiff in this, that the said slave, at the time of making the said promise and undertaking of the defendant, had not three years to serve, but was entitled to her freedom in one year, &c., and had only one year to serve, whereby the plaintiff lost the benefit of her service for a long time, &c.

But THE COURT (nem. con.) said, that the count was not for deceit, and did not aver fraud; and rejected the evidence.

SMARR (BARTLEMAN v.). See Case No. 1,074.

Case No. 12,964.

SMEDBERG v. BENTLEY.

[21 Int. Rev. Rec. 38.]

Circuit Court, D. New Jersey. Nov., 1874.

CONSTITUTIONAL LAW—INCOME TAX—DIRECT TAXES—APPORTIONED AMONG STATES.

[An income tax, such as that laid by the act of July 14, 1870, is not a "direct tax," which is required by the constitution of the United States (article 1, §§ 2, 9) to be apportioned among the several states; and the act is valid notwithstanding that it lays the tax by the rule of uniformity. Applying Hylton v. U. S., 3 Dall. (3 U. S.) 171; Pacific Ins. Co. v. Soule, 7 Wall. (74 U. S.) 443; and Veazie Bank v. Fenno, 8 Wall. (75 U. S.) 533.]

This action [by Oscar Smedberg against James V. Bentley, collector of internal revenue] was brought to recover the amount of tax paid by the plaintiff upon his income for the year 1871, under the act of congress of July 14, 1870 [16 Stat. 256]. The tax was paid under protest. The question raised by the pleadings in the case, was whether the tax on incomes imposed by said act was not unconstitutional. The plaintiff's declaration alleged that said tax was within the meaning of the words "capitation or other direct tax," in the 9th section of the 1st article of the constitution of the United States, and that as it was by the terms of said act laid uniformly throughout the United, instead of being apportioned among the several, States, according to their respective numbers, as required by the 2nd section of the 1st article of the constitution, the act was unconstitutional and void, and the tax illegally assessed and collected. The defendant demurred. The case was argued in the United States circuit court at Trenton, before Hon. John T. Nixon, district judge, in November last.

E. W. West and Miron Winslow, for plaintiff.

A. Q. Keasley, U. S. Dist. Atty., for defendant.

NIXON, District Judge. This was a suit brought by the plaintiff against the collector of internal revenue for the Fourth collection district of New Jersey, to recover back certain taxes on his income for the year 1871, which he had paid to the defendant under protest. The first count of the declaration alleges that the only warrant or color of authority or right that the defendant had for collecting or receiving from the plaintiff the said tax, was derived from an act of congress, entitled "An act to reduce internal taxes, and for other purposes," approved July 14, 1870, and particularly the sections from 6 to 11, inclusive, which provide for the levying and collection of a tax of two and one-half per centum upon the gains, profits and income of the persons therein described; and that the amount so collected and received by the defendant from the plaintiff was collected and received as the amount of the tax upon the income of the plaintiff, imposed by virtue of the said sections; that it was a direct tax, and that as such the same was not laid agreeably to the provisions of the third paragraph of the second section of the first article of the constitution of the United States, but contrary thereto; and that the several sections of the said act, under which the said tax was levied and collected, was repugnant to the provisions of the constitution, and therefore void. The defendant demurred to the said count, and the only question presented to the court, on the demurrer, is the constitutionality of said legislation.

It is not at all material to this case to state what may have been the opinion of this court, if the question were open for its

consideration. It is sufficient to say that the supreme court has left nothing to be done here, except to sustain the demurrer of the defendant.

It is claimed by the counsel of the plaintiff that the income tax was unconstitutional, because it was a direct tax within the meaning of the constitution, and ought to have been apportioned among the states according to their population. The second section of the first article of the constitution of the United States provides "that representatives and direct taxes shall be apportioned among the several states, which may be included within this Union, according to their respective numbers," and authorizes the congress to make provision for a census every ten years, to determine such numbers. The ninth section of the same article says: "No capitation or other direct tax shall be laid unless in proportion to the census or enumeration herein before directed to be taken." The only other references to the subject of taxation in the constitution, are found in the eighth and ninth sections of the first article, prohibiting the states from laying any tax or duty on exports, and authorizing congress "to lay and collect taxes, duties, imposts and excises; to pay the debts, and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform through the United States."

It is conceded under these constitutional provisions, that if any income tax is not a direct tax, it should be laid by the rule of uniformity; but if it is a direct tax, it can only be laid after an apportionment among the states, according to the last census. The question of the meaning of a direct tax, in the sense of the constitution, came under the consideration of the supreme court, in Hylton v. U. S., 3 Dall. [3 U. S.] 171. This was in 1796. The case was elaborately argued, and excited great interest at the time, as some of the parties engaged in the discussion and decision were amongst the most distinguished of the members of the convention which framed the constitution. It was the unanimous opinion of the court that a tax on carriages was not a direct tax, but was included within the power to levy duties; and that the only direct taxes contemplated by the constitution were two, to wit, a capitation or poll tax, and a tax on land. Pacific Ins. Co. v. Soule, 7 Wall. [74 U. S.] 443, was a case arising under the internal revenue act of June 30, 1864 [13 Stat. 223], and the amendment thereto of July 13, 1866 [14 Stat. 98]. The corporation plaintiff had brought suit against the defendant to recover back monies alleged to have been wrongfully paid upon its business and income, and it was conceded that if a tax upon income was a direct tax, under the constitution, the act was unconstitutional, because it had not been laid by the rule of apportionment. The court was again unanimous that the income tax or duties laid by sections 105 and 120 of the said act, upon the amounts insured and assessments made, and upon the dividends and income, was not a direct tax, but a duty or excise. Mr. Justice Swayne, in delivering the opinion, after reviewing the case of Hylton v. U. S., supra, said: "If a tax upon carriages, kept for his own use by the owner, is not a direct tax, we can see no ground upon which a tax on the business of an insurance company can be held to belong to that class of revenue charges." The only other case to which we shall advert is that of Veazie Bank v. Fenno, 8 Wall. [75 U. S.] 533, where it was held that the 9th section of the act of July 13, 1866, which provides that all banking associations shall pay a tax of ten per cent. on the amount of the notes of any state bank, paid out by them after the 1st day of August, 1866, does not lay a direct tax within the meaning of the clause of the constitution, which ordains that "direct taxes shall be apportioned among the several states according to their respective numbers."

The late chief justice carefully investigated the taxing powers of congress under the constitution, and the methods therein authorized. In the course of his opinion, he observes: "Much diversity of opinion has always prevailed upon the question, what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes, which congress was authorized to impose, was probably made with very little reference to their speculations. The great work of Adam Smith, the first comprehensive treatise on political economy in the English language, had then been recently published; but in this work, though there are passages which refer to the characteristic difference between direct and indirect taxation, there is nothing which affords any valuable light on the use of the words 'direct taxes' in the constitution." He then resorts to the historical evidence furnished by the manner in which the congress had always exercised the power, and from this draws the inference that "direct taxes," as therein used, comprehended only capitation taxes and taxes on land, and, perhaps, as was suggested by Mr. Justice Paterson, in Hylton v. U. S. [supra], taxes on personal property by general valuation and assessments of the various descriptions possessed within the several states. "It follows," he adds, "necessarily that the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct duties, imposts and excises, and must be laid and collected by the rule of uniformity. The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties." Although

a difference of views existed in the court as to another question involved in the case, to wit, whether such a tax could be upheld consistently with the constitutional power in the states to create and establish banking institutions, no dissent was expressed to the conclusions of the chief justice on the meaning of the term "direct taxes," and the case must be treated by this court as an unanimous re-affirmation of the doctrine of the supreme court on that subject. The case before us falls clearly within the principles on which these adjudications are founded. Under the constitutional designation of the different kinds of taxation to which resort might be made by congress, a tax upon incomes must be classed among the duties authorized, rather than among the direct taxes. No apportionment is necessary when it is laid, and there is nothing to be done here but to sustain the demurrer to the first count of the plaintiff's declaration, and it is ordered accordingly.

Case No. 12,965.

SMEDLEY v. YEATON.

[3 Cranch, C. C. 181.] [1]

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

SHIPPING—MASTER—SUPERCARGO.

The master of a vessel, who is also consignee of the cargo, has thereby the authority of supercargo during the voyage.

Assumpsit [by Smedley's executor against W. Yeaton], for not delivering fifty barrels of flour, shipped on board the defendant's schooner, Hero, for Barbadoes, consigned to the master, W. Sowle. The pumps being choked by corn, 113 barrels of the cargo of flour were damaged. The vessel put into Norfolk, where the damaged flour was taken out and sold, and the same number of barrels of good flour put on board in place of the damaged flour.

In order to prove the replacing of the flour, Mr. Taylor, for defendant, offered to read in evidence an account rendered by J. R. Harwood, of the sales of 113 barrels of damaged flour, and the supply of 113 barrels of good flour, which account was verified in the usual manner by the signature of W. Sowle, the master and consignee, who died before the trial.

Mr. Hewitt, for plaintiff, objected that it was the mere act of the master, in his character of master of the defendant's vessel, and not in his character of consignee, which did not arise, nor did his agency for the shipper commence until the arrival of the flour at Barbadoes.

Taylor & Mason, for defendant, contended that the master, who was consignee, had thereby the authority of supercargo to receive the good flour in lieu of the damaged; and that his certificate or acknowledgment of the receipt of the flour was evidence for the defendant.

And of that opinion was THE COURT (THRUSTON, Circuit Judge, contra). See Biggs v. Lawrence, 3 Term R. 434.

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

SMILAX, The (WILMER v.). See Case No. 17,777.

SMILEY (UNITED STATES v.). See Case No. 16,317.

Case No. 12,966.

Ex parte SMITH.

[3 App. Com'r Pat. 414.]

Circuit Court, District of Columbia. Dec. 21, 1860.

PATENTS—PATENTABILITY—NOVELTY AND UTILITY

[Smith's invention of an improvement in iron pavements by laying the blocks or plates so separated from each other that one or more may be readily taken up, without injury, possesses utility and patentable novelty.]

[Appeal by Barzellai C. Smith from a decision of the commissioner of patents refusing to grant him a patent for improvements in iron pavements.]

DUNLOP, Chief Judge. This is an appeal to me from the decision of the commissioner refusing a patent to B. C. Smith, for improvements in iron pavements. Mr. Smith does not claim the "fastening the plates or blocks of pavements by mortises and tenons, or dowels, or their equivalents," but his claim is in fact limited to a mode of laying such blocks of iron pavements as follows, to wit: "An iron pavement composed of a series of plates, laid a given distance apart from each other, and having projections and recesses, so proportioned to that distance that one of the plates may be readily removed, after a slight lateral movement of the adjacent plates, as herein set forth."

The question presented on this appeal is within a very narrow compass. Mr. Smith claims to have invented a mode of laying pavements of iron, by which, without disturbing the body of the pavement, particular plates may be taken up and replaced at small cost, to lay down and repair, in cities and towns, under ground sewers, water and gas pipes. Heretofore, the iron plates, as shown in the references given by the office, have been laid, iron to iron, fastened together by tenons and mortises, so as to fit close, and therefore costly and difficult to get up, without fracture, when the purposes above referred to called for their removal. Smith's mode is to lay the plates about an eighth of an inch apart, and to proportion the mortises and tenons to that distance, filling up the interstices, with sand, gravel, or such; making when so filled up, an equally solid and compact pavement. When a

plate or plates are desired to be removed, the sand or earth in the interstices of the adjacent plates is picked out, which gives room, by lateral pressure, to take up the plates desired to be removed, without fracture of the plate or tenons, so as to get at the ground below, for laying or repairing sewers, water and gas pipes.

It is not denied by the office that this contrivance is useful. Smith, it seems, offered to prove it, which was not insisted on, and its utility is apparent, on inspection of the papers, model, and drawings. The office refused to patent it, and the argument, in substance, of the board of appeal is that the thing was obvious, and within the reach of ordinary mechanical skill, and, further, that the elements were all old, and well known. This argument is answered by the fact that, though iron pavements have been introduced and patented as early as the year 1815, no such device, though useful, has been heretofore contrived by any mere mechanic who has laid such pavements. That can hardly be said to be obvious which has taken so long a time to find out.

I agree, it is sometimes difficult to determine where ordinary mechanical skill ends, and invention begins. The best practical principle to guide the office is that laid down by the courts of justice, and which must be regarded as settled patent law, that where the combination of known elements produces new and useful results to the public, not before attained, there the person who discovers and applies the combination is an inventor, within the true intent and meaning of the patent law. I refer to Prouty v. Draper, 16 Pet. [41 U. S.] 336; Godon & Burke's Law of Patents and Copyrights, 63; Many v. Sizer [Case No. 9,056],—referred to in Commissioner Holt's decision in Phelan's Case; Curt. Pat. §§ 24, 73, 94; Ryan v. Goodwin [Case No. 12,186]; my own decision in the Case of Larowe [Id. 8,093], March 6, 1860.

The commissioner, in his answer to the reasons of appeal, says: "Now, it seems to me clear that it is not patentable, at this day, to lay blocks of any material, to be held together by known fastenings, at any given distance from each other, for any purpose." This asserts the doctrine, if I rightly understand the commissioner, that no combination of known elements of invention, applied in a mode not before practiced, however new and useful the results produced by such combination, is patentable. The authorities I have cited are not in harmony with this position.

Again, the commissioner, in the same paper, says: "The determined distance at which the plates shall be placed from each other, so that the change in this distance shall permit the removal of one or more, is a mere arbitrary measure adapted to the particular occasion, but to my mind this adoption of a determined distance to isolate a single plate of the series is not an invention, within the meaning of the patent law, and derives no patentable novelty, from its relation to the mode of fastening selected." But the determined distance is not arbitrary; it is deliberate, and designed by the applicant, Smith, for attaining a useful purpose. It is not adapted to the particular occasion only, but is meant for all occasions and all times where iron pavements are to be used; and, whether it is patentable or not, I think, depends upon the question whether the results produced are new, and useful and valuable to the public. As these results are so new, useful, and valuable, I can see no reason why Smith should be denied a patent. He ought not to be so denied because his invention is simple. In the case of Ryan v. Goodwin [supra] Judge Story said: "The combination is apparently very simple; but the simplicity of an invention, so far from being an objection to it, may constitute its great excellence and value. Indeed to produce a great result by very simple means, before unknown or unthought of, is not unfrequently the peculiar characteristic of the very highest class of minds."

I sustain the appellant's reasons of appeal, and do, this 21st December, 1860, reverse the decision of the honorable, the commissioner of patents, of date the 30th August, 1860; and I do further, this 21st December, 1860, adjudge that a patent be issued to Barzellai C. Smith, for the improvement in iron pavements, as claimed by him. I return herewith to the office all the papers, models, and drawings, with this my opinion and judgment, this 21st December, 1860.

Case No. 12,967.

Ex parte SMITH.

[2 Cranch, C. C. 693.] [1]

Circuit Court, District of Columbia. May Term, 1826.

MILITIA—LIABILITY TO DUTY—GOVERNMENT CLERKS.

The clerks employed in the office of the several departments of the government are not liable to militia duty.

[Cited in U. S. v. Hartwell, 6 Wall. (73 U. S.) 393; Platt v. Beach, Case No. 11,215.]

Upon habeas corpus the marshal returned the cause of caption and detention of Mr. Smith "to be for sundry militia fines imposed by the legionary court of the 1st regiment, 1st brigade of the militia of the District of Columbia, put into the hands of the said marshal for collection according to law." By the fourth section of the act of congress of the 1st of July, 1812 (2 Stat. 769), supplementary to the act more effectually to provide for the organization of the militia of the District of Columbia, the militia fines are to be certified by the clerks of the legionary and batalion courts of inquiry respectively, to the marshal

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

of the district, and delivered to him within fifteen days after the sitting of the court, and he is required forthwith to proceed to collect the same by distress and sale of the goods and chattels of the delinquent, "and where there are no goods or chattels to be found, the marshal shall commit such delinquent to jail and hold him in close confinement during the term of twenty-four hours for each and every fine by him payable (unless the same shall be sooner paid), in the same manner as other persons condemned to fine and imprisonment at the suit of the United States may be committed."

The return of the marshal is informal and defective, but no exception was taken to it; the principal question intended to be raised was, whether the subordinate clerks in the public offices were liable to militia duty.

By the second section of the act of congress of the 8th of May, 1792 (1 Stat. 271), "more effectually to provide for the national defence, by establishing an uniform militia throughout the United States," the persons exempted from militia duty are, the vice president of the United States; the officers, judicial and executive of the government of the United States; the members of both houses of congress and their respective officers; all custom-house officers, with their clerks; all post-officers and stage-drivers employed in the care and conveyance of the mail, &c. The militia law of the District of Columbia exempts all who are exempted by the laws of the United States. Mr. Smith was a clerk in the treasury department, duly appointed by one of the comptrollers, and sworn in the manner required by the act of congress.

Mr. Hellen, for Mr. Smith, contended, that he was an executive officer of the government of the United States, within the meaning of the second section of the act of the 8th of May, 1792, and therefore exempt from militia duty. Const. U. S. art. 2, § 2, has the expression, "principal officer in each of the executive departments," thereby implying that there may be inferior officers; and by the second clause of the same section, "Congress may, by law, vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law, or in the heads of departments." The act of July 27, 1789, § 3 (1 Stat. 28), requires the principal officer in the department of state, and every person appointed or employed in the department, to be sworn. There is a similar clause in the act of August 7, 1789 (Id. 49), establishing the war department; and in the act of March 3, 1791 (Id. 215), supplemental to the act establishing the treasury department, "each and every clerk and other officer," "shall, before they enter upon the duties of such appointment, take an oath or affirmation, before one of the justices of the supreme court, or one of the judges of a district court of the United States, to support the constitution of the United States, and also an oath or affirmation, well and faithfully to execute the trust committed to him, which oath or affirmation, subscribed by such clerk, and certified by the person administering the same, shall be filed in the office of the person employing such clerk." "Clerk" and "officer" are, in the acts of congress, used as synonymous. Great inconvenience to the government would result from taking away their clerks to do militia duty.

J. Dunlop and Mr. Jones, contrà.

Exemptions are odious, and ought to be construed strictly. None are exempted but officers commissioned by the president. There can be no officer without an office, and there can be no office unless created by the constitution or an act of congress. Custom-house officers are expressly exempted, which was unnecessary, if they were officers of the government. Wise v. Withers, 3 Cranch [7 U. S.] 331. By naming custom-house clerks, the legislature meant to exclude all other clerks.

THE COURT (THRUSTON, Circuit Judge, absent) decided, that Mr. Smith, being at the time of his enrolment, and at the time he was required to muster, a clerk in the treasury department, duly appointed by one of the comptrollers, and sworn in the manner required by the act of congress, was an executive officer of the government of the United States, and within the second section of the act of May 8, 1792, and was not liable to be enrolled in the militia.

Case No. 12,967a.

Ex parte SMITH.

[Hempst. 201.] [1]

Superior Court, Territory of Arkansas. July, 1832.

MUNICIPAL CORPORATIONS — CRIMINAL JURISDICTION AND COGNIZANCE—POWERS OF MAYOR.

1. The act incorporating the city of Little Rock delegates no power to punish for offences provided for by the general laws of the country.

2. An ordinance, imposing a fine for an assault, committed in the limits of the city, is void.

3. The mayor may exercise the same powers as to criminal matters as a justice of the peace.

Before JOHNSON, ESKRIDGE, and CROSS, JJ.

OPINION OF THE COURT. The body of John Smith is brought before this court on a writ of habeas corpus, the return of which shows that he is held in custody by the town constable under a warrant issued by the mayor of the town of Little Rock, reciting that "whereas John Smith, on the —— day of July, inst., before me, Mathew Cunningham, mayor of the town of Little Rock, was convicted of having committed an assault on the body of John H. Walker, within the limits of said town, in violation of the ordinances, and fined by me in the sum of thirty dollars, for said offence, and also the costs of

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

prosecution, and commanding the said constable to take the said John Smith, if to be found within the town of Little Rock, and unless he shall pay the aforesaid fine and costs, to deliver him to the keeper of the common jail of the county of Pulaski, who is commanded to receive into his custody the said John Smith, and him safely keep until he shall pay said fine of thirty dollars and the costs aforesaid." The motion to discharge involves two questions: First, as to the power delegated to the mayor and town council by the act of incorporation; and second, as to the powers of the mayor unconnected with the council.

By an act, passed at the last session of the legislature, entitled, "An act for the incorporation of the town of Little Rock, and for other purposes," various powers are delegated to the mayor and town council, when organized according to its provisions. They are constituted a legislative body for the town, and may enact ordinances to preserve its health, to remove nuisances, provide night-watches, erect market houses, make such by-laws as they may deem proper for the suppression of vice and immorality, and enforce the same, and do all such matters and things for the well-being and good police of said town, as are not inconsistent with existing laws. These are the principal powers given to the mayor and town council in their legislative capacity, none of which expressly authorize the making of ordinances or by-laws on the subject of assaults. If such a power be given at all, it is by implication. The power to make by-laws for the suppression of vice and immorality, as well as that to do all things necessary for the well-being and good police of the town, would seem to embrace almost every species of crime; but no one would contend that the mayor and town council could, under these general grants of power, make ordinances and by-laws on the subject of murder, or other felonies. The most rational construction, then, to be given to terms so indefinite and apparently comprehensive is, that the legislature intended to confer no power to make ordinances and by-laws in relation to matters already provided for by the general laws of the country. It may be said, that if the mayor and town be thus restricted in their sphere of action as a legislative body, the object of incorporation will never be attained. This, however, would be an unjust conclusion, as ample power is given, although not to the mayor and town council, in the exercise of which, offences of every grade may receive their appropriate punishments.

Is it to be found in the enumeration of powers delegated to the mayor, unconnected with the council, which will now be considered, and forms the second question involved in the motion to discharge? The moment the mayor is regularly installed into office, he is declared, by the act of incorporation, to be a conservator of the peace, and not only empowered, but actually required to do and execute all such matters and things within the limits of the town, as justices of the peace for the territory may and can lawfully do. In an examination, therefore, of his powers and duties, it would be necessary to ascertain those of a justice of the peace, as regulated and defined by the laws of the territory. Acting in that character, he might issue a warrant, upon proper information, for the arrest of any person charged with felony, and upon examination bind over for further trial, or commit to prison. In case of assault and battery, or breach of the peace in his presence, or upon the oath of a creditable person, he can cause the offender to be brought before him, and upon confession or the verdict of guilty, by a jury of twelve men, impose a fine of not less than five nor more than twenty dollars. He may cause recognizances to be entered into in certain cases for keeping the peace, and issue warrants for the apprehension of vagrants. The duty is likewise imposed upon him to execute the laws and ordinances of the council, and see that they be faithfully observed.

Entertaining the opinion, that no power has been delegated to the mayor and town council in their legislative capacity to make ordinances and by-laws on the subject of offences, for the punishment of which the general laws of the country provide, it follows that the ordinance imposing a fine of thirty dollars for an assault is void, and that Smith, who has been fined and committed for its violation, is improperly in custody. The imprisonment would have been equally unauthorized, if the mayor had acted in the matter as a justice of the peace, there being no power given in such cases to impose a fine of thirty dollars. The prisoner, therefore, must be discharged.

Discharged accordingly.

Case No. 12,968.

Ex parte SMITH.

[6 Law Rep. 57; 3 McLean, 121.] [1]

Circuit Court, D. Illinois. Jan. 5, 1843.

INTERSTATE EXTRADITION — AUTHORITY OF STATE EXECUTIVE TO CAUSE ARREST—JURISDICTION OF FEDERAL COURTS — AFFIDAVIT FOR REQUISITION —DEFECTS.

1. The executive of a state has no authority to cause the arrest and surrender of a citizen, as a fugitive from justice, unless it appears that the alleged crime was committed in the state which makes the demand.

[Cited in Re Stupp, Case No. 13,562.]

[Cited in State v. Chapin, 17 Ark. 561.]

2. Governors of states, in issuing warrants for such arrest and surrender, act by the authority of the laws of the United States, although the state may have legislated upon the same subject.

[Cited in Re McDonald, Case No. 8,751; Re Robb, 19 Fed. 31.]

[Cited in Re Mohr, 73 Ala. 503.]

[1] [The syllabus is from 6 Law Rep. 57; the statement and opinion, from 3 McLean, 121.]

3. The courts of the United States have jurisdiction in the premises, and may order a person so arrested to be discharged; but whether the state courts have jurisdiction, or whether it is competent for either courts on habeas corpus to inquire into facts behind the writ, quære.

[Cited in Re Kaine, Case No. 7,598; Re Bull, Id. 2,119; U. S. v. McClay, Id. 15,660; Re Leary, Id. 8,162; Ex parte Brown, 28 Fed. 654; Re Cook, 49 Fed. 839.]

[Cited in Jones v. Leonard, 50 Iowa, 110; Work v. Corrington, 34 Ohio St. 64; People v. Brady, 56 N. Y. 187.]

4. The governor of Missouri made a requisition on the governor of Illinois for the surrender and delivery of S., an alleged fugitive from justice, charged with being accessory before the fact to an assault with intent to kill B., in Missouri. The affidavit of B., upon which the said requisition was founded, set forth, that he was shot with intent to kill, and that he believed and had good reason to believe, from evidence and information in his possession, that S. was accessory before the fact of the intended murder, and that the said S. was a citizen and resident of Illinois. The governor of Illinois thereupon issued his warrant for the arrest and delivery of S., upon whose petition a writ of habeas corpus was afterwards issued by this court. *Held*, that the courts of the United States had jurisdiction in the premises.

[Cited in Re Sheazle, Case No. 12,734; U. S. v. McClay, Id. 15,660; Re Doo Woon, 18 Fed. 899; Ex parte Hart, 63 Fed. 260.]

5. S. was entitled to his discharge, for defects in the affidavit upon which the requisition and warrant were founded, inasmuch as it did not appear distinctly that he had committed any crime in Missouri, or that he had fled from that state.

[Cited in Re Jackson, Case No. 7,125; Ex parte Lane, 6 Fed. 39; Ex parte Morgan, 20 Fed. 308.]

[Cited in Com. v. Hall, 9 Gray, 265. Distinguished in Re Davis, 122 Mass. 329. Cited in Re Eldred, 46 Wis. 552, 1 N. W. 175; Hartman v. Aveline, 63 Ind. 352; Johns v. State, 19 Ind. 427; Smith v. State, 21 Neb. 558, 32 N. W. 594; Ex parte Spears, 88 Cal. 642, 26 Pac. 608; State v. Chapin, 17 Ark. 561; Ex parte Stanley (Tex. App.) 8 S. W. 646; State v. Hall (N. C.) 20 S. E. 730. Cited in brief in State v. Swope, 72 Mo. 401.]

This case came before the court upon a return to a writ of habeas corpus, which was issued by this court on the 31st of December, 1842, upon a petition for a habeas corpus on the relation of Joseph Smith, setting forth that he was arrested and in custody of William F. Elkin, sheriff of Sangamon county, upon a warrant issued by the governor of the state of Illinois, upon a requisition of the governor of the state of Missouri, demanding him to be delivered up to the governor of Missouri, as a fugitive from justice; that his arrest, as aforesaid, was under color of a law of the United States, and was without the authority of law in this, that he was not a fugitive from justice, nor had he fled from the state of Missouri.

Afterwards, on the same day, the sheriff of Sangamon county returned upon the said habeas corpus, that he detained the said Joseph Smith in custody, by virtue of a warrant issued by the governor of the state of Illinois, upon the requisition of the governor of the state of Missouri, made on the affidavit of Lilburn W. Boggs. Copies of the said affidavit, requisition and warrant were annexed to the said return in the words and figures following:

"State of Missouri, County of Jackson, ss. This day personally appeared before me, Samuel Weston, a justice of the peace within and for the county of Jackson, the subscriber, Lilburn W. Boggs, who, being duly sworn, doth depose and say, that on the night of the 6th day of May, 1842, while sitting in his dwelling in the town of Independence, in the county of Jackson, he was shot with intent to kill, and that his life was despaired of for several days; and that he believes, and has good reason to believe, from evidence and information now in his possession, that Joseph Smith, commonly called the Mormon Prophet, was accessory before the fact of the intended murder; and that the said Joseph Smith is a citizen or resident of the state of Illinois; and the said deponent hereby applies to the governor of the state of Missouri to make a demand on the governor of the state of Illinois, to deliver the said Joseph Smith, commonly called the Mormon Prophet, to some person authorised to receive and convey him to the state and county aforesaid, there to be dealt with according to law. Lilburn W. Boggs.

"Sworn to and subscribed before me, this 20th day of July, 1842. Samuel Weston, J. P."

"The Governor of the State of Missouri, to the Governor of the State of Illinois—Greeting: Whereas, it appears by the annexed document, which is hereby certified to be authentic, that one Joseph Smith is a fugitive from justice, charged with being accessory before the fact to an assault with intent to kill, made by one O. P. Rockwell, on Lilburn W. Boggs, in this state, and it is represented to the executive department of this state, has fled to the state of Illinois: Now, therefore, I, Thomas Reynolds, governor of the said state of Missouri, by virtue of the authority in me vested by the constitution and laws of the United States, do by these presents demand the surrender and delivery of the said Joseph Smith to Edward R. Ford, who is hereby appointed as the agent to receive the said Joseph Smith, on the part of this state. In testimony," &c.

"The People of the State of Illinois, to the Sheriff of Sangamon County—Greeting. Whereas, it has been made known to me by the executive authority of the state of Missouri, that one Joseph Smith stands charged by the affidavit of one Lilburn W. Boggs, made on the 20th day of July, 1842, at the county of Jackson, in the state of Missouri, before Samuel Weston, a justice of the peace, within and for the county of Jackson aforesaid, with being accessory before the fact to an assault with an intent to kill, made by one O. P. Rockwell, on Lilburn W. Boggs, on the night of the 6th day of

May, 1842, at the county of Jackson, in said state of Missouri, and that the said Joseph Smith has fled from the justice of said state, and taken refuge in the state of Illinois: Now, therefore, I, Thomas Ford, governor of the state of Illinois, pursuant to the constitution and laws of the United States, and of this state, do hereby command you to arrest and apprehend the said Joseph Smith, if he be found within the limits of the state aforesaid, and cause him to be safely kept and delivered to the custody of Edward R. Ford, who has been duly constituted the agent of the said state of Missouri, to receive said fugitive from the justice of said state, he paying all fees and charges for the arrest and apprehension of said Joseph Smith, and make due return to the executive department of this state, the manner in which this writ may be executed. In testimony whereof," &c.

The case was set for hearing on the 4th day of January, 1843, on which day Josiah Lamborn, attorney general of the state of Illinois, appeared, and moved to dismiss the proceedings, and filed the following objection to the jurisdiction of the court, viz: "1st. The arrest and detention of Smith was not under or by color of authority of the United States, or of any officers of the United States, but under and by color of authority of the state of Illinois, by the officers of Illinois. 2d. When a fugitive from justice is arrested by authority of the governor of any state, upon the requisition of the governor of another state, the courts of justice neither state nor federal, have any authority or jurisdiction to inquire into any facts behind the writ."

The counsel of the said Joseph Smith then offered to read in evidence affidavits of several persons, showing conclusively that the said Joseph Smith was at Nauvoo, in the county of Hancock and state of Illinois, on the whole of the 6th and 7th days of May, in the year 1842, and on the evenings of those days, more than three hundred miles distant from Jackson county, in the state of Missouri, where it is alleged that the said Boggs was shot, and that he had not been in the state of Missouri at any time between the 10th day of February and the 1st day of July, 1842, the said persons having been with him during the whole of that period. That on the 6th day of May aforesaid, he attended an officers' drill at Nauvoo aforesaid, in the presence of a large number of people, and on the 7th day of May aforesaid he reviewed the Nauvoo Legion in presence of many thousand people. The reading of these affidavits was objected to by the attorney general of the state of Illinois, on the ground that it was not competent for Smith to impeach or contradict the return to the habeas corpus. It was contended by the counsel of the said Smith, 1st. That he had a right to prove that the return was untrue. 2d. That the said affidavits did not contradict the said return, as there was no averment under oath in said return that the said Smith was in Missouri at the time of the commission of the alleged crime, or had fled from the justice of that state. The court decided that the said affidavit should be read in evidence, subject to all objections; and they were read accordingly.

The cause was argued by J. Butterfield and B. S. Edwards, for Smith, and by Josiah Lamborn, attorney general of the state of Illinois, contra.

J. Butterfield, counsel for Smith, made the following points:

(1) This court has jurisdiction. The requisition purports on its face to be made, and the warrant to be issued, under the constitution and laws of the United States, regulating the surrender of fugitives from justice. Const. U. S. art. 4, § 2; Act Cong. Feb. 12, 1793, § 1 [1 Stat. 302]. When a person's rights are invaded under a law of the United States, he has no remedy except in the courts of the United States. Const. U. S. art. 3, § 2; 12 Wend. 325; [Prigg v. Commonwealth of Pennsylvania] 16 Pet. [41 U. S.] 543. The whole power in relation to the delivering up of fugitives from justice and labor, has been delegated to the United States, and congress has regulated the manner and form in which it shall be exercised. The power is exclusive. The state legislatures have no right to interfere, and if they do, their acts are void. Const. U. S. art. 4, § 2, cls. 2, 3; 2 Laws U. S. 331; [Prigg v. Commonwealth of Pennsylvania] 16 Pet. [41 U. S.] 617, 618, 623; [Sturges v. Crowninshield] 4 Wheat. [17 U. S.] 122, 193; 12 Wend. 312. All courts of the United States are authorised to issue writs of habeas corpus when the prisoner is confined under or by color of authority of the United States. Act Cong. Sept. 24, 1789, § 14 [1 Stat. 81]; 2 Cond. R. 33; [Ex parte Burford] 3 Cranch [7 U. S.] 448; [Ex parte Watkins] 3 Pet. [28 U. S.] 193.

(2) The return to the habeas corpus is not certain and sufficient to warrant the arrest and transportation of Smith. In all cases on habeas corpus previous to indictment, the court will look into the depositions before the magistrate, and though the commitment be full and in form, yet if the testimony prove no crime, the court will discharge. Ex parte Tayloe, 5 Cow. 50. The affidavit of Boggs does not show that Smith was charged with any crime committed by him in Missouri, nor that he was a fugitive from justice. If the commitment be for a matter for which by law the prisoner is not liable to be punished, the court must discharge him. 3 Bac. Abr. 434. The executive of this state has no jurisdiction over the person of Smith to transport him to Missouri, unless he has fled from that state.

(3) The prisoner has a right to prove facts not repugnant to the return, and even to go behind the return and contradict it, unless

committed under a judgment of a court of competent jurisdiction. 3 Bac. Abr. 435, 438; [Ex parte Watkins] 3 Pet. [28 U. S.] 202; Gale's Rev. Laws Ill. 323. The testimony introduced by Smith at the hearing, showing conclusively that he was not a fugitive from justice, is not repugnant to the return.

J. Lamborn, attorney general of the state of Illinois, in support of the points made by him, cited 2 Cond. R. 37; Gord. Dig. 73; Gale's St. Ill. 318; Conk. Prac. 85; 9 Wend. 212.

And afterwards, on the 5th day of January, 1843, POPE, District Judge, delivered the following:

The importance of this case, and the consequences which may flow from an erroneous precedent, affecting the lives and liberties of our citizens, have impelled the court to bestow upon it the most anxious consideration. The able arguments of the counsel for the respective parties, have been of great assistance in the examination of the important question arising in this cause. When the patriots and wise men who framed our constitution were in anxious deliberation to form a perfect union among the states of the confederacy, two great sources of discord presented themselves to their consideration; the commerce between the states, and fugitives from justice and labor. The border collisions in other countries had been seen to be a fruitful source of war and bloodshed, and most wisely did the constitution confer upon the national government, the regulation of those matters, because of its exemption from the excited passions awakened by conflicts between neighboring states, and its ability alone to adopt a uniform rule, and establish uniform laws among all the states in those cases. This case presents the important question arising under the constitution and laws of the United States, whether a citizen of the state of Illinois can be transported from his own state to the state of Missouri, to be there tried for a crime, which, if he ever committed, was committed in the state of Illinois; whether he can be transported to Missouri, as a fugitive from justice, when he has never fled from that state.

Joseph Smith is before the court, on habeas corpus, directed to the sheriff of Sangamon county, state of Illinois. The return shows that he is in custody under a warrant from the executive of Illinois, professedly issued in pursuance of the constitution and laws of the United States, and of the state of Illinois, ordering said Smith to be delivered to the agent of the executive of Missouri, who had demanded him as a fugitive from justice, under the 2d section, 4th article of the constitution or the United States, and the act of congress passed to carry into effect that article. The article is in these words, viz.: "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall on demand of the executive authority of the state, from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." The act of congress made to carry into effect this article, directs that the demand be made on the executive of the state where the offender is found, and prescribes the proof to support the demand, viz.: indictment or affidavit.

The court deemed it respectful to inform the governor and attorney general of the state of Illinois, of the action upon the habeas corpus. On the day appointed for the hearing, the attorney general of the state of Illinois appeared, and denied the jurisdiction of the court to grant the habeas corpus: 1st. Because the warrant was not issued under color or by authority of the United States, but by the state of Illinois. 2d. Because no habeas corpus can issue in this case from either the federal or state courts, to inquire into facts behind the writ. In support of the first point, a law of Illinois was read, declaring that whenever the executive of any other state shall demand of the executive of this state, any person as a fugitive from justice, and shall have complied with the requirements of the act of congress, in that case made and provided, it shall be the duty of the executive of this state to issue his warrant to apprehend the said fugitive, &c. It would seem that this act does not purport to confer any additional power upon the executive of this state, independent of the power conferred by the constitution and laws of the United States, but to make it the duty of the executive to obey and carry into effect the act of congress. The warrant on its face purports to be issued in pursuance of the constitution and laws of the United States, as well as of the state of Illinois. To maintain the position that this warrant was not issued under color or by authority of the laws of the United States, it must be proved that the United States could not confer the power on the executive of Illinois. Because if congress could and did confer it, no act of Illinois could take it away, for the reason that the constitution, and laws of the United States, passed in pursuance of it, and treaties, are the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding. This is enough to dispose of that point. If the legislature of Illinois, as is probable, intended to make it the duty of the governor to exercise the power granted by congress, and no more, the executive would be acting by authority of the United States. It may be that the legislature of Illinois, appreciating the importance of the proper execution of those laws, and doubting whether the governor could be punished for refusing to carry them into effect, deemed it prudent to impose it as a duty, the neglect of which would expose him

to impeachment. If it intended more, the law is unconstitutional and void. Prigg v. Pennsylvania, 16 Pet. [41 U. S.] 617.

In supporting the second point, the attorney general seemed to urge that there was greater sanctity in a warrant issued by the governor, than by an inferior officer. The court cannot assent to this distinction. This is a government of laws, which prescribes a rule of action, as obligatory upon the governor as upon the most obscure officer. The character and purposes of the habeas corpus are greatly misunderstood by those who suppose that it does not review the acts of an executive functionary. All who are familiar with English history, must know that it was extorted from an arbitrary monarch, and that it was hailed as a second magna charta, and that it was to protect the subject from arbitrary imprisonment by the king and his minions, which brought into existence that great palladium of liberty in the latter part of the reign of Charles II. It was indeed a magnificent achievement over arbitrary power. Magna Charta established the principles of liberty; the habeas corpus protected them. It matters not how great or obscure the prisoner, how great or obscure the prison-keeper, this munificent writ, wielded by an independent judge, reaches all. It penetrates alike the royal towers and the local prisons, from the garret to the secret recesses of the dungeon. All doors fly open at its command, and the shackles fall from the limbs of prisoners of state as readily as from those committed by subordinate officers. The warrant of the king and his secretary of state could claim no more exemption from that searching inquiry, "The cause of his caption and detention," than a warrant granted by a justice of the peace. It is contended that the United States is a government of granted powers, and that no department of it can exercise powers not granted. This is true. But the grant is to be found in the 2d section of the 3d article of the constitution of the United States: "The judicial power shall extend to all cases in law, or equity, arising under this constitution, the laws of the United States, and treaties made and which shall be made under their authority."

The matter under consideration presents a case arising under the 2d section, 4th article of the constitution of the United States, and the act of congress of February 12th, 1793 [1 Stat. 302], to carry it into effect. The judiciary act of 1789 confers on this court (indeed on all the courts of the United States,) power to issue the writ of habeas corpus, when a person is confined "under color of or by the authority of the United States." Smith is in custody under color of, and by authority of the 2d section, 4th article of the constitution of the United States. As to the instrument employed or authorised to carry into effect that article of the constitution (as he derives from it the authority to issue the warrant,) he must be regarded as acting by the authority of the United States. The power is not official in the governor, but personal. It might have been granted to any one else by name, but considerations of convenience and policy recommended the selection of the executive, who never dies. The citizens of the states are citizens of the United States; hence the United States are as much bound to afford them protection in their sphere, as the states are in theirs. This court has jurisdiction. Whether the state courts have jurisdiction or not, this court is not called upon to decide.

The return of the sheriff shows that he has arrested and now holds in custody Joseph Smith, in virtue of a warrant issued by the governor of Illinois, under the 2d section of the 4th article of the constitution of the United States, relative to fugitives from justice, and the act of congress passed to carry it into effect. The article of the constitution does not designate the person upon whom the demand for the fugitive shall be made; nor does it prescribe the proof upon which he shall act. But congress has done so. The proof is "an indictment or affidavit," to be certified by the governor demanding. The return brings before the court the warrant, the demand and the affidavit. The material part of the latter is in these words, viz.:—"Lilburn W. Boggs, who being duly sworn, doth depose and say, that on the night of the 6th day of May, 1842, while sitting in his dwelling in the town of Independence, in the county of Jackson, he was shot with intent to kill; and that his life was despaired of for several days, and that he believes, and has good reason to believe, from evidence and information now in his possession, that Joseph Smith, commonly called the 'Mormon Prophet,' was accessary before the fact of the intended murder, and that the said Joseph Smith is a citizen or a resident of the state of Illinois." This affidavit is certified by the governor of Missouri to be authentic. The affidavit being thus verified, furnished the only evidence upon which the governor of Illinois could act. Smith presented affidavits proving that he was not in Missouri at the date of the shooting of Boggs. This testimony was objected to by the attorney general of Illinois, on the ground that the court could not look behind the return. The court deems it unnecessary to decide that point, inasmuch as it thinks Smith entitled to his discharge for defect in the affidavit. To authorise the arrest in this case, the affidavit should have stated distinctly: 1st. That Smith had committed a crime. 2d. That he committed it in Missouri. It must appear that he fled from Missouri, to authorise the governor of Missouri to demand him, as none other than the governor of the state from which he fled, can make the demand. He could not have fled from justice, unless he committed a crime, which does not appear. It must appear that the crime was committed in Missouri, to warrant the governor of Il-

linois in ordering him to be sent to Missouri for trial. The 2d section, 4th article, declares, he "shall be removed to the state having jurisdiction of the crime." As it is not charged that the crime was committed by Smith in Missouri, the governor of Illinois could not cause him to be removed to that state, unless it can be maintained that the state of Missouri can entertain jurisdiction of crimes committed in other states. The affirmative of this proposition was taken in the argument with a zeal indicating sincerity. But no adjudged case or dictum was adduced in support of it. The court conceives that none can be. Let it be tested by principle.

Man in a state of nature is a sovereign, with all the prerogatives of king, lords and commons. He may declare war and make peace, and, as nations often do who "feel power and forget right," may oppress, rob and subjugate his weaker and unoffending neighbors. He unites in his person the legislative, judicial and executive power—"can do no wrong," because there is none to hold him to account. But when he unites himself with a community, he lays down all the prerogatives of sovereign, (except self-defence,) and becomes a subject. He owes obedience to its laws and the judgments of its tribunals, which he is supposed to have participated in establishing, either directly or indirectly. He surrenders, also, the right of self-redress. In consideration of all which, he is entitled to the ægis of that community to defend him from wrongs. He takes upon himself no allegiance to any other community, so owes it no obedience, and therefore cannot disobey it. None other than his own sovereign can prescribe a rule of action to him. Each sovereign regulates the conduct of its subjects, and they may be punished upon the assumption that they know the rule and have consented to be governed by it. It would be a gross violation of the social compact, if the state were to deliver up one of its citizens to be tried and punished by a foreign state, to which he owes no allegiance, and whose laws were never binding on him. No state can or will do it. In the absence of the constitutional provision, the state of Missouri would stand on this subject in the same relation to the state of Illinois, that Spain does to England. In this particular, the states are independent of each other. A criminal, fugitive from the one state to the other, could not be claimed as of right to be given up. It is most true, as mentioned by writers on the laws of nations, that every state is responsible to its neighbors for the conduct of its citizens, so far as their conduct violates the principles of good neighborhood. So it is among private individuals.—But for this, the inviolability of territory, or private dwelling, could not be maintained. This obligation creates the right, and makes it the duty of the state to impose such restraints upon the citizen, as the occasion demands. It was in the performance of this duty, that the United States passed laws to restrain citizens of the United States from setting on foot and fitting out military expeditions against their neighbors. While the violators of this law kept themselves within the United States, their conduct was cognizable in the courts of the United States, and not of the offended state, even if the means provided had assisted in the invasion of the foreign state. A demand by the injured state upon the United States for the offenders, whose operations were in their own country, would be answered, that the United States' laws alone could act upon them, and that, as a good neighbor, it would punish them.

It is the duty of the state of Illinois to make it criminal in one of its citizens to aid, abet, counsel, or advise, any person to commit a crime in her sister state. Any one violating the law would be amenable to the laws of Illinois, executed by its own tribunals. Those of Missouri could have no agency in his conviction and punishment. But if he shall go into Missouri, he owes obedience to her laws, and is liable before her courts, to be tried and punished for any crime he may commit there; and a plea that he was a citizen of another state, would not avail him. If he escape, he may be surrendered to Missouri for trial. But when the offence is perpetrated in Illinois, the only right of Missouri is, to insist that Illinois compel her citizens to forbear to annoy her. This she has a right to expect. For the neglect of it, nations go to war and violate territory. The court must hold that where a necessary fact is not stated in the affidavit, it does not exist. It is not averred that Smith was accessary before the fact, in the state of Missouri, nor that he committed a crime in Missouri: therefore, he did not commit the crime in Missouri—did not flee from Missouri to avoid punishment.

Again, the affidavit charges the shooting on the 6th of May, in the county af Jackson, and state of Missouri, "that he believes and has good reason to believe, from evidence and information now (then) in his possession, that Joseph Smith was accessary before the fact, and is a resident or citizen of Illinois." There are several objections to this. Mr. Boggs having the "evidence and information in his possession," should have incorporated it in the affidavit, to enable the court to judge of their sufficiency to support his "belief." Again, he swears to a legal conclusion, when he says that Smith was accessary before the fact. What acts constitute a man an accessary is a question of law, and not always of easy solution. Mr. Boggs' opinion, then, is not authority. He should have given the facts. He should have shown that they were committed in Missouri, to enable the court to test them by the laws of Missouri, to see if they amounted to a crime. Again, the affidavit is fatally defective in this, that Boggs swears to his belief. The language in the constitution is, "charged with felony, or other crime." Is the constitution satisfied with a charge upon suspicion? It is

to be regretted that no American adjudged case has been cited to guide the court in expounding this article. Language is ever interpreted by the subject matter. If the object were to arrest a man near home, and there were fears of escape if the movement to detain him for examination were known, the word "charged" might warrant the issuing of a capias on suspicion. Rudyard (reported in 2 Vent. 22, Skin. 676); was committed to Newgate for refusing to give bail for his good behavior, and was brought before the common pleas on habeas corpus. The return was, that he had been complained of for exciting the subjects to disobedience of the laws against seditious conventicles, and upon examination they found cause to suspect him. Vaughan, C. J.: "Tyrrel v. Wild [unreported] held the return insufficient—1st. because it did not appear but that he might abet frequenters of conventicles in the way the law allows; 2d. to say that he was complained of, or was examined, is no proof of his guilt; and then to say that he had cause to suspect him, is too cautious; for who can tell what they count a cause of suspicion, and how can that ever be tried? At this rate they would have arbitrary power, upon their own allegation, to commit whom they pleased."

From this case, it appears that suspicion does not warrant a commitment, and that all legal intendments are to avail the prisoner. That the return is to be most strictly construed in favor of liberty. If suspicion in the foregoing case did not warrant a commitment in London by its officers, of a citizen of London, might not the objection be urged with greater force against a commitment of a citizen of our state, to be transported to another, on suspicion? No case can arise demanding a more searching scrutiny into the evidence, than in cases arising under this part of the constitution of the United States. It is proposed to deprive a freeman of his liberty—to deliver him into the custody of strangers, to be transported to a foreign state, to be arraigned for trial before a foreign tribunal, governed by laws unknown to him—separated from his friends, his family and his witnesses, unknown and unknowing. Had he an immaculate character, it would not avail him with strangers. Such a spectacle is appalling enough to challenge the strictest analysis. The framers of the constitution were not insensible of the importance of courts possessing the confidence of the parties. They therefore provided that citizens of the different states might resort to the federal courts in civil causes. How much more important that the criminal have confidence in his judge and jury? Therefore, before the capias is issued, the officers should see that the case is made out to warrant it. Again, Boggs was shot on the 6th of May. The affidavit was made on the 20th of July following. Here was time for inquiry, which would confirm into certainty or dissipate his suspicions. He had time to collect facts to be laid before a grand jury, or be incorporated in his affidavit. The court is bound to assume that this would have been the course of Mr. Boggs, but that his suspicions were light and unsatisfactory.

The affidavit is insufficient—1st. because it is not positive; 2d. because it charges no crime; 3d. it charges no crime committed in the state of Missouri. Therefore, he did not flee from the justice of the state of Missouri, nor has he taken refuge in the state of Illinois.

The proceedings in this affair, from the affidavit to the arrest, afford a lesson to governors and judges, whose action may hereafter be invoked in cases of this character. The affidavit simply says that the affiant was shot with intent to kill, and he believes that Smith was accessary before the fact to the intended murder, and is a citizen or resident of the state of Illinois. It is not said who shot him, or that the person was unknown. The governor of Missouri, in his demand, calls Smith a fugitive from justice, charged with being accessary before the fact to an assault with intent to kill, made by one O. P. Rockwell, on Lilburn W. Boggs, in this state (Missouri). This governor expressly refers to the affidavit as his authority for that statement. Boggs, in his affidavit, does not call Smith a fugitive from justice, nor does he state a fact from which the governor had a right to infer it. Neither does the name of O. P. Rockwell appear in the affidavit, nor does Boggs say Smith fled. Yet the governor says he fled to the state of Illinois. But Boggs only says he is a citizen or resident of the state of Illinois. The governor of Illinois, responding to the demand of the executive of Missouri for the arrest of Smith, issues his warrant for the arrest of Smith, reciting that—"whereas, Joseph Smith stands charged, by the affidavit of Lilburn W. Boggs, with being accessary before the fact to an assault with intent to kill, made by one O. P. Rockwell, on Lilburn W. Boggs, on the night of the 6th day of May, 1842, at the county of Jackson, in the said state of Missouri, and that the said Joseph Smith has fled from the justice of said state, and taken refuge in the state of Illinois." Those facts do not appear by the affidavit of Boggs. On the contrary, it does not assert that Smith was accessary to O. P. Rockwell, nor that he had fled from the justice of the state of Missouri, and taken refuge in the state of Illinois.

The court can alone regard the facts set forth in the affidavit of Boggs, as having any legal existence. The mis-recitals and overstatements in the requisition and warrant, are not supported by oath, and cannot be received as evidence to deprive a citizen of his liberty, and transport him to a foreign state for trial. For these reasons, Smith must be discharged.

At the request of J. Butterfield, counsel for Smith, it is proper to state, in justice to the

present executive of the state of Illinois, Governor Ford, that it was admitted on the argument, that the warrant which originally issued upon the said requisition, was issued by his predecessor; that when Smith came to Springfield to surrender himself up upon that warrant, it was in the hands of the person to whom it had been issued at Quincy in this state; and that the present warrant, which is a copy of the former one, was issued at the request of Smith, to enable him to test its legality by writ of habeas corpus.

Let an order be entered that Smith be discharged from his arrest.

Case No. 12,969.

Ex parte SMITH.

[3 Wkly. Law Gaz. 237.]

Circuit Court, S. D. Ohio. March, 1859.

NATURALIZATION OF ALIENS—JURISDICTION OF PROBATE COURTS.

[The act of 1802 (2 Stat. 155) declares that "every court of record, in any individual state, having common law jurisdiction, and a seal and clerk or prothonotary, shall be considered a district court," and have jurisdiction in matters of naturalization. *Held*, that the probate courts of Ohio (which by the state constitution are declared to be courts of record), which exercise common law jurisdiction in numerous instances, which have a seal provided by law, and the judges of which are empowered to appoint deputy clerks, are within the statute, and have jurisdiction of such proceedings.]

[Cited in People v. Pease, 30 Barb. 603.]

We have heretofore given the decision of the probate court (see [In re Downs] 2 Wkly. Law Gaz. 278), and subsequently the decision of the district court of Ohio, for Hamilton county, on the question as to the right of the probate court to issue naturalization papers; the district court, Judge Swan presiding, having decided that the probate court had no power to act in such case. See Id. 318. Below we give the opinion of Judge McLean sustaining the jurisdiction of the probate court.

McLEAN, Circuit Justice. Smith, a native of Baden, represents that on the twenty-seventh day of October, 1856, he filed in the probate court, in and for Hamilton county, Ohio, the declaration of his intention to become a citizen of the United States; that he has been a resident of the United States for the term of five years now last past, and of the state of Ohio one year; that he is attached to the principles of the constitution of the United States, and is well disposed to the good order and happiness of the same; and he is ready to comply with all requisites of the act of congress to entitle him to citizenship, and asks for his final certificate.

It appears that upon the 27th of October, 1856, the applicant personally appeared before the judge of probate for the county of Hamilton, in the state of Ohio, and stated himself to be a native of Baden, aged about forty-six years, bearing allegiance to the grand duke of Baden, and that he emigrated from Havre, on the seventeenth day of November, 1852, and arrived at New Orleans on the twenty-fourth day of December of the same year, and that he intends to reside within the jurisdiction of the United States, that he makes report of himself for naturalization and declared on oath that it is bona fide his intention to become a citizen of the United States of America, and to forever renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state and sovereignty whatever, and particularly to the grand duke of Baden; which declaration was duly signed by the said Smith and certified by John Burgoyne, probate judge, and by his deputy, J. M. Clark, under the seal of the state. On the 2d of September, 1856, J. M. Clark was declared to be appointed deputy clerk of the probate court, and commenced his duties as such. And that he was duly acting as such on the 27th of October, 1856, when the above declaration was made by Matthew Smith, of his intention to become a citizen of the United States.

In the case of Chirac v. Chirac, 2 Wheat. [15 U. S.] 259, the supreme court of the United States say, "The power of naturalization is exclusively in congress." But it has been repeatedly held that congress has power to authorize such a jurisdiction to be exercised by a state court. By the third section of the act of congress of April, 1802, it is declared that "every court of record in any individual state, having common law jurisdiction, and a seal and clerk or prothonotary, shall be considered a district court," and have jurisdiction in matters of naturalization. By the constitution of Ohio (article 4, § 7), it is declared, "There shall be established in each county a probate court, which shall be a court of record, open at all times and holden by one judge," etc.; and by the act of March 14, 1853 (Ohio Laws), certain records are required to be kept by the probate court, and "a special record which shall contain a complete record in each cause or matter, of all parties, returns, reports, awards and judgments."

The constitution of the state declares the probate court shall be a court of record. It is not very well perceived how this declaration of the constitution can be disregarded. There are numerous instances in which this court unquestionably exercises a common law jurisdiction. In certain cases appeals lie from inferior tribunals to the court of probate, where a jury is called. And it is provided in certain cases that a trial before a jury in the court of probate shall be had in the same manner as the trial in civil cases in the court of common pleas. And in case of fraud the court of probate may set aside conveyances when made to defraud creditors. It is very properly said by the court of appeals of Kentucky, in Morgan v.

Dudley, 18 B. Mon. 722, that the act of congress which authorizes state courts to admit aliens to become citizens does not describe them as courts of general common law jurisdiction, but as courts having common law jurisdiction. It would be a singular construction of the act of congress to hold that the power of naturalization by the probate court cannot be exercised, unless its jurisdiction be shown to apply to all questions arising at common law. No such rule is sustainable. On the contrary, if the jurisdiction exercised by the probate judge be declared to be a common law power in the constitution, and it is, in fact, an appropriate power to the object specified, there is no room for doubt on the subject. But it is said the probate court must have a seal and clerk, or prothonotary. The seal is provided by law. And every probate judge has power to appoint a deputy clerk or clerks, who shall take the oath, or oaths, required; and the judge is required to take security from them for the faithful performance of the duties of his deputy, or deputies.

It is said in Ex parte Cregg [Case No. 3,380] that a court of record without any clerk or prothonotary, or other recording officer distinct from the judge, is not competent to receive an alien's preliminary declaration. If this be admitted, it does not affect the question, for the probate judge has authority by law to appoint a deputy clerk or clerks, who are required to make the records; so that there is not only a clerk, but a recording officer duly appointed in the case under consideration.

The objection that the probate judge is his own clerk, and that he cannot discharge the duties of judge and clerk at the same time, is an exceedingly technical objection, and is without substance. The law authorizes the judge of probate to appoint one or more deputy clerks. The deputy clerk discharges his duty under the direction of the judge, and is subject to his order in the same way as a clerk of a court appointed in the ordinary mode by the judge. The duties of the clerks are defined by law, and, this being the case, of what importance is it, whether he is the deputy or principal clerk? In either capacity he acts under the probate judge, and is responsible for the performance of his duties. In Ex parte Gladhill, 8 Metc. (Mass.) 171, the court said: "It might be urged with some plausibility, that if the judge is specially vested by law with the clerical authority, the court has a clerk within the letter and equity of the statute." But the statute of the state has expressly authorized the judge of probate to appoint one or more deputies, and in the language of the supreme court of Massachusetts, above cited, "the requisition in the act of congress, that the court shall have a clerk or prothonotary, means, I think, not that the court shall have an officer denominated clerk or prothonotary: but a recording officer, charged with the duty of keeping a true record of its doings, and afterward of authenticating them."

It has been said that a probate court is a court of ecclesiastical, and not common law jurisdiction, and is not, therefore, such a court as the act of congress authorizes to naturalize aliens. Strictly speaking, we have no ecclesiastical courts in this country. Such courts in the English law are held by the king's authority, as supreme governor of the church for matters which chiefly concern religion. We have probate and other courts which partake somewhat of the nature of ecclesiastical courts; but they are regulated by statutory provisions and the principles of the common law. It is enough that the constitution of the state of Ohio declares that the "court of probate shall be a court of record," and it is so in fact, and in law, as it appears to me, although some of its powers are not founded on common law.

I think that the probate court has jurisdiction under the act of congress, to naturalize aliens, and that the declaration of Matthew Smith has been made in due form, and that on complying with the remaining requisitions of the act of congress, the final certificate of citizenship may be granted to him.

SMITH, Ex parte. See Case No. 2,784.

SMITH, Ex parte. See Case No. 12,993.

SMITH, In re. See Case No. 1,868.

Case No. 12,970.

In re SMITH.

[Nowhere reported; opinion not now accessible.]

Case No. 12,971.

In re SMITH.

[2 Ben. 113;[1] 1 N. B. R. 243 (Quarto, 25).]

District Court, S. D. New York. Jan., 1868.

BANKRUPTCY — CHOICE OF ASSIGNEE — DUTY OF REGISTER—CHANGE OF REGISTER—NOTICE OF OBJECTION TO PROOF OF DEBT.

1. It is incumbent upon registers in no manner to interfere with or influence, directly or indirectly, the choice of an assignee by creditors.

[Cited in Re Wetmore, Case No. 17,466.]

2. The policy of the bankruptcy act [of 1867 (14 Stat. 517)] is to give to the creditors, in the first instance, a free, deliberate, unbiased choice of the assignee.

3. Where creditors applied to have the proceedings sent before another register than the one to whom the case had been referred, on the ground that the register had interfered in the choice of an assignee, the court granted the application, without, however, questioning the motives of the register in what he had done, but because the creditors, who had made affidavits in support of the application, and their

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attorney, ought not to be compelled by the court, after all that had transpired, to continue the proceedings before the register in question.

4. Where creditors, who had proved their debts, served on the register a notice protesting against the proof of any claims against the estate by certain other creditors, and requesting to be notified if any such claims were tendered for proof, *held*, that they had the right to serve such a notice.

[In the matter of John Ogden Smith, a bankrupt.]

[2] [Mr. G. De Forest Lord moved to show cause why this case should not be removed from the hands of Mr. John Fitch, one of the registers in bankruptcy, at present having charge of the matter, and sent to some other register. Mr. Lord, in support of the motion, read several affidavits setting forth the gravamen of the complaint against the register; that Mr. Fitch, to whom the case of John Ogden Smith, a bankrupt, was referred, improperly sought by misrepresentation to get one Isaac M. Andruss appointed assignee for the estate of the bankrupt. Mr. Lord, as counsel for one of the creditors, the firm of Halleck & Robbins, having read the affidavits of several creditors and counsel of creditors of the estate of the bankrupt, was followed by the defendant, Mr. Fitch, who read counter affidavits of persons who denied the representations of Mr. Lord as set forth in his affidavits, both as to occurrences and dates. Mr. Lord then proceeded to address the court. He said it was important that the bankrupt act should be free from all abuse, and that the register should not descend from the bench to take part in the contests going on between the creditors and the bankrupt. It was desirable that a register should have no ends to serve, no axe to grind, no friends to push forward. He (Mr. Lord) would expect that from every register before whom he appeared. There was danger from the appointment of bad assignees, and good would come from the appointment of good assignees. The assignee was to take the place of the bankrupt himself, to take charge of the property, to deal with all claims against the estate, and make the most of it for the benefit of all the creditors. It depended on the fidelity of the assignee whether there should be a dividend at all, or whether it should be large or small. This was the essence of the bankrupt act, and it was all important. The choice of an assignee should be left to the unbiased choice of the creditors. Any interference by the register with the appointment of an assignee was a gross prostitution of his official position, and was introducing into the bankrupt act a practice full of evil and danger. He stated in strong language that this was exactly the case he had to complain of in regard to Mr. Fitch, who, he said, had solicited all the creditors who had proved their debts to vote for Mr. Andruss as assignee. He therefore asked the court to send this case before some other register, who would not have some friend to push forward as assignee. He might have adopted another course by going to Mr. Fitch, and telling him he intended to remove the case to another register if he did not cease his interference with the assignee. But the court could see that if he had adopted that course he (Mr. Lord) would have stood in the position of one who had thwarted Mr. Fitch in the carrying out of a cherished purpose. He (Mr. Lord) complained that in the presence of his friends, and among many of the members with whom he was accustomed to practice, Mr. Fitch had put an indignity upon him and done him all the harm he could, and therefore he wished that this case should be taken from the hands of Mr. Fitch.

[Mr. Fitch replied that he had no personal feeling against Mr. Lord, whom he did not know at the time he came before him to be the son of Hon. Daniel Lord. But he did complain that Mr. Lord had attempted to get his own assignee appointed, and he would always fail to get him (Mr. Fitch) to swerve from the due and faithful discharge of his duties. He would always treat every person and every creditor who came before him with courtesy. He did not reprimand Mr. Lord because he had applied to his honor to show cause, but because he (Mr. Lord) had applied to him to get his own assignee appointed in the interest of his own clients.

[Mr. Lord remarked that the statement of Mr. Fitch that he had applied for the appointment of an assignee was entirely false. He (Mr. Lord) had never mentioned the subject at all until it was brought to his notice by Mr. Fitch mentioning to him the name of Mr. Andruss.

[Mr. Parsons said that, representing creditors as he did, he wished to state that they had no objection to leave the case in the hands of Mr. Fitch. They were sure they would get justice at his hands, and that was all they wanted.

[Mr. Courson, representing creditors to the amount of $4,000, said that in order to have the proper notice given to creditors, it would be necessary to have an early decision in the matter.] [2]

G. D. Lord, for creditors.
The Register, in pro. per.

BLATCHFORD, District Judge. This is a case of involuntary bankruptcy, in which an adjudication of bankruptcy was made by the court on the 17th of December, 1867. The order of adjudication referred the case to one of the registers in bankruptcy of the court, by name, to take such proceedings thereon as are required by the act. On the same day a warrant was issued, which appointed the 15th day of January, 1868, at the office of such register, as the day for the meeting of the creditors of the bankrupt to

[2] [From 1 N. B. R. 243 (Quarto, 25).]

[2] [From 1 N. B. R. 243 (Quarto, 25).]

prove their debts and choose one or more assignees of his estate. An application is now made to the court, on the part of Hallett & Robbins, creditors of the bankrupt, who have proved their debt against his estate, to vacate so much of the order of adjudication as refers the case to the register designated in the order, and to refer it to some other register, without prejudice to proceedings already had in the case. The ground on which this application is based is, that the register has improperly interfered in the matter of the choice of an assignee of the estate of the bankrupt. Uncontradicted testimony shows that, on several occasions, on several different days, from two to five days prior to the day appointed for the first meeting of creditors and for the choice of an assignee, when creditors attended in person at the office of the register for the purpose of making oath before him to their proofs of debt, he presented, or caused to be presented, to them, a printed blank of form No. 15, with the name of a person inserted in it as assignee of the bankrupt's estate, and requested them, either directly or through a clerk in his office, to sign such blank form, and vote for such person as assignee. It does not appear that such person was known to or of by any of such creditors, and it does appear that several of them did not know him or know of him. The register's reply to these allegations consists in a vindication of his motives in soliciting votes for the assignee, and in testimony as to the fitness of the person designated, and in attacks upon the character and motives of the attorney for Hallett & Robbins, who are also the petitioning creditors.

Whatever were the motives of the register, and however well fitted for the position the assignee of his choice was, his interference in the matter, in the manner stated, was wholly unwarrantable and improper. The register is a part of the court, his duties are of a judicial character, and his action should, under all circumstances, be free from reproach and above all suspicion of interest or partisanship. The fourth section of the bankruptcy act provides, that "no register shall be of counsel or attorney, either in or out of court, in any suit or matter pending in bankruptcy, in either the circuit or district court of his district, nor in an appeal therefrom, nor shall he be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of said courts of bankruptcy, nor be interested in the fees or emoluments arising from either of said trusts." This provision indicates the spirit of judicial impartiality which the law expects will be exhibited by every register in the discharge of his important duties. With the choice of an assignee by the creditors he has nothing to do, except to preside at the meeting at which the choice is made. It is not necessary he should approve or confirm the choice; for, although such an approval by the register is appended to form No. 15, nothing of the kind is required by the statute. The election is subject to the approval of the judge; and, although it is the duty of the register, in transmitting the result of an election to the judge, for his action thereon, to make known any objection which exists to an approval of the choice, yet, beyond this, the register has nothing to do with either the election or appointment of an assignee, unless there is a failure to choose, or a non-acceptance by the person chosen, and then, in certain cases, the register can appoint an assignee. In regard to the choice of an assignee, the policy of the bankruptcy act, as clearly shown in its provisions, is, to give to the creditors of a bankrupt the free, deliberate, unbiased choice, in the first instance, of the person who is to take the assets and manage them. This is a feature which did not exist in any former bankruptcy law of the United States, and was adopted from the English system. The importance of this policy has been uniformly recognized by this court, and it has not failed to approve all elections of assignees by creditors, unless something was placed before it to show that the choice was not a proper one. It is especially incumbent upon registers in no manner to interfere with, or influence, either directly or indirectly, the choice of an assignee by creditors. The action of a register should, in all things, be that of strict impartiality, not only in fact but in appearance, and he should not present the semblance of having any interest or bias in favor of or against any particular person as assignee, any more than of being prejudiced for or against the bankrupt, or for or against any creditor, in any proceeding. Any other course will lead, if not to abuses, to the suspicion of them, and will impair the usefulness of the registers and derange the harmonious working of the system.

It might not be proper, in this case, to apply the remedy asked for, of transferring the case to another register, were it not that it is manifest, from the affidavits in the matter, and from what transpired in open court, on the argument of the motion, that it will be a judicious exercise of discretion to send the case to another register. This I do without at all meaning to question the motives of the register in soliciting votes for the assignee designated by him. I do it because the creditors who have made affidavits in support of this motion, and the attorney for the petitioning creditors, ought not to be compelled by the court, after all that has transpired, to continue the proceedings in this case before the register to whom it was referred.

Some animadversion was made by the register upon the fact that the attorney for the petitioning creditors served upon him, on the 10th of January, 1868, a notice stat-

ing that such creditors protested against the proof of any claims against the estate by four several creditors, naming them, and opposed their claims on the ground that they were not entitled either to prove their debts or to vote for or be eligible as assignees, and requesting that such attorney might be immediately notified if any of such persons should tender their claims for proof. This notice was served in the exercise of an undoubted right. Section 23 of the act provides, that "when a claim is presented for proof before the election of the assignee, and the judge entertains doubts of its validity, or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen." Rule 6 of this court gives to the register the same power of postponing the proof of a claim. The last clause of section 22 of the act provides for the mode of investigating a claim, with a view to its rejection if it shall be shown to be founded in fraud, illegality, or mistake. The notice in question served on the register seems to have been a proper notice preliminary to the exhibition to the register of grounds for the exercise of his power of postponement in regard to the claims specified.

[See Case No. 12,984.]

Case No. 12,972.

In re SMITH et al.

[2 Ben. 122.] [1]

District Court, S. D. New York. Jan., 1868.

COSTS—CLERK'S AND MARSHAL'S FEES.

[In the matter of John P. Smith and James Smith, bankrupts.]

Where, in a case of involuntary bankruptcy, the petitioner advanced the clerk's fees, including $50 for the register, and also $40 for the marshal, as messenger, before he executed the warrant, and, after an assignee was appointed, applied for an order that the assignee repay them those sums out of the estate; the court (BLATCHFORD, District Judge,) held, that the motion could not be granted in that shape; but, that the court could, under section 47 of the act [of 1867 (14 Stat. 540)] and general order No. 29, direct the assignee to pay the register's and marshal's fees out of the estate, but it must be regular bills of legal fees, properly taxed, and not those gross sums.

[See Case No. 12,973.]

Case No. 12,973.

In re SMITH.

[2 Ben. 432; [1] 1 N. B. R. 599 (Quarto, 169); 1 Am. Law T. Rep. Bankr. 112.]

District Court, S. D. New York. May, 1868.

JUDGMENT—LIEN—EXECUTION AND LEVY.

1. Where, before a petition in involuntary bankruptcy was filed, two judgments had been entered, in a state court, against the bankrupts, on each of which executions had been issued to a sheriff, and he had made an actual levy, under the first one which came to his hands, on personal property of the bankrupts, they also having real estate on which the judgments were liens, the validity and bona fides of the judgments not being attacked: *Held*, that the receipt, by the sheriff, of the second execution, after the levy made under the first one, operated as a constructive levy under the second one, and an actual levy under it was unnecessary.

[Cited in The Haytian Republic, 60 Fed. 293.]

2. The judgments were liens on the real estate of the bankrupts, as against the assignee in bankruptcy, and came within the saving clauses of sections 14 and 20 of the bankruptcy act [of 1867 (14 Stat. 522, 526)].

[Cited in Re Dey, Case No. 3,870.]

3. The sheriff, therefore, should be allowed to sell the personal property, to satisfy the two executions, and, if there was not enough to satisfy them, the deficiency would continue a lien on the real estate, and the court would then determine, on the application of the assignee, how it should be discharged.

[In the matter of John P. Smith and James Smith, involuntary bankrupts. See Case No. 12,972.]

John Henry Hull, for J. W. & W. H. Morgan.

W. S. Hascall, for Barkley & Turfler.

A. Fallon, for assignee.

BLATCHFORD, District Judge. The facts in this case are as follows: On the 25th of October, 1867, John F. Barkley and Jacob C. Turfler recovered a judgment in the supreme court of New York, against John P. Smith and James Smith, the bankrupts, for $334.10. A transcript of said judgment was filed and docketed in the office of the clerk of the county of Rockland, where the debtors resided, and where real estate owned by them was situated, on the 29th of October, 1867. By the filing and docketing of such transcript, the judgment, according to the law of New York, became a specific lien on such real estate. On the 30th of October, an execution, issued on the judgment to the sheriff of Rockland county, was received by him. Under that execution, he, on the 1st of November, 1867, made a levy on certain personal property of the bankrupts.

On the 2d of November, 1867, John W. Morgan and William H. Morgan recovered a judgment in the supreme court of New York, against the bankrupts, for $213.91. A transcript of said judgment was filed and docketed in the office of the clerk of the county of Rockland, on the 4th of November, 1867. On the 5th of November, at 10 o'clock a. m., an execution, issued on this judgment to the sheriff of Rockland county, was received by him. Nothing was done by the sheriff under that execution, except to hold it.

On the 5th of November, 1867, at 3 o'clock p. m., the petition in this matter, it being a case of involuntary bankruptcy, was filed.

The assignee in bankruptcy does not contest the validity of either of the judgments, or impeach the bona fides of the executions,

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

or of the liens, whatever they were, acquired by the recovery of the judgments and the issuing of the executions and the levy, nor does he object to the application to the executions, in their order, of the proceeds of the personal property actually levied on by the sheriff under the first execution. The receipt of the second execution, after the levy under the first one, and while such levy remained in force, operated as a constructive levy under the second, and an actual levy under it was unnecessary. Cresson v. Stout, 17 Johns. 116; Van Winkle v. Udall, 1 Hill, 559.

The judgments became, both of them, liens on the real estate of the bankrupts, as against the assignee in bankruptcy, such liens having been perfected before the commencement of the proceedings in bankruptcy. The liens on the real estate, by the docketing of the judgments in Rockland county, and the levy under the first execution, it operating also as a levy for the second execution, are such liens as are within the saving clauses of sections fourteen and twenty of the bankruptcy act.

An order will, therefore, be made, that the sheriff be at liberty to sell the personal property on which he levied, or so much thereof as may be necessary to satisfy the two executions, and apply the proceeds thereto in the order of the receipt of the executions by him. If there shall be any deficiency to satisfy either execution, it will continue to be a lien on the real estate, and it will then be for the court to determine, on the application of the assignee or the creditor, on notice, whether the lien shall be discharged by the assignee under general order No. 17, or whether some other of the courses provided for by sections fourteen and twenty shall be adopted. The assignee objects to paying the deficiency out of the personal property of the bankrupt in his hands. No reason for this objection is assigned. Under section fourteen, the assignee is authorized, under the direction of the court (and general order No. 17 was made to carry out this provision), to discharge a lien on real estate, or to sell the real estate, subject to the lien.

Case No. 12,974.

In re SMITH.

[4 Ben. 1;[1] 3 N. B. R. 377 (Quarto, 98); 3 Am. Law T. 7; 1 Am. Law T. Rep. Bankr. 147.]

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

BANKRUPTCY—GENERAL ASSIGNMENT WITHOUT PREFERENCES—INTENTION—PRESUMPTION.

1. The execution by an insolvent of a general assignment of all his property for the benefit of his creditors, without preferences, is an act of bankruptcy.

[Cited in Re Silverman, Case No. 12,855; Globe Ins. Co. v. Cleveland Ins. Co., Id. 5,486; Boese v. King, 108 U. S. 385, 2 Sup. Ct. 770.]

[Disapproved in Haas v. O'Brien, 66 N. Y. 602.]

2. Where the execution of such an assignment is admitted, an adjudication of bankruptcy will be made, even though the respondent denies any intention to defeat or delay the operation of the bankruptcy act [14 Stat. 517], or to hinder his creditors, or to prevent his property from being distributed according to the provisions of the act.

[Cited in Re Silverman, Case No. 12,855; Curran v. Munger, Id. 3,487; Re Marter, Id. 9,143.]

3. Every person of a sound mind is presumed to intend the necessary, natural, or legal consequences of his deliberate act. This legal presumption may be either conclusive or disputable, depending upon the nature of the act and the character of the intent; and when, by law, the consequences must necessarily follow, the presumption is ordinarily conclusive, and cannot be rebutted by any evidence of a want of such intention.

[Cited in Re Silverman, Case No. 12,855; Re Bininger, Id. 1,420; Re Rainsford, Id. 11,537; Re Jacobs, Id. 7,159.]

[Cited in brief in Stearns v. Gosselin, 58 Vt. 39, 3 Atl. 193.]

In bankruptcy.

HALL, District Judge. The first of the petitions filed in this case alleges as acts of bankruptcy the making of two chattel mortgages, one to Henry Tilton, and the other to the Genesee Valley National Bank, to secure the payment of pre-existing debts, the debtor and mortgagor being at the time insolvent, and executing the same with intent to give a preference to the said mortgagees over the other creditors of the debtor; and, also, the making of a voluntary general assignment of all the property of the debtor, for the benefit of his creditors, he at the time being insolvent, and making such assignment with intent to defeat the operation of the bankrupt act.

[As the same acts of bankruptcy are alleged in the second petition, and with a fuller statement of the several transactions, and as the two petitions have been consolidated, the fuller allegations of acts of bankruptcy contained in the second petition will be taken as those upon which the questions presented in this case must be litigated.] [2]

This petition alleges as acts of bankruptcy: First—That the said Seymour T. Smith, the debtor, on the 4th day of November, 1869, being then insolvent, executed to Henry Tilton a chattel mortgage of all the merchandize, personal property, goods, and chattels in the debtor's store for the express purpose of securing to said Tilton the payment of $1,399.68, due and owing to said Tilton, with intent to give a preference to said Tilton over the other creditors of said Smith. Second—That the said Smith, on the 6th of November, 1869, being insolvent, made to the Genesee Valley National Bank another chattel mortage, upon substantially the same property, to secure (as expressed in said mortgage) the payment to the said bank of $600, which, as stated in said chattel mortgage, was loaned and advanced to said Smith upon his promissory note, which had become due on the 20th day of September,

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

[2] [From 3 N. B. R. 377 (Quarto, 98).]

1869; and that said mortgage was so made with the intent to give a preference to said bank over the other creditors of said Smith. Third—That on or about the 20th day of September, 1869, the said Smith, being a merchant or trader, fraudulently stopped payment of his commercial paper, and had not resumed within a period of fourteen days; and that among said paper was the note to the Genesee Valley National Bank, mentioned in said chattel mortgage as aforesaid. Fourth—That the said Smith, on the 11th day of November, 1869, being insolvent, and possessed of certain property, rights and credits, as described, made an assignment of all his property, of every name and description, to Moses H. Jewell, with the intent to defeat or delay the operation of the bankruptcy act, and to hinder and delay the creditors of the said Smith, of their just suits, and to prevent his property from being distributed according to the provisions of the said act.

[Smith, the respondent, filed his separate answer to these petitions, but as the answer to the petition secondly above referred to is in substance like the answer to the first petition, so far as it relates to the allegations of acts of bankruptcy contained in the first, only the answer to the petition secondly referred to need be considered.] [2]

The respondent, Smith, by his answer, denies that he committed an act of bankruptcy by the making of the chattel mortgage to Tilton, or that to the Genesee Valley National Bank, as alleged in the petition. He then affirms, in respect to each of such mortgages, that it was executed in good faith to secure an honest indebtedness from the mortgagor to the mortgagee, to the amount secured by such mortgage; and expressly denies that he executed the same with the intent to give a preference to the mortgagee over other creditors. He affirms that he then believed that he had property sufficient to pay all his debts, and intended to do so. He further alleges that both said mortgages were executed by him without any knowledge or belief that he was insolvent, and without intending to commit any fraud on the bankruptcy act. He also denies that he committed a further act of bankruptcy, as alleged in the petition, in that on or about the 20th day of September last past, being a merchant or trader, he fraudulently stopped payment of his commercial paper, but, on the contrary, by reason of being unable to collect his debts, he could not meet such paper, but intended to, and believed he could, meet it soon thereafter; but that such intention was defeated "by circumstances entirely beyond his control;" and he adds an express denial that he had fraudulently stopped payment of his commercial paper. He also denies that he committed an act of bankruptcy in executing the general assignment set forth in the petition, and also expressly denies that "he executed the same with the intent to defeat or delay the operation of the said act, and to hinder or delay the creditors of him, the said Smith, of their just suits, and to prevent his property from being distributed according to the provisions of the said act."

In the conclusion of his answer, the respondent "alleges and affirms that the said chattel mortgages were executed in good faith, as above stated, and because the creditors named therein requested security, and because he believed that he could give them such security without injustice to his other creditors, as he then believed he had the means to pay all his indebtedness, and that said assignment was executed without preferences and for the sole purpose of having his creditors share equally in his property in proportion to their indebtedness."

On these answers being filed, it was insisted by the petitioning creditors that they were entitled to an adjudication of bankruptcy against the respondent, upon such answers, notwithstanding the denials and defensive allegations of the respondent: and in order to present the precise state of the case, a very full statement of the answers has been carefully made. Whether an act of bankruptcy was committed by the respondent, by the execution of either of the chattel mortgages, is a question which will not be discussed. It will be assumed, for the purposes of the present case, and in order to rest the adjudication of bankruptcy upon a different ground, that the existence of the intention necessary to constitute the fact of such execution an act of bankruptcy, is sufficiently denied.

Nor will the case be disposed of upon the ground that the commission of an act of bankruptcy by the debtor, in stopping payment of his commercial paper, and failing to resume payment thereof within fourteen days, is substantially admitted by the answer, although the decision heretofore made in the Case of Wells [Case No. 17,387], is still recognized as the law of this court.

The remaining question relates wholly to the alleged act of bankruptcy by the execution of a voluntary general assignment of all the respondent's property for the benefit of all his creditors, without preference, with the alleged intent to defeat or delay the operation of the bankruptcy act, and to prevent his property from being distributed according to the provisions of that act.

In disposing of this question, it will be considered as though the respondent's denial of an intention to defeat or delay the operation of the bankruptcy act, and to hinder or delay his creditors, and to prevent his property from being distributed according to the provisions of the act, had been made in the disjunctive, and in such form as to fully deny either of the intentions thus imputed to him. The important question will then be, whether, under the admissions of the respondent, the law does not conclusively presume the intention to defeat or delay the operation of the bankruptcy act, and to prevent the property assigned

[2] [From 3 N. B. R. 377 (Quarto, 98).]

from being distributed according to the provisions of that act.

The insolvency of the respondent at the time this assignment was executed is not denied, and cannot be controverted. His whole stock in trade, if not the whole of his property, had been transferred or encumbered by two chattel mortgages within the week next preceding the assignment; and the assignment itself necessarily broke up the respondent's business, if this had not already been done by the chattel mortgages; and no creditor, except those he had preferred by his previous action, can receive any of the proceeds of his property, if this assignment be sustained, except as it may be converted into money and distributed by this assignee of the respondent's selection.

The execution of the assignment was the voluntary and deliberate act of the respondent, and there is no pretence that he did not understand its provisions, or that he did not know that the natural and necessary consequences of the execution of the trust thereby created would be to give to the assignee the entire control of the disposition of his property and the pro rata distribution of its proceeds.

If such an assignment be upheld in hostility to the creditors of an insolvent and bankrupt assignor, it necessarily and absolutely defeats the operation of the bankruptcy act. It commits the disposition of the property of the bankrupt and the distribution of the proceeds to an assignee selected by the debtor, and deprives his creditors of the right given them by the bankrupt act to choose an assignee for that purpose; it takes from the courts of bankruptcy the legal supervision and control—the legal and equitable jurisdiction—which they, under that act, are to exercise in respect to such property, and the hostile claims and adverse interests of the bankrupt's creditors, and the marshalling of his assets, as well as in respect to his conduct, property and person; and it also defeats its operation in many other respects, by preventing the property assigned from being brought within the operation and protection of numerous minor provisions of the act, and within the protection of other provisions of great importance, the infractions of which are punished as heinous crimes.

There can be no possible doubt that the execution of the general assignment under the circumstances of this case was an act of bankruptcy; and the only question upon which there can be the slightest doubt is, whether, in the absence of any rebutting proof—and even in the absence of a replication to the respondent's answer—the denial of the intention imputed to him, and which is necessary to constitute the act of bankruptcy, must not prevent an adjudication until the question of intention has been submitted to a jury.

Every person of sound mind is presumed to intend the necessary, natural, or legal consequences of his deliberate act. This legal presumption may be either conclusive or disputable, depending upon the nature of the act and the character of the intention. And when, by law, the consequences must necessarily follow the act done, the presumption is ordinarily conclusive and cannot be rebutted by any evidence of a want of such intention.

In such cases the oath of the defendant to an answer to a bill in chancery, though ordinarily sufficient to countervail the testimony of a single witness, without regard to the actual belief of the judge as to the truth of such testimony, is not sufficient to destroy such legal presumption, even in a case which is brought to a hearing upon bill and answer without the filing of any replication. Even fraud is thus conclusively presumed in certain cases. Cunningham v. Freeborn, 11 Wend. 240; Waterbury v. Sturtevant, 18 Wend. 353; Fiedler v. Day, 2 Sandf. 594; Robinson v. Stewart, 10 N. Y. 189. And see Barney v. Griffin, 2 Comst. [2 N. Y.] 365; Collomb v. Caldwell, 16 N. Y. 486. The doctrine of Cunningham v. Freeborn (which was heard on bill and answer alone), that the admission of facts which are per se fraudulent in law, is as much so and as conclusive upon the defendant as if he had in express terms admitted a fraudulent intent in his answer, and that in such case any subsequent disclaimer of intent will not avail him, was expressly approved in Waterbury v. Sturtevant.

In the former, Mr. Chief Justice Nelson declared, in substance, that it could not be endured, in principle or practice, that the answer of a defendant disclaiming a fraudulent intent, though it admits facts from which such intent is a necessary or legal inference, shall still be conclusive upon this point.

In Fiedler v. Day, the court declared that it was of no consequence that the defendants denied all fraudulent intent, and that such a denial was of no avail when the answer admitted facts conclusively showing the fraud; and in Robinson v. Stewart, it was said to be a familiar rule that a positive denial of fraud in an answer will not prevail against admissions, in the same pleading, of facts which show that the transaction was fraudulent.

General denials of fraud, and of fraudulent intent, in an answer, even when it is plain that such denial should not be made, seem not to be a hard thing for the conscience of the party; and if received as of the same force as the denial of specific allegations of distinct facts, the powers of courts would be too much cramped in the exercise of a salutary jurisdiction. Waterbury v. Sturtevant, ubi supra. And to give to the denial of intent, in cases like the present, the effect insisted upon by the respondent's counsel, would be productive of useless and expensive litigation, of frequent perjury, and gross injustice.

In the present case the answer denies, upon the party's own personal knowledge, and equally in the most absolute terms, the con-

clusion of law that he had committed an act of bankruptcy, the absence of the intent imputed to him, and other allegations of specific facts in respect to which a direct denial, of his own knowledge, may be proper. In like manner he denies that he knew or believed himself to be insolvent when he gave the chattel mortgages before referred to, although the admissions in the answer show that he was legally insolvent, and that he knew the facts upon which the law judged him insolvent. But it must in charity be presumed, and probably in accordance with the fact, that he was ignorant of the legal definition of the term insolvency, and that such ignorance led to such denial.

It may, perhaps, be proper to consider the argument that the provisions of the bankruptcy act should not be so construed as to impute to congress an intention to invalidate a voluntary assignment without preferences, under which the property of an insolvent will be distributed pro rata among his creditors, and, perhaps, more expeditiously and with less expense than it can be done under proceedings in bankruptcy.

That the provisions of the bankruptcy act fully authorize, if they do not absolutely require, such construction, is very clear; and this case furnishes a sufficient reason for the adoption of such provisions. Unless the creditors can proceed in bankruptcy, the chattel mortgages, by which preference has been given to certain creditors of the bankrupt, cannot be set aside on the ground of such unlawful preference, and an insolvent, by giving preference in that mode, and then making a general assignment without preferences, could defeat some of the most salutary provisions of the bankruptcy act.

An adjudication of bankruptcy will therefore be ordered. [And the case referred to Register Husbands for further proceedings.][3]

Case No. 12,975.

In re SMITH.

[6 Ben. 187.][1]

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

BANKRUPTCY — STRIKING OUT PROOF OF CLAIM— UNLIQUIDATED DAMAGES.

A claim by a broker, who had made contracts as the agent of the bankrupt, but in his own name, for the purchase of goods, which contracts the bankrupt refused to carry out, whereupon the broker settled them at a loss, to recover against the bankrupt the amount of such losses and of his brokerage, is a claim for unliquidated damages, and the proof of it, as a claim against the bankrupt's estate, is to be disallowed.

[See in Re Bailey, Case No. 729.]

[In the matter of W. Fleming Smith, a bankrupt.]

The register, in this matter, certified to the court that the assignee had requested him to re-examine and to disallow a claim of one Jones, the proof of which had been filed with the register, on the ground that it was a claim for unliquidated damages, and that, in obedience to his order, the parties had appeared before him in the matter, and that the proof of claim stated a claim of $3,246 28, for and on account of moneys paid by Jones to various persons, and for interest and services, as set out in an account attached; that Jones, as broker, purchased the goods mentioned in the account, at Cincinnati, by the direction and for the account of the bankrupt, to be delivered to him, at Cincinnati, at the times therein mentioned; that the bankrupt failed to accept or receive the goods pursuant to the contracts of purchase made by Jones for him, by reason whereof the losses mentioned in the account occurred; that Jones thereupon settled and closed said several contracts of purchase, and disposed of the subject-matter thereof, and paid and suffered said several items of loss mentioned in the account, for and on account of the bankrupt, amounting to said sum of $3,246 28. The register certified that the only question was whether this was a claim for unliquidated damages, and that, if it was, it should be expunged.

BLATCHFORD, District Judge. The claim, as proved, must be disallowed and expunged.

Case No. 12,976.

In re SMITH et al.

[9 Ben. 494;[1] 18 N. B. R. 24.]

District Court, S. D. New York. May 29, 1878.

BANKRUPTCY—ARREST—FACTOR'S LIABILITY— DISCHARGE.

1. S. & Co. were adjudicated bankrupts in June, 1877. On February 5, 1878, an order was granted for the arrest of the bankrupts in an action in the supreme court of the state of New York. S. having been arrested under that order, petitioned this court for a discharge from the arrest. The debt, to recover which the action in the supreme court was brought, accrued prior to the commencement of the bankruptcy proceedings and was for the proceeds of goods consigned to them for sale as factors: *Held*, that the cases which held that a factor's liability is not discharged by a discharge in bankruptcy (In re Seymour [Case No. 12,684]; In re Kimball [Cases Nos. 7,768, 7,769]) have been over ruled by the case of Neal v. Clark, 95 U. S. 704, which case, though not directly involving the question, adopted a principle of construction as to the 33d section of the bankruptcy act of 1867 [14 Stat. 533] which is clearly applicable to the case of a factor.

2. Under the principle laid down in that case, it must be held that the debt, to recover which the action in the supreme court was brought, would be discharged by the discharge in bankruptcy, and that the petitioner was therefore entitled to be discharged from arrest.

[Cited in Gibson v. Gorman, 44 N. J. Law, 328; Hennequin v. Clews, 77 N. Y. 431;

[3] [From 3 Am. Law T. 7.]

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

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

Herrlich v. McDonald, 80 Cal. 479, 22 Pac. 299; Woodward v. Towne, 127 Mass. 42.]

[In the matter of Abner E. Smith and others, bankrupts.]

Ward, Clark & Angell, for bankrupt.

CHOATE, District Judge. This is an application on behalf of Smith, one of the bankrupts, to be discharged from arrest under an order of arrest granted in an action in the supreme court of the state of New York, June 30, 1877. The petitioner and his copartners were adjudicated bankrupts on petition of creditors. The arrest was made under an order dated February 5, 1878, pending the proceedings in bankruptcy, and the petitioner is now held to bail.

The petitioner is entitled to be discharged provided the cause of action on which he has been arrested is a debt from which his discharge in bankruptcy, if granted, will release him. In re Glaser [Case No. 5,474]. The debt, for the recovery of which the action was brought, as set forth in the affidavit on which the order of arrest was granted, accrued prior to the filing of the creditor's petition against the bankrupts, and is a claim against them for the proceeds of goods consigned to them for sale as factors.

The bankrupt law of 1867 (section 33) provided that "no debt created by the fraud or embezzlement of the bankrupt or by his defalcation as a public officer, or while acting in a fiduciary character shall be discharged under this act." There has been considerable conflict of authority as to whether a claim against a factor for the proceeds of goods consigned to him for sale was protected under this section from the effects of a discharge. It was early held in this district by Judge Blatchford and Mr. Justice Nelson, after a very careful examination of the question, that such a debt was not discharged. In re Seymour [Case No. 12,684]; In re Kimball [Cases Nos. 7,768, 7,769]. The same construction of the act has been declared in other districts and in some of the state courts. Other cases, however, of great authority, have held the contrary. Grover & Baker Sewing-Mach. Co. v. Clinton [Case No. 5,845] (U. S. Cir. Ct. Wis., Davis and Hopkins, JJ.); Owsley v. Cobin [Case No. 10,636] (Cir. Ct. S. C., by Waite, C. J.). And in Neal v. Clark, 95 U. S. 708, the supreme court of the United States appear to approve the construction given by that court to the corresponding section of the bankrupt act of 1841 [5 Stat. 440], in the case of Chapman v. Forsyth, 2 How. [43 U. S.] 202, as applicable to the 33d section of the act of 1867. The act of 1841, excluded from its benefits "all persons owing debts created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity." In Chapman v. Forsyth, it was held that the debt due from a factor for the balance of his account was not a fiduciary debt within the meaning of the act, that the words "other fiduciary capacity," must be construed to refer to trusts or fiduciary relations of the same kind as those enumerated, that is, public officers, executors, administrators, guardians, and trustees. The decision of the case In re Kimball [supra] proceeded upon the theory that the 33d section of the act of 1867 was much broader in its terms and meaning than the corresponding section of the act of 1841. The language of the act of 1867, was, "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act." In Neal v. Clark, 95 U. S. 704, the court of appeals of Virginia had held that the liability of one who purchased with notice from an executor at a discount a part of the assets under circumstances which made it a devastavit on the part of the executor, so to dispose of them, but without actual fraud on the part of the purchaser was not discharged from his liability by a subsequent discharge in bankruptcy. The supreme court of the United States reversed the judgment on the ground that the "fraud" intended by the statute is actual and not constructive fraud, and they make the following observations on the construction of the act of 1867: "The bankrupt act of 1841, exempted from discharge debts 'created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity.' The question arose under that act whether a factor who had sold the property of his principal, and had failed to pay over the proceeds, was a fiduciary debtor within the meaning of that clause. This court, in Chapman v. Forsyth [supra], said, 'If the act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies, and indeed all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor; and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act. The cases enumerated "the defalcation of a public officer," "executor," "administrator," "guardian," or "trustee," are not cases of implied but special trusts; and "the other fiduciary capacity" mentioned, must mean the same classes of trusts. The act speaks of technical trusts, and not those which the law implies from the contract. A factor is not therefore within the act.' A like process of reasoning may be properly employed in construing the corresponding section of the act

of 1867. It is a familiar rule in the interpretation of written instruments and statutes, that 'a passage will be best interpreted by reference to that which precedes and follows it.' So also 'the meaning of a word may be ascertained by reference to the meaning of words associated with it.' . . . Applying these rules to this case we remark that in the section of the law of 1867, which sets forth the classes of debts which are exempted from the operation of a discharge in bankruptcy, debts created by 'fraud' are associated directly with debts created by 'embezzlement.' Such association justifies, if it does not imperatively require, the conclusion that the fraud referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud, or fraud in law which may exist without the imputation of bad faith or immorality. Such a construction of the statute is consonant with equity, and consistent with the object and intention of congress in enacting a general law by which the honest citizen may be relieved from the burden of hopeless insolvency. A different construction would be inconsistent with the liberal spirit which pervades the entire bankrupt system." Although the precise question of a factor's liability was not before the court, I think the principle of construction which was made the ground of the decision, thus clearly expressed is applible to the case of a factor, and that this decision must be held to have overruled the cases in which a factor's liability was held not to be discharged in bankruptcy, under the act of 1867. No change was made in this respect in the re-enactment of the bankrupt law in the Revised Statutes (section 5117).

The petitioner is entitled to be discharged from arrest.

Case No. 12,977.

In re SMITH et al.

[8 Blatchf. 461.] [1]

Circuit Court, N. D. New York. May 19, 1871.

BANKRUPTCY — DISCHARGE — WHO MAY OPPOSE — PROOF OF DEBT NOT FILED.

If a person appearing to oppose the discharge of a bankrupt be, in fact, a creditor, and that appears by the bankrupt's oath to his petition and schedules, in his voluntary petition to be adjudged a bankrupt, that is sufficient to admit him to so appear, and afterwards to file specifications of objections to the discharge, under general order No. 24, although he has not, at the time of the return of the order to show cause against the discharge, filed any formal proof of debt.

[In review of the action of the district court of the United States for the Northern district of New York.

[In the matter of Ananias F. Smith and Sidney Bickford, bankrupts.]

Francis Kernan, for bankrupts.

John Ganson, for opposing creditors.

WOODRUFF, Circuit Judge. In this proceeding, the bankrupts, who were so declared upon their voluntary petition, had, as they allege, complied with all the provisions of the bankrupt act [of 1867 (14 Stat. 517)], and, upon that allegation, they applied for their discharge. On that application, an order was made requiring their creditors to show cause on the 22d of November, 1870, why a discharge should not be granted. On that day, William P. McLaren and another, composing the firm of William P. McLaren & Co. appeared to oppose the granting of such discharge. They had not, at that time, filed any proof of their debt, but such proof had, on the previous day, been made in Wisconsin, where they resided, and proof was thereafter, on the 26th of November, duly made, in this district; and, on the 30th of November, they filed their specification of objections to the granting of such discharge, as required by the 24th of the general orders in bankruptcy. On behalf of the bankrupts, a motion was made in the district, that the specification of the grounds of opposition to the discharge be struck out, and a discharge be granted, on the ground that the said McLaren & Co. had not proved their debt at the time when they appeared, pursuant to the order to show cause, on the 22d of November, and that, on that day, an order of reference was made to a register, to report whether the bankrupts were entitled to their discharge, and, on the 28th of the said month, the said register had reported that the bankrupts were entitled to their discharge which report was filed on the 30th, the same day on which the aforesaid specification was filed. It, however, appears, (according to the answer of the said McLaren & Co. to the petition of review,) that, by the petition of the bankrupts praying that they be adjudged bankrupts, and in the schedules thereto annexed, the said McLaren & Co. are sworn to be creditors, to the amount of $882.85. The district court denied the motion to strike out the specification of their grounds of objection to the granting of a discharge, and, by petition of the bankrupts, this court is asked to review and reverse the decision of that court.

For purposes affecting the rights of the creditors of a bankrupt as among themselves, and, especially, such as relate to the distribution of the assets, no one is regarded as a creditor, who has not filed proof of his debt, in the manner prescribed by the law. This is important, in order to prevent fraudulent claimants from injuriously affecting the rights of bona fide creditors, and to prevent collusion between the bankrupt and pretended creditors, to whom, in fact, nothing is due. But, as between the bankrupt himself and an alleged creditor, no such rule is essential for

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

any purpose, except that the orderly conduct of the proceeding makes it proper that the bankrupt should not be put to litigation and expense with third parties who have no interest in the subject. If the person appearing to oppose the discharge of the bankrupt be, in fact, a creditor, and that appears by the bankrupt's oath to his own petition and schedules, that is enough, as against the bankrupt, to warrant the creditor in so appearing. In proceedings in voluntary bankruptcy, the very first step taken by the bankrupt is to state, under oath, all his debts, and to whom due, &c., (section 11). Notices are to be served on all who are so declared by him to be creditors. True, no such creditor can take part in the choice of an assignee, or interfere with the administration of the assets, or receive a dividend therefrom, until he has proved his debt. This, as already suggested, is for the protection of bona fide creditors. But such creditor is not barred of his right to prove his debt, nor is his debt deemed extinguished by neglect to prove it at any stage of the proceedings. When the thirty-first section declares, that any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, it does not, in terms, nor by any necessary implication, confine the privilege to such as have already made formal proof, entitling them to dividends. The twenty-ninth section directs, not only that notice of the bankrupt's application for a discharge shall be given, by mail, to all creditors who have proved their debts, but that it shall also be published in such newspapers as the court shall designate, &c. The application for the discharge, and the proceedings thereupon, provided for in the twenty-ninth and thirty-first sections, are matters strictly between the bankrupt and his creditors, or any one of them, seeking to oppose. There is, therefore, no reason why the bankrupt's sworn admission that the party appearing to oppose is his creditor, should not, in that controversy, be taken to be true, and to give such party a standing in court, for the purposes of such opposition. If the bankrupt has thus admitted the debt, he may properly be affected by such admission, and no other creditor is prejudiced by allowing such admitted creditor to oppose the discharge. Nothing in rule 24, of the general orders in bankruptcy, conflicts with this view.

I can see that cases may often arise, in which persons who are confessedly creditors of the bankrupt may properly choose not to prove their debts, so as to share in the assets, or commit themselves to any acquiescence in the bankrupt's proceedings, and yet may and ought to be permitted to resist his endeavor to obtain a discharge from the debts he owes to them. True, the court will not permit a stranger to intervene, but the proof which should satisfy the court of the right of a party to oppose a discharge need not involve the formal proof which brings the creditor to a participation in the bankrupt's estate.

By section 34 of the act, any creditor whose debt was either proved or provable, may apply to set aside and annul a discharge already granted, and he may set up and prove, as grounds of avoidance, the acts of the bankrupt which, in section 29, are declared grounds for refusing the discharge in the first instance. There is equal reason for permitting all creditors whose debts are either proved or provable to appear and oppose the granting of the discharge when applied for. Section 34, therefore, tends to show, that the creditor mentioned in sections 29 and 31, is not merely a creditor who has proved his debt, but any creditor whose debt is either proved or provable against the estate.

The circumstance that the register reported that the bankrupts had complied with the provisions of the act, is of no importance. The objections to the discharge are addressed to the court, and, on specifications being filed, they are to be tried as the court may direct.

The order sought to be reviewed was, I think, correct, and it must be affirmed, with costs.

Case No. 12,978.

In re SMITH.

[2 Hughes, 284.] [1]

District Court, E. D. Virginia. May, 1874.

BANKRUPTCY—ASSIGNEES—CONTEMPT.

Assignees in bankruptcy will be treated as in contempt when they take any steps in a state court without authority from the court of bankruptcy; more especially when they act in virtual contravention of the rulings and orders of the bankruptcy court.

The bankrupt [G. W. F. Smith], many years before the war, had purchased the "Meadowville" farm, in Fauquier, in part with some $10,000 borrowed for the purpose, of Anderson, giving a deed of trust on the property. Other unquestionable liens had accrued upon the same property, all to an amount in excess of its value. The widow of Anderson, to whom the original purchase-money is now due to the amount of $15,000, is in need of it for her support. The same was the case with another tract of land called the "Walter Smith Tract," in Fauquier county, bought by the bankrupt, except that the purchase-money due upon it as a lien is itself in excess of its present value. The bankrupt had also purchased at different times other real estate, some half a dozen tracts, all now charged with liens; but the liens on all but the two first-named tracts are claimed to be subject to credits which are claimed not to have been allowed in reports of commissioners of courts made of liens and their priorities. The circuit court of Spottsylvania county made an order for the sale of the Meadowville and

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

Walter Smith tracts, and the other real estate of the bankrupt a year or more ago. Whereupon Smith went into bankruptcy, filed his petition for exemptions, including the homestead exemption, and procured a restraining order from the then judge of the United States district court, putting a stop to the sales ordered by the state court. Thus the case stood in February last, when a motion was made at Alexandria by the counsel of Mrs. Anderson and other creditors for a dissolution of the restraining order of the bankrupt court. This motion, after extended argument, was granted by HUGHES, District Judge, as to the sales of the Meadowville and the Walter Smith land, on the ground that it was not shown that any credits claimed to be not allowed, even if allowable, could affect the amounts due upon these two estates, both incumbered beyond their value by undisputed liens. But the restraining order was continued upon the other tracts of land belonging to the bankrupt. The commissioners of the state court thereupon readvertised the two named estates for sale. Against this order of the district court an appeal was taken to the supervisory power of the circuit court, and after elaborate argument again of the case before the circuit court, that court affirmed the decree of the district court. To this decree of affirmation by the circuit court no appeal has been or can be taken to the supreme court of the United States. But the assignees of the bankrupt went before the judge of the circuit court of Culpeper county with a bill of injunction setting out an ex parte statement of facts, and suppressing the fact that the cause had been twice heard and decided in the district and circuit courts of the United States, and asking of this state court an injunction against the sale about to be made by the commissioners of the circuit court of Spottsylvania. Injunctions under the practice in the state courts are allowed on ex parte motion without notice to the adverse party; and so, on this prayer for an injunction, the Culpeper circuit judge awarded an injunction against the order of the Spottsylvania circuit judge. This order having been obtained by assignees in bankruptcy, who are officers of the United States court and under its control, upon a sworn statement, suppressing the fact that the cause had been twice heard and decided against the prayer of their petition, the bankrupt court made an order on April 10th, 1874, requiring these assignees at once to dismiss their bill of injunction in the state court, and to appear in Richmond on the 5th of May, 1874, to show cause why they should not be removed as assignees and why they should not be attached for contempt. On the return day of the order to show cause, the assignees purged themselves of contempt; but THE COURT nevertheless removed them from office, and appointed another assignee of this bankrupt's estate.

Case No. 12,979.

In re SMITH et al.

Ex parte AUGUST.

[2 Hughes, 307.] [1]

Circuit and District Courts, E. D. Virginia. Feb., 1874.

HOMESTEAD EXEMPTION — PARTNERSHIP ASSETS — ALIENATION—PURCHASER.

1. The homestead exemption allowed by the laws of Virginia to housekeepers and heads of families cannot be set apart out of the assets of a partnership of which the housekeeper or head of family is a member.

2. Property set apart as a homestead under the laws of Virginia cannot be alienated by a husband without the joint act of his wife. Code 1873, §§ 9, 11, 12, pp. 1171-1173.

3. A purchaser of property improperly exempted to the vendor of it, and sold by him without the joint action of his wife, takes no title, and will be required on proper application to relinquish the property.

[4. Cited in Re McKenna, 9 Fed. 29, to the point that a summary petition to recover possession of property withheld by the bankrupt is the proper remedy for the assignee, and not a plenary suit by bill, or an action at law.]

The assignee in bankruptcy [B. T. August] petitioned for a restitution of property improperly taken by the bankrupts [Smith & McCurdy] in lieu of homestead exemptions, and sold by them to a purchaser who was cognizant of the facts affecting the title to the property at the time of his purchase.

The bankrupts were partners, and dealers in house-furnishing articles, chinaware, and the like goods, on Broad street, Richmond, Virginia. They filed their petition in voluntary bankruptcy on the 14th of July, 1873, and on that day were adjudicated bankrupts. They surrendered no individual property, and no other property, except their stock of goods, the cost price of which was about $5,000. They reported debts in their schedules to the amount of about $5,700. The stock of goods would seem to have been unpaid for. Nevertheless, they filed a petition on the 18th of July setting forth that they were householders and heads of families, and claiming, besides other exemptions, that given to heads of families to the amount for each of $2,000. On the same paper containing their petition for the homestead, and on the same day, the district court (Judge Underwood) made an order appointing two appraisers "to value and set apart to the bankrupts the amount of property allowed them by the constitution of Virginia, to wit, $2,000 each, or such part thereof as they may have;" and the order further directed "that, until said appraisement, the said Smith & McCurdy shall remain custodians of their property." This was all that was contained in the order of the district court of the 18th of July, 1873. But the order was illegal in the implication it carried, that a homestead ex-

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

emption could be allowed out of social assets at all, and out of property the purchase-money for which had not been paid.

The appraisement was made, and was reported on the 19th of July. No proceedings were afterward had in court to ascertain whether the goods so appraised and set apart had been paid for, which was a constitutional prerequisite to their being available as an exemption to the head of a family. The appraisers reported that the value of the whole property was $3,000, and that they had set aside to each of the bankrupts goods to the value of $1,500; but no separate inventory of the articles set apart to each was then or at any time afterwards made, according to the requirements of the Virginia act of assembly relating to such exemptions. In fact, the report of the appraisers was not true in asserting that they "had set aside goods to the value of $1,500 to each;" for there was no such division or separation of the stock of goods at all. Being then mere custodians of the goods under the order of the court, before any of the steps had been taken which were necessary under the Virginia act of assembly to give power to either of these heads of families to alienate the goods thus designated as an exemption in lieu of a homestead, their wives, if they had any, not joining in the disposal of them as that act requires of property exempted in lieu of the homestead, these bankrupts went on to sell the stock of goods, as if the order of the court and the action of the appraisers which had been described had vested the property in them with unrestricted power to sell. They sold for awhile at private sale from the storehouse, on Broad street, which they had occupied; and on the 7th and 8th August they closed out the stock at auction. On the 9th the assignee in bankruptcy was appointed. The principal purchaser of this stock of goods was C. L. Foster, who had been acquainted for a few months with McCurdy, and was brother-in-law of Smith, the two having married sisters. Foster bought at private sale to the extent of $1,212, and then at auction to the amount of $336, his whole purchase amounting to $1,548, or more than half the gross proceeds of the stock of goods. He sent these goods to the auction house of Redwood & Crenshaw, Main street, Richmond, and Smith went down there to act as auctioneer or crier for that firm, the goods of Foster being placed in his custody, and Foster giving him a power of attorney to sell them. Foster was not a merchant and not a dealer in such goods. He describes himself as a builder of railroads and as a collector of taxes in the township of Buckingham county, Virginia, in which he lives; and says that in August, when this purchase was made, he was writing in the county treasurer's office in Buckingham and in the bank at Buckingham courthouse.

On October 30th, 1873, the circuit court of the United States, sitting here, made an order denying the exemption to the said bankrupts, reversing and setting aside the order of the district court of July 18th, and directing the district court to proceed to collect the assets which had been set aside as described. On the 2d of February, 1874, the assignee in this case, B. T. August, filed his petition in this court, praying that Smith and Foster might be made parties thereto, and required to show cause why the goods in the possession of Smith, at Redwood & Crenshaw's, claimed by Foster as his property, should not be delivered to the assignee. Previously, on the 20th of January, this court, on affidavit by the assignee that these goods had been secreted and were in the possession of Redwood & Crenshaw, had ordered the marshal to take possession of them, and they are now in the custody of that officer, subject to the order of this court. On February 20th Foster filed his answer to the assignee's petition, in which he claims that he purchased these goods, for full consideration, of Smith & McCurdy, and paid for them. In this answer Foster alleges that after this property had been set apart to Smith & McCurdy, as has been described, "and had been delivered to them as their exemption or household, in pursuance of the order of said United States district court, or the judge thereof, the said Smith & McCurdy had and held possession thereof as they rightfully and lawfully might do; and that afterwards said Smith & McCurdy, as owners thereof, made sale thereof for their own benefit, etc., etc., etc.; and that this respondent having knowledge of the order and decision of said court or judge, and in full reliance, etc., purchased," etc., etc. In his deposition taken before the commissioner, Foster says that when he made the purchase he was advised of the exemption of homestead allowed to the bankrupts out of this stock of goods, by order, etc.; adding distinctly, "I saw the order itself." He claims that the sale to him was a valid sale; that it was bona fide on his part; that the goods are lawfully his own, and that they cannot now be made assets in the hands of the assignee. There is no denial of the identity of the goods at Redwood & Crenshaw's with those bought by Foster of Smith & McCurdy. A portion of the original purchase has indeed been sold; but there are left of them goods to the value of about $1,000, according to Smith, and of $1,206 or $1,400 according to Foster.

John B. Young, for assignee.

James Neeson, for purchaser, C. L. Foster.

HUGHES, District Judge. It is unnecessary to inquire whether the purchase of Foster was in good faith. Were the bona fides perfect on his part, it could not be sustained. Smith & McCurdy had no power, either under the order of the district court, given on the 18th July, or under the law of Virginia relating to the homestead, to sell the goods.

Foster confessedly had knowledge that these goods were set apart and exempted in lieu of the homstead. He claims to have seen the order. He knew that the order treated the goods as property thus exempted. He knew that it did not, in its terms or purport, give power to Smith & McCurdy to alienate them. He was bound to have knowledge that the laws of Virginia expressly forbade the alienation of personal property exempted in lieu of the homestead except by the joint act of the husband and wife. Smith & McCurdy, not being the owners of the property, and Foster having notice of the fact, it cannot be claimed that their sale to him was valid to pass a title in the goods. That the order of the district court gave power to Smith & McCurdy to sell the goods cannot be pretended. The only effect of that order, as far as its terms go, was to fix the character of the exempted property upon the goods. It was afterwards, at some future time, for the court to ascertain whether the purchase-money for the property had been paid, and whether it was in other respects property which could be held as an exemption; and if so, then to prescribe the manner in which the property should be held and managed for the benefit of the family. Yet before any other action of the court in these respects could be had, these bankrupts, in a few days, sold the whole stock of goods as their own absolute property, and Foster bought part of them, having before his eyes the order of the court giving no such power, but fixing the character of this property. There being nothing in this order of the 18th July giving Smith & McCurdy power to sell, was there anything in the laws of Virginia on the subject of homestead conferring a power to sell on the men who had custody of it under the order of court? This order expressly refers to the constitution of Virginia.

The eleventh article of this constitution provides for the exemption of a homestead to the householder or head of a family. In section 5 it empowers the legislature to prescribe by law in what manner and on what conditions the head of a family may hold "for the benefit of himself and family such personal property" as may be exempted. The legislature accordingly did prescribe how property should be set apart and held as an exemption. It first gives directions in regard to real estate, among other things providing, in section 7, c. 183, of the Code, that the homestead shall not be alienated except by the joint act of husband and wife, if both are alive. It then, in section 11, directs how personalty may be set apart as an exemption; and in section 12 directs that an exemption in personalty shall be held in the same manner, under the same limitations, and subject to the same conditions, as to incumbrance and sale, and in all other respects as had been provided in regard to a homestead in realty. Plainly, under these provisions of the Virgina law of homestead, these men, Smith & McCurdy, had no title as individuals to this property; and no title in it whatever under the order of court, except as an exemption for the benefit of the family, in their character of heads of families, without power to alienate except jointly with their wives, and then only for the purpose of reinvestment in some other property to be held as an exemption. Therefore Smith & McCurdy had no power to sell. Foster had full notice that this was a family exemption, and was bound to know the provisions of the laws of Virginia denying to them that power. It is a plain principle of law that a person who buys goods (otherwise than in market overt) acquires no better title than that possessed by his immediate vendor, even though such purchaser buys bona fide, without notice of any infirmity of title on the part of his vendor. Here Foster bought with full notice of facts which, as he was bound in law to know, negative the right of the vendors to sell. He therefore acquired no right to the goods by his purchase. To allow such a purchase as this to stand would be to establish a pernicious precedent.

The goods in question must therefore be taken possession of by the assignee as part of the assets of these bankrupts.

Case No. 12,980.

In re SMITH.

[11 Int. Rev. Rec. 78.]

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

FORFEITURE—BREWERY—FRAUDULENT MANUFACTURE.

In the case of the brewery of Mrs. Clarissa Smith, at Kingston, a verdict was given on the 28th of February against the claimants, the jury refusing to believe the assertion of the defendant's witnesses, that the "blotter," extracts from which were introduced by the prosecution, was merely a memorandum book kept by the foreman in the absence of the superintendent, and that the entries in it were faithfully transferred to the book required to be kept by law. On the contrary, they held that the amounts of ale entered in the "blotter" were fraudulently manufactured, and consequently the brewery and contents, appraised at $1,700, were declared forfeited.

Case No. 12,981.

In re SMITH et al.

[2 Lowell, 69.] [1]

District Court. D. Massachusetts. Sept., 1871.

BANKRUPTCY—TRADER—RAILROAD CONTRACTOR.

One who contracts with a railroad company to grade and build its road is not, by virtue of such contract and his acts under it, a merchant or trader within section 39 of the bankrupt act [of 1867 (14 Stat. 536)], and the suspension of his commercial paper is, therefore, not an act of bankruptcy.

[Cited in Daniels v. Palmer, 35 Minn. 350, 29 N. W. 164.]

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

A creditor's petition represented that the defendants were joint traders, who had fraudulently suspended payment of their commercial paper. It was proved that they were contractors to build the Ware River Railroad, and were to grade the road, put down the ties and rails, and build the stations; receiving money, bonds, and shares of the company, in certain proportions, as the work proceeded. Whether they bought any materials on credit did not appear. They needed money to carry on the work; and raised it in part by acceptances of the petitioner's drafts, which he signed for a consideration, and some of which he had been obliged to take up.

G. F. Verry, for petitioner.
J. W. Allen, for respondents.

LOWELL, District Judge. The defendants are joint contractors for building a railroad in the Western part of this state; and the main point of discussion has been, whether, as such contractors, they are traders within the thirty-ninth section of the bankrupt act, so that the dishonor of their commercial paper, continued for fourteen days, is an act of bankruptcy. The most usual meaning of "trader" is one who buys and sells goods. In a writ or deed or indictment it would not be regular to describe one as a trader whose business it was to build or undertake works upon the land of other people. Bouvier, in his Law Dictionary, defines "trader" as one who makes it his business to buy merchandise, or goods and chattels, and to sell the same for the purpose of making a profit. In the later statutes of bankruptcy in England, a long alphabetical list of the persons who shall be deemed traders is made a part of the act; and it may be found necessary for congress to enlarge the description of those the dishonor of whose promises shall be an act of bankruptcy, since this has been found a simple and safe test of insolvency; and they have already, by the amendment of 14th July, 1870 [16 Stat. 276], added manufacturers, brokers, and miners. In respect to most manufacturers, the act is, perhaps, only declaratory; for they have been held to be traders, since they buy goods and sell them again, though after changing the form and value of the articles. In re Eeles [Case No. 4,302]; Wakeman v. Hoyt [Id. 17,051]. The amendment seems to show that congress had a doubt whether even manufacturers could in all cases come within the description of merchants and traders; and certainly miners would not. The cases under the earlier English statutes were many, and not altogether harmonious. Whether stocks were chattels, and whether certain acts amounted to buying and certain others to selling, was disputed; but it was agreed, that to be a trader one must both buy and sell chattels or merchandise. A clergyman who was largely engaged in draining his lands was not a trader; because, though he bought goods for use in his operations, he did not sell again. Hankey v. Jones, Cowp. 745. And see Com. Dig. "Bankrupt," B; Henley (Eden) Bankr. c. 1; Ex parte Gibbs, 2 Rose, 38; Patten v. Browne, 7 Taunt. 409. It was decided under the act of 1841 that a livery-stable keeper was not a trader. Hall v. Cooley [Case No. 5,928]. And it was so of innholders, gun-founders, and victuallers to the navy, in England. Com. Dig., ubi supra.

I am aware that neither the English statutes under which these decisions were made, nor our own laws of 1800 [1 Stat. 19] and 1841 [5 Stat. 440] had the word "trader" They used a paraphrase, substantially this: Any person using the trade of merchandise in gross or by retail. But, in all the arguments and decisions, the word "trader" was taken to express the exact equivalent of the statute phrase; and such seems to be its ordinary and proper meaning. "Trade" has a secondary sense, by which almost any occupation is called a man's trade; as in the proverb, "two of a trade can never agree:" but this latitude has not been extended to "trader." If, then, it be true, as was ably argued, that all who have occasion to borrow money on their notes or acceptances are within the mischief of the statute, I must, nevertheless, be governed by its language, when it is clear. I have heretofore ruled to the jury, that a dealer in real estate, and a builder, were not traders and tradesmen under sections 29 and 39 of the statute; and I consider those rulings, though sound, much more doubtful than one which denies the name to persons who have one contract or several for grading and building a railroad, to be paid for by the company who own the land and franchise. Petition dismissed.

Case No. 12,982.

In re SMITH.

[1 McA. Pat. Cas. 255.]

Circuit Court, District of Columbia. May, 1853.

PATENTS—PATENTABLE INVENTION—ANALOGOUS USE—COMBINATIONS—ANTICIPATION—LETTER-FILES.

[1. A mere analogous use is not patentable; but where a new or improved manufacture is produced by new contrivances, combinations, or arrangements, a new principle may be constituted, and the application or practice of old things produce a new result. The usual test is whether the production of the article is as good in quality at a cheaper rate, or better in quality at the same rate, or with both these consequences partially combined. The fact that a combination appears to be simple, and the invention not very great, is not a sufficient objection, if the invention be not frivolous and foolish.]

[2. A letter-file, consisting of the combination of a series of narrow leaves bound in the form

of a book with larger covers, the leaves being coated on one side with adhesive material before leaving the maker's hands, is not anticipated by the well-known device of fastening letters to marginal leaves with wafers, paste, gum, etc., or by the known practice of preparing adhesive paper so that it may be always ready for use by merely wetting the surface.]

[This was an appeal by Hamilton L. Smith from the refusal of the commissioner of patents to grant him a patent for an alleged invention relating to letter-files.]

The application under consideration in this case afterwards issued as patent No. 9,776, June 7th, 1853.

P. H. Watson, for appellant.

MORSELL, Circuit Judge. On the 23d of November, 1850, the appellant made his application for letters-patent for an improvement in paper or letter-files, with his specification, drawing, &c. This specification was amended as now presented in the form required by law. It states that he had invented a new and useful article of manufacture, to wit, a paper-file, giving a description thereof, in which he states that his letter-file consists of a series of narrow leaves which may be numbered and are bound together in the form of a book. The outer margins of the narrow leaves are coated on one side with a glutinous or adhesive preparation, common glue, or a solution of gum arabic, for example, in such manner that by simply moistening the glue and applying the margins of letters thereto they are secured permanently to the leaves in the order in which they have been respectively applied. As the boards or sides of the book are of sufficient size to cover ordinary letters when unfolded, the latter, when filed, are protected from injury, and can be conveniently referred to as the pages of a book. He states, also, that he had bound up a blank index with prepared leaves.

The argument before the commissioner was, in substance, that he merely claimed the exclusive right to manufacture and sell files with prepared adhesive leaves, which he contended was a new and useful discovery in the connection as stated in the specification, upon the ground that the paste or adhesive matter could be applied to the leaves before the files had left the hands of the manufacturer much more cheaply and conveniently than it could be applied while the files were in use; and, by such means, those who should use the file would be saved both cost and trouble in the preparation of the leaves, and in addition would be enabled to put up letters with far greater facility than they could be put up in any other file heretofore known; that Smith had, therefore, produced a new article of trade and an improvement upon all others, enabling the user to file letters at less cost and with greater facility and convenience than could be done before. The commissioner, after having examined into and considered the subject of the application, refused to grant the patent, and rejected said application upon the ground that the letter-folder was found and admitted to be old, with the exception of the adhesive preparation upon the leaf margins; and this preparation was also admitted to be old, and used in a similar manner for other purposes. The appellant having stated to the commissioner that he was under a misapprehension as to the extent of his admissions, the commissioner, in a letter of the 19th of February, 1851, to said Smith, says: "It has not at any time been admitted or asserted that a letter-file with 'prepared adhesive leaves' has been known before, and the official letter of yesterday (containing that part of the report) will not admit of that construction." And from another part of the commissioner's report contained in his letter of July 16th, 1851, it appears that the analogous use alluded to by him is thus stated: "The letters have usually been attached to the marginal leaves of such letter-folders by the common and well-known devices of stitching and fastening with wafers, paste, gum, &c. It is also an old and well-known device to prepare adhesive paper so that the paper may always be ready for use by merely wetting its surface, &c. The commissioner concludes that it is a clear case of the substitution of one well-known mode of attachment in a letter-folder for another, and as such unpatentable."

The reasons of appeal to which the report is intended to be an answer are, substantially, first, that the references given by the office for refusing a patent were not applicable, separately or altogether, to his invention, and would not be used for the same purpose; second, that the case did not come within any of the conditions of the seventh section of the act of congress of July the 4th, 1836 [5 Stat. 119], which authorize its rejection. Upon this state of the case, together with all the original papers, the appeal is brought before me; and on the day and place appointed for the hearing the appellant appeared by his counsel, and an examiner on the part of the office. A written argument was received from the appellant's counsel, to which no other reply was given.

The argument relies on the oath of the party himself as prima-facie evidence that he is the first and original inventor or discoverer of the said improvement for which he solicits a patent. It is contended that the commissioner sums up by admitting that it does not appear that the precise combination of parts for such a purpose had been used before. The applicant states more explicitly the combination of which his improvement forms a part; that it is composed of a back like the back of a book; of a series of narrow leaves bound into this back, which are each coated on one side with some material which, on the application of

moisture, will instantly soften and become sufficiently adhesive to join or cement to the coated margin a letter or other paper that may be applied to it—in other words, the cement, the marginal leaves, and the back, to bind them. These constitute a definite and precise combination of three things.

The peculiar excellence and advantage of this improved mode, in the facilities attending it, the saving of cost, and otherwise, make it of sufficient utility and benefit to business men and the public to comply with the requisite of the statute in that respect; and it is not, and cannot be, denied that in the combination with which it is connected it is certainly distinguishable from everything of the kind that ever was known before, and is new in that combination. Analogous use and small amount of invention seem to be the ground upon which the decision of the commissioner is placed. There is some reason to believe that the commissioner has in some measure misapprehended the rule of law on this subject, from the application which he has made of it to this case. The rule, as I understand it, is that a mere analogous use is not patentable; but where a new or improved manufacture is produced by new contrivances, combinations, or arrangements, a new principle may be constituted, and the application or practice of old things will of course be new also in the result. The usual test is whether the production of the article is as good in quality at a cheaper rate, or better in quality at the same rate, or with both these consequences partially combined; and so is the like principle in mechanism. It is true the combination appears to be simple and the invention not very great, but that is not a sufficient objection if the invention be not frivolous and foolish.

I do not think it will be necessary to refer to authorities for these principles, as I suppose the mention of the principles will be enough to bring them to the recollection of the learned commissioner. One only will I refer to, to be found in Park v. Little [Case No. 10,715]. In that case the patent was for the application of bells to fire-engines, to be rung by the motion of the carriage, for the purpose of alarms or notice, instead of manual action. Here there was the use of old things; and the arrangement or contrivance, the invention which was determined to be patentable, consisted in the modus operandi —the motion of the engine instead of direct manual action. It was thought also sufficiently useful. I cite this case for the principle of it. In this case the whole preparation is ready as soon as it leaves the hands of the manufacturer, at much less expense, and very beneficial to the public as an article of trade, especially to business men.

I am therefore of opinion that the commissioner erred in refusing to grant the patent in this case, and that the said decision ought to be, and is hereby, reversed.

Case No. 12,983.

In re SMITH.

[1 N. B. R. 214;[1] Bank. Reg. Supp. 46.]

District Court, D. Massachusetts. July 30, 1867.

BANKRUPTCY—PARTNERSHIP—REMOVAL OF CASE.

In the United States district court, before Judge Lowell of Boston, a hearing was had on the petition of Moses C. Smith, bankrupt, to have the jurisdiction of his case transferred from said court to the district court of New Hampshire. It appeared that the petitioner, a resident of West Newbury, Mass., had been carrying on business, in Hampstead, New Hampshire, in company with Nathaniel C. Smith of that town, under the firm name of N. C. & M. C. Smith. The firm had failed; his partner had filed in the district court of New Hampshire, on the 20th of last June, a petition for adjudication in bankruptcy. The bankrupt act provides, that all cases under it shall be tried in the district where the partners reside, and, as in this case, each partner resides in a different state, the same case would have to be tried in two different courts. The petitioner, therefore, prayed that further proceedings be stayed, and the court of New Hampshire be allowed to have exclusive jurisdiction over the same. After hearing the argument of the counsel, Judge Lowell ordered that the proceedings be stayed until further orders.

Case No. 12,984.

In re SMITH.

[2 N. B. R. 297 (Quarto, 98); 1 Chi. Leg. News, 123][2]

District Court, S. D. New York. Dec. 1, 1868.

BANKRUPTCY—PETITION—RELIEF—APPEARANCE.

1. A creditor may petition the court for relief, to be paid a judgment against the bankrupt, out of moneys in the hands of the assignee in bankruptcy, but the proper way to bring the creditor into the case is by petition, setting forth the facts on which he relies for relief, and praying for the specific relief he seeks.

[Cited in Re Frizelle, Case No. 5,133.]

2. In the first instance, seeking affirmative relief, he must come in person and not by attorney.

[In the matter of John Ogden Smith, a bankrupt. See Case No. 12,971.]

W. A. Coursen, for the motion.

G. De F. Lord, for assignee.

BLATCHFORD, District Judge. In this case the attorney for one Matthew P. Read moves, on his behalf, on an affidavit made by such attorney, and on notice to the assignee in bankruptcy of the bankrupt, that such as-

[1] [Reprinted from 1 N. B. R. 214 by permission.]

[2] [Reprinted from 2 N. B. R. 297 (Quarto, 98), by permission. 1 Chi. Leg. News, 123, contains only a partial report.]

signee be directed to pay to said Read or to his attorney the amount of a certain judgment recovered by said Read, against the bankrupt, out of the moneys in the hands of such assignee held by him as such. Read claims to be paid the money adversely to the assignee, and the assignee claims to hold the money adversely to Read. This motion is not a suit in equity, brought under the second section of the act [of 1867 (14 Stat. 517)], as an independent original suit, but is sought to be made a part of the matter in bankruptcy, under the first section. I concur in the view of Judge Benedict in Re Kerosene Oil Co. [Case No. 7,725] (Eastern Dist. of N. Y., Nov., 1868), that such relief as is applied for on this motion may be obtained upon a petition in the bankrupt matter. There is, however, no such petition now before the court. Read should sign and verify a petition setting forth the facts on which he relies for relief, and praying for the specific relief he seeks. Coming into court as he does in an original manner, seeking affirmative relief, and not brought in by another party, he must come in in person in the first instance, and not by attorney. For these reasons the motion is denied.

Case No. 12,985.

In re SMITH et al.

[5 N. B. R. (1871) 20.] [1]

District Court, N. D. New York.

BANKRUPTCY — DISCHARGE — OPPOSITION — SPECIFICATIONS — PLEADING.

1. A creditor who does not appear upon the return day of the order to show cause why discharge should not be granted, has no standing in court and cannot subsequently file specifications against bankrupt's discharge.

2. It is not necessary to state in specifications that the persons named to whom fraudulent payments are stated to have been made, were creditors of the bankrupt.

3. False swearing, if alleged, must be charged to have been wilful.

4. The strictness of common law pleading is not required in creditors' specifications, but the bankrupt is entitled to such particularity of statement as will give him reasonable notice of what is expected to be proven against him.

[In the matter of Smith & Bickford, bankrupts.]

Geo. Gorham, for the motion.

J. M. Smith, opposed.

HALL, District Judge. The bankrupts in this case have made an application for an order striking out the specifications filed by George D. Russell & Co. and William P. McLavem & Co., and for their final discharge. No appearance for or by George D. Russell & Co. was entered on the day on which the order to show cause was returnable, and on which it was referred to the register to ascertain and report whether the bankrupts had in all things conformed to the provisions of the bankruptcy act, and were entitled to their discharge, and their specifications must therefore be stricken out. The appearance of McLavem & Co. was duly entered and in proper time, and their specifications were filed within the ten days allowed for that purpose by the general orders in bankruptcy; but it was insisted that these specifications were insufficient, and should, for that reason, be stricken out. These specifications, from the first to the tenth, both inclusive, are based upon the express provisions of the twenty-ninth section of the bankrupt act, that no discharge shall be granted if the bankrupt has, within the time limited in the act, "given any fraudulent preference" contrary to its provisions, "or made any fraudulent payment, gift, transfer, conveyance or assignment of any part of his property," or "has been guilty of any frauds" whatever, contrary to the true intent of the act.

The first of these specifications alleges that the bankrupts, being insolvent, made fraudulent payments to the firm of Smith, Wemple & Co., at Albany, of the sum of one hundred thousand dollars and over, on divers days from the twenty-first day of September, 1869, to and including the fourteenth day of the succeeding month. Those from the second to the tenth, both inclusive, allege in substance that the bankrupts, being insolvent, and with the intent and design on their part to give a preference to the parties or persons particularly named in such specifications respectively, and in fraud of the provisions of the bankrupt act, did, at or about certain times or in certain months named in such specifications, (and being within four months of the time of filing the original petition), pay certain sums of money—some specifically and some generally stated—to certain persons and firms therein named, giving their places of residences or stating that they are unknown to the opposing creditors.

It was insisted that these specifications were bad because they did not allege that these payments were made in contemplation of becoming bankrupt, nor expressly allege that the persons to whom they were made were creditors of the bankrupt. The provisions of the bankrupt act, before referred to, on which these specifications are based, do not, in express terms, require that the fraudulent preference given, or fraudulent payments or transfers made, shall be given or made to a creditor of the bankrupt, or even to one to whom he was or might become liable, though it is probable that cases of that character are those intended to be embraced and provided for. Fraudulent preferences given, and fraudulent payments and transfers made, both "in fraud of the provisions of the bankrupt act," are expressly and distinctly alleged, and the obvious and ordinary construction of these allegations, under the legal rules of construction which require a similar interpretation of the language of the provisions of the bankrupt act

[1] [Reprinted by permission.]

on which these specifications are based, is, that these preferences were given, and fraudulent payments and transfers made, to the persons named as creditors, real or supposed, of the bankrupts, or as persons to whom they were or might become liable. The language of the specifications in this respect is in substance like that of the provisions referred to. The motion to strike out these specifications is therefore denied.

The eleventh and twelfth specifications may be literally true, and yet the errors or omissions alleged, may have been the result of accident, honest mistake or want of knowledge or information, and there is no allegation of wilful false swearing, wilful or intended concealment, or other fraud or unlawful intent. These specifications are therefore considered insufficient.

The thirteenth specification is too general, indefinite and uncertain, especially as no want of specific knowledge or information is averred, or any other excuse given for these apparent defects. The strictness of common law pleading is not required in these cases, but the bankrupt is entitled to such particularity of statement as to give him reasonable notice of what is expected to be proved against him; and in this respect the thirteenth specification is deemed objectionable. The same objection might also be urged against the eleventh and twelfth specifications, and perhaps the first ten of the specifitions might also have been made more specific and certain. They are, however, considered sufficient to give to the bankrupts the information to which they are entitled, of the character and extent of the proof intended to be made under these specifications, especially as such proof must relate to the acts of the bankrupt and to matters which must be supposed to be peculiarly within their knowledge.

The eleventh, twelfth and thirteenth specifications must be stricken out, unless the opposing creditors elect to pay fifteen dollars costs, and amend the same within fifteen days.

Case No. 12,986.

In re SMITH.

[8 N. B. R. 401; 6 Chi. Leg. News. 33; 5 Leg. Gaz. 350; 18 Int. Rev. Rec. 167.] [1]

District Court, N. D. Georgia. Oct. 3, 1873.

BANKRUPTCY — CONSTITUTIONALITY OF AMENDED ACT—EXEMPTIONS.

1. The amendment to the bankrupt act of March 3d, 1873 [17 Stat. 577], *held* constitutional in this case.

[Cited in Re Jordan, Case No. 7,515; Darling v. Berry, 13 Fed. 670.]

2. A bankrupt who files his petition after the passage of Act March 3, 1873, is entitled to have the assignee set apart to him the exemptions "as existing in the place of his domicil on the 1st day of January, 1871," even though there are judgments in force rendered prior to the passage of the state act giving the increased exemption.

[Cited in brief in Wooster v. Bullock, 52 Vt. 50.]

3. The amendment of March 3, 1873, does not destroy the uniformity of the bankrupt act.

4. Congress has power to destroy existing contracts and to release liens held for their enforcement.

[Cited in Re Everitt, Case No. 4,579.]

[In the matter of John W. Smith.]

Peeples & Howell, for assignee.

Boynton & Dismuke, for bankrupt.

ERSKINE, District Judge. This petition in bankruptcy was filed in this court on the 24th of May, 1873. The assignee, because there are judgments of force against the bankrupt, rendered in the state courts prior to July 21st, 1868, refused to set apart other property than that allowed by the exemption laws 1864. The bankrupt claims the exemption allowed by the constitution and laws of Georgia as existing in the year 1871. The register, after argument before him, held that the bankrupt was entitled to the benefit of the exemption laws of this state as they stood in 1871, and made the following order: "Let the assignee set apart as exempted property: First. The necessary household and kitchen furniture, and such other articles and necessaries of the bankrupt as he shall designate and set apart, having reference in the amount to the family, condition and circumstances of the bankrupt, but altogether not to exceed in value the sum of five hundred dollars. Second. The necessary wearing apparel of the bankrupt and that of wife and children, without valuation. Third. The uniform, arms, and equipments of a soldier in the militia, if he be such, or if he is in the service of the United States. Fourth. Such other property as now is exempt from attachment, or seizure, or levy on execution by the laws of the United States. Fifth. Real estate to the value of two thousand dollars in specie, and personal property to the value of one thousand dollars in specie."

The objections of the assignee were confined to the fifth item of the register's order. The validity of certain portions of the fourteenth section of the bankrupt act of March 2, 1867 [14 Stat. 517], and the amendatory act of June 8, 1872 [17 Stat. 334], and that of March 3, 1873, is questioned. But counsel for the assignee has pressed his argument with more directness against the constitutionality of the act of March 3, 1873. The fourteenth section of the original act exempts, in addition to certain property of various kinds excepted from the provisions of this section, "such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the

[1] [Reprinted from 8 N. B. R. 401, by permission. 18 Int. Rev. Rec. 167, contains only a partial report.]

laws of the state in which the bankrupt has his domicil at the time of the commencement of proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year 1864." The amendment of June 8, 1872, struck out the words "1864," and inserted in lieu thereof "1871." To this followed the amendatory or declaratory act of March 3, 1873, (just referred to) which declares "that the exemptions allowed the bankrupt by said amendatory act" (of June 8, 1872,) "should, and it is hereby enacted that they shall be the amount allowed by the constitution and laws of each state, respectively, as existing in the year 1871, and that such exemptions be valid against debts contracted before the adoption and passage of such state constitution and laws, as well as those contracted after the same, and against liens, by judgment or decree of any state court, any decision of such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding."

The bankrupt act of March 2, 1867, the amendatory acts, and the declaratory act of 1873, make but one system of law; they are therefore to be taken together, and interpreted and construed as one entire law or statute. One of the objections taken by counsel for the assignee to the constitutionality of this law, was that it does not, in certain of its provisions, possess the element of uniformity as required by the fourth clause of the eighth section of the first article of the national constitution—the clause which confers on congress the power "to establish uniform laws on the subject of bankruptcies throughout the United States"—and the main reason presented was that it gave a bankrupt in one state property, as exempted from the pursuit of his creditors, to a larger or lesser amount or value than it bestowed upon a bankrupt in another state, and he illustrated his theory by examples: If the bankrupt, he argued, is domiciled in Georgia, he will (at least if the head of a family) be entitled to an exemption to the value of two thousand dollars in specie in realty, and one thousand dollars in specie in personalty; if the bankrupt is a resident of Mississippi, he would be entitled to property, as exempted, to the value of four thousand dollars; if of California to a still larger exemption, and if of Maine to an exemption far less in value than that allowed in any of the states named. This diversity, as was urged, showed clearly the want of uniformity in the statute, and, consequently, its repugnancy to the constitution of the United States.

The argument is plausible and apparently sound; but when the mind rises from effects to causes, the fallacy of the reasoning is revealed: for congress has never claimed the power, under this or any other provision of the constitution, to annul state exemption laws, or to mould them to a uniformity and equality throughout the United States. From this brief statement, it will, I apprehend, be seen that the words "uniform laws," as used in this clause of the constitution, have no reference to, or in anywise affect, the exemption laws of the several states, no matter how variant they may be. And this view is not without authority to support it. In Re Beckerford [Case No. 1,209], argued before Mr. Justice Miller of the supreme court of the United States, and Krekel, J., in the federal circuit court for the Western district of Missouri, this question came up for decision, and Judge Krekel, in delivering the opinion of the court, said, "It is insisted that the fourteenth section, already cited, having adopted the exemption laws of the state in which the bankrupt is domiciled, and these exemptions having no regard to uniformity, violate the constitutional provision authorizing uniform laws throughout the United States to be passed. If congress saw cause to pass bankrupt laws under the grant of power referred to, the injunction is that they shall be uniform throughout the United States. So far as the distribution of the bankrupt's assets—the point under consideration—is concerned, the law is uniform. * * * Though the states vary in the extent of their exemptions, yet what remains the bankrupt law distributes equally among the creditors." A like view of this question was taken by Rives, J., in Re Wylie, 5 Am. Law T. 330, and in Re Kean [Case No. 7,630]. So, likewise, by Dick, J., in Re Jordan [Id. 7,514]. See, also, Bump Bankr. (6th Ed.) 135. If the reason which I have advanced is too narrow to show that the bankrupt act of 1867, and the amendments cited are in harmony with the clause of the constitution requiring laws on the subject of the bankruptcies to be uniform throughout the United States, then I am content to rest satisfied upon the broader reason of the authorities quoted or referred to. A bankrupt system or law must be regarded as comprehensive and not partial in its operation; so, too, it should be accompanied with enlightened principles of equity, that honesty may be encouraged and protected, and fraud suppressed. True, it is a general tenet of ethics, that the author of any damage ought in conscience to repair it. But if this rule be extended to the case of a debtor who makes default of payment at the time appointed, by means whereof the creditor sustains some extraordinary detriment, a strict application of the maxim would in many cases be unjust; for it must be also recollected that men should not be held accountable for unforeseen contingencies—contingencies proceeding from a concurrence of conflicting circumstances over which the debtor could have had no control. No one can peruse the declaratory act of March 3, 1873,—and which it may be said, re-enacts the amendatory act of June 8, 1872,—without perceiving the prominence of its retrospective features, also its power to impair the obligation of contracts, and to displace liens created by judgments and decrees rendered in state courts. But if there be no con-

stitutional infirmity in this enactment it must be taken as absolute and uncontrollable. And there is nothing in the federal constitution which precludes congress from passing laws impairing the obligation of contracts; the inhibition contained in the first clause of the tenth section of the first articles of that instrument is confined to the states respectively. White v. Hart, 13 Wall. [80 U. S.] 646; Gunn v. Barry [15 Wall. (82 U. S.) 610]. In modern days laws of bankruptcy are considered as laws calculated for the benefit of trade, in its largest sense, and are founded on principles of humanity as well as justice; and being for the good of trade, the thought suggests itself, that if a national bankrupt law did not possess the element of retrospectiveness, and the power to impair, or, if necessary, to discharge the obligation of antecedent contracts, it would but half perform its functions. And, indeed, it does not strike my mind that it would be a purely speculative postulate to say, that if the constitution had not expressly granted to congress the power to establish laws on the subject of bankruptcies; still the right of the legislature to enact laws of this nature—laws so intimately connected with the regulation of commerce at home and abroad and with manufacturing and agricultural interests—would, it seems to me, be within its legitimate powers, as an attribute of sovereignty in the nation—as essentially so as the paramount right of eminent domain, or the authority to pass embargo laws, or laws for the erection of forts, lighthouses or public buildings. But notwithstanding the expression of any theoretical ideas, the court has been guided to its conclusion solely by those reasons which were fairly deducible from the language of the constitution itself. Confiding the decision to the issues made, the validity of the general bankrupt law of 1867, the amendatory act of 1872, and also, (so far at least as the present matter in controversy is involved,) the declaratory act of 1873 is assumed, and cannot, I think, be treated as debatable.

And that I may not fall into the mischievous habit of not indicating the sources of my information I will name, and, when necessary, quote from the cases and authorities mainly consulted, to sustain the views exhibited. The fifth section of the act of congress of March 3d, 1797, (1 Stat. 512,) gave a preference to the United States in cases of insolvency, and the supreme court, in U. S. v. Fisher, 2 Cranch [6 U. S.] 358, decided the act to be constitutional; and also that it was not confined to persons accountable for public money, but extended to debtors of the government generally. In Evans v. Eaton [Case No. 4,559], Mr. Justice Washington said: "There is nothing in the constitution of the United States which forbids congress to pass laws violating the obligation of contracts, although such a power is denied to the states individually." Similar language was held by Mr. Justice McLean, in Bloomer v. Stolley [Id. 1,559]; and see Satterlee v. Matthewson, 2 Pet. [27 U. S.] 330. Chief-Justice Chase, in pronouncing the decision of the court in Hepburn v. Griswold, 8 Wall. [75 U. S.] 603, remarked that "congress has express power to enact bankrupt laws, and we do not see that a law made in the execution of any other express power, which, incidentally only, impairs the obligation of a contract, can be held to be unconstitutional for that reason." Mr. Justice Miller, in his dissenting opinion in the same case (concurred in by justices Swayne and Davis,) said that "while the constitution forbids the states to pass such laws" (laws impairing the obligation of contracts) "it does not forbid congress. On the contrary, congress is expressly authorized to establish a uniform system of bankruptcy, the essence of which is to discharge debtors from the obligation of their contracts." Mr. Justice Field, in his dissenting opinion in the Legal Tender Cases, 12 Wall. [79 U. S.] 457, said: "The only express authority for any legislation affecting the obligation of contracts is found in the power to establish a uniform system of bankruptcy, the direct object of which is to release insolvent debtors from their contracts upon the surrender of their property." Mr. Justice Strong, in giving the judgment of the court in the Legal Tender Cases, supra, said: "Nor can it be truly asserted that congress may not, by its action, indirectly impair the obligation of contracts, if by the expression be meant rendering contracts fruitless or partially fruitless. Directly it may, confessedly, by passing a bankrupt act embracing past as well as future transactions. This is obliterating contracts entirely. * * * And it is no sufficient answer to this to say it is true only when the powers exerted were expressly granted. There is no ground for any such distinction." Dick, J., in Re Jordan, and Rives, J., in Re Kean [supra], have held the act of 1873, amendatory of the general bankrupt law, constitutional. And the court is indebted also to Register Murray, for his written opinion upholding the validity of the act.

The act of 1873, as previously observed, declares it was the true intent and meaning of the act of 1872, that the exemptions "as existing in the year 1871," shall be valid against debts contracted before the adoption and passage of such state constitution and laws as well as those contracted after the same, and against liens by judgment or decree of any state court, etc. This court, in a series of cases which arose prior to the declaratory act of 1873, ruled that, under the general bankrupt act of 1867, and also under the act of 1872, state exemptions were paramount debts preexisting the passage of these acts; and none of these rulings were ever seriously questioned here. But whether, before the passage of the declaratory act of 1873, a court would have been warranted in so interpreting and construing the acts of 1867 or 1872, as to adjudge exemptions valid against liens by judgment or decree of state courts it is now too late to discuss. Congress has, however, by the act of 1873, declared the true intent and meaning of

the act of the preceding year, and, so far as the case now before me is concerned, the bankrupt having filed his petition in bankruptcy nearly two months subsequent to the passage of the act of 1873,—the court decides that the exemptions claimed by the bankrupt supplant the liens of state judgments and decrees. See Cooley, Const. Lim. (2d Ed.) 90–94, and the cases cited by that learned and accomplished jurist, and also, in Re Kean, supra.

The assignee is instructed to carry into effect the order made by Register Murray.

Affirmed.

Case No. 12,987.

In re SMITH et al.

[13 N. B. R. (1876) 500.] [1]

District Court, N. D. New York.

Bankruptcy—Individual and Partnership Assets—Expenses.

1. Where there are assets of a firm and of individual members thereof, each estate must pay its proportion of the entire expenses of administering the estate.

2. Where there are partnership assets, the firm creditors cannot share in the individual estate.

The bankrupts [Elijah E. Smith and George Smith] were co-partners under the firm name of E. E. Smith & Son, and were declared bankrupts under a petition in involuntary bankruptcy filed against the firm. The assignee filed a petition in court, inquiring whether the firm-creditors could share pari passu with the individual creditors of E. E. Smith, and alleging that there was no firm estate, and no solvent partner. An order for the individual creditors to appear and show cause was granted, and on the return day several of them appeared and joined issue, and the matter was referred to the register to take proofs, and report on the same with his opinion thereon to the court. The register filed the following report:

By D. F. GOTT, Register:

In pursuance of an order of this court bearing date April 6, 1875, in and by which I am directed to take the proofs offered by the parties, and report the same to this court, with my opinion as to whether or not the creditors who have proved their debts against the estate of the firm of E. E. Smith & Son, bankrupts, should be allowed to prove, or their present proofs stand good against the estate of Elijah E. Smith, one of said bankrupts, I respectfully report: That I have been attended by the parties and their counsel, and have taken all the evidence offered before me, which is herewith returned:

The following facts are established from the evidence:

The total receipts by the assignee from the estate of E. E. Smith & Son, are	$ 233 85
From the individual estate of Elijah E. Smith	3,162 42
From the individual estate of George Smith	nothing
Total receipts	$3,396 27
The total disbursements	1,481 19
Leaving balance in the hands of the assignee of	$1,915 08

Section 36 of the bankrupt act—section 5121, Rev. St. U. S.; [14 Stat. 534]—provides that the assignee "shall keep separate accounts of the joint stock or property of the co-partnership and of the separate estate of each member thereof, and after deducting out of the whole amount received by the assignee, the whole of the expenses and disbursements, the net proceeds of the joint estate shall be appropriated to pay the creditors of the co-partnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors." Under the provisions of this section, it is, I think, clear that where there are assets of a firm and of individual members of the firm, that each estate must pay its proportion of the entire expenses of administering the estate. This would leave in the hands of the assignee, after payment of all the expenses of administration, a fund belonging to the firm estate for distribution among the creditors of that estate. And such being the case, the firm creditors cannot share in the individual estate of Elijah E. Smith until his individual creditors are paid in full. In re McEwen [Case No. 8,783]; Story, Partn. § 380.

All which is respectfully submitted.

The assignee thereupon filed exceptions to the register's report.

Markham & Smith for the assignee, cited In re Knight, [Case No. 7,880], and cases cited; In re McEwen [supra], and cases cited; Lord Loughborough's order of March, 1794, given in 1 Mont. & A. Bankr. 748; Rules 76 and 113 under the English bankrupt act of 1869, published in Roche & H. Bankr. 523, 530; Ex parte Rutherford, 1 Rose, 201; Ex parte Longman, Id. 303.

L. C. Gardner and W. C. Ruger, for the individual creditors.

WALLACE, District Judge. Let an order be entered confirming the report of the register.

[1] [Reprinted by permission.]

Case No. 12,988.

In re SMITH.

[14 N. B. R. 432.] [1]

District Court, N. D. New York. Aug. 19, 1876.

BANKRUPTCY—EXAMINATION OF ASSIGNEE—ORDER OF REGISTER.

1. An assignee may be subpœnaed and required to testify in the same manner as any other witness, and the register has authority to make the requisite order.

2. An assignee is not subject, as of course, to an examination by any creditor whenever the latter may desire it; but will be protected against unnecessary annoyance, by refusing an application for his examination unless upon some issues regularly referred to the register.

[In the matter of Elmer C. Smith, a bankrupt.]

De L. Crittenden, for creditors opposing discharge.

Quincy Van Voorhis, for bankrupt.

WALLACE, District Judge. The assignee may be subpœnaed and required to testify in the same manner as any other witness, and he may also be examined orally without subpœna, upon submitting his account preparatory to a final dividend; and in either of these cases the register has authority to make the requisite order. But the assignee is not subject, as of course, to an examination by any creditor, whenever the latter may desire it. If he fails to file his reports according to the rules of the courts, or the general orders, he may be compelled to do so upon an application to the court, and he may be punished for contempt for delinquency; but he is not to be subjected to examinations, as the bankrupt is, upon the mere motion of a creditor, and will be protected against unnecessary annoyance by refusing an application for his examination, unless upon some issue regularly referred to the register.

Case No. 12,989.

In re SMITH.

[15 N. B. R. 97; [2] 1 Tex. Law J. 42.]

District Court. W. D. Texas. May 30, 1876.

BANKRUPTCY—REOPENING DIVIDEND—ERROR.

1. A register has no power to vacate or reopen a dividend for the purpose of paying a claim which was not proved and filed or presented prior to the dividend meeting.

2. A register has no power to vacate or reopen a dividend for the purpose of paying a claim for services rendered to the assignee which was not presented at the dividend meeting.

3. A dividend duly made and filed in court cannot be disturbed except for some error committed by the register apparent from his memoranda and papers on file existing at the time of or prior to the making of the dividend.

[1] [Reprinted by permission.]

[2] [Reprinted from 15 N. B. R. 97, by permission.]

On the 6th day of March, 1876, Robertson's & Herndon filed a petition addressed to the register, representing that on the 4th day of November, 1872, they were employed by the bankrupt, B. K. Smith, to institute suit in the United States circuit court, in chancery, at Tyler, against J. M. H. Parsons, agent, etc., to recover damages for the wrongful use of a patent right, owned by said Smith, to the Rhodern M. Brooks cotton press, and to secure a perpetual injunction against said defendant, for further infringement of said patent. That they did commence said suit in said court, and at the first term of said court obtained a judgment against said defendant for eight thousand dollars and an injunction. That afterwards said decree was set aside, and a new trial awarded. That subsequently said Smith was adjudicated a bankrupt, and his assignee duly made a party to said proceedings by an appropriate order of the United States district court; that said assignee assumed the fee contracted by said Smith with the petitioners, and directed the petitioners to proceed with the cause, which they did, and retook the testimony in said cause, and tried the same at the November term, 1875, and the same is submitted to the court, and is now held under advisement by the said court. That the fee agreed upon with said Smith was the sum of two hundred and twenty-five dollars, dated November 4, 1872, due May 1, 1873, with eight per cent. after maturity. That they have performed all the services in said case, and that said note and interest has been due and has been. under the order of said court, assumed by said assignee, T. R. Bonner; that the last dividend has been declared in said cause, and that the funds will soon be paid out, and if paid out there will or may be no funds out of which to pay them.

The note attached to the petition was as follows, to wit:

"$225.00. Tylér, Texas, Nov. 4, 1872. Due, May first, 1872, to Robertson's and Herndon, or bearer, at Tyler, Texas, two hundred and twenty-five currency dollars. Value received. B. K. Smith."

The petitioners prayed that the assignee might be directed to pay them the amount due on the note out of the funds for dividend. The assignee made an indorsement on the petition that he had examined it, and that the statements were true. The petition was then referred to the register, who made the following order, to wit:

By S. T. NEWTON, Register:

I have examined the statutes with reference to the question presented by the foregoing application, and can find no authority or precedent which will authorize a register of the court to order the assignee of a bankrupt estate to pay a claim of any character which had not been proven up and filed in court, or presented prior to, or on the day appointed for the declaration of the dividend,

and after the same had been declared and filed in the office of the clerk of the court. I must therefore decline to make the order prayed for in this case, without any prejudice to the equitable rights of the parties for compensation.

I do hereby certify that there are no other funds in the estate of said bankrupt, except the money on which the dividend is now declared, out of which to pay the claim of applicants, and that this is the final dividend, unless the suit now pending and undecided in the United States circuit court at Tyler, for which this fee was contracted, shall bring sufficient funds for another dividend.

The foregoing certificate is made at the instance of applicants, and at their request. My order in refusing to allow said claim is respectfully certified to the honorable judge of said court for review.

The register also sent the following certificate to the court, to wit:

I, S. T. Newton, register of said court in bankruptcy, do hereby certify that the following proceedings were had before me in said matter, and the following question arose: Has a register of the court the power to vacate, or re-open a dividend which has been duly declared in pursuance to notice of meetings called and held under the provisions of the twenty-seventh or twenty-eighth sections of the act [14 Stat. 529, 530], for the purpose of paying a claim, which was not proved up and filed, or presented prior to or on the day appointed for the dividend meeting?

This question arose upon the following state of facts: On the 2d day of January, A. D. 1876, upon the application of T. R. Bonner, assignee, a general meeting of the creditors of said bankrupts was ordered, in accordance with the provisions of the twenty-eighth section of the act, at Tyler, in said district, on the 1st day of March inst., and notice given as required by law. On the 1st inst., pursuant to said order, the meeting was held, and a dividend was declared on all claims proved and filed against said estate; and proper orders were made for paying the same, which were filed in the office of the clerk of the court. Subsequent thereto, to wit, on the 7th inst., Messrs. Robertson and Herndon, attorneys, presented and filed their application, praying an order of court requiring the said assignee to pay them the sum of two hundred and twenty-five dollars, for professional services, out of the funds in the hands of the assignee, upon the dividend which had been declared at said meeting. Their claim being for the amount of a promissory note, executed by B. K. Smith, bankrupt, in 1872, prior to commencement of proceedings against him in bankruptcy, to said attorneys for professional services in prosecuting a suit pending in the United States district court at Tyler, to which said suit the said assignee was subsequently made a party by order of the court. I refused the order as prayed for, as shown by my order indorsed on their application, and my reasons therefor.

Opinion of Register:

My order on the application brings under review by the court, to some extent, the limitation of the powers and duties conferred upon the registers of the court by the law. By section 4998, Rev. St., the register is invested with power of holding meetings under sections 5092 and 5093, and making computations of dividend and all orders of distribution. By section 5096 of the act it is required that the estate of the bankrupt shall be divided among such of the creditors as have proved their debts, in proportion to the respective amount of the debts; and by section 5097 it is declared that no dividend shall be disturbed by reason of debts being subsequently proven up; but the creditors proving such debts shall be entitled to a dividend equal to that received by the other creditors before any payment is made to the latter. In the case of In re Hoyt [Case No. 6,806], it is decided that there is no warrant in the statute for paying dividends to creditors who have not proved their claims, and that all the sections on the subject refer to creditors who have proved their claims. From the foregoing sections cited, I am of the opinion, and it seems to be clear, that they contemplate that creditors only who have proved their debts and filed them in court are entitled to share in the dividend declared on them, and that the register of the court could not order the payment of any claim which was not so proven up before the dividend was made. I do not question that the claim presented by said attorneys has merit, and that the services have been performed; but I hold that I have no power to vacate the dividend and order payment; that the application should have been presented first to the court, which in the exercise of its equitable powers could make such order as was proper. Respectfully submitted.

DUVAL, District Judge. In declining to make the order prayed for in the foregoing application, I think Mr. Register Newton is correct. His decision is therefore approved and confirmed.

After this decision was rendered the petitioners filed a petition of review, addressed to the judges of the circuit court for the Western district of Texas. In this they set forth the facts alleged in the original petition and the subsequent proceedings thereon. They also charged that there was an error in the statement of facts in that the note was treated as a claim against the estate, when in fact it served only the purpose of showing the amount due by the assignee as a part of the expenses; they also averred that they did not file the claim because they supposed the assignee had in-

cluded it in his account, and prayed for appropriate relief. This was duly served on the assignee. Subsequently the petitioners filed another petition, addressed to the register. In this they alleged that the assignee agreed to pay the fee; that the note was merely a memorandum of the amount agreed to be paid, and asked that the same be paid. With this petition they filed the following account, to wit:

Estate of B. K. Smith, in bankruptcy, to Robertson's & Herndon, Dr.

1876. March 6. To professional services as attorneys, rendered in the case of B. K. Smith v. J. H. Parsons, agent of W. H. Reynolds, in which suit T. R. Bonner became a party complainant. Suit pending in United States circuit court, in chancery, at Tyler, Texas, and said services rendered at the instance and request of said assignee $225 00

With interest at eight per cent. since May 1, 1873.

This petition was then referred to the register, who gave the following decision, to wit:

The claim herein presented was submitted to me in a former application, and after a careful examination of the law, I declined to make the order as then prayed for, and assigned my reasons therefor. This application comes before me in the form or nature of a petition for a rehearing of the same matter, in which the learned attorney, who presented the former application, very generously takes upon himself the fault for the erroneous ruling of the register, as he conceives, in refusing to make the order asked for in that application; and alleging the error arose from a misconception of the facts and law applicable thereto, and refers me to the following sections of the Revised Statutes: 5096, 5097, 5099, 5101. From an examination of these sections I see nothing that would cause me to change my former ruling. I held then, as I now hold, that the jurisdiction and powers of the register ceased after a dividend had been declared, and the proper orders made for paying the same and filed in court; and that he could not reopen or vacate the dividend, and empower the assignee to pay any claim of any character, whether the party applying be regarded as a general creditor of the estate, or entitled to priority under section 5101, Rev. St., when there was no notice of such claim given to the register prior to the declaration of the dividend.

I am of the opinion that a dividend, when made pursuant to proper notice, and filed in court, becomes virtually a judgment of the court, and cannot be disturbed, except for some error committed by the register, apparent from his memoranda and papers on file, existing at the time or prior to making the dividend. The law requires the assignee of the bankrupt's estate to file, on or before the day appointed for the declaration of a dividend, his account under oath exhibiting just and true items of his receipts and disbursements, with vouchers therefor, subject to examination by the creditors, and to any exceptions which they might think proper to make. I think it can make no difference, so far as the law of the case is concerned, whether the party asking the payment of claims out of the funds in the hands of the assignee, upon which the dividend had been declared, be a general or preferred creditor. If the assignee had paid the claim and exhibited it as a part of his disbursements in his final account, it would then have been open to exceptions as any other item of his account by the creditors, and they would have had an opportunity of examining it. The assignee, who assisted in preparing the list of claims for dividend, and in making the dividend sheet, having failed to show the claim in his account, or give notice of it at the time when the list of claims for dividend was prepared, I must therefore decline to make the order asked for in this application, and adopting, therefore, the reasons assigned for refusing the former order, and my certificate and opinion of the law as then stated, and certified to the honorable judge of said court. From this ruling the parties give notice of appeal, and pray the same to be certified to the Honorable THOMAS H. DUVAL, judge of said court.

DUVAL, District Judge. Having considered the within petition for review, and accompanying papers, together with the opinion of Hon. S. T. Newton, register, etc., of date the 5th inst., my conclusion is that it would not be proper to grant the prayer of said petition, for the reasons set forth by the register, and which are hereby affirmed. The relief sought must be refused.

Case No. 12,990.

In re SMITH.

[15 N. B. R. (1877) 459; [1] 2 Cin. Law Bul. 119.]

District Court, S. D. Ohio.[2]

BANKRUPTCY — LIEN — BANK CHECK — APPROPRIATION OF FUNDS.

1. Where one who has purchased a cheque of one bank upon another fails to present it for payment until the drawer has been adjudged a bankrupt, he is not entitled to priority of payment from the fund in the hands of the assignee, although there were sufficient funds in the hands of the drawee at the time of presentment to pay the cheque.

[Cited in Re Smith, Case No. 12,992.]

2. Such cheque creates no appropriation of or lien upon the fund in the bank, nor does it give a right of action against the drawee. Bank of Republic v. Millard, 10 Wall. [77 U. S.] 152, followed.

In bankruptcy. On certificate of register allowing the claim of Jacob Witteman as a preferred debt.

[1] [Reprinted from 15 N. B. R. 459, by permission.]

[2] [Affirmed by circuit court. Case unreported.]

The facts found by the register were as follows: Charles A. Smith, the bankrupt, was a private banker in Lebanon, Warren county, Ohio, receiving deposits, loaning money and selling exchange: being styled "the Warren County Bank." On the 20th day of December, 1872, he drew and sold to Witteman a draft or check, numbered seven thousand two hundred and forty-three, on the First National Bank of New York, for the sum of eight hundred and thirty-six dollars and sixty-one cents, having at the time and afterwards until the instrument was presented for payment, funds on deposit with said bank sufficient to pay the same, placed there to be drawn upon in the course of his business as a banker. On the 30th of May, 1873, he conveyed all his property to trustees, for the benefit of his creditors, being insolvent; and the trustees, by notice to his New York depositary, stopped the payment of his outstanding drafts and checks. On the 11th of June a petition in bankruptcy was filed against him, and the voluntary assignment was superseded. On the 20th of June, the Witteman check or draft was presented to the drawee in New York City, and payment refused; the excuse stated in the protest being the notice of the trustees forbidding payment. The balance on deposit at the time was one thousand six hundred and ninety dollars and six cents, exceeding all the drafts and checks drawn against it. This sum was afterwards withdrawn by the assignee in bankruptcy, and is now held by him. The draft or check was purchased and paid for at the time by Witteman in good faith, with no suspicion of the financial weakness which ended in Smith's suspension and assignment five months afterwards; and the amount of the draft, at the date it was drawn, was credited by Smith to the account of the drawee. These facts, with the original draft or check and the protest, fully appear in the petition of the creditor Witteman and in the agreed copies of the account between Smith and the First National Bank, as it appears on the books of each, covering the period from the date of the instrument until it was presented for payment.

The following is a copy of the instrument in question:

"$836.61. Warren County Bank. Charles A. Smith, Proprietor. Lebanon, O., December 20, 1872. Pay to the order of Jacob Witteman, Esq., eight hundred and thirty-six dollars and sixty-one cents. (Signed) Charles A. Smith. To the First National Bank, New York City."

R. B. Wilson, for petitioner.

Ward & Probasco, for assignees.

Before BROWN and SWING, District Judges.

BROWN, District Judge. We fully concur in the opinion of the register, that the instrument in question is a check and not a bill of exchange. It possesses the two peculiarities of the former, viz.: it is drawn upon a bank and is payable immediately upon presentment; and the fact that it is drawn by one bank upon another in a distant state does not deprive it of the character with which these features have stamped it. In re Brown [Case No. 1,985]; Roberts v. Corbin, 26 Iowa, 315. We entertain no doubt of the correctness of the proposition that in a case of this kind the assignee has no greater rights than the bankrupt. Whatever defenses are available to the latter are also open to him; he takes the property subject to all just claims by the way of lien or otherwise, and except in cases of fraud where he represents the creditors, his title is subject to the same equities as that of the bankrupt. Mitchell v. Winslow [Case No. 9,673], and notes; In re Wynne [Id. 18,117]; Brown v. Heathcote, 1 Atk. 160; Jewson v. Moulson, 2 Atk. 417; Mitford v. Mitford, 9 Ves. 87; Tiffany v. Boatman's Inst., 18 Wall. [85 U. S.] 387.

While there is some conflict as to the exact nature of the contract between a depositor and his bank, it is now settled, so far as the federal courts are concerned, that the general relation between them is that of debtor and creditor; that in the absence of an agreement to the contrary, its deposits are not special, but become the property of the bank, and that it does not stand in the character of a trustee. Bank of the Republic v. Millard, 10 Wall. [77 U. S.] 152; Foley v. Hill, 2 H. L. Cas. 28; In re Corn Exchange Bank [Case No. 3,243]; Carr v. National Security Bank, 107 Mass. 45, 48; Chapman v. White, 6 N. Y. 412; In re Bank of Madison [Case No. 890]; In re Franklin Bank, 1 Paige, 254. By accepting the deposit the bank impliedly agrees that it will honor the checks of its depositors in the order in which they may be presented, to the full amount of the deposit, subject only to revocation by death, bankruptcy, or a direct order not to pay. Dykers v. Leather Manuf'rs' Bank, 11 Paige, 612; Butterworth v. Peck, 5 Bosw. 341. No contract exists primarily between the holder and drawee of a check, and the cases which have sustained an action in favor of the former, have proceeded either upon the theory that the check operated as an equitable assignment of the fund, pro tanto, or upon the familiar principle that the person for whose benefit a contract is made may sustain an action upon it. Munn v. Burch, 25 Ill. 21; Chicago M. & F. Ins. Co. v. Stanford, 28 Ill. 168; Fogarties v. President, etc., of State Bank, 12 Rich. Law, 518; National Bank v. Elliot Bank, 5 Am. Law Reg. 711; Weston v. Barker, 12 Johns. 276. The authority of these cases, however, is denied in Bank of the Republic v. Millard, 10 Wall. [77 U. S.] 152, above quoted, very recently affirmed in First Nat. Bank v. Whitman [94 U. S. 343], and the doctrine there announced that no such action will lie, must be accepted as the

law of this case. It is abundantly supported by such cases as Bullard v. Randall, 1 Gray, 606; Chapman v. White, 6 N. Y. 412; Butterworth v. Peck, 5 Bosw. 341; Second Nat. Bank v. Williams, 13 Mich. 282; Dykers v. Leather Manuf'rs' Bank, 11 Paige, 616; Wharton v. Walker, 4 Barn. & C. 163; Warwick v. Rogers, 5 Man. & G. 374, and must be regarded as overruling the leading case of Munn v. Burch, to the contrary.

While we need not for the purposes of this case question the proposition that a check is an assignment, pro tanto, of the depositor's money in the hands of the bank, it still remains to be decided when it takes effect as such assignment; not, we conceive, when it is delivered to the payee, because the check may be revoked by others subsequently drawn but earlier presented. If checks worked an immediate transfer of the fund, an action would lie in favor of the payee, and no banker would be safe in paying them, since he could never know that the money had not already been assigned to persons holding prior checks. If, in such case, the bank and its contents were burned before the check, in the ordinary course of business, was presented, the loss would be that of the payee. We deem it a logical conclusion from the case above cited, that if the check be an assignment at all, it does not take effect as such until accepted or certified by the bank, unless perhaps it be taken upon the faith of a previous promise to honor it. In Bullard v. Randall, 1 Gray, 605, it was held that a check constitutes no assignment until presented for payment and accepted by the bank, and where the bank was garnished by a creditor of the depositor after the check was drawn, but before it was presented, it was held that the garnishing creditor had the prior legal claim to the fund. If this case be law, we do not see how the petition under consideration can be supported. See also Butterworth v. Peck, 5 Bosw. 341. Whenever the check is accepted or certified a new contract arises between the payee and the bank, upon which an action may be brought, upon a subsequent refusal to pay. There is no reason why checks should stand in any better position than assignments of other choses in action, against which the other party to the contract is always protected until notice of the assignment. Were the question an original one, we should be disposed to regard a check rather as a power of attorney to draw a certain amount of money and appropriate it to the payee's use, than an absolute appropriation of the amount. The power of revocation remaining in the drawer is an incident to the power of attorney but not to the assignment. Although in several cases, (notably the following in Ohio: Morrisons v. Bailey, 5 Ohio St. 13; Andrew v. Blachly, 11 Ohio St. 89; Stewart v. Smith, 17 Ohio St. 82, 85), a check is characterized as an appropriation or equitable assignment of a fund; it differs from a bill of exchange only in being payable upon presentment, without grace, and in the fact that no notice is necessary to charge the drawer.

There are several cases strongly adverse to the position assumed by the petitioner. In Dickey v. Harmon [Case No. 3,894], a draft upon one Jameson was given by the bankrupts to Sackett, and presented to the drawee for acceptance. The drawee admitted himself indebted to the bankrupt in the amount of the draft, but refused to accept because the money in his hands had been attached by the creditors of the bankrupt. The only question was whether the complainants, the assignees of the bankrupt, or Sackett should have the money in the hands of Jameson. It was contended that the draft was an assignment of the funds in the hands of the drawee, and gave the payee an equitable right to recover the money, and that it was not revoked by the subsequent bankruptcy, but the court held the assignee entitled to the money. In Bank of Commerce v. Russell [Id. 884], complainant, in the course of its banking business, sent certain notes to a firm of bankers at Pleasant Hill, Missouri, for collection. The firm collected the money and, having two thousand dollars on deposit in the Second National Bank of St. Louis subject to their order, sent the complainant a draft on this bank for a portion of the money collected. The draft was presented, payment demanded and refused, and the draft protested. The drawers having failed, and the assignee having come into possession of the two thousand dollars deposited in the Second National Bank, it was claimed: (1) That the money was held in trust for the complainant, and hence that it did not vest in the assignee. (2) That the drafts drawn by the bankrupts amounted to an equitable assignment of that amount in favor of the complainant. The court—Dillon, J.,—held that the complainant was not entitled to relief. Except that the instrument is termed a draft, the case is directly in point. The following cases are very nearly if not quite analogous: First Nat. Bank of Mount Joy v. Gish, 72 Pa. St. 13; Randolph v. Canby [Case No. 11,559]; Walker v. Seigel [Id. 17,-085].

It is not denied there are several cases which support the position taken by the register; but so far as they conflict with the leading case of Bank of the Republic v. Millard [supra], we are constrained by the latter as a binding authority. In McGregor v. Loomis, 1 Disn. 247, a depositor drew a check upon his banker which was presented and payment refused, although the banker still held the funds of the depositor. The banker then failed, and his assignee claimed the depositor's money, notwithstanding the depositor had ordered the banker to pay it out, and that order was presented, thus giving him notice of the depositor's appropriation of the fund. It was held by a divided court, that the check was an absolute appropriation of so much money in the hands of the banker to the holder of the check, and there it ought

to remain until called for. This case seems to be not only in direct conflict with Chapman v. White, but irreconcilable with the reasoning in the case of Bank of the Republic v. Millard. We do not consider the other Ohio cases as conflicting at all with the position taken here, as the point in each seems to have been whether the instrument was a check or draft, and payable with or without grace. In Blin v. Pierce, 20 Vt. 25, and Ex parte South, 3 Swan. 392, the orders were accepted before the bankruptcy, and the question there involved did not here arise. To the same effect is Mandeville v. Welsh, 5 Wheat. [18 U. S.] 277, 286. In Re Brown [Case No. 1,985], certain checks were drawn in favor of one Curtiss, by Brown's agent, as collateral security for a promissory note made by Curtiss and payable to Brown, for his accommodation. The checks were made payable on two certain days, and were presented on those days, but not on the last days of grace; but during the three days of grace, the drawer had not sufficient funds in the bank on which they were drawn to pay them, although there was a small balance there in his favor. It was held that the instruments were checks, were properly presented, and were not entitled to grace, and that Brown was not entitled to notice of protest. It is true that in the conclusion of the case Mr. Justice Story decides that the petitioners are entitled to be relieved in equity to the full amount of the debt proved by them, for which the checks were given by the bankrupt; but from a careful perusal of the case we do not gather the inference that the petitioners were decreed any priority of payment. Indeed, the case did not admit of a preference, as there were insufficient funds in the bank at the time the checks were made payable, or for three days thereafter. The main question in the case was whether the fact they were made payable on a future day characterized them as bills of exchange, and it was held it did not. That question does not arise in this case.

The case of Roberts v. Corbin, 26 Iowa, 315, is admitted to be upon all-fours with the one under consideration. It was held: First. That a draft drawn by one banker upon another in a different state, having funds of the drawer on deposit, in favor of a third person as payee, is to be regarded simply as a banker's check, and not as a foreign bill of exchange. This proposition we expressly affirmed at the outset of this opinion. Second. The holder of such a check may maintain an action thereon, before acceptance, against the drawee thus having the funds of the drawer in his hands, and wrongfully refusing to pay the same. Third. A general assignment of the drawer for the benefit of his creditors, after drawing the check, but before the same is presented, will not invest his assignee with the right to the money represented by the check, nor affect the rights of the payee thereto. Fourth. The assignee, in a general assignment for the benefit of creditors, takes the property of his assignor, subject to all the equities existing against it in favor of third parties. He merely stands in the shoes, and succeeds to the rights of his assignor. It will be observed that the second proposition lies at the foundation of this whole opinion, and the correctness of this is expressly denied by the supreme court of the United States in Bank of the Republic v. Millard. The case is reasoned with a good deal of care, although it does not carry the weight it would have, had all the judges concurred in the opinion.

While it is conceded that the petitioner possesses the same rights, as against the assignee, that he would have against the bankrupt, the only property of the latter upon which he could have the pretense of a lien, by way of appropriation, would be that in the hands of the bank, and if he cannot enforce that lien, that is, if he has no right of action against the bank, it is because no such lien or appropriation exists, until the check is accepted or certified. We do not see how, if Smith had settled with the bank before this check was presented, and had drawn his deposits, the creditor would have a lien upon that money, or indeed anything but a bare right of action against the drawer. It may be assumed that he intended to invest the payee with the right of drawing the money represented by the check, but his subsequent intent to revoke or countermand that, must be conclusively presumed from the act of assignment. His funds in bank, unappropriated, undoubtedly passed to his assignee, under the authorities above quoted, and we are constrained to hold that inasmuch as this check was never presented, it wrought no appropriation. We lay no stress upon the want of diligence in presenting the check until six months after it was drawn, as affecting the legal rights of the payee, although he thereby fails to show that equitable title to relief which prompt action upon his part might have suggested. Conroy v. Warren, 3 Johns. Cas 259.

As there was no appropriation and no right of action against the drawee, we think the petitioner is not entitled to priority of payment, and his petition must be dismissed.

On appeal to the circuit court this case was affirmed by Mr. Justice Swayne. [Case unreported.]

Case No. 12,991.

In re SMITH.

[16 N. B. R. 113.] [1]

District Court, E. D. Virginia. Aug. 2, 1877.

BANKRUPTCY—PARTNERSHIP—SURETY FOR DEBT—RIGHTS OF SOLVENT PARTNER.

Where a partnership of two partners in equal interest were bound as a firm as surety for a debt, and a decree was rendered against the firm for the debt, to be paid, and which was paid, out of the social assets, the firm having been dissolved, and a balance having been left due, but not ascertained by judicial judgment or de-

[1] [Reprinted by permission.]

cree, from one of the partners to the other, and the partner who owed the balance having, after all this, gone into bankruptcy, *held*, that the solvent partner had no right to be subrogated to the rights of the creditor of the firm, who obtained the decree, for half the amount paid, against the individual estate of the bankrupt partner, as against other creditors of that partner.

On exceptions of P. W. Harwood, late partner, to the report of liens and their priorities, made by Special Commissioner Howard. G. W. Smith and P. W. Harwood were partners under the name of Smith & Harwood. In a chancery suit between the partners for a settlement of accounts, it was ascertained by a decree of June 26, 1873, that as of the 3d of June, 1873, their partnership assets amounted to twenty thousand nine hundred and fifty-three dollars and forty-five cents, and their debts to thirteen thousand eight hundred and seventy-seven dollars and thirty cents, leaving an estimated surplus of seven thousand and seventy-six dollars and fifteen cents, but that Smith owed Harwood, on account of the transactions of the firm, ten thousand and seventy-five dollars and fifteen cents. There has been no final decree ascertaining the clear assets of the firm, and requiring Smith to pay any finally ascertained sum to Harwood. In a suit pending at the time by Douglass H. Gordon against one L. W. Rose as principal, and the firm of Smith & Harwood as guarantors, for a debt held by Gordon against Rose, there was a recovery, by decree of May 13, 1874, against these defendants. The property of Rose being insufficient to pay the whole debt, the decree required the firm of Smith & Harwood to make good a deficiency of five thousand eight hundred and ninety-four dollars and sixty-three cents, due as of June 6, 1874, which sum was directed to be paid, and was paid, out of the assets of Smith & Harwood. Smith afterwards went into bankruptcy, and this court became charged with the duty of settling his estate. Harwood, by exception to the report of liens and their priorities, made in the cause by Special Commissioner Howard, claims a lien upon the individual estate of Smith, by right of subrogation to Gordon, for half the debt of five thousand eight hundred and ninety-four dollars and sixty-three cents, which was paid out of the partnership assets to Gordon.

E. Y. Cannon and C. U. Williams, for exceptant.

F. M. Conner, for other lien creditors.

HUGHES, District Judge. If this debt of the firm had not been paid out of the social assets, but had been paid out of the individual property of Harwood, then the question of subrogation as to half the debt, in favor of Harwood, might arise. But the debt having been paid with social assets, there is no right of subrogation as to Harwood's half, so far as the debt specifically paid with social assets is concerned. If in the suit for settlement between the partners a final balance had been found due from Smith to Harwood, and a decree rendered requiring Smith to pay that balance to Harwood; and afterwards this debt to Gordon had been decreed, and Harwood had paid it out of his individual means; then, and in that event, Harwood might have had a right of subrogation for half against Smith's individual estate. There is no reason why a person who is a partner, has become surety for another happening to be a partner, and has out of his individual means, after final settlement of the partnership affairs, paid a joint debt, should not be subrogated to the rights of the creditor of both against the individual estate of the other partner, for the proportion of the joint debt for which his other partner was liable. See Will. Eq. Jur. (Ed. 1875) pp. 107-117, and cases cited. But this right of substitution plainly cannot arise when the debt was a social debt, and was paid with social assets; certainly not as against the creditors of either partner. The debt to Gordon was a social debt, and paid out of social assets. The payment consumed, or well-nigh consumed, the whole assets of the firm, leaving Smith's debt to the firm, which amounted on the 3d of June, 1873, to ten thousand and seventy-five dollars and sixty-three cents, wholly or almost wholly due. If Harwood had obtained a decree against Smith for a definite sum as the balance due especially to himself, into which balance this debt paid to Gordon would indirectly have entered, the balance itself might have been claimed of Smith by Harwood, as any other creditor might claim an ascertained debt. But Harwood cannot, in the absence of such decree of final settlement, go back of it to the suit of Gordon against the firm, and claim contribution out of Smith's estate for half of the Gordon decree. The payment of that decree out of the social assets only created an item in the account between the two partners and their firm, and only indirectly fell upon Harwood for payment out of his portion of the social assets, or his individual estate.

The report of the commissioner in this respect, as in all others, must be confirmed; and I will sign a decree accordingly.

Case No. 12,992.

In re SMITH.

[16 N. B. R. 399; [1] 10 Chi. Leg. News, 86; 5 N. Y. Wkly. Dig. 322.]

District Court, D. Massachusetts. Nov. 10, 1877.

BANKRUPTCY—APPROPRIATION—ORDERS ON FUNDS IN HANDS OF ATTORNEY.

The bankrupt, nearly a year before the petition was filed, left for collection with his attorney a note signed by a third person, and subsequently drew several orders upon him payable out of the proceeds thereof. *Held*, that the

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holders of the orders were entitled to payment out of such proceeds, in preference to the assignee.

The decision of this case was submitted to the court upon a written statement of facts in accordance with Rev. St. § 5011. [E. M.] Smith, the bankrupt, nearly a year before the petition was filed, left for collection with Mr. Field, his attorney, a note signed by a third person, for eight hundred and fifty dollars, and an action was brought upon it, which ripened into a judgment at about the time the bankruptcy took place, which was August 25, 1875. In the meantime, the bankrupt drew several orders upon Mr. Field, some of which were negotiable and some not, requesting him to pay divers sums to the several payees. It was not contended that any of these orders were fraudulent or voidable for want of consideration, or as preference or otherwise. It was the intention of the bankrupt that these orders should be paid from the proceeds of the note when collected by Mr. Field, and he so informed Mr. Field and the payees; and the acceptance was in each instance expressed substantially as follows: "Accepted when collected," or "After collections made over and above the amount of prior acceptance." Mr. Field obtained judgment for the debt and costs, and levied on certain real estate of the judgment debtors, but no money has come to his hands, as the debtors have a right to redeem within a certain time. Soon after the levy, the assignees in bankruptcy of Smith's estate notified his attorney, Field, that they discharged him from the case, tendering him the taxable costs, and offering to pay for his services up to that time. They refused to indemnify him against the acceptances above mentioned, and notified him that they revoked the same; and he declined the tender. Upon these facts, the question submitted was whether the assignees in bankruptcy or the holders of the orders had the better title to the proceeds of the note or of the judgment obtained thereon.

LOWELL, District Judge. I suppose that the aggregate amount of all the orders given by the bankrupt, and conditionally accepted by Mr. Field, will be enough to absorb the net proceeds of the judgment, after deducting the reasonable counsel fees of Mr. Field. If not so, the assignees would, perhaps, have a strict legal right to collect the money, even though the orders may be valid; in which case, they would be trustees for the holders of the orders, to the extent of their several demands, and trustees for the general creditors of Smith, for the remainder. I understand, however, that the question which the parties wish me to decide is whether the orders are valid, and create a change in the proceeds of the judgment against the assignee in bankruptcy; and that the settlement will be readily made by the parties when this is decided. It is the law that an ordinary bill of exchange, like those which pass between merchants, does not operate as an assignment of any funds in the hands of the acceptor. The reasons are: (1) That such a bill is a well-known commercial security which is taken upon the credit of the parties; and (2) the great inconvenience to trade if merchants and bankers were to be held as trustees for the holders of all their acceptances. Harris v. Clark, 3 Comst. [3 N. Y.] 93; Cowperthwaite v. Sheffield, Id. 243; Hopkins v. Beebe, 2 Casey [26 Pa. St.] 85; Thomson v. Simpson, 5 Ch. App. 659.

The supreme court of the United States, and the courts of many of the states where the question has arisen, have applied a similar rule to bank-checks, "that no right to the deposit of the drawer of the check passes to the payee by the signing and delivering of the check. In other states, the bank-check is held to work an assignment. See Bank of Republic v. Millard, 10 Wall. [77 U. S.] 152; Bullard v. Randall, 1 Gray, 605; Dana v. Boston Third Nat. Bank, 13 Allen, 445; Carr v. National Security Bank, 107 Mass. 45; Lunt v. Bank of North America, 49 Barb. 221; Strain v. Gourdin [Case No. 13,521]; In re Smith [Id. 12,990]; and the cases cited in Judge Brown's opinion. The reasons for this rule do not apply to a draft or order which is made payable out of a particular fund. Such a paper is not, strictly speaking, a bill of exchange, and it is well settled that such an order makes an assignment in equity, whether accepted or not. Spain v. Hamilton, 1 Wall. [68 U. S.] 604; Yeates v. Groves, 1 Ves. Jr. 280; Ex parte Alderson, 1 Madd. 53; Ex parte South, 3 Swanst. 392; Diplock v. Hammond, 2 Smale & G. 141, 5 De Gex, M. & G. 320; Cutts v. Perkins, 12 Mass. 206; Robbins v. Bacon, 3 Greenl. 346; Legro v. Staples, 16 Me. 252; Lowery v. Steward, 25 N. Y. 239; Moody v. Kyle, 34 Miss. 506.

Then the only question is, whether these drafts were payable out of the proceeds of this note; and it cannot be doubted that they were. The drafts, as drawn, do not express this fact, but the mode of acceptance does. An agreement for such payment is perfectly good in equity, though made wholly by word of mouth; and therefore the facts found in this case, that the creditors were severally informed that the order was to be paid out of the proceeds of the judgment, would bind the fund, in equity, even if the acceptance had been absolute. It is hardly necessary to say that an assignee in bankruptcy takes the property subject to all equitable as well as legal liens.

My decision, therefore, is that the several holders of the orders are entitled to be paid the amounts of their several acceptances in preference to the assignee in bankruptcy.

Case No. 12,993.

In re SMITH.

[1 N. Y. Leg. Obs. 249; 5 Law Rep. 372.]

District Court, S. D. New York. Jan., 1843.

BANKRUPTCY — INJUNCTION — ATTEMPT TO EMBEZZLE ESTATE.

1. Where it appears that there is a covenous contrivance between the bankrupt and other parties to embezzle the estate for the benefit of the bankrupt or his preferred creditors, the court will interpose by injunction, upon adequate security being given to cover all probable losses.

2. A party is to be regarded to certain purposes a bankrupt from the time the application is presented to the court, and the decree, when rendered, will retrospect, so as to act upon his estate and rights as they existed when the bankruptcy occurred.

This was a petition upon the footing of an order to show cause in case of involuntary bankruptcy, and that the bankrupt [John Harper Smith] had secretly and fraudulently transferred his goods, etc., by covenous ingenuity with Smith and Miller, and praying an injunction against all.

P. Clark, for creditors.

H. P. Barker, for bankrupt.

BETTS, District Judge. The first section of the act manifestly contemplates that on facts there indicated being established in the manner pointed out, a decree of bankruptcy was to be rendered instanter. But the seventh section, by requiring a period of notice and authorizing cause to be shown against a decree of bankruptcy, by necessary intendment, defers the decree until the period of notice has expired, and the opportunity to avoid the decree has been allowed all persons interested. Nevertheless, to certain purposes, the party is to be regarded a bankrupt from the time the application is presented to the court. The statute expressly provides he may be so declared, and the decree, when rendered, will necessarily retrospect, so as to act upon his estate and rights as they existed when the bankruptcy occurred. In case of involuntary proceedings, such bankruptcy arises upon the commission of any act designated by the statute, and the jurisdiction of the court attaches in respect to it on the presentation of the petition. Under the high equity powers conferred by the statute, it must be competent to the court to give full effect to its jurisdiction for the protection of creditors and the preservation of interests in which all parties are concerned. It may restrain wanton waste of the estate, and, by parity of reason and necessity, must be empowered to interfere and secure the property of the bankrupt from being dissipated or withdrawn by himself or his voluntary assignees. In this case the petitioner shows a covenous contrivance between the bankrupt and the other parties to embezzle the estate for the benefit of the bankrupt or his preferred creditors, and the law will not compel creditors to await the remedies of suits by the assignee at some future day, and against parties of questionable responsibility, but will at once arrest the property, and place it where it may be commanded if the decree of bankruptcy is perfected. This extraordinary, but necessary, power will be so exercised as to hold those upon whom it acts indemnified, in case the creditors fail to establish good cause for their proceeding. Security will accordingly be exacted to an amount adequate to cover all probable losses, and thereupon an injunction will issue.

Decree accordingly.

[For hearing on a motion to dissolve the above injunction, see Case No. 12,994.]

Case No. 12,994.

In re SMITH.

[1 N. Y. Leg. Obs. 291.]

District Court, S. D. New York. 1843.

COURTS—INJUNCTION—BANKRUPTCY.

The United States circuit and district courts can exercise the power of granting injunctions in cases in bankruptcy ex parte, and without notice to the adverse party or his attorney.

[Cited in Re Muiler, Case No. 9,912; Re Providence & N. Y. Steamship Co., Id. 11,451.]

[Cited in Hill Manuf'g Co. v. Providence & N. Y. Steamship Co., 113 Mass. 501.]

[In the matter of John Harper Smith, a bankrupt.]

This was an application to dissolve an injunction [granted in Case No. 12,993].

H. P. Barber, for bankrupt.

P. Clark, for creditors.

Cur. ad vult.

BETTS, District Judge. On the 22d day of September, Jacob Tweedy moved the court to set aside the injunction issued in this case, and served on him on the 16th of August preceding. His motion was rested on the ground that an injunction was granted on the ex parte application of creditors, and without notice to him. The counsel contended that by the act of congress of March 2, 1793, an injunction cannot be granted in any case by the supreme or circuit court, or any judge of those courts, without previous reasonable notice to the adverse party or his attorney; and that the act of February 13, 1807, in extending the power to the district judges, gave it also the same limitation. It would meet this branch of the argument with a sufficient answer to observe that the act of 1807 does not give the power to the district court, but constitutes the district judge an injunction master, as it were, in a certain class of cases, and in a qualified manner. When full equity powers are given to the court in bankruptcy by a subsequent statute, the limitation or the exercise of these new powers is not necessarily to be understood as accompanying

their bestowment. But the more satisfactory view of the subject, and that which has induced the court in repeated instances to grant injunctions in bankrupt cases instanter, and without notice, is that the restriction in the act of 1793 [1 Stat. 333] applies only to cases or suits pending in the supreme or circuit court. In these particular instances the injunction cannot issue without a previous notice to the adverse party, but the restriction does not apply where, as under the bankrupt act, a mere equity jurisdiction is created, and is conferred upon the district court in relation to matters pending in that court, and within its cognizance exclusively. I find that Judge Story has examined this subject at a later day, and has affirmed the construction this court had given the act in this respect. His reasoning upon the topic cannot be fortified by any remarks I could offer, and I shall content myself with reasserting the power as it has been exercised in this court since the bankrupt act went into operation, and adopting his opinion as a satisfactory indication of the practice. Carlton's Case [Case No. 2,415]. Judge Judson, of the Connecticut district, pursues the like practice. Calender's Case [Id. 2,308]. Motion denied, with costs.

Case No. 12,995.

In re SMITH.

[1 Woods, 478;[1] 13 N. B. R. 256.]

Circuit Court, S. D. Georgia. April Term, 1871.

BANKRUPTCY—DISCHARGE—OMISSION TO SCHEDULE PROPERTY—INTENTION.

An omission to include all his property in his schedule is not of itself cause for refusing a bankrupt his discharge. The omission must be for the purpose of concealment, or to mislead or defraud.

[Cited in Re Boynton, 10 Fed. 279.]

This was a petition of review, filed under the second section of the bankrupt act, for the reversal of an order of the district court.

H. R. Jackson, for petitioner.

F. S. Hesseltine, for respondent.

BRADLEY, Circuit Justice. The petitioner asks for a reversal of the decree of discharge, because the district court overruled and disregarded a report of the register as to certain proceedings had before him, in which the creditor objected to the discharge, and desired a trial on the subject. If a creditor objects to the discharge of a bankrupt, the 31st section of the bankrupt act requires that he should file a specification in writing of the grounds of his opposition, and enacts that the court may, in its discretion, order any question of fact so presented to be tried at a stated session of the court. The 24th general order requires the creditor to file his specification of the grounds of his opposition, in writing, within ten days after the time for showing cause, and directs that the court shall thereupon make an order as to the entry of said case for trial, etc. Supposing that the objections to the discharge in this case were properly filed, an examination of them, as certified by the register, shows that they could not, if fully sustained, have prevented the bankrupt's discharge. The specification is, that the schedule filed by him did not contain a full and complete statement of the property owned by him at the time of filing his petition; the following items not being contained therein, to wit: one tract of land, etc. (describing it, together with other property also described). An omission to include all his property in his schedule is not, of itself, cause for refusing a bankrupt his discharge. It must be done for the purpose of concealment, or to de fraud, or to mislead. There must be false swearing, or some other of those delicts which are enumerated in the law as grounds for refusing a discharge. They are enumerated in the 29th section of the bankrupt act. A mere omission of property is not one.

The parties have sent up to the court a statement of facts alleged on the one side and the other, in reference to the matter specified; but it does not aid the objection, but rather shows that the debtor had an excuse, if not an entire justification, for the omission. It seems that the property omitted was, in 1865, decreed to be conveyed to a trustee for the benefit of the bankrupt's wife. The creditor alleges that that decree was obtained by the procurement of the bankrupt, and was in fraud of creditors. It certainly could not have been procured in contemplation or in fraud of the bankrupt law, for it was rendered two years before the passage thereof. It raises an issue entirely distinct from and collateral to the issue in this case, and one that the assignee may well be justified in subjecting to a legal investigation. It is very possible that the assignee may recover the property, and employ it for the benefit of the creditors. But it must, at least, be conceded, that there was a plausible excuse for its omission from the schedule, and that a fraud in the procurement of that decree does not necessarily imply deceit in the omission of the property from the schedule. And as no perjury is charged against the bankrupt, nor any design to conceal the property, but the omission alone is relied on for preventing a discharge, I think the district judge was justified in overruling the objection, and refusing an issue. The decree is affirmed.

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

Case No. 12,996.

In re SMITH.

[2 Woods, 458;[1] 2 N. Y. Wkly. Dig. 532; 14 N. B. R. 295; 8 Chi. Leg. News, 315; 3 Cent. Law J. 386; 3 Am. Law T. Rep. (N. S.) 335.]

Circuit Court, N. D. Georgia. March, 1876.

BANKRUPTCY — EXEMPTION — CONSTITUTIONALITY OF AMENDED ACT.

The act of congress, approved March 3, 1873 [17 Stat. 577], prescribing what property shall be allowed the bankrupt, as exempt from the operation of the bankrupt law, is uniform and constitutional.

[Cited in Darling v. Berry, 13 Fed. 670.]

[Cited in brief in Wooster v. Bullock, 52 Vt. 51.]

[See review of the action of the district court of the United States for the Northern district of Georgia.]

This was a petition filed to reverse a decree of the district court in bankruptcy. The facts of the case appeared from the pleadings and evidence to be as follows: John W. A. Smith, was adjudicated a bankrupt by the district court on June 3, 1873. At the date of the adjudication, the petitioner, Mathew Whitfield's administrator, was the judgment creditor of the bankrupt in the sum of $8,397. The judgment was rendered prior to July 21, 1868, when the present constitution of Georgia went into effect, and was a lien upon the real estate of the bankrupt. By an act passed prior to and in force in 1864, when the debt due to the petitioner was contracted and which remained in force until the adoption of the constitution of 1868, there was allowed to the head of a family, as a homestead exempt from execution, fifty acres of land, and in addition thereto, five acres for each of his children under sixteen years of age. By the constitution of 1868, and by an act of the legislature, passed October 3, 1868, to carry the constitutional provision into effect, there was allowed to the head of a family a homestead of realty, exempt from execution, of the value of two thousand dollars. The judgment of the petitioner against the bankrupt was duly proven and allowed as a debt against the bankrupt estate, prior to June 30, 1874. On that day the assignee in bankruptcy set off to the bankrupt his homestead, according to the provisions of the act of 1864, namely, ninety acres of land, that being fifty acres and five acres in addition thereto for each child of the bankrupt under sixteen years of age. The bankrupt claimed that he was entitled to have assigned to him the homestead allowed by the constitution of 1868, and the act of October 3, 1868, to wit: realty of the value of $2,000. He therefore filed with the register his objections to the assignment made by the assignee. The register referred the question thus raised, with his opinion thereon, sustaining the objections of the bankrupt against the assignment, to the district judge who also sustained the objections of the bankrupt, and held that he was entitled to have his homestead set off under the provisions of the act of October 3, 1868, notwithstanding the fact that the debt of the objecting creditor was contracted, and the judgment therefor a lien upon the realty of the bankrupt before the change in the homestead law. To review and reverse this decision of the district judge is the purpose of this petition, filed by the administrator of the judgment creditor.

C. Peeples and E. P. Howell, for petitioner.
J. S. Boynton and F. S. Dismuke, contra.

WOODS, Circuit Judge. The case turns upon the constitutionality of the act of congress approved March 3, 1873, entitled "An act to declare the true intent and meaning of the act approved June 8, 1872 [17 Stat. 334], amendatory of the general bankrupt law." 17 Stat, 577; Rev. St. § 5045. This statute enacts that "the exemptions allowed the bankrupt * * * shall be the amount allowed by the constitution and laws of each state respectively as existing in the year 1871, and that such exemptions be valid against debts contracted before the adoption and passage of such constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any state court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding."

To put the question clearly in view, it must be stated that after the adoption of the constitution of 1868, and the act of October 3, 1868, to carry into effect the exemptions prescribed by the constitution, the supreme court of Georgia, at its January term, 1873, in the case of Jones v. Brandon, 48 Ga. 593, decided that the provisions of the constitution and of the law so far as they increased the exemptions of property from execution as against debts contracted before their adoption were in conflict with that clause of the constitution of the United States, which declares: "No state shall * * * pass any * * * law impairing the obligation of contracts" (Const. U. S. art. I, § 10), and were therefore null and void. The same decision had in effect been previously made by the supreme court of the United States in the case of Gunn v. Barry, 15 Wall. [82 U. S.] 610. It follows from this state of the law as declared by the courts, that when the assignee undertook to set off the homestead of the bankrupt on June 30, 1873, he was not authorized to set apart as against Whitfield's administrator, any greater quantity of realty than was authorized by the act of 1874 [18 Stat. 178], except as he derived his authority from the act of congress of March 3, 1873, above quoted. In other words, there was no valid and operative state law by which the bankrupt could claim that he was entitled to a homestead of the value of $2,000, as prescribed by the constitution and law of 1868.

The question, therefore, whether the act of

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

congress of March 3, 1873, is constitutional, is vital to the decision of this case. The objection to this act is not that it impairs the obligation of contracts, for congress is not prohibited by the constitution from passing such a law. Evans v. Eaton [Case No. 4,559]; Satterlee v. Matthewson, 2 Pet. [27 U. S.] 380; Bloomer v. Stolley [Case No. 1,559]. Besides, the power expressly given to congress "to establish uniform laws on the subject of bankruptcies throughout the United States" implies the power to impair the obligations of contracts. Hepburn v. Griswold, 8 Wall. [75 U. S.] 603; The Legal-Tender Cases, 12 Wall. [79 U. S.] 457. The ground of objection is, that the law is not uniform as required by the constitution of the United States. In my judgment, a bankrupt law which adopts the exemption from execution prescribed by the laws of the several states is uniform so far as such exemptions are concerned. The exemptions may differ widely in different states, but such an act would apply a uniform rule, namely, to subject to the payment of the bankrupt's debts all his property not exempted by the laws of the state wherein he resided. Upon this ground, the original provision of the bankrupt act, which adopted the state exemption laws in force in 1864, was declared to be uniform. In re Beckerford [Case No. 1,209]. But it is said that the act of 1873 does not adopt the exemption laws as they exist in the states, but gives effect to all those which were upon the statute books of the states in 1871, even though some of them may have been declared unconstitutional, invalid and inoperative by the state courts; that the operation of the act of congress is therefore not uniform, because in some states the exemption allowed by the state law is followed, while in others, exemptions are permitted, which the state laws, as interpreted by the courts, do not allow. The same objection would apply to the original bankrupt act of 1867 [14 Stat. 517]. That declared that the exemptions allowed by the state laws in force in 1864 should be allowed under the bankrupt act. The unconstitutionality of this provision has never been declared, and yet, before the 3d of March, 1867, the date of the bankrupt act, many of the states might have altered, amended or repealed the exemption laws which were in force in 1864. Doubtless, many of them did so before the passage of the act of 1873. Yet the bankrupt act of 1867 undertook to give effect, not to the exemption laws as they existed at its passage, and as they might be thereafter altered or amended, but as they existed in 1864. So, if the original act was uniform, the amendment of 1873 must be uniform. Had the bankrupt act made no exemption at all, or a horizontal one, as of such a number of dollars, or of certain specified articles, it would have been less uniform than the rule adopted in 1867 or 1873, because the contracts made in each state were subject to the implied condition that they could never be enforced against the property of the debtor exempted by the laws of such state, and a horizontal exemption would have cut down contracts in one state and aided them in another, which would not have been uniform; that is, it would not have been paying uniform respect to the obligation of contracts made in different states. Perhaps the most exactly uniform rule would have been to subject every contract to such an exemption as it was liable to when made. But that would not have been practicable, for the property of the same debtor would, in many instances, have been liable to different exemptions, and his property would always be taken by the claims which were subject to the least exemption, but only for the benefit of the owners of such claims, so that some creditors would get a larger percentage of their claims than others.

It appears, therefore, that the best thing congress could do was to adopt the state exemptions existing at a recent day and likely to affect most contracts made by the bankrupt. Congress has undertaken to say that all exemptions in force at a certain date by laws of the state shall have effect under the bankrupt act. I think this sufficiently meets the requirement of uniformity, and that, to make the law uniform, it was not necessary to enact that the bankrupt act should follow the shifting legislation of the states on the subject of exemptions, or the decisions of the state courts. Thus, the bankrupt act of 1867 continued the exemptions that were in force in Georgia in 1864, although those exemptions had been repealed and new ones established by the act of October 3, 1868. Suppose the bankrupt act of 1867 had declared that all exemptions by the state law in force at the date of its passage should have effect under the bankrupt act. That would clearly be a uniform enactment. Would it cease to be such and become unconstitutional merely because the legislature of a state had, at a subsequent time, amended its exemption laws, or the courts of another state had declared its exemption laws unconstitutional? I think it would not. In other words, I think congress may adopt the state laws on the statute books of the state, at a particular date, in reference to exemptions, and that the legislation is uniform, although the laws in some of the states may afterwards be repealed by the legislature or declared null by the courts. I am advised that a different view of the subject has been taken by the United States circuit court for the Eastern district of Virginia in Re Deckert [Case No. 3,728]. But, in passing upon the constitutionality of an act of congress, all the presumptions are in favor of the law. While, therefore, disposed to yield great weight to this high authority, I cannot forget that, in the opinion of the congress of the United States, this law is constitutional, and that the highest judicial authority has said that

the courts ought not to pronounce a law unconstitutional unless its incompatibility be clear, decided and inevitable. Fletcher v. Peck, 6 Cranch [10 U. S.] 87; Dartmouth College v. Woodward, 4 Wheat. [17 U. S.] 625; Livingston v. Moore, 7 Pet. [32 U. S.] 469.

While I admit that the argument against the constitutionality of this act is plausible and persuasive, yet I cannot say that it is entirely convincing; it does not make the unconstitutionality of the act clear, decided and inevitable. Resolving doubts, therefore, in favor of the law, I must decline to declare it unconstitutional, and I must affirm the decree of the district court.

SMITH, In re. See Case No. 11,746.

Case No. 12,997.

Case of SMITH.

[1 Pa. Law J. 149.]

Circuit Court, N. D. New York. 1842.

BANKRUPTCY—LIEN—CREDITOR'S BILL.

The mere filing of a creditor's bill against the bankrupt, without the service of an injunction, gives no such lien to the complainant as would prevail over the rights of the assignee in bankruptcy. .

The case [of Charles Smith, Jr.] was argued by Mr. Duer for complainants in the creditor's bill.

Mr. Myers, for assignee, on a former day.

The matter having been in the meantime held under advisement, the court now decided that the assets passed to the assignee, and ordered the same to be delivered to him. Judge CONKLING said he considered the point entirely clear, both upon principle and authority. There was nothing in the cases cited by the counsel for the creditor, which, properly understood, militated at all against the conclusion he had formed.

In the case of Corning v. White, 2 Paige, 567, on which the counsel chiefly relied, the defendant, in his answer, admitted the judgment and execution of the complainants, and that he possessed equitable assets; but alleged that he had other judgment creditors, whose claims were unsatisfied. The only point involved in the case, and the only one decided therefore, was, that the complainants were entitled, as the reward of superior vigilance, to a preference over the other creditors. The language of the chancellor is to be interpreted with reference to the facts of the case before him, and to the point in judgment. What he says of the effect of filing a bill, in giving a preference to the complainant over other creditors, is to be considered as descriptive of the nature and form of the proceeding, and has no reference to the particular question involved in this case. And his remark concerning the effect of such a suit upon the title acquired by the assignee of an insolvent debtor, is very far from importing that the filing of the bill alone creates a lien on the debtor's property.

If obscurity rested upon the question before, (which however he did not admit,) it was removed by the recent decision of the court of chancery in the case of Hayden v. Bucklin [9 Paige (N. Y.) 512], in which it was held that an assignment by the judgment debtor of his property to a third person, after the filing of a creditor's bill, but before the actual service of a subpœna, was valid and effectual in favour of the assignee. In that case the injunction, which, together with a subpœna, had been issued at the time of the filing of the bill, but which was not served until the day after the assignment, was, upon this ground, dissolved. His honour said a decree of bankruptcy certainly could not be less efficacious than an assignment, by the voluntary act of the debtor himself, and he was bound to suppose that the court of chancery would so decide, and would at once, upon application, relieve the bankrupt from the injunction which had been issued and served subsequently to the decree in this case.

It had been objected, that the court ought not thus summarily to decide upon the conflicting claims of the adverse parties. But it was the duty of the assignee in behalf of the creditors, at once to take into his possession the property of the bankrupt, and it is provided by one of the rules made in pursuance of the act [of 1867 (14 Stat. 517)] that the assignee on proper evidence and on motion of the court, may have the requisite order and process of the court put to him in possession of the bankrupt's estate, books, vouchers, accounts. To the demand of the assignee in this case, the bankrupt replied that a creditor's bill had been filed against him the day before the decree of bankruptcy was entered, and that subsequently, and after the decree, an injunction had been served on him—that for this reason he must decline to surrender his books of account, &c. The assignee, supposing this to be an insufficient reason for his refusal, applied to the court as he was bound to do, in pursuance of the above mentioned rule. Notice of this application was ordered to be given to the prosecuting creditor, who has appeared by counsel to resist the application of the assignee.

The facts set forth in the petition of the assignee were distinctly admitted. Thus the question was directly presented for decision, whether the bankrupt could lawfully refuse to surrender the assets in question, and Judge CONKLING said he did not perceive any ground on which he could justifiably refuse to decide it. He had patiently listened to the able argument of the counsel for the creditor, and had no doubt of the soundness of the conclusion at which he had arrived. The proceeding, it is true, was

summary; but there was no dispute concerning the facts, and the parties had been fully heard upon the law. The act expressly required that the proceedings under it should be summary, and enjoined it upon the courts to take care that they should be brought to a speedy conclusion. In the case of Hayden v. Bucklin, already mentioned, precisely the same question was decided in the same manner, on a motion to dissolve the injunction—a proceeding quite as summary as this.

His honour said he was extremely solicitous to avoid even the appearance of collision with the state tribunals, and if he could properly have left this controversy to be decided in the state court, he should have been glad to do so. But having been first presented for decision here, he conceived he had no right to refuse to pass upon it; and he regretted this necessity less than he should otherwise do, because he entertained not the slightest doubt that the decision he had felt himself compelled to make, was precisely that which the state court would have made had the question first arisen there. It was scarcely necessary, his honour said, to add, that according to his views of the matter, no conflict of jurisdiction could, in fact, possibly grow out of this proceeding, because the injunction from chancery could operate, and was intended to operate, only on the property of the defendant, which, in the language of the bankrupt act, had, ipso facto, been divested out of him, and vested in the assignee, by force of the decree of bankruptcy.

Case No. 12,998.

SMITH v. ADDISON et al.

[5 Cranch, C. C. 623.] [1]

Circuit Court, District of Columbia. Nov. Term, 1839.

SURETY—DISCHARGE—CHANGE IN TERMS OF CONTRACT—EXTENSION OF TIME.

John Addison having been appointed by the Washington National Monument Society, collector of subscriptions, in the state of Kentucky, gave bond to the plaintiff, treasurer of that society, with the defendant and others, his sureties for the faithful execution of the trust, and to account, &c. "for which services," says the condition of the bond, "he will be entitled to a commission of 10 per cent." &c. The society, afterwards, without the consent of his sureties, agreed to allow him an additional commission of five per cent., provided the amount collected should be equal to, or exceed ten cents on each white inhabitant of the state: *Held*, that such agreement for an increased commission did not discharge the sureties in the bond; that the bond covered the collection of the second year as well as the first although, by the condition, he was to make his final return, and close his collections in one year from the date, unless the society should extend the time; and that he had no right, under the contract, to set off his expenses.

[Cited in Fond du Lac Harrow Co. v. Bowles, 54 Wis. 430, 11 N. W. 797.]

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

Debt upon a bond for $5,000, given to the plaintiff [Samuel H. Smith], as treasurer of the Washington National Monument Society, by John Addison, and the defendant James L. Addison and others, his sureties, with condition that the said John Addison, who had been appointed by that society, collector of contributions in and for the state of Kentucky, should use his best endeavors to collect from all the white inhabitants of that state, such contributions as they should be willing to make for the erection of a great national monument to the memory of Washington, at the seat of the federal government, &c. &c., and should account, &c., and make his final return, and close his collections in one year from the date of the bond unless the society should extend the time; and in all things well and faithfully execute the trusts reposed in him, &c., "for which services he will be entitled to a commission of ten per cent. upon all moneys which he shall have transmitted, deposited, or paid over to the treasurer of the said society."

The defendant's second plea was, in substance, that after giving the bond, it was resolved by the society, and agreed to by the plaintiff that the collector should be allowed 15 per cent. on the amount deposited by him to the credit of the treasurer of the society within twelve months from the date of the bond, provided the sum so collected should be equal to, or exceed ten cents on each white inhabitant of the state. That the said John Addison, the collector, agreed to the same, but that the defendant had no notice thereof and did not consent thereto; and that this agreement is different from the condition of the bond, by which he was to receive a commission of ten per cent. To this plea there was a general demurrer, and joinder.

Wm. M. Addison, for defendant, contended, that the sureties were exonerated by this new agreement without their consent. Although it was intended for the benefit of the collector, yet it was injurious to the sureties, because the additional commissions induced the collector to continue in office, whereby he received more money than he would otherwise have received, and increased the responsibility of the sureties. The general rule is, that any material alteration of the contract exonerates the sureties although beneficial to them. Miller v. Stewart, 9 Wheat. [22 U. S.] 703; Id. [Case No. 9,-591]; Rees v. Berrington, 2 Ves. Jr. 542; Walsh v. Bailie, 10 Johns. 181, 182; Ludlow v. Simond, 2 Caines, Cas. 49, 50; U. S. v. Nichol, 12 Wheat. [25 U. S.] 510; Rathbone v. Warren, 10 Johns. 586; Co. Litt. 232; Eppes v. Randolph, 2 Call, 125. The new agreement was upon good consideration, the continuance of the collector in office.

Mr. Addison, having given notice of the set-off, contended that the defendant had a right to charge the society with his travelling expenses, &c. The commission is only for

his personal services. Expenses of agency are always to be charged to the principal unless there be some agreement to the contrary. Green v. Winter, 1 Johns. Ch. 37, 38; Fearns v. Young, 10 Ves. 184; Bonithon v. Hockmore, 1 Vern. 316; Dean v. Angus [Case No. 3,702].

Mr. R. J. Brent, same side, contended, that the sureties were not liable for the collections of the second year. There is no allegation that the society extended the time. The new contract turns the whole into a parol contract. No action can be maintained upon the bond, even against the principal. Lattimore v. Harsen, 14 Johns. 330; Brown v. Goodman, 3 Term R. 592, note b; Heard v. Wadham, 1 East, 630; Ousterhout v. Day, 9 Johns. 115.

Mr. Smith and Mr. Bradley, contra, contended that the additional five per cent. allowed by the society was a mere gratuity, not a contract, nor a variation of the contract, and was without consideration. U. S. v. Nichol, 12 Wheat. [25 U. S.] 510; Lemore v. Powell, Id. 554; U. S. v. Tillotson [Case No. 16,524]. The defendant has no right to charge his personal expenses to the society. The commission of 15 per cent. was to cover all his expenses. Besides, there is no privity between the surety and the principal which will authorize the surety to set off a debt due to his principal.

THE COURT (nem. con.) was of opinion that the subsequent allowance of the additional five per cent. did not avoid the bond or exonerate the sureties; that the bond covers the collections made in the second year, as well as the first; and that the defendant cannot set off his expenses.

The demurrer was withdrawn by consent, and upon the issue joined the plaintiff recovered a verdict; upon which judgment was rendered for the penalty, to be discharged by the payment of $150.83, with interest from the 1st of February, 1837, and costs.

Case No. 12,998a.

SMITH v. The ALABAMA.

[19 Betts, D. C. MS. 70.]

District Court, S. D. New York. Aug. 5, 1851.

SHIPPING—MARITIME TORT—OBSTRUCTING PASSAGE—DAMAGES—LOSS.

[This was a libel by Belknap Smith against the steamer Alabama for a maritime tort.]

Before BETTS, District Judge.

It is considered by the court: 1. That a maritime cause of action arises against a vessel unlawfully obstructing the passage of another on tide waters, whereby the vessel obstructed receives direct damage or prejudice.

2. That the steamboat Alabama had no lawful right to be so moored or placed as to intercept the free passage of the Jenny Lind to Peck slip, and the use of the floating dock stationed there, and that the manner in which the said steamship Alabama was moored, as in the pleadings mentioned, was an illegal obstruction of the right of way or passage to which the Jenny Lind was then and there entitled.

3. That the Alabama might, with safety to herself, have been so moored at the time as to allow a free passage and entrance to the Jenny Lind to said dock, and the refusal of the officers in charge of the Alabama so to remove her was wrongful and tortious in respect to the Jenny Lind.

4. That the Jenny Lind is entitled to compensation, by way of damages against the Alabama, for the expenses or injuries incurred by her directly in consequence of such act of the Alabama, she having been towed to that place by a steamer, on appointment to be there received on the balance dock.

5. But that the Alabama is not responsible for consequential or remote damages supposed to arise from such obstruction and hindrance of the Jenny Lind, but only to such as are immediate and direct to her. That the act of fastening the Jenny Lind to the Alabama was voluntary on the part of the former, and was at her own risk, unless some improper act to her prejudice was afterwards done by the Alabama.

6. That those on board the Alabama were justified in cutting the lines of the Jenny Lind, when she was found to be sinking and likely to injure the Alabama thereby, and it was the duty of those having charge of the Jenny Lind, and not of the officers of the Alabama, to see to her safety whilst lying there, or to have had her guarded or protected safely otherwise than by fastening her to the Alabama.

7. The Alabama is not responsible for the sinking and loss of the Jenny Lind occurring after the lines were cut. In her crippled and sinking state, it was the duty of her crew to have had her taken to a place of security, or to have proper supports provided for her at that place.

Wherefore it is adjudged that the libellant is entitled to recover in this action his necessary charges and expenses for towing the steamer Jenny Lind to the entrance of Peck slip, in order to have her placed on the balance dock, and which he was prevented having done by the misconduct of the owners or officers of the Alabama, and that it be referred to a commissioner to ascertain and report the amount of such charges and expenses. And it is ordered that the steamship Alabama be discharged of all claim for the total loss and value of the said Jenny Lind caused by her sinking the day after. Because of the wilful and obstinate misconduct of the officers of the Alabama in refusing to move her, and allow the Jenny Lind a passage into the slip and to the dock to which she was

destined, it is ordered that the libellant, in addition to his expenses and damages aforesaid, recover his costs to be taxed.

Case No. 12,999.

SMITH et al. v. ALLEN.

[2 Fish. Pat. Cas. 572.] [1]

Circuit Court, D. Massachusetts. Oct., 1865.

PATENTS—APPLICATION—REISSUES—PRIORITY OF INVENTION.

1. Where the plaintiffs' application was much earlier than the defendant's, although their patent was subsequent to his, and the defendant, in his first application, did not in terms describe or claim the plaintiffs' invention, but deliberately disclaimed it; but afterward reissued his patent and procured a reissue identical with the plaintiffs', *held*, that these facts constituted a case against the defendant, which he was called upon to meet.

2. Priority of invention awarded to the patent granted to Smith and Wesson December 18, 1860, for improvement in revolvers, over that reissued to Ethan Allen February 4, 1862.

This was a bill in equity, filed to restrain the defendant [Ethan Allen] from infringing letters patent [No. 30,990], for "improvement in revolvers," granted to complainants [Horace Smith and Daniel Wesson] December 18, 1860. The defendant claimed under letters patent for a similar improvement, granted to himself July 3, 1860 [No. 28,951], and reissued February 4, 1862 [No. 1,268].

The claims of these several patents were as follows:

Patent of Smith and Wesson: "We claim, first, the combination of a revolving cylinder, having its chambers extending entirely through the block, with an unbroken recoil shield having a projection on its face, as described, for the purpose set forth. Second, the combination of the barrel, hinged to the lock plate with a spring catch b, arranged with end projections to grasp the barrel and plate, substantially as described, for the purpose as set forth."

Original patent of Ethan Allen: "Providing the recoil plate of revolving fire arms with a projection in the form of an inclined plane, so that the cylinder will be free to revolve at the first minute movement of the hammer, substantially in the manner and for the purpose set forth and described."

Reissued patent of Ethan Allen: "The combination of a revolving cylinder, having its chambers extending entirely through the block, and an unbroken recoil shield, having a projection on its face, as described and for the purpose set forth. Also, in the said combination, as described, the making of the said projection, on the recoil plate, in the form of an inclined plane, substantially as and for the purpose specified."

E. T. Hodges and E. W. Stoughton, for complainants.

J. E. Maynadier, Causten Browne, and B. R. Curtis, for defendant.

LOWELL, District Judge. In this case the parties hold patents for the same invention, and their specifications are identical—a state of things as novel, probably, as the flat projection on the recoil shield of revolving fire arms, which is the subject of the patents. This fact relieves the case of many difficulties of interpretation, and of mechanics, usually found in controversies of this nature, and leaves open only the question of priority of invention, and this only between the parties to this suit; no invention by any third party being alleged. The plaintiffs, after many experiments, and after making and selling pistols, arranged upon a principle, the identity of which with this invention is in dispute between the parties, certainly made the precise improvement now patented, in April or May, 1858, and applied for a patent in January, 1859, before which time they had completed all their tools and preparations for making and selling pistols, embodying the improvement. Their application was rejected because the invention was supposed to be covered by one of several patents granted to Rollin White in 1855. They afterward renewed their application, with some modifications of their specification, and the patent was granted in December, 1860.

The defendant first applied for his patent for a projection in the form of an inclined plane, in April, 1860, something more than fifteen months after the plaintiffs had first made application, but when his petition was rejected, and he was referred to the Rollin White patent, and to the plaintiffs' application, he promptly disclaimed the flat projection, which, indeed, he had not in terms described or claimed, and received his patent for the inclined projection some months before the plaintiffs received theirs for the flat form. He has since obtained a reissued patent identical with the plaintiffs'; and it is admitted that, in law, the defendant could not support a patent for the inclined form of projection, if the plaintiffs' invention was earlier.

These facts, the very considerable priority of the plaintiffs' application, the nature of the defendant's original specification, which did not describe or claim, in terms, the flat form of projection, and his deliberate disclaimer on oath of the flat form as not new, certainly make a case which the defendant is called upon to meet. He introduces his own testimony and that of his workman Huber, to show that in the autumn of 1857 a model pistol was made for the purpose of testing this kind of fire arm, that is, a pistol with chambers bored through the cylinder. It was manufactured, they say, by Huber after a wooden model made by the defendant, and, when nearly finished, was tried, and found not to revolve easily, and the defendant ordered Huber to file the

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

shield away, around the line marked by the cartridge, excepting in the line of fire. Huber says he did so file it, and found it to work well thereafter. The defendant did not try it again, but was satisfied with Huber's report, and gave the model to Mr. Prescott, then, or soon after, his foreman, to make tools by for manufacturing the pistols.

A good deal of doubt is thrown by the plaintiffs' rebutting evidence upon the alleged fact of Huber's making any such pistol at that time.

It is not contended that any other pistol of this kind was made until after the admitted date of the plaintiffs' invention. And we are disposed to consider the weight of the whole evidence, including the copy of the defendant's contemporaneous letter to Rollin White, to be that he was not ready to make and sell in the market any pistols of this general class until January, 1859. This tends to increase the doubt of the correctness of the date for the model pistol, because it makes a very long interval for the carrying a successful experiment into practice.

But there is still greater doubt whether the model pistol, whenever made, contained any such protuberance on the recoil shield as would fairly anticipate the plaintiffs' invention. Prescott, who took charge of it to make the tools by, observed nothing of the kind, nor did any one else. The pistol itself is not produced. Its non-appearance is accounted for by the allegation sworn to by all the witnesses, who are asked to explain that circumstance, that, after the tools were made, it was of no importance. But no tool was made to carry out this part of the model. The explanation, therefore, fails, because the model would still remain important in this part. Again, it is perfectly certain, and is now admitted, that many, and probably most, of the pistols first made by the defendant were not filed at all. The plaintiffs have produced four such, made by the defendant during the year 1859. The defendant has produced none that were filed. Many witnesses who were in a position to know, and who examined many of the pistols, and who worked on all parts of them, saw and heard nothing of such a filing as is now sought to be established; and the majority of all who knew of any filing, speak of it as a filing in different parts of the shield, wherever the cartridges happened to bind. And the weight of the evidence decidedly is, that the whole matter of filing was left to the judgment of the fitters or finishers, without any model, or any definite or uniform plan upon which it was to be done. And there is no evidence that the model pistol was retained, for any purpose, for a single day after the tools were made.

Again, when the defendant came to make the large sized pistols, in which the binding is much greater, as it was obvious that it would be, and this was after the plaintiffs' original application for a patent, he made the shields entirely flat, and three uncontradicted witnesses say that they saw him trying one of these larger pistols in August, 1859, and that it would not revolve; and a suggestion being made by one of the bystanders that it needed a raised part on the shield, he said that he could not do that, as he had a number made in the same way, that is, flat. Soon after this, the defendant invented his inclined projection, and proceeded to make a proper tool for cutting or milling it uniformly upon all his pistols, and to take out a patent for it. Upon the rejection above mentioned, he disclaimed the flat projection as not original with him. Now, upon this point the defendant's explanation is far from satisfactory. He says he signed what his solicitor sent him, which, no doubt, is true. But he does not say that he did not fully understand what he was doing. There is some intimation that he did not know who was supposed to have invented the flat projection. This is not very material; but he certainly had full means of knowledge, because he knew all about the White patent, and had had some negotiation about buying it, and he knew that the plaintiffs had in fact bought it. When he was referred by the commissioner of patents to the patent of White, and the application of the plaintiffs, he was put on an inquiry which he could easily satisfy, so far as he was not already informed. The pistols of the plaintiffs were in the market, and the solicitor, Mr. Cooper, whom the defendant then proceeded to employ, had been their solicitor in making their original application. We think, under these circumstances, he must be affected with the knowledge that the plaintiffs were the persons concerned. And his disclaimer is a very distinct admission that his discovery was not earlier than January, 1859, the date of the plaintiffs' rejected application.

Upon all the evidence, of which we have referred to only some of the more prominent points, we find, as matter of fact, that the plaintiffs' invention of the flat projection was first in time, and that they are entitled to our decree.

This view makes it unnecessary to decide whether the invention of the plaintiffs of tipping the cylinder of their pistols is identical in principle and mode of operation with that of the flat projection, and, if so, whether it is properly described and claimed in their patent.

Case No. 13,000.

SMITH v. ALLYN.

[See Case No. 13,064.]

Case No. 13,001.

SMITH v. ALLYN.

[See Case No. 13.065.]

Case No. 13,002.

SMITH v. AMERICAN BRIDGE CO.

[3 Ban. & A. 565;[1] 8 Biss. 312.]

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

PATENTS—DIES—CHORD-BAR HEADS—NOVELTY.

1. It being old to cut dies in the face of a trip-hammer, or in the anvil upon which a trip-hammer works, so as to forge iron into different shapes, there was no invention in making dies in such hammers or anvils of the proper shape to form chord-bar heads for iron bridges.

2. Letters patent No. 101,529, issued to Frederick J. Smith, April 5th, 1870, for an improvement in dies for making chord-bar heads, *held* void for want of novelty.

[This was a bill in equity by Mary Ann Smith against the American Bridge Company to restrain the infringement of letters patent No. 101,529, granted to Frederick J. Smith April 5, 1870.]

Banning & Banning, for complainant.

Lawrence, Campbell & Lawrence, for defendant.

BLODGETT, District Judge. This is a suit brought by the complainant to restrain the defendant from the use of a patent issued to Frederick J. Smith, April 5, 1870, for an improvement in dies for making chord-bar heads.

The chord-bar head is a bar used in the construction of iron bridges. The dies are simply recesses or slots cut in the head of a trip-hammer, or the anvil upon which the trip-hammer works, and by the working of the hammer the bar heads are brought into the desired shape from the joint effect of the dies and hammer blows.

It is simply a hammer with the pattern cut in the face of the hammer and the anvil, so as to fashion the iron to be manipulated under it into the desired shape. The shape required for these chord-bar heads is an oval, and it is contended or claimed by this patentee that he has made an improvement in chord-bar heads by this process.

There is this peculiarity about the specifications that strikes me as noticeable. The patentee starts out by stating that he has made an improvement in dies for the manufacture of chord-bar heads. He then describes the method by which he prepares the iron for making chord-bar heads, saying that he commences by shingling scrap iron together, reheating it, and rolling it into a solid bar, and bringing it into the outline of the shape finally wanted. Then he places it under the hammer into which these dies have been cut, and by blows of the hammer, when falling upon the anvil, he brings it into the proper form, and claims that he draws the fibre around the curved portion, so as to make the fibre surround the curved portion of the bar head, and thereby make it stronger. This is the claim which he puts in for making a better bar head, and one which will sustain more weight by many tons than those cut or chucked out in the ordinary way. The die, however, is all that he claims as the patented device, and the question naturally arises: How much of the patentee's improvement results from the better iron which he uses by shingling scrap iron together, and thereby obtaining a better material with which to make his bar heads, and how much is due to the process by which he manipulates the iron in his dies after he has shingled the bars together?

Every person familiar with the making of iron knows that scrap iron, when shingled and reheated and welded together, makes the toughest iron that is known to the trade, and that it is the process by which the best iron is prepared for the extraordinary services to which it is subjected for many purposes—such, for instance, as railroad car axles, where the very best quality of iron is required. But the feature of this invention which struck me when the case was first presented was, that these dies are old; they have been in use many years, as the proof in this case shows—many years before this man obtained his patent, or claims that he made his invention—for as the proof in this case shows, for twenty years before this man appeared upon the field as an inventor of this device, dies similar to this, except in shape, were used in Colt's armory at Hartford, Conn., for the purpose of shaping the butts of pistols under the trip-hammer, the die being partly in the anvil and partly in the hammer which fell upon the anvil. So, too, the hammers for pistols were struck under a die in a similar manner; and for many years prior to this inventor's entering the field, dies were used in a manufactory at Cleveland, for striking into shape irons, in form similar to this, used in making draw-bar heads for railroad cars.

Now, after the art of cutting dies in the face of the hammer and in the face of the anvil, so that articles could be shaped to a given pattern under the trip-hammer, had been so far developed that an ordinary mechanic could, with dies in an anvil and hammer, or in either the anvil or hammer, produce shapes like those draw-bar heads, what possible invention was there in cutting dies of another pattern in your anvil or hammer so as to shape these chord-bar heads? It was simply changing the form of the die.

A die which would work, or a hammer and anvil which would work a piece of iron into a draw-bar head, would work one into a chord-bar head when you simply changed the form of the die. It seems to me that it is preposterous to hold that a man is entitled to a patent for a mere device of this kind. It is not an invention of a new die, to change the form of a die so as to make a new shaped article under it. The time may come when it will be desirable to make a chord-bar head of

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

different shape from the one which this die makes, and if the principle contended for by this patentee is sound, we should have a new patent for every conceivable new form of die, not only in chord-bar heads, but for every other form into which iron can be worked by the aid of dies. There is certainly nothing new in this device; there is no novelty in the mere change of form of the die, so as to change the form of that which is manipulated under the die.

The bill will be dismissed.

SMITH (APPLETON v.). See Case No. 498.

Case No. 13,003.

SMITH v. ARDEN.

[5 Cranch, C. C. 485.][1]

Circuit Court, District of Columbia. Nov. Term, 1838.

REAL PROPERTY — PARAMOUNT TITLE — SUBPURCHASER—NOTES—RIGHTS OF INDORSER.

1. A sub-purchaser, who gets in the paramount title, is bound in equity to fulfil his contract with the first purchaser, deducting what he has been obliged to pay to get in the title.

2. The first purchaser of several lots having given his several notes for each lot respectively, with the same indorser, and the lots having been resold for his default, some of the lots bringing more, and some less than the first contract price, it was *held* that the indorser was entitled to the benefit of the surplus of one to make good the deficiency of the others.

[This was an action by Clement Smith against Arden's heirs.]

Upon a motion for ratification of a sale which had been made under a decree in this cause, and for disposition of the proceeds of the sale, the facts, by the statement of the parties, appeared to be these: Certain lots in the city of Washington had been sold under a deed of trust from D. C. Mr. Arden became the purchaser, and gave a separate note for each lot, with J. C. R. as his indorser. Arden sold a lot to Hill, who sold it to Mr. Coyle. Arden's note, given for the lot, was assigned to the complainant, Clement Smith; Arden failed to pay Smith; Hill failed to pay Arden, and Coyle failed to pay Hill. The lot was resold by the trustee of D. C., and at that sale Coyle became the purchaser, with notice of the sale by Arden to Hill, and of Hill's delinquency.

On the 28th December, 1838, THE COURT (MORSELL, Circuit Judge, doubting) decided that Coyle, standing in the place of Hill, with notice, must pay the purchase-money due from Hill to Arden, deducting what Coyle has paid, or is to pay, to get in the legal title. And as some of the lots sold for more, and some for less, than the respective notes given by Arden, therefore,

THE COURT (CRANCH, Chief Judge, not giving any opinion upon that point) decided that the indorser of Arden's notes was entitled to the benefit of the surplus of one to make good the deficiency of the others.

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

Case No. 13,004.

SMITH v. ARNOLD.

[5 Mason, 414.][1]

Circuit Court, D. Rhode Island. Nov. Term, 1829.

STATUTE OF FRAUDS—SUFFICIENCY OF MEMORANDUM—AUCTION SALE BY ADMINISTRATOR.

1. Where a sale was made by an administrator, at public auction, of the real estate of his intestate, under a license of the proper court, to pay debts, and he acted as auctioneer at the sale; it was *held*, that a memorandum by him of the sale at the time, was not binding on the purchaser, who bid at the sale, and that he was not his agent so as to make the sale a valid contract under the statute of frauds of Rhode Island.

[Cited in Camden v. Mayhew, 129 U. S. 85, 9 Sup. Ct. 249; Pewabic Min. Co. v. Mason, 145 U. S. 362, 12 Sup. Ct. 890.]

[Cited in Barron v. Mullin, 21 Minn. 376; Bent v. Cobb, 9 Gray, 399; Hutton v. Williams, 35 Ala. 503; McGuinness v. Whalen, 16 R. I. 560.]

2. No memorandum under the statute of frauds is sufficient, unless it state the price and material terms of the contract for the sale of lands.

[3. Cited in Blossom v. Milwaukee & C. R. Co., 3 Wall. (70 U. S.) 207, and Blackburn v. Selma R. Co., 3 Fed. 695, to the point that a sale made under the direction of a court of chancery is not final until a report is made to the court, and it is approved and confirmed. The purchaser becomes a party to the suit and is subject to the orders of the court.]

[4. Cited in Bamber v. Savage, 52 Wis. 113, 8 N. W. 609; Capehart v. Hale, 6 W. Va. 551; Gwathney v. Cason, 74 N. C. 5; Horton v. McCarty, 53 Me. 397; Walker v. Herring, 21 Grat. 682,—to the point that the memorandum of the auctioneer, in order to bind the purchaser, must be made contemporaneous with the sale.]

Assumpsit [by Dutee Smith, administrator of Russell Aldridge, against John Arnold]. The declaration was for the price of a certain farm sold by the plaintiff, as administrator of Russell Aldridge, to the defendant, the defendant refusing to complete the purchase. Plea, non-assumpsit.

At the trial it appeared, that the plaintiff was duly licensed as administrator, by the supreme court of Rhode Island, to sell the land in controversy; and that it was duly advertised for sale, at public auction, in May, 1824. The administrator acted as auctioneer at the sale, (administrators being exempted from the prohibitions of the statute of Rhode Island as to public sales,) and the defendant being the highest bidder at the sale, the premises were struck off to him. The advertisement was of all the right and title of the intestate in the premises. The administrator wrote down, at the time of the sale, upon a paper containing the conditions

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

of the sale, the following memorandum: "The home farm of said Aldrich, called 140 acres more or less, said Aldrich's title in the same struck off to John Arnold, highest bidder, for $1705,50." The memorandum was without any signature. But below it there was another memorandum signed by the administrator verifying it, which appeared to have been made at a different time and with different ink. Some time after the sale in September, 1824, the court of probate, upon the application of the widow of the intestate, set off her dower in his estate, and assigned a considerable part of the premises for that purpose. The defendant, in October, 1824, prayed an appeal to the supreme court from the decree for dower, and in his petition alleged, that he was "a creditor to said R. Aldrich's estate, and a purchaser at auction of the said tract or farm." The condition of his bond, given on the granting of the appeal, stated, that he was interested in the said estate. The memorandum and a record copy of the petition and bond were offered as a sufficient memorandum, within the statute of frauds, to charge the defendant as purchaser.

Mr. Whipple, for defendant, objected to the evidence as inadmissible, and argued his objection at large, and cited 2 Camp. 203; 3 Burrows, 1921; 1 W. Bl. 509; 2 Taunt. 38; 4 Taunt. 409; 4 Johns. Ch. 659; 14 Johns. 484; 3 Ves. & B. 57; 1 Jac. & W. 350; 4 Johns. Ch. 663, 669; 9 Ves. 251. On the point, as to the inadmissibility of the evidence of the petition and bond, as evidence of the contract per se, he cited Prec. Ch. 560; 2 Schoales & L. 22; 1 Atk. 12; 1 Brown, Parl. Cas. 345; 1 Ves. Jr. 326; 10 Mass. 230; 15 Ves. 516; 1 Hen. & M. 166; 2 Desaus. Eq. 188; 1 Johns. Ch. 273.

Tillinghast & Searle argued at large, è contra, and cited on the point, that the memorandum was sufficient, 7 Ves. 341; 9 Ves. 234; 13 Ves. 341; 2 Johns. 248; 8 Johns. 520. They also contended, that this was a judicial sale, and so out of the statute of frauds; and cited 12 Ves. 471.

The arguments are not given at large, as they are fully considered in the opinion of the court.

STORY, Circuit Justice. The question here is, whether there is a sufficient memorandum, within the statute of frauds of Rhode Island (Rev. Laws 1822, p. 366), to bind the defendant as purchaser of the land. The statute is the same in substance with the English statute of frauds of 29 Car. II. c. 3, § 4. The words are, "No action shall be brought, whereby to charge, &c. &c. any person upon any contract for the sale of lands, &c. &c. unless the promise or agreement, upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person, by him thereto lawfully authorized."

I will first consider, whether the petition and bond in the court of probate contain any sufficient proof of the contract now sued on; or contain any reference to the memorandum made by the administrator, acting as auctioneer at the sale, so as to amount to an adoption or ratification of the memorandum. Now, taking the probate proceedings per se, it is very clear, that they contain no sufficient statement of the contract to be binding on the party. The language of the petition is, that the petitioner is a "creditor and purchaser at auction of the farm." It is not said of whom he purchased, at what sale, or at what time; and the court cannot intend, that it must necessarily refer to the sale by the administrator. But what is fatal is, that it contains no statement of any price or consideration of the purchase; and no memorandum is sufficient within the statute, which does not contain in substance the essential terms of the contract. How can that be said to be a memorandum of a contract, which is wholly silent as to the consideration and terms of the contract? which merely states, that there was a contract or purchase; but leaves all in darkness as to the nature and extent of it? The probate papers, therefore, as a memorandum, may be entirely laid aside. Then, do they contain any certain reference to the memorandum of the administrator, so as to admit and adopt it? There is not a word of reference to any memorandum whatsoever. It is not even said, that the purchase was of the administrator; and unless there were some certain reference so clear as to admit of no doubt, there is no pretence to say, that the court is at liberty to incorporate the memorandum into, and make it a part of, the petition, as the written admission of the defendant. We may, then, lay aside any further consideration of these proceedings. They stand alone, and are of themselves no proof of any contract binding on the defendant.

Then is the memorandum of the administrator sufficient? The memorandum is at the bottom of the conditions of sale, and so far as respects the defendant, it is in the following words: "Struck off to John Arnold, highest bidder, for $1705,50." There is now found at the bottom of the paper a signature of the administrator's name; but it is almost certain, that it was not made at the time when the memorandum was written, for it is in a very different ink, and apparently of more recent date. So that the memorandum is not brought within the terms of the statute. It is not signed by the party to be charged therewith, or by his agent thereunto lawfully authorized.

But the important question is, whether, under the circumstances of the present case, the administrator can be considered as the agent of the purchaser, authorized by him to make and sign the memorandum. If he can, then the defendant is bound, for the memorandum sufficiently sets forth the terms of the con-

tract. After much fluctuation and doubt, it has at last been settled in England, that an auctioneer is to be deemed the agent of both parties in respect to the sale, and authorized to make a memorandum for both. Lord Mansfield, in Simon v. Motivos, 3 Burrows, 1921, began that doctrine; and it has, after very great hesitation, been followed. It appears to me, speaking with all due respect, to have done much to destroy the salutary operation of the statute of frauds. By the common law, if an agent is to execute a deed for his principal, his authority must be of as high a nature. It must be by deed. By analogy it would have seemed convenient, if not indispensable, to have held, that where the statute, to prevent frauds and perjuries, required a contract to be in writing, if executed by an agent, his authority should be in writing also. That the auctioneer is agent of the seller is clear; that he is also agent of the buyer is not so very clear; and is a conclusion founded on somewhat artificial reasoning. But the doctrine is now established; and the best reason in support of it is, that he is deemed a disinterested person, having no motive to misstate the bargain, and enjoying equally the confidence of both parties. The agency is presumed to be given to him on this account by the purchasers, trusting to his integrity and disinterestedness. But the case is very different, where the auctioneer is the vendor, and is himself the very party in interest, with whom the contract is made. There can be no reasonable presumption from the mere act of bidding, that the purchaser means to trust the other party with settling, by his own memorandum, the whole terms of the contract. It would be a very extraordinary position, at war with the ordinary care and caution of men, to put into the hands of the other party the unlimited power to settle all the terms of an important contract by his own memorandum. And this would be the result of the doctrine contended for. For if the mere act of bidding, being proved by parol, would be sufficient to create a virtual agency for the bidder, then the party would be bound, though he never saw the memorandum; and when the memorandum was once reduced to writing, no parol evidence could at law be admissible to show, that the terms were mistaken or varied; for the memorandum would be the proper evidence of the contract, though made by the very party in interest. It is said, that here the administrator is not the party in interest; and that he has a mere power or license to sell. But he is the party, who alone is competent to make the contract. The price must be paid to him; and non constat, to what extent, as administrator, he may have an interest in the proceeds, either as creditor, or for services. He stands in the same situation as a trustee of an estate, selling for the use of his cestui que trust. He could not be a witness to prove the contract. And yet, upon the doctrine now asserted, his memorandum is better than any testimony. In a legal point of view he is the real party to the contract, and is alone authorized to sue upon it. And whether he has a beneficial interest in it, or not, is immaterial. He is the legal party in interest in the price and performance of the contract.

The case, then, is not distinguishable from that of any other vendor, who acts as auctioneer. If there were no authority upon the subject, we should say, upon principle, that a vendor was not to be presumed to be the agent of the purchaser for the purpose of signing the contract for him. That it would be a presumption against common sense to suppose, that the party could act both as buyer and seller at the same time, and that the purchaser meant to surrender himself into the hands of a party in interest. If there were an express authority given for such a purpose, that might be another thing. But it ought not to be presumed from so equivocal an act as bidding at a public sale, and having the property struck off at the bid. There are cases, where courts of law have interposed limitations upon the construction of the statute, which are not found in its words. It is, for instance, decided, that the memorandum of the auctioneer, to bind the purchaser, must be contemporaneous with the sale. It cannot be made afterwards. Now, the statute does not say, that the memorandum in writing shall be contemporaneous with the sale. But the courts, upon principles of just policy, have bound up the words by this restriction, in order to prevent men from being ensnared by contracts subsequently reduced to writing by agents. See 13 Ves. 456. The same reasoning applies to the present case, and with far greater force. But there is an authority directly in point, and even stronger, than the case before the court. It is Wright v. Dannah, 2 Camp. 203. There, the vendor reduced the contract to writing, and showed it to the vendee, who corrected it and approved it. But it was held by Lord Ellenborough, that the memorandum was not sufficient within the statute of frauds. On that occasion he said, "The agent must be some third party, and could not be the other contracting party." Now there, the very paper was assented to by the party, after it had been read; but the court thought it dangerous to allow the doctrine, that the mere assent of the vendee to the contract, as drawn up by the vendor, should be deemed by implication to make him an agent to bind the vendee by the memorandum. It was quite consistent with the facts, that he should be satisfied, that it was truly stated, and yet that he should not adopt it as his own act, or the act of his agent to bind him.

But it is said, that this is the case of a judicial sale, and such sales have been held not to be within the statute of frauds. The cases alluded to are sales of a very different sort from that before the court. In sales directed by the court of chancery, the whole business is transacted by a public officer under the guidance and superintendence of the court it-

self. Even after the sale is made, it is not final, until a report is made to the court, and it is approved and confirmed. Either party may object to the report, and the purchaser himself, who becomes a party to the sale, may appear before the court, and, if any mistake has occurred, may have it corrected. He, therefore, becomes a party in interest; and may represent and defend his own interests; and if he acquiesces in the report, he is deemed to adopt it, and is bound by the decree of the court confirming the sale. He may be compelled, by process of the court, to comply with the terms of the contract. So that the whole proceedings, from the beginning to the end, are under the guidance and direction of the court; and the case does not fall within the mischiefs supposed by the statute of frauds. In the case of an administrator, the aumority to sell is, indeed, granted by a court of law. But the court, when it has once authorized the administrator to sell, is functus officio. The proceedings of the administrator never come before the court for examination or confirmation. They are mere matters in pais, over which the court has no control. The administrator is merely accountable to the court of probate for the proceeds acquired by the sale, in the same manner as for any other assets. But whether he has acted regularly or irregularly in the sale is not matter, into which there is any inquiry by the court granting the license, or by the court of probate having jurisdiction over the administration of the estate. So that the present case is not a judicial sale in any just sense; but it is the execution of a ministerial authority. The sale is not the act of the court, but of the administrator.

For these reasons we are of opinion, that the evidence is inadmissible. Plaintiff discontinued.

SMITH (ASKEW v.). See Case No. 588.

Case No. 13,005.

SMITH v. ATLANTIC MUT. FIRE INS. CO.

[Brunner Col. Cas. 573;[1] 12 Law Reporter, 408.]

Circuit Court, D. New Hampshire. Oct. Term, 1849.

PLEADING AT LAW—ABATEMENT—TERM OF COURT—INSURANCE—LIMITATION IN POLICY—ON WHOM BINDING.

1. In a suit against a mutual insurance company, the latter cannot, by a plea in abatement, interpose the objection that under the charter suit can only be brought at the term of court succeeding the loss.

2. A clause in an insurance policy that suit shall only be brought at a term of court, next succeeding the loss, applies to members of the company only; not to one who holds the policy as collateral security.

This was assumpsit on a policy of insurance made by the defendants to Dana & Carpenter, of Attleborough, Mass., on certain paintworks, etc. The amount insured was fifteen hundred dollars, and in case of loss it was to be paid to Joseph Smith, of Pawtucket, who brings this action. The defendants were averred in the writ to be a corporation under a special act of the legislature of New Hampshire, and to be doing business at Exeter, in that state. They pleaded generally in abatement, that this court had no jurisdiction over the present case. On this fact issue was joined by the plaintiff, and at the trial the defendants showed that after the fire, March 28, 1848, the plaintiff on the 12th of April, 1848, demanded more than the company thought had been sustained in damages by the fire, most of the injury being in their opinion caused by the explosion of a steam boiler, for which they did not consider themselves liable. That on the 2d June, 1848, the company voted to allow for the loss, two hundred dollars in full, and on the 10th July, 1848, communicated the result to Mr. Austin, the counsel for the plaintiff, who had demanded the amount due. The present action was then instituted in this court, for that last supposed amount, although a session of a state court had intervened since the decision of the company, at which this suit might have been brought, and where it was insisted that by the act of incorporation, the insured were bound to bring it, under the following clause in the second section of their act:—"And the directors upon a view of the same, or in such other way as they may deem proper, shall ascertain and determine the amount of said loss or damage, within ninety days after notice aforesaid, and if the party suffering is not satisfied with the determination of the directors, the question may be submitted to referees, or the said party shall bring an action against said company for said loss or damage, at the next court to be held in and for the county of Rockingham, and not afterwards, unless such court shall be holden within sixty days after such determination; but if holden within that time, then at the next court holden within said county thereafter." It was contended first by the respondents, that on this clause and the facts in the case, no jurisdiction existed in this court, and it was agreed that this objection be considered before instructing a jury in relation to it.

Ivers J. Austin, for plaintiff.

J. Wells, for defendants.

WOODBURY, Circuit Justice. It is objected that the respondents cannot interpose this exception to the suit, not having been brought in the first court sitting in the county where they did business, and "not afterwards"; first, because they did not communicate their decision to the insured or to the plaintiff, "within ninety days after notice" of the loss. But we do not understand the charter as requiring this, but only that they shall determine on the amount of the loss within that ninety days. That determination being a matter of record, and the insured being a mem-

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

ber of the corporation, where, as here, it is a mutual association, he can obtain information of it as soon as he pleases, or defer it as long as he pleases. In respect to such notice, a member of a mutual insurance office, who is himself one of the insurers, stands entirely different from a naked insurer, in a corporation where he has no interest, and has no means to look at records as he has here.

It is next objected that when the notice was given in August, it was not to the assured, Dana & Carpenter, but to the attorney of Smith, the plaintiff. But it will be seen that by our views on the first exception, this question becomes immaterial. This special notice was unnecessary and useless. Yet had it been otherwise, it is somewhat doubtful whether Smith himself claiming to be a rightful plaintiff, and being notified through his counsel, is not estopped to deny that the proper person had been notified when it is the one suing. The respondents then do not appear to have done anything or neglected anything, so as to disable them from setting up as a defense, that they have not been sued in the manner prescribed in the policy and charter. But though this exception to the right of the defendants to take the objection that they were not sued at the first court sitting in the county, after this decision as to the amount of the loss, fail, it by no means follows that this objection goes to the jurisdiction of the court. This court has jurisdiction over the subject-matter, and over the parties as residing in different states. See the judiciary act [1 Stat. 73], and cases cited in Dexter v. Haight [Case No. 3,861] and Nunan v. Litchfield [Id. 10,378], Jan., 1849. See, also, 2 N. H. 376, and 3 N. H. 232; Steph. Pl. 217; Catlett v. Pacific Ins. Co. [Case No. 2,517].

The objection seems to be one which grows out of the nature of a contract or mutual engagement between the members of this mutual insurance association, ratified by the legislature, and embodied by consent into the law itself, by which the corporation exists and acts at all as a corporation. The assured stipulate with each other to sue only at a particular time, and the company made up of them united, agrees to be sued only at a particular time, by a member. This compact or agreement may therefore be a bar at law to a recovery at any other time by a member. Such is the contract, and parties make contracts for themselves, and not the court for them. Whether it may not be such a bar if interposed under the general issue, or whether it must be specially pleaded in bar of the maintenance of this action, need not be decided till the question arises in one of those modes, and in a suit by a member. It suffices now to say, that in our view it is not a valid exception to our jurisdiction in a plea in abatement to this action, and much less a valid objection to its general jurisdiction, which is the form of pleading it here.

I shall therefore on these pleadings and facts instruct the jury that they are bound in point of law to return a verdict for the plaintiff. If the court entertain these views, it is understood that the defendants wish to withdraw their plea in abatement, and file the general issue or a special plea, to attempt to take advantage in a different way of the same objection, and of a further objection that no suit for this loss can be sustained in the name of Smith, he not being a member of the mutual association, nor the person insured. I will hear the counsel for the parties on this motion when made, and also on another point of difference, in case the motion be not allowed, whether the judgment be rendered finally against the defendants on the verdict, on the plea in abatement, or may be, respondeat ouster. It is laid down that if judgment be for plaintiff in a plea of abatement, demurred to or replied to, it is interlocutory, respondeat ouster. 1 Tidd, Prac. 589. But if an issue of fact be made and tried and found for plaintiff, the judgment peremptory, quod recuperet. Id. 588; 2 Bos. & P. 389; 1 East, 636. Till the proper time arrives I do not propose to go into the case cited of Kittredge v. Rockingham Fire Ins. Co. [unreported], decided by the supreme court of this state, in Rockingham county, December, 1847. If that case, as is supposed, has decided against an action for the loss being sustained in the name of any person except the insured, it must govern this court as a construction of a local statute, by the highest local authorities. See Luther v. Borden, 7 How. [48 U. S.] 1. But the cases must be exactly parallel before I would relieve the corporation from its express written promise to pay any loss on this policy to the plaintiff.

If the defendants have liberty to amend their plea, the plaintiff should have leave to amend his declaration also, and to declare on a special promise to pay him the amount of the loss, rather than the member of the Mutual Insurance Company. It is well settled that A. may sue on a promise made to B. by C., to pay A., though A. be not privy to the consideration. A. had a debt against B., and B. placed demands with C. to collect and pay over to A. C. is liable to A. Delaware & H. Canal Co. v. Westchester Co. Bank, 4 Denio, 97. See cases collected there, page 98. See form of declaring, as if promise to A., page 99. 1 Bos. & P. 97. And if a third person can thus sue an insurance company on a special promise which it must be authorized to make, as being merely to pay the loss to the mortgagee instead of the mortgagor, which is highly proper if the property mortgaged happens to become lost, it may steer clear of the other difficulty, that the action must be brought at the next court held in the county, because the provision probably applies only to an action brought by one of the members of the mutual incorporation, and not by a third person on a special promise.

Case No. 13,006.

SMITH et al. v. ATWOOD et al.

[3 McLean, 545.][1]

Circuit Court, D. Indiana. May Term, 1845.

CONFLICT OF LAWS—RIGHTS—REMEDY.

1. A contract made in Pennsylvania and sued on in Indiana, in regard to the remedy cannot be governed by the law of Pennsylvania.

[Cited in Mathuson v. Crawford, Case No. 9,279.]

2. Such a rule is impracticable, and cannot be enforced.

3. The law of the contract accompanies it, and must govern it; but that relates to the rights and obligations of the parties, and not to the remedy.

At law.

O. H. Smith, for plaintiffs.

OPINION OF THE COURT. On the 9th of November, 1839, Smith and Sample, at Philadelphia, in the state of Pennsylvania, executed their promissory note to Atwood & Co., payable six months after date. A judgment was entered on the note in November, 1842, for $1,725, in the circuit court of the United States, in Indiana; and execution was issued, which was levied on the real estate of the defendants. The law of Pennsylvania prohibits the sale of lands on execution, if the rents and profits for seven years shall be appraised by twelve men to a sum sufficient to satisfy the judgment and costs, &c.; and if such return shall be made, and confirmed by the court, a levari facias shall issue to sell the rents and profits; and if they shall not sell for a sum sufficient, the plaintiff may have the land delivered over to him, &c. The laws of Indiana, at the date of the contract, and when suit was brought, required the rents and profits to be first offered, and if they shall not sell for a sum sufficient to pay the debt and costs for seven years, then the fee of the land may be sold for the best price it will bring.

On the above facts, a motion was made to set aside the return of the marshal, and that he be directed to collect the money under the laws of Pennsylvania. In support of this motion, the case of McCracken v. Hayward, 2 How. [43 U. S.] 608, is referred to, where the court say: "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them, as the measure of the obligation to perform them by the one party, and the right acquired by the other." And again, "The obligation of the contract between the parties, in this case, was to perform the promises and undertakings contained therein; the right of the plaintiff was to damages for the breach thereof, to bring suit and obtain a judgment, to take out and prosecute an execution against the defendant, till the judgment was satisfied, pursuant to the existing laws of Illinois. These laws, giving these rights, were as perfectly binding on the defendant, and as much a part of the contract, as if they had been set forth in its stipulations, in the very words of the law, relating to judgments and executions."

If this opinion be law, it is contended, the law of Pennsylvania is as much a part of the contract as if it had been incorporated in it. This must be admitted. The court referred to the remedy in the case cited, and the principle laid down must apply to all contracts. If the remedy be a part of the contract, the mode of its enforcement must be found not in the state where suit is brought, but in the state where the contract was made, or was to be performed. No proposition can be clearer, than that the law of the contract follows it wherever it may be enforced. And, on the ground assumed, by the mere force of the contract the remedy is kept alive, in the state where it was made, or elsewhere, in disregard of the legislative power. That this is the case, so far as regards the legality of the contract, is undoubted; but that the remedy constitutes a part of the contract, it is believed, was never before asserted by any court. The law of Pennsylvania cannot regulate the sale of real estate, by execution or otherwise, in Indiana. And this shows the impracticability, if not the absurdity, of the rule contended for. The motion is overruled.

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

Case No. 13,007.

SMITH v. AVERILL.

[7 Blatchf. 29;[1] 9 Am. Law Reg. (N. S.) 47; 3 Am. Law T. Rep. U. S. Cts. 1; 10 Int. Rev. Rec. 139, 156; 2 Chi. Leg. News, 57.]

Circuit Court, N. D. New York. Oct., 1869.[2]

INTERNAL REVENUE — FORFEITURE — CERTIFICATE OF REASONABLE CAUSE—ACTION AGAINST MARSHAL—RETURN OF PROPERTY.

1. Under the eighty-ninth section of the act of March 2, 1799 (1 Stat. 695), and the first section of the act of February 24, 1807 (2 Stat. 422), the fact that a certificate of reasonable cause of seizure was made in a case where a judgment was given for the claimant of property seized, on the trial of the prosecution on account of the seizure, is no defence to an action brought by such claimant against the officer who seized it, to recover its value, where it has not been returned to such claimant.

2. It was not necessary for such claimant to demand the return of such property before bringing an action against the seizing officer to recover its value.

3. Although the marshal took possession of the property when the prosecution was instituted, and held possession of it until the judgment was given, it was the duty of the seizing officer then to return the property.

This was an action [by Jarvis R. Smith] to recover the value of property seized by

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

[2] [Reversed in 17 Wall. (84 U. S.) 82.]

the defendant [Oscar J. Averill], as a collector of internal revenue, for an alleged violation of the internal revenue act. The question of forfeiture was tried in the district court, upon an information founded upon such seizure, and a verdict was found for the present plaintiff, who appeared as claimant in that proceeding; and thereupon a certificate of probable cause was granted by that court. The property seized was placed in a warehouse, by the defendant's direction, soon after the seizure; and it still remained there at the time of the trial in this court. The judgment of the district court was, that the property had not been forfeited, and that it should be discharged, but it was never returned to the claimant, the present plaintiff, who was the lawful owner of all the property so seized. The warehouseman, who held the property seized, testified, on the trial, that he still held the same; that no one had been there to take possession of it; that he had charges against the defendant for holding and storing the property; that the United States marshal had never notified him that he had taken possession of the same; and that he had no notice from any one of such possession by the marshal. The defendant testified, that the property was taken in possession by the marshal, who showed him the order for taking possession of it, in May, 1868, and that he had never heard of or seen it since; but the other proofs showed that it had remained in the warehouse, where it was placed by the defendant's order, down to the time of the trial, and had never been removed by the marshal, if he ever took, or ever attempted to take, formal possession of the same. On the cross-examination of the defendant, he stated that he never saw the property after it was seized. The marshal's return to the warrant of arrest and monition stated, that he had attached the property and given the proper notices; but the proof showed that he had not removed it from the warehouse where it was deposited by the defendant's order, and there was no proof that he had in any way interfered with the possession of the property by the warehouseman, as the bailee of the defendant. A verdict was taken for the plaintiff, subject to the opinion of the court.

Church, Munger & Cooke, for plaintiff.

William Dorsheimer, Dist. Atty., for defendant.

HALL, District Judge. It will be assumed, for the purposes of the present controversy, that the return of the marshal is conclusive; and that, either by the endorsement and delivery to him of the warehouse receipt for the property, or otherwise, he properly executed his process, and afterwards held the property under legal arrest until it was discharged by the judgment of the district court, or that it was so held by the collector, after the marshal's seizure, as the legal custodian, under the act of congress. [A verdict was taken for the plaintiff, subject to the opinion of the court; and the counsel for the respective parties have submitted the case upon their written briefs.] [3]

The important question now to be determined is, whether the certificate of reasonable cause, granted by the district court, is a good defence to this action, as the property seized was never returned, or offered to be returned, to the owner. In a case of municipal seizure, like that complained of in this case, probable and reasonable cause is no defence, except where some statute creates and defines the exemption from damages. The Apollon, 9 Wheat. [22 U. S.] 362, 373. But, in prize cases, the captors, if there be probable cause, are entitled, as of right, to an exemption from damages (Id. 372, 373); and, therefore, decisions made in prize cases are of no authority in respect to the present question, which depends entirely upon the construction of acts of congress.

In this case, the exemption from damages is claimed under the first section of the act of February 24, 1807 (2 Stat. 422), and the eighty-ninth section of the act of March 2d, 1799 (1 Stat. 695); and each of those sections contains a provision that the property seized must be returned. The provisions of those sections, in respect to the question now presented, are substantially the same; and that contained in the act of 1807 reads as follows: "When any prosecution shall be commenced on account of the seizure of any ship or vessel, goods, wares, or merchandise, made by any collector or other officer, under any act of congress authorizing such seizure, and judgment shall be given for the claimant or claimants, if it shall appear to the court before whom such prosecution shall be tried, that there was a reasonable cause of seizure, the said court shall cause a proper certificate or entry to be made thereof; and, in such case, the claimant or claimants shall not be entitled to costs, nor shall the person who made the seizure, or the prosecutor, be liable to action, suit, or judgment on account of such seizure and prosecution; provided, that the ship or vessel, goods, wares, or merchandise, be, after judgment, forthwith returned to such claimant or claimants, his, her, or their agent or agents." It was insisted, by the plaintiff's counsel, that, under this section and proviso, the certificate of reasonable cause is no defence, because the property was not returned; and he cited in support of his position, the case of Hoit v. Hook, 14 Mass. 210, decided in the supreme judicial court of Massachusetts, by Chief Justice Parker, and Justices Thatcher, Putnam, and Wilde, in 1817. The property in controversy in that case had been seized and libelled, and then sold, pendente lite, under the order of the district court. After it had been sold the cause was tried, and Hoit, the plaintiff, as the then claimant, had a verdict. The district judge thereupon decreed that the prop-

[3] [From 9 Am. Law Reg. (N. S.) 47.]

erty was not liable to forfeiture; that there was reasonable cause for the seizure; that $384.43, for the expenses which had been incurred for the custody and sustenance of the cattle seized, should be deducted from the proceeds of sale; and that the residue, $151.57, should be paid to the claimant. A verdict having been taken for the plaintiff in the state court, subject to the opinion of that court upon the facts stated, the question whether the certificate and decree of the district court were a defence was argued, and the court decided, that the certificate of reasonable cause could operate as a bar to an action only when the property was restored, according to the proviso in the statutes above referred to, and ordered judgment for the plaintiff on the verdict. This case seems to be directly in point; and it was decided by judges of the highest character for learning and ability.

It was insisted, however, by the attorney for the United States, who appeared for the defendant, that he should not be held responsible, by reason of the non-return of the property seized, because (1) the plaintiff had never made a demand upon the collector for the return of the property; (2) the collector did not have the possession of the property after the filing of the information, the marshal having taken possession of it under the process of the court, and the collector having no longer any control of the property, was not liable therefor. For this, he cited Burke v. Trevitt [Case No. 2,163]; The Maria, 4 C. Rob. Adm. 348; Shattuck v. Maley [Case No. 12,714]. He also insisted that the plaintiff, failing to obtain possession of his property, should have applied to the district court, which had power to compel a re-delivery of the property, or its value, into the possession of those who might be entitled to it. To maintain this position, he cited Slocum v. Mayberry, 2 Wheat. [15 U. S.] 1; Gelston v. Hoyt, 3 Wheat. [16 U. S.] 246; Burke v. Trevitt, ubi supra. The cases cited do not sustain these positions or weaken the authority of the case of Hoit v. Hook. In the case of Burke v. Trevitt there had been no information filed against the property in respect to which a recovery was claimed; and, of course, there was no certificate of probable cause. The owner of the property failed to recover because he failed to make out the trespass or taking alleged. The case of The Maria was a case of capture as an alleged prize, jure belli, and, as has been before stated, such cases have no application to the present question. In the cases of Shattuck v. Maley and Slocum v. Mayberry there had been no trial or certificate of reasonable cause; and in Gelston v. Hoyt there had been a trial, but a certificate of reasonable cause had been refused by the district court. In short, these authorities are not applicable to the present case.

It was insisted, however, that, the property having been arrested by the marshal, under the warrant of arrest, it was no longer in the custody of the defendant; that it was the duty of the marshal to return the property; that, if he failed to do so, the plaintiff should have applied to the district court to compel the marshal to return the property; and that the defendant was not liable for the marshal's default.

It is quite certain that it was not the duty of the marshal to make return of the property to the claimant; and that the district court could only require him to release the property from the arrest. But, if it were the duty of the marshal to make the return, and the court had power to require him to perform such duty, it would, nevertheless, be very doubtful, to say the least, whether the marshal's neglect of duty would not prevent the statute from operating as a protection to the defendant. The return of the property forthwith after judgment, is a condition precedent to the exemption from liability declared by the statute; and it is clear that it was the intention of congress that a failure to make such return should fix the liability of the seizing officer. If the marshal has neglected his duty, to the injury of the seizing officer, the latter must seek his remedy against the marshal; and, if any application to the district court was necessary to secure such return, it was the defendant's duty, and not that of the plaintiff, to take care that such application was made, in order to secure the protection of the statute. But the marshal had no such duty imposed upon him in this case; and the defendant was liable to the warehouseman for storage, for which the latter could probably retain the possession of the property, at least as against the defendant, and, perhaps, as against the plaintiff, and against the marshal, after the order or judgment of the district court that the property should be discharged, and that there was reasonable cause for the seizure.

The plaintiff must have judgment upon the verdict.

[This judgment was reversed by the supreme court, where it was carried on writ of error. 17 Wall. (84 U. S.) 82.]

SMITH (AYLWARD v.). See Cases Nos. 687 and 688.

Case No. 13,008.

SMITH v. BABCOCK et al.

[3 Sumn. 583.][1]

Circuit Court, D. Massachusetts. May Term, 1839.

PLEADING IN EQUITY — AMENDMENTS TO ANSWER —WHEN ALLOWED—MISTAKE.

1. In matters of form, or mistakes of dates, or verbal inaccuracies, courts of equity are very indulgent in allowing amendments of answers.

2. But they are slow to allow amendments in material facts, or to change essentially the grounds taken in the original answer.

[Cited in India Rubber Comb Co. v. Phelps, Case No. 7,025; Rice v. Ege, 42 Fed. 660.]

3. Where the object is to let in new facts and defences, wholly dependent upon parol evi-

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

dence, the reluctance of the court to allow amendments is greatly increased, since it would encourage carelessness and indifference in making answers, and open the door to the introduction of testimony manufactured for the occasion.

[Cited in India Rubber Comb Co. v. Phelps, Case No. 7,025; Page v. Holmes Burglar Alarm Tel. Co., 2 Fed. 333; Cross v. Morgan, 6 Fed. 244; Spill v. Celluloid Manuf'g Co., 22 Fed. 96.]

[Cited in brief in Chouteau v. Allen, 74 Mo. 57. Cited in Elder v. Harris, 76 Va. 192.]

4. But where the facts sought to be introduced are written papers or documents, which have been omitted by accident or mistake, there the common reason does not apply in its full force; for such papers and documents cannot be made to speak a different language from that, which originally belonged to them.

[Cited in Wyman v. Babcock, Case No. 18,-113. Cited in brief in Reeves v. Keystone Bridge Co., Id. 11,660.]

[Cited in brief in Witters v. Sowles, 61 Vt. 367, 18 Atl. 191.]

5. The whole matter is in the discretion of the court; but, before the amendments to the answer are allowed, the court should be satisfied, that the reasons assigned for the application are cogent and satisfactory; that the mistakes to be corrected, or the facts to be added, are made highly probable, if not certain; that they are material to the merits of the case in controversy; that the party has not been guilty of gross negligence; and that the mistakes have been ascertained, and the new facts have come to the knowledge of the party, since the original answer was put in and sworn to.

[Cited in Neale v. Neale, 9 Wall. (76 U. S.) 9; Hicks v. Ferdinand, 20 Fed. 111; Rice v. Ege, 42 Fed. 660.]

6. Where a party sought to amend his answer, by showing, that the instrument annexed to the answer was not the original instrument executed at the time of the conveyance, or a copy thereof; but that it varied from that instrument in some important particulars material to the present controversies; that the original was lost or mislaid by the party (not the defendant) to whom it belonged; that the contents, so far as they were material in this application, as well as the existence and genuineness of the paper, could be established by satisfactory evidence; and that the mistake in the answer was not discovered, until long after the answer was sworn to and filed; and that its materiality was wholly unsuspected, until it was recently brought as a point of objection by the other side. *Held*, that under the circumstances, a supplementary answer might be filed, which should fully, positively, and accurately state all the attendant circumstances, and the substantial contents of the lost instrument, and in what particulars, as far as may be practicable, it differs from that annexed to the original answer in the case.

Bill in equity [by William Sydney Smith against Samuel H. Babcock, Joseph Noble, and others]. An application was made by Joseph Noble, by motion in this case, for leave to file an amended answer upon certain circumstances stated in the accompanying affidavit, which was in substance as follows: "That since making and swearing to his said answer, the said Noble has seen and conversed with Cross, and with John D. Kinsman, the attorney of said Cross, and by whom was written the agreement between the said Noble and Cross, setting forth the purposes and objects for which the said Noble was to hold the property conveyed to him by said Cross, and has been furnished with the original draft of said agreement, as said agreement was first written; and he says, that the paper annexed to his answer to the original bill of complaint of the plaintiff, marked C, is not a true copy of the agreement aforesaid, and all its parts and provisions, as the same was finally concluded and completed by him, and delivered to the said Cross; that the paper so annexed to said answer, and marked C, originated in this manner, that is to say: on the 19th day of October, 1835, said Kinsman prepared a paper as and for the agreement, which said Noble was to execute, and dated it as of that date; that the said Noble carried it to his house and had it copied, but on the copy the date was omitted; that he signed the said paper; but on the 22d day of October, 1835, when he met the said Cross for the purpose of completing the said agreement by delivery, it was not satisfactory and was not delivered, and a new agreement under date of 22d October was written, signed, and delivered, and was the agreement under and on which the said Noble took and held the property conveyed to him by the said Cross; and the said Noble, finding among his papers the copy of the first draft, so as aforesaid taken by him, supposed it to have, probably, been a copy of the agreement actually concluded, with the exception of the date. And the said Noble says, that the terms, substance, and objects of the said agreement, as finally concluded and completed, were such as are set forth and stated in his answer to the plaintiff's amended bill; and he asks to be permitted to prove on the hearing, the reasons why the first draft thereof was not satisfactory; and that one principal purpose and object, for which that, which was finally executed, was prepared, was to express, with more distinctness and certainty, the intention of the parties to be, that the property conveyed by the said Cross was to be held for, and applied to the then existing debts and liabilities from and on account of said Cross, J. B. Cross & Co., and renewals thereof." Certain other affidavits of Messrs. Kinsman, Mellen, and Daveis, and Cross and Poor, were also filed in corroboration.

Mr. Fletcher and E. H. Derby, for plaintiff.
Choate & Greenleaf, for Noble.

STORY, Circuit Justice. The general rules of courts of equity in the amendment of answers are well known. In mere matters of form, or mistakes of dates, or verbal inaccuracies, courts of equity are very indulgent in allowing amendments. But when application is made to amend an answer in material facts, or to change essentially the grounds taken in the original answer, courts of equity are exceedingly slow and reluctant in acceding to it. To support such applications, they require very cogent circumstan-

ces, and such as repel the notion of any attempt of the party to evade the justice of the case, or to set up new and ingeniously contrived defences or subterfuges. Where the object is to let in new facts and defences wholly dependent upon parol evidence, the reluctance of the court is greatly increased; since it has a natural tendency to encourage carelessness and indifference in making answers, and leaves much room open for the introduction of testimony manufactured for the occasion. But where the new facts, sought to be introduced, are written papers or documents, which have been omitted by accident or mistake, there the same reason does not apply in its full force; for such papers and documents cannot be made to speak a different language from that which originally belonged to them.

The whole matter rests in the sound discretion of the court. I should be sorry, that it should be supposed, that the court had no authority to grant leave to file an amended answer, wherever it was manifest that the purposes of substantial justice required it. On the other hand, considering the solemnity of answers, I should be sorry to see any practice introduced, which should in any, the slightest degree, encourage negligence, indifference, or inattention to the duties imposed by law upon parties who are called upon to make statements under oath. And it seems to me, that, before any court of equity should allow such amended answers, it should be perfectly satisfied that the reasons assigned for the application are cogent and satisfactory; that the mistakes to be corrected, or the facts to be added, are made highly probable, if not certain; that they are material to the merits of the case in controversy; that the party has not been guilty of gross negligence; and that the mistakes have been ascertained, and the new facts have come to the knowledge of the party, since the original answer was put in and sworn to. Where the party relies upon new facts, which have come to his knowledge since the answer was put in; or where it is manifest that he has been taken by surprise, or where the mistake or omission is manifestly a mere inadvertence and oversight, there is generally less reason to object to the amendment, than there is where the whole bearing of the facts and evidence must have been well known before the answer was put in.

The present case is not an application to substitute one written document for another, which was annexed to the original answer by mistake, the mistake having been subsequently ascertained. If it were, the court would not hesitate to allow it; for the danger of perjury, or of a corrupt manufacture of an instrument to suit a new purpose, would not ordinarily occur. And, indeed, the court, before allowing the amendment, would require plenary proof of the antecedent existence, as well as of the genuineness, of the instrument. Nor can this be said to be a case, in which the amendment proposes to offer parol evidence to mere facts in pais. It is an intermediate case, where the proposed amendment seeks to show, that the instrument annexed to the answer is not the original instrument, executed at the time of the conveyance, or a copy thereof; but that it varies from that instrument in some important particulars, material to the present controversy; that the original has been lost or mislaid by the party (not the defendant) to whom it belonged; that the contents, so far as they are material in this application, as well as the existence and genuineness of the paper, can be established by satisfactory evidence of disinterested persons, who were present at its execution and knew its contents; and that the mistake in the answer was not discovered until long after the answer was sworn to and filed, upon a conference with the parties, who were connected with the original transaction; and that the materiality of the mistake was wholly unsuspected, until it was recently brought out, as a point of objection, by the other side.

Now, upon the present application, it is not necessary, nor would it be proper finally to decide, whether the fact of such a mistake is positively and absolutely made out, or the existence and genuineness of such an original established beyond all controversy by the evidence. That would be more proper for consideration upon the final hearing of the cause upon the whole evidence, when all these and the other matters are put in issue before the court by the whole evidence in the cause. All that is required on the present ex parte application, is that the court should be satisfied that the defendant, Noble, has not been guilty of gross or inexcusable negligence in not before ascertaining the facts, or instituting inquiries respecting them; that there is a high probability that there was such a genuine, original instrument, different from that annexed to the answer; that there has been an entire good faith on the part of the defendant, Noble; and that there has been a real and inadvertent mistake. I must say, that, upon all these points, the evidence is clear and cogent. I do not say that it is conclusive or irresistible. That there was such an original, genuine instrument, differing from that annexed to the answer, is made out by the affidavits of Mr. Cross and Mr. Kinsman, in a manner which I can scarcely deem open to serious doubt. At least I cannot, in the present state of the evidence, overcome it without believing both those gentlemen have made very gross misstatements, and deliberately affirmed matters absolutely false. Certainly I can come to no such conclusion. Their narratives carry with them an intrinsic probability; and I may say, that Mr. Kinsman's known character at the Portland bar forbids such an imputation.

I have paused a good deal upon this matter, because I am exceedingly unwilling to

encourage any rashness, or negligence, or indifference in drawing up answers. But I deem it indispensable to the purposes of the administration of public justice, to hold to a strict course against allowing parties, upon afterthoughts, and new suggestions, and new aspects of a cause, to change the posture of the case from that in which they deliberately chose originally to present it to the court. Still, we must make allowances for human error and infirmity; and the object of all courts must be substantially the same, not to shut out truth, where it is clearly seen, but rather to invite its admission, if it may be done without the introduction of other mischiefs. I believe, that my duty requires me on this occasion to allow a supplemental answer to be filed. But certainly I ought not to accede to the introduction into the cause of that annexed to the motion of the defendant. It would be injustice to him, and not justice to the other side. The proposed supplemental answer contains no explanations of the supposed mistake, and no statement of the circumstances, under which it originated; and no positive allegations of the contents of the lost original instrument. It amounts to a positive naked denial, that the paper annexed to the original answer is that, which was executed, when the conveyances referred to were made. So that, upon this naked statement, the two answers would directly and flatly contradict each other; and the answers, being without any circumstances to explain the contradiction, would, as evidence, become mere nullities, and could, neither of them, be entitled to any credit. What I shall do therefore, is to grant the motion sub modo, allowing a supplementary answer to be put in, which shall fully, and positively, and accurately state all the attendant circumstances and the substantial contents of the lost instrument.

I have examined the authorities with some care and solicitude, to assist my own judgment upon the present occasion. The known caution and scrupulous hesitation of Lord Eldon make his decisions on such a subject of peculiar value. He has not hesitated to go as far as I have gone. Nay, he and other judges have gone somewhat further. In Livesey v. Wilson, 1 Ves. & B. 149, Lord Eldon was asked to allow a defendant to amend his original answer, which had stated, that he took possession of the whole of certain real estate, under a contract, of which a specific performance was sought, so far as to show, that he had taken possession of a part only. He refused it, unless the defendant would swear, that when he swore to the original answer, he meant to swear in the sense, in which he now desired to be at liberty to swear to the fact. This seems to convey a manifest implication, that if he would so swear, he might file an amendment of the answer, although it was merely evidence of a fact in pais, and resting in the knowledge of the defendant. In Strange v. Collins, 2 Ves. & B. 163, the defendant had sworn in his answer (April, 1813), that he had obtained letters of administration on his father's estate, in which character he was sued for a legacy. He now moved to file a further answer, stating (among other things) by his affidavit, that upon looking over papers and deeds, since putting in his answer, he found that an administration was granted to him of his father's effects in the year 1797, at which time the defendant was just of age, and but little acquainted with business, and entirely ignorant of law, and considering that he was only doing some formal act, to make out a title to some leasehold property of his father which he had sold. Lord Eldon, upon the whole circumstances, which were detailed at large in the affidavit, allowed the amendment to be filed. Upon this occasion his lordship said: "This is a motion of considerable importance, for leave to file a supplemental answer; the object of which is to admit that the defendant is administrator of his father, and, as such, has effects sufficient to satisfy this legacy; which the answer denies. There is no suggestion by affidavit, that this application is made in consequence of any knowledge, or threat of an indictment for perjury. The application is supported by an affidavit, stating positively, that, when the defendant gave instructions for, and swore to, his answer, he had no recollection of the letters of administration; or that they in any way related to the matters in the bill; and that he never considered himself, but considered his mother as altogether in possession, she keeping the accounts; a representation not unnatural by an ignorant man. It is obvious, that, unless there is some general ground, upon which the defendant ought not to be permitted to put in a supplemental answer, it is for the benefit of the plaintiff that he should do so. But, whether the plaintiff may choose to except to it or not, care must be taken that public principle is not infringed; and the objection that has been made justifies me in requiring commissioners to pay more attention to transactions of so solemn a nature as taking answers upon oath, than has been applied in this instance; in which there is a degree of carelessness, which is shocking in moral consideration; the answer twice positively denying, that the defendant is the administrator, and that he ever possessed any part of his father's effects; the former a pure denial of a matter of fact; the other a fact, upon which an ignorant farmer might make a mistake, but commissioners, or the attorney, could not." In Edwards v. M'Leay, 2 Ves. & B. 256, a motion was made to file a supplementary answer upon an allegation of the discovery of an entry or minute in a parish book, after the answer had been sworn to and filed, the defendant by his affidavit stating, that at the time of filing his answer he had no recollection of such entry.

Lord Eldon granted the application, and said: "There are many cases, in which Lord Thurlow refused leave to amend an answer; and that is obviously right upon this reason, that the court, permitting the destruction of the answer upon the record, and the substitution of another, has no security as to the propriety, with which the first answer was sworn. The course since has therefore been to permit an additional answer to be filed, which has been done in many instances; always with great difficulty, where an addition is to be put upon the record, prejudicial to the plaintiff; though the court would be inclined to yield to the application, if the object was to remove out of the plaintiff's way the effect of a denial, or to give him the benefit of an admission, material, perhaps conclusive, to enable him to obtain a decree. Where, therefore, the opposition to such application is not upon the ground, that it is against the plaintiff's interest, that such supplemental answer should be put in, that, with reference to his interest in that cause or property, any mischief can arise to the plaintiff, the only ground for hesitation is the public interest, upon the circumstance, that the defendant might have been guilty of perjury, and a prosecution for that offence may be required by the public interest. In several instances, though that has been alleged, the court has permitted such supplemental answers. On the one hand, it has been constantly argued, that, permitting it, the court decides against the prosecution; on the other, it is frequently urged with weight, that the court, refusing this, goes a great way towards convicting the defendant. The truth is, this permission ought to have no influence either way upon such prosecution. But a case was mentioned by Mr. Spranger, which throws much difficulty in the way. The King v. Carr, 1 Sid. 418; 2 Keb. 516. Upon an indictment for perjury in an answer, to which exceptions were taken, and a second answer put in, giving an explanation, it was resolved, that nothing shall be assigned as perjury, which is explained by the second answer; because the second answer makes that, which was at first a perjury, no perjury. Whether that would be held now, or not, there is a material distinction from this case. The habit of the court now is, to consider an insufficient answer as no answer. If the exceptions produce an explanation, the two are taken as one answer; and perhaps, in favor of a person accused, the court might hold them to be one answer, containing the explanation with the assertion constituting the charge. I should have had considerable difficulty in acceding to that. Upon this application for leave to put in a supplemental answer, considering all the consequences, and professing not to hold, that the explanation by such other answer takes away the opportunity of indictment upon the former answer, I think I ought to permit a supplemental or other answer to be filed in this case on payment of costs." There are other cases to the same effect;[2] but I think that these sufficiently show the practice.

I shall, therefore, make an order allowing a supplementary answer to be filed; but I shall expect it to contain a full and positive statement of all the circumstances, and of the substance of the original instrument, and in what particulars (as far as may be practicable) it differs from that annexed to the original answer in this case. Order accordingly.

[For final hearing in this cause, see Case No. 13,009.]

Case No. 13,009.

SMITH v. BABCOCK et al.

[2 Woodb. & M. 246.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1846.

EQUITY — RESCISSION OF SALE — FRAUD — PARTY BENEFITTED—BANKRUPTCY—LACHES.

1. In a proceeding in equity to set aside a sale of land for fraud, the person who was most benefitted by the sale is in a situation to be suspected of it, if a fraud was actually committed.

2. If such a person makes statements as to material matters connected with the value of the land, and which, from being more within his private knowledge, or other circumstances, were clearly relied on in the purchase, and they turn out to be false, the sale is void, whether he believes them to be true or not.

[Cited in Clark v. Manufacturers' Ins. Co., Case No. 2,829; Iowa Economic Heater Co. v. American Economic Heater Co., 32 Fed. 737.]

[Cited in Converse v. Blumrich, 14 Mich. 123; Newton v. Tolles (N. H.) 19 Atl. 1093.]

3. It is no objection to rescinding such a contract, that another remedy or a guaranty may exist against that person alone, now become insolvent, but not against the other respondents, and particularly if fraud be the ground assigned for rescinding; or that the complainant had an opportunity to examine the land, and one of his friends did examine it some time before the bargain was completed, if the false representations of the person, making the sale, were relied on as to details, and others hired by him, unknown to the examiner, were uniting in statements and acts likely to mislead; and more especially if the misrepresentations extended also to other matters than the timber on the land which were material, and were not attempted nor offered to be examined.

[Cited in Mason v. Crosby, Case No. 9,234; Perry Manuf'g Co. v. Brown, Id. 11,015.]

4. A bill charging falsehood and fraud in a sale, as to the exaggerated quantity of timber on land, may contain enough to justify setting the sale aside for a gross mistake in the quantity, without setting up the latter as a specific and separate cause; but it is better to have such cause stated independently, in order to give clearer notice to the respondents, of what is to be contested.

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[2] See Wells v. Wood, 10 Ves. 401; Bowen v. Cross, 4 Johns. Ch. 375, and the cases there cited, and those collected in the Reporter's note a to Livesey v. Wilson, 1 Ves. & B. 149, 150.

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

5. Where such person owned in common with others an undivided share of the land, and the whole title of it had been vested in two of the number in trust for the rest, and those two had agreed to sell to him the whole, at a given price, and he had failed to make payment at the time agreed, or to tender it, the whole title was not in him. And if they agree to allow him further time, and he sells for more, receiving the excess for himself, and those two then convey to him, he having conveyed to the purchasers, and receive the consideration agreed from the purchasers through him before delivering the deeds, he is to be regarded as their agent. If they took the proceeds and benefits of the sale, they must aid him to refund the consideration which they received.

6. More especially is this the case when some of the owners in common, beside the person negotiating the sale, united in the false representations and attempts to mislead, by making similar exaggerated statements as to the timber, and in forming another company, in which they were part proprietors, to purchase of themselves at a still higher rate per acre, than he was to give. This person was to be the agent to sell for that company, and at the same time was represented as the vendor to them after buying of the trustees, though, in fact, he never had a conveyance from the trustees, nor made one to the other company.

7. Where this person, so negotiating the sale to the complainant, keeps a part of the notes given for the consideration, and assigns them to a creditor of his as collateral security for a previous debt, or for a debt partly new, but not in payment or satisfaction of it, the note is open to any defence which was good against it in his hands.

[Cited in Bowman v. Van Kuren, 29 Wis. 218.]

8. More clearly is this the case, where the creditor had notice of the consideration of the note, and probably had information of the exaggerations and misrepresentations practised.

9. A plea in bankruptcy is not to be sustained against a claim in equity to rescind a contract like this on the ground of fraud.

10. A delay of two years after the completion of a sale alleged to have been fraudulent, and of one year after the discovery of the fraud, was *held* not to bar a suit for a rescission of the sale.

[Cited in Upham v. Brooks, Case No. 16,797; Stillman v. White Rock Manuf'g Co., Id. 13,446.]

[Cited in Gatling v. Newell, 9 Ind. 586.]

This was a bill in equity, entered as long ago as January, 1839. [At that time an application was made by Joseph Noble for leave to file an amended answer upon certain circumstances. The motion was allowed. Case No. 13,008.] The defendants were fourteen in number, viz: Samuel H. Babcock, John B. Glover, Josiah Daniels, Increase S. Withington, Joseph Leeds, Benjamin Leeds, Paul Whitney, Levi B. Haskell, Jos. F. Leach, Osgood P. McLellan, William H. Montague, George L. Montague, John B. Cross, and Joseph Noble. The bill prayed a re-payment of certain money, given by the complainant to Cross, and by him divided between himself and the different respondents, except Noble: it having been received from Smith in part payment of one fifteenth of a tract of land, called township ——, A. No. 2, in Oxford county, in Maine. This portion of that township, Cross on the 9th of November, 1835, conveyed by deed to [William S.] Smith [Jr.], and it had been before owned by the respondents in certain proportions, hereafter to be explained. The bill prayed also for a return of certain notes, then executed by the complainant to Cross towards the consideration of that conveyance, and which it was averred were now in the hands of Noble, with notice of their consideration, as collateral security, to indemnify him for certain liabilities on account of Cross. The principal charge in the bill was, that in the sale, made in certain shares to the plaintiff and five others (consisting of five thirtieths to Joshua Fanning, five thirtieths to George Miller, two thirtieths to Nathaniel Tuthill, Jr., one thirtieth to Nathaniel Miller, and two thirtieths to Smith), there were fraud, misrepresentation and falsehood, on the part of Cross, in several material particulars, which were relied on by the plaintiff in the purchase; and that the conveyance ought, therefore, to be set aside, and the consideration restored. It further averred, that Cross was chiefly instrumental in making these misrepresentations, as agent and part owner with the other respondents, except Noble; and that those others, as principals and part owners, having received the money paid on account of the sale of their interests in the land, were bound to refund the money; and that Noble, as holder of Smith's notes given for the land, with full notice of their consideration, and only as collateral security, could not recover their amount, and ought to return them to the plaintiff.

The brief history of the other parts of the transaction, as set out in the bill, was as follows. Some time previous to the 1st of June, 1835, this township was owned by William Reed. On or about that day, Cross having become possessed of Reed's bond, given for a deed on certain terms specified, took a conveyance from him of the township, and, to secure part of the payment, executed a bond to Reed for the payment of $24,000 in money, in which E. Wyer was his surety. On the 25th of June, 1835, Cross, in pursuance of a previous agreement, executed a deed of the same township for $3.50 per acre to Babcock and Glover, or the survivor of them, who are two of the defendants, and who gave a writing of the same date to others who had united with them in the purchase; showing that the land was held in trust by Babcock and Glover for those owning the ten shares, into which it had been divided, each of the defendants but Noble owning one, except that the two Montagues as a firm, and Leach & McLellan as a firm, and Whitney & Haskell as a firm, owned but one share to each firm. The owners of these shares constituted what is called the First Boston Company, and for whom Babcock and Glover were trustees, to manage and sell the property, and account for any in-

come or proceeds, equally among the share holders. The bill then alleged, that with a view to dispose of this township at a high price, and mislead those who might purchase as to its true value, the First Boston Company soon afterwards commenced a system of deceptions and misrepresentations as to the title and sales of the land, and the quantity of timber thereon, and the facilities of getting it to market, till eventually, in November of that year, as before specified, the plaintiff made the purchase of one fifteenth of it at six dollars per acre, when its true value was not one sixth of that sum; and he was induced to over-estimate it to that extent by gross frauds and falsehoods. Among the means used to accomplish the imposition, it was averred, that a second Boston company was got up to buy this township of Cross, the then supposed owner of the whole; that it was to be divided into thirty shares, and six dollars per acre given therefor, and Cross, if desired, was to guarantee one hundred and thirty millions feet of good pine timber on it per acre; that Babcock first signed this undertaking, and for three thirtieths, Whitney & Haskell next for two thirtieths, and Benjamin Leeds for one thirtieth—all members of the first company—and thus others were soon induced to subscribe for the remaining shares; and afterwards, August 10, 1835, that they executed a written indenture to Cross, reciting that the land had been bought by them of him, at six dollars per acre, and that he might sell the same for seven dollars per acre, and retain all he obtained over that sum. On the 15th of August, 1835, a bond was executed also by Babcock and Glover to Cross, to convey the land to him at five dollars per acre, on or before the 17th of October; and another bond by him to them, that he would pay or secure to them this price by that day. Previous to this, and as early as June 27, 1835, certificates had been obtained from several persons, that on a careful examination of the township, there were one hundred and thirty millions feet of good pine timber on it, and a good stream for getting the logs to market the first year; and other certificates were given still earlier, in March, 1835, stating the quantity of good pine timber to be at least seventy or eighty millions of feet.

It is then averred that Cross started about the 20th of August with these papers for New York, and there, through one Alexander Chalmers, a former partner of his, whom it was stated he hired, at large commissions on all the land sold, to aid him in disposing of it, was introduced to George Miller, one of these five subsequent purchasers. Not effecting a sale there at nine dollars per acre, the price asked, he left and returned again the first week in October, when Tuthill, one of the purchasers, before finishing the bargain, concluded to visit the county of Oxford, and make some examination of the title or the records, and the locality and value of the township. Cross in the mean time, on the 17th of October, made no payment to the First Boston Company under his bond, and became liable for its amount; conveyed a large portion of his property, on the 22d of that month, to Noble, including the notes of some of the First Boston Company for their original purchase of him, doing this for security and indemnity to Noble; and having found most of the second company unwilling to settle with him and take conveyances of the land, though three of them, Babcock, Jenkins, and Cordis, if no more, had given bonds to do it. But Cordis had become satisfied that the pine timber on the land was much less than Cross represented, and hence refused to take it, and gave notice to other new members, as well as to Cross, of his refusal and the grounds for it.

In consequence of some conversation with Tuthill, indicating that he might purchase the land at a lower price than nine dollars per acre, Cross once more in November visited Long Island in company with G. Montague, one of the First Boston Company. The latter carried with him deeds of the township in different shares, of one tenth each, from Glover and Babcock to Cross, with instructions not to deliver them till receiving money or satisfactory notes, at five dollars per acre therefor. After Cross had made the sales in New York to the plaintiff and others, of twenty-six thirtieths of the whole township, he returned to Boston and settled with the First Boston Company, for the amount, by money and notes of the purchasers, indorsed by him to the first company, and delivered to Noble the plaintiff's notes to the amount of about $28,520 for security and indemnity, as before recited. He offered various guarantees, is was averred, in New York and elsewhere, to purchasers, as to the quantity of pine timber on the land, being one hundred and thirty millions feet per acre, and represented himself as a man of large property, and abundantly able to fulfil such guarantees. To the plaintiff he gave a bond to take back the land again in two years, and pay him his consideration and ten per cent. interest, if he was dissatisfied; and another bond to him and others, to pay them a large sum if he, as their agent, did not in five years get off the land lumber enough to pay all they had given, and twenty-five per cent. interest thereon. Among the false representations alleged to have been made by Cross to the plaintiff and his associates, were these: That he was the owner of the township; that he was a person of large estate, able to respond to all his guarantees and bonds; and that the land had one hundred and thirty millions feet of good pine timber per acre on it, and a stream suitable to transport it yearly to market.

The bill was amended from time to time, and various exceptions made to the answers; but the substance of the allegations in the bill,

not given above, are, so far as material, referred to in the opinion of the court.

The answers, after several amendments and supplements, are divided chiefly into three classes. Those by the First Boston Company, except Cross, are mostly alike; then come his separately, and then Noble. The first respondents deny the allegations charging fraud, or concealment, or misrepresentation, and virtually admit such deeds and papers as are set out in the bill. They also deny any agency of Cross to sell the land in their behalf; and aver that the certificates were honestly obtained, and were believed to be true. The answer of Cross also denies all fraud, and in other respects generally, as above named, accords with the rest; but goes further, and avers himself, at the time of his guarantees referred to in the bill, to have been a man of large estate, and was so considered by himself and others as early as July, 1835, and as late as the time of his answers in 1837 and 1839. The answer of Noble either denied or expressed ignorance of other matters, except the transfer of the note of Smith to himself by Cross; and alleged, that it was given to secure him against certain liabilities for Cross by him and Wyer, existing before the large assignment in October, and instead of some of the notes then assigned, which were returned to Cross in November, and for indemnity on account of some new liabilities then assumed. And he further averred, that the assignment in October was to secure only debts and responsibilities then existing, or afterwards to be renewed, within four years.

Some other matters in the different answers are noticed in the opinion, wherever important, as are also such portions of the testimony on both sides as are deemed competent and material, the whole being too voluminous for recital. This case was argued before Mr. Justice Story for some days in 1844, but left unfinished and never resumed till since his death. It came on for hearing again at the adjourned term of this court in April last, and was then argued at some length, and concluded at the May term, 1846, after occupying in all most of sixteen days.

Mr. Bosworth, of New York, and R. Fletcher, for plaintiff.

Mr. Cooley, J. P. Rogers, C. G. Loring, and Mr. Choate, for different defendants.

WOODBURY, Circuit Justice. The lapse of time since the proceedings in this case commenced has been such, that the members of the court are neither of them the same. Most of the counsel are also new, and the condition of all the respondents, with a single exception, has changed, it is said; and several, from what was supposed to be splendid affluence to bankruptcy, and one of them passed "that bourne whence no traveller returns." Where the fault has been for such unusual delay, or whether there has been none but mere casualties and postponements, growing out of the great number of parties and counsel, and the complexity as well as magnitude of the case, I shall not attempt to settle. But my best efforts have been made to prevent any further postponement, not indispensable to a due hearing and examination of the cause; and I shall now proceed to deliver a final opinion on the questions necessary to be decided, with a desire to put both sides in possession of the reasons on which it is founded, rather than with the vain expectation of rendering it satisfactory to both.

Various questions have been raised as to the competency of some portions of the testimony and the sufficiency of other parts, which may be first disposed of by a single general remark. Without giving in detail my decision in each case, it may be taken for granted, where I rely on a piece of evidence, and refer to it in support of a conclusion of fact, it is deemed competent; and where a fact has been denied by the answers in particulars responsive to the bill, it is not considered as sustained by sufficient proof, unless it be by more than the testimony of one witness. It may be added further in the outset, that I discover no delay in the institution of the proceedings by the complainant, which should be regarded as a bar to his recovery on the merits, if merits exist; and which can, therefore, be interposed to excuse this court from the labor and responsibility of examining the rights of the different parties on those merits. Warner v. Daniels [Case No. 17,181]; Mason v. Crosby [Id. 9,234]. The proceedings were begun in less than two years after the purchase of the land by the plaintiff, and in little more than one year after the deficiency in the timber was ascertained to be great, and after the conduct of the respondents was believed to have been unfair and illegal. Nor is there understood to have been any alteration in the property or title since the sale, which is sufficient to disable the plaintiff from making a valid re-conveyance of his share, if it should otherwise appear just to rescind the sale; though it is stated in evidence that some auctions of the land for taxes have since taken place. But redemptions are understood to have been made before the title was foreclosed; and though some timber was got off by the plaintiff and others the first winter, it is supposed to be not so much as sensibly to change the value and condition of the premises.

Proceeding then to the great points in controversy, as the interests and liabilities of the respondents are in some respects different, I shall first consider those of Cross, the most active and conspicuous participator in the transaction; next, those of the rest of the First Boston Company; and, lastly, those of Noble.

It is clear, that the respondent, Cross, was the sole owner of the whole township in dispute, about the 1st of June, 1835. It is equally clear, that in all the subsequent transfers of it, as well as in all the contracts and arrangements for sales, whether defeated or perfected,

and in all the representations connected with them, whether true or false, and in all the certificates obtained as to the timber, and which are conceded now to be so erroneous, he was the chief actor, and probably more deeply interested than any other individual. For if the whole land cost him only about $30,000, which is the price that was to be paid to Reed, according to his testimony, though Cross testifies to near $20,000 more in various ways; and if Cross obtained for it about $70,000 beyond this $30,000 from the First Boston Company, and next received in New York near $30,000 more than he was to pay to the First Boston Company, and something like $5,000 more net profits on his one tenth reserved in his original deed, and invested in that company, he would, supposing all the payments to be honestly made, have realized, in only this one township, in about six months, the enormous profits of near $105,000; while all the other persons united, so far as is known here, could not have profited in this same operation half that amount, and no one person over one twentieth as much. It will be seen, then, at a glance, how great was his interest or inducement to effect these various sales, and how strong were his motives to press on purchasers such considerations, as should be likely to throw within his grasp in so short a time, and in an operation as to a single tract of land, such a brilliant fortune. Cross being thus situated, as the great gainer by these sales, was therefore in a condition to be tempted into misrepresentations in order to effect them. But having stronger motives that any others to do wrong, is only one step in the inquiry as to his real conduct; and the next is what representations, if any, did he actually make concerning the township, which were in fact erroneous, and likely to deceive the plaintiff?

The first specific examination concerning Cross's course, in respect to these sales, may as well be in relation to the representations about the quantity of pine timber on the township. What kind of statements on that subject did he actually make to the plaintiff and others, about the same period, and connected with the sale of this land, so as to render them competent evidence? See cases in Warner v. Daniels [supra], showing when they are competent. Next, were they relied on by the plaintiff? and were they false? The case is full of proof, that he made statements as to the quantity of good pine being one hundred and thirty millions feet per acre, not only at Boston and Hopkinton, in writing and orally, by guarantee separately and in bonds, but at Long Island and to this plaintiff, with the other purchasers. That they were relied on, also, is proved by the fact, that the land was purchased with the view of paying the interest and part of the principal speedily, by sales of the timber; that Cross gave a guarantee of twenty-five per cent. profits from it by such sales; that even before leaving New York he was constituted their agent, to go at once on the land and begin the removal of the timber, to realize these great profits from it; that he gave written guarantees of the quantity, and computations showing how some $43,200 per share could be made by the purchasers of this timber.

It is an objection not well sustained, which his counsel have urged against setting up such representations as fraudulent, that another remedy existed on those guarantees. It is a novel doctrine, that a written warranty is a bar to a suit or defense founded on fraud in the same transaction; and the cases are not only numerous, that fraud vitiates all contracts tainted by it, but that it may be set up in contests as to the consideration of the sales, whether a warranty existed or not. Semble Schwartz v. United States Ins. Co. [Case No. 12,505]; 1 Day, 156–158; 4 Mass. 491, 492; 4 Durn. & E. [4 Term R.] 67, 337; 6 Johns. 110, 181; 1 Johns. 414, 503; 2 Wooddeson, 416; 7 Mass. 68. If such an objection was urged in another view, as furnishing an ample remedy at law (and hence that none in equity exists here, under the judiciary act of 1789), the conclusive answer to it is this: The other remedy is only against one of the respondents instead of all, and that one entirely insolvent.

All that remains on this point is, to decide whether these representations were in reality true or false. Perhaps there is no better general test of this, than the failure of Cross to fulfil his various guarantees concerning them, during the four or five years after, when the plaintiff and others contended that they had turned out to be false, and while Cross was not only under guarantees to make them good, but swears that he had ample means for any such purposes, though since become insolvent. If they were true, it would have been no loss, but a gain for him to take back the land; or if doubtful, it was honest and honorable to exhibit new evidence of their truth, or, with his professed ample means, to make good the indemnity he had given. On the contrary, if they were neither true nor colorably so, but undeniably groundless, and made, not in ignorance, but with intent to mislead, the course of conduct was likely to have been pursued which has been charged in the bill as exhibited on the present occasion. Firstly, buying Reed's bond, who estimated the good pine at only twenty-five millions, then getting a set of certificates which were made in March for seventy or eighty millions, and then in three months, when new sales at a higher price were contemplated, obtaining a new set of certificates for one hundred and thirty millions, increasing like the rolling snow ball; and whether obtained in some degree by presents or "gratification money," or by inexperience and looseness of morals in certifying, it is not necessary to settle on the evidence as to those points; but only that they were obtained and used, and were in truth great exaggerations. Again, when the correctness of the statements as to this large

quantity of timber was questioned by Cordis, certainly as early as October, if not September, and the grounds of it stated to Cross; and when in consequence of it, in part at least, the Second Boston Company was broken up; it is in symmetry with this previous suspicious behavior of his, not to have the land more carefully re-examined, and not to be more cautious and measured in his future statements as to the quantity, but still continue to represent it as high or higher than the last inflated certificates. And so, when letters were written to New York from Maine, repeating this charge of deception against him, he refrained from taking any new steps to disprove it, as incorrect. So, when at Long Island, new and more careful explorations instead of these were proposed to him, not being willing to make them, but objecting to the loss of time from them, and offering his guarantee as to the quantity, with assurances of his great wealth and responsibility to meet it.

Lastly, when those who had been thus misled complained in 1836, it is in perfect keeping with the same hypothesis, that the certificates were false, if not so known to be, that he should not attempt to fulfil his guarantee, though professing in his answer to have been amply able, but recommended "Christian resignation," and proceeded at once to foreclose his mortgages. If satisfied that a great error had occurred inadvertently, why did he not procure and return the notes, and honorably rescind the sale, when his ability at that time, though pledging the notes to Noble for certain specified liabilities, is sworn by both him and Noble to have been great, and to have rested on much other property not pledged, as well as that pledged. But the closing survey of the timber, made under an arrangement between the purchasers, and some of the holders, to give up their notes to the amount or extent the quantity of pine timber should prove to be less than eighty millions of feet, shows beyond question how the actual truth was in respect to the representations of there being one hundred and thirty millions. The whole quantity was in fact found not to have exceeded eight millions, not one sixteenth of the quantity represented and guaranteed; and two of the very certifiers in March, 1835, Russell and Paine, when under oath, testify to this reduced quantity of eight or ten millions as the truth in March, 1835, instead of the eighty millions, to which they then certified, and instead of the one hundred and thirty millions which Russell was the pilot to point out to the certifiers in June, 1835. How fully does this indicate what was to be inferred from Reed's own knowledge and belief, for some time an owner and explorer of this township, that the quantity of good pine timber was then known not to exceed twenty-five millions? And how fully could any one possessed of that knowledge, like Cross in all probability, have been satisfied that certificates swelling the quantity several hundred fold most be deceptive, and founded in ignorance or fraud? and that the land, if possessing such an increased quantity, would never have been sold to him by Reed at a dollar per acre, or even two dollars, and that he himself, or the Boston Company, with such an increased quantity really on it, ought not to sell it at even six dollars per acre?

Whether the exaggeration and falsity of these representations and certificates were known at the time or not by Cross, is not material in a civil suit, however otherwise it may be in a criminal one. See Doggett v. Emerson [Case No. 3,962]. But, to show the probability of his knowledge, connected with his representations, and the fact of their falsity, it is apparent that still more evidence could have been furnished if deemed necessary. The bond of Reed distinctly appears to have been in the market for this land before January, 1835, and in the hands of some person in Bangor. It would have had a very material and additional influence on this point, if this township, as seems probable, had in fact been fully explored before he bought it, and the quantity of timber ascertained to be less, or at all events no larger than Reed had supposed. As the proof is, it certainly was surveyed from Bangor before January, 1835; and the result as to the timber seems to have been such as to defeat any permanent purchase of the township there. And this was probably done by Haynes, judging from Cross's own answer to Tuthill's bill. That Cross knew this result before his purchase is not improbable, though the evidence of it is inferential. Certainly he knew it through Cordis in September, who had obtained it at Bangor from Moulton, and made it the ground with Cross against completing a purchase of a share in the town from him, and was thus fully in possession of the facts when he made the exaggerated statements to the plaintiff in October and November after. Before that, also, from Reed's evidence as to Cross's frequent inquiries of him about the quantity of timber on the land, Cross probably must have known that Reed did not, though once the owner, compute the quantity higher than twenty-five millions. Probably, then, through the whole sales Cross knew that the survey by Morse and Stone was not only a great exaggeration of the true quantity of pine timber on the land, when calling it seventy or eighty millions feet per acre, but the survey in June, calling it one hundred and thirty millions, was a still greater departure from the facts. He had assuredly enjoyed ample means to know the incorrectness of both of them. But if this survey under Morse and Stone, was believed by Cross to be only as high as the truth, and nothing then existing is known which should suggest any motive for its being too low; but, on the contrary, Moulton's communications, founded probably on some other prior examination, or facts connected with this, in-

dicate a knowledge at Bangor that these were too high, the inquiry arises, how could Cross honestly suppose that the statements made to the First Boston Company by himself and the second lot of surveyors, in June, 1835, nearly doubling this quantity of good pine, were unexaggerated and true? But much more, how could he in November, after told by Cordis in September of Moulton's. representations, if not known before, honestly repeat his exaggerations and guarantees? Either the first surveyors were incompetent and unfaithful, or the last ones were so; and the certificates of both could not properly be used longer as trustworthy. Or if it be said, that he confided in the first ones, and not in the last, then the last should not have been exhibited, and the inflamed quantity set out in them should not have been reiterated by him as less even than the truth about the quantity, and the correctness of it guaranteed by him over and over again in writing, as well as verbally. But enough as to the timber.

The next important representation, connected with the sale, and especially with the confidence placed in the statements and guarantees of Cross, as to the quantity of pine timber, related to his wealth. As that was asserted and believed by others to be great, or otherwise, his guarantee as to the quantity of timber, and also as to the profits to be made from it, would be more or less confided in, and more or less induce a stranger to buy. Had Cross represented himself to be poor, who believes that his guarantee would have had the influence on the purchase by the plaintiff which it probably had, when coming from a man stated to be so very wealthy? So the prior purchase of the land back by Cross from the first company, at an enhanced price over what they gave for it, if made by a man of property, able and likely to pay, and not by a needy speculator, careless whether he ever paid or not, if he could only obtain the title to sell to others, was an important element to influence the plaintiff and other buyers. What others, possessing fortune and responsibility, had done at five dollars per acre, there could be less risk in doing at six dollars, than if it had been done by those who were irresponsible and never likely to pay, unless able to sell again at as high a price. The importance and influence of his wealth on purchasers in trusting to his guarantees, and to the risk he had run in buying at such high prices as a man of fortune, are thus very manifest. That he made representations of his great wealth to the plaintiff and others, and in almost all forms, is not only proved again and again, but attempted to be shown by himself and some witnesses to have been well founded. Without going into all the details of evidence, as to the truth or falsehood of his assertions to the plaintiff and others, concerning his great wealth at that time, it is certain that he has since taken the benefit of the bankrupt law, and disclosed, in his petition and schedule, rather a meagre account of property compared with the debts he owed. It is equally certain that no particular losses are shown to have been sustained by him since 1835, unless it be by the Long Island notes; and most of that must, as yet, have fallen on others. Much less are many specific losses shown, since 1837 and 1839, when his last answers were filed, and when he still seemed unwilling to be regarded as insolvent. It is evident, too, that the depreciation in his property since 1838 and 1839 is not likely to be much, though it may have been more since 1835. But, even in 1835, the idea of his great wealth seems to have rested much more on a mere reputation to that effect, than on any substantial and particular data, sworn to by witnesses. If his own testimony, however, were competent, the case, on its face, in its general aspect, might appear to be one, showing his fortune then to exceed $290,000. Indeed, even after his conveyances to Noble, he represents himself as retaining "much property," being, as estimated by him in another place, over $130,000; and that he has since paid "many thousand dollars."

But the proof as to this, when coming to particulars, is very meagre, except his own testimony. That he had, even in October, 1835, much estate of solid and real value, except what was then conveyed to Noble, and especially much after paying his debts, is very questionable from various circumstances, some of which it may be here proper to advert to. They are, that the conveyance then was made on the eve of a threatened suit by the First Boston Company; that it contained a long list of both real and personal estate; that it extended down to his carriage and horses, if not to every thing which was exposed to attachment; that it seemed on its face, so far as any writing is put in the case, to contain another proof of its being a general conveyance by an insolvent, as it extended so as to cover subsequent liabilities for four years; that one of his creditors soon after sued him, and recovered a judgment which he was unable to satisfy; that others had contests concerning the title of a part of the property he conveyed to Noble; that the only notes he is shown to have procured since the conveyance, have been likewise transferred to Noble under like pledges; and that from his own answer, and more especially his deposition, giving an estimate of the value of his property and the amount of his debts, so as to render him then worth a balance of nearly $150,000 by one, and $290,241 by the other, it is quite evident that the property, not assigned to Noble, was chiefly of a "fancy character." It consisted, among other things, of shares in the Maine "Mining Company," "United States' Quarrying Association," and "Hollis Granite Company;" beside, some lands in various places, and among the rest in "Shelburne, N. H.," "inclusive of minerals," and for which little probably was given, or could soon, if ever, be expected. These are valued

by him at sixty or seventy thousand dollars, and including what was assigned to Noble, there are beside, in all his estate, as Cross estimated it, some $200,000 of other lands, and $99,504 in notes and other obligations; making the great aggregate of $390,241. The debts owing are put at only $100,000. But what has been done with these effects, except those assigned to Noble, or what was their real value, does not appear, as he gives no exact list of sales or collections, and they are not contained in the schedule of his effects as a bankrupt. His deposition, furnishing the chief specific data concerning them, is confined, in that respect, to 1835. Some of these will soon be referred to for another purpose, and others are particularized in the eighth page of the testimony taken as to document C, and exhibit, among other alleged and extraordinary reservations, when conveying to Noble, about $5,000 in money, and this at the very time Winslow was attempting, without success, to collect from him less than $1,000.

Again, taking the property which is in his conveyance to Noble, and putting the value on it which Noble would seem to, and making the deductions made by him for incumbrances, and then making a like pro rata reduction on Cross's estimates of other property, where he is as likely to run into excesses as in that with Noble; and it is manifest, even on his deposition if admitted, that he was a bankrupt in 1835, not having means enough, if thus estimated, to pay all he concedes that he then owed. He seems to forget that the debts he owed were sure to be exacted without reduction, while the claims due to himself were subject to great losses and risks, and the property he owned was of such a character, that no reliance could be placed on any thing beyond its cost, and not always that, until it was actually sold, and the consideration realized in money. Thus, as one illustration. Of the lands assigned to Noble, the latter seems to value one portion of them at about $24,000, after deducting the mortgages on them; while Cross, after a like deduction, values them at $150,000. This is an over-estimate by Cross in these lands alone of $126,000. Supposing a like over-estimate in all his property, and the true value of the whole was but $56,000, while his admitted debts were $100,000. Again, Cross computes all he assigned to Noble, both real estate and notes, at about $203,000; but all which Noble has realized from it, is stated to be only $13,500, or not one sixteenth. His whole property, on that scale of depreciation, would be worth only $22,000, or not enough to discharge his debts into $78,000. Again, Noble swears that all the signers of the notes assigned to him in the first instance, except two firms, have failed; that set-offs existed against many of them; that none were secured by mortgages; and that half of the debt of these two firms was doubtful. From this it can readily be computed how little his notes, as well as other property, was likely to accomplish in paying $100,000 of debts, most of which in the end, as was to be expected, seem to have been spunged out by the bankrupt law.

Another striking evidence of Cross's own opinion, being entirely unsettled as to the value of his property to the extent of over $100,000, is, that in his deposition he computes his wealth to be from $100,000 to $150,000 (varying as doubtful quite $50,000), while in his bill of particulars annexed he computes himself worth $290,241, after paying all debts, or nearly $200,000 more than the first sum of $100,000. There is another similar illustration of his habit in over-estimating his property, tested by himself, and near the time of this transaction, before any depreciation could have occurred. Thus he computes the Dorchester property at $7,000, when he sold it to Noble for only $1,200, a depreciation of near five sixths. Such a fortune, like the Indian philosophy of the earth resting on an elephant, and the elephant on a tortoise, but nothing for the tortoise to stand on, falls with the first adverse gale. So it happened, and was verified by Cross himself, in relation to the sales and the net profits anticipated, of more than $100,000 from this very tract of land now in controversy. Instead of realizing that princely fortune, the very first purchase-money to Reed of the small sum of $30,000, according to the proof, has never yet been paid, except a few thousand dollars otherwise raised. The paying of that, depended mainly on the paying by the First Boston Company to Cross; and their paying, depended on Cross's purchase back and paying them; and his paying them, depended on the paying of the First Boston Company or somebody else to them; and the paying by the Second Boston Company or others, depended on the sale and paying to them by purchasers in Long Island or elsewhere; and theirs, on the paying to them by the purchasers of "the good pumpkin white pine timber" at one hundred and thirty millions feet, yielding over a million dollars in profit, when in fact only seven or eight millions grew on the whole township, and with a bad stream to get it to market. This foundation of the whole failing, the entire cob-house tumbled down, with fragments rolling and scattered in all directions, but not a single payment perfected from first to last.

I refrain from spending time on the evidence as to Cross's efforts to create, through the newspapers and otherwise, in advance of the attempts in August to make these sales, exaggerated notions as to his great wealth and philanthropy. It is certain, that when in that month he gave his bond to the first company, though it was intended as he says for a purchase, they were not willing to trust him as a man of property, nor did they even confide in his notes secured by a mortgage. So, again, whether he was intending to dupe others, or really duped himself on this topic, till the 22d of October, 1835, it is impossible,

after the failure which happened then to meet his engagements with the First Boston Company, and after the Second Boston Company had refused to buy of him the same land, assigning to him a deceit as to the quantity of timber as a cause, and after he had become conscious, as stated in his answers, that Eastern lands were growing duller of sale and falling in the market, and after he had felt obliged to make so large and sweeping a conveyance of his property to Noble, it is almost impossible to suppose that the delusion could continue of his being likely to turn out very rich. Certainly not, unless in the madness of the times, not entirely over in some places, he could be able to dispose of this township in some way so as to realize more for it than he had engaged to give the First Boston Company. It is very significant that Noble, who knew Cross's means best and his character fully, and was less likely, therefore, than others to confide in mere reputation, or in newspaper puffs, treated him throughout very much as mankind in general do debtors, whom they consider insolvent. His earnest inquiries of Cordis as to any payments he intended to make to Noble, his procurement of security on the 22d of October of almost the whole of Cross's property shown to be attachable, and to possess much real value, even down to his horses and carriage; his obtaining also all the new notes belonging to Cross connected with the Long Island purchase, almost immediately after his return, and extending to near $30,000 in amount—all indicate that his practical course, whatever may have been his theoretical conjectures, was precisely that of a shrewd man towards one believed by him to be of questionable responsibility. And when it soon became apparent, that all Cross's assignments to him were likely to yield much less than his just claims, and that these notes were to be contested, it seems inconceivable, if he too then deemed Cross really retaining much valuable property, and able to secure any of his creditors (as his answer and Cross's both hold out), that he should not have asked for more of it to be placed in his hands, considering the confidential and friendly relations that existed between them; and considering the very large liabilities he and his partner Wyer were under on account of Cross, amounting, as he says, to near $80,000. Indeed, in his answer in Tuthill's Case, he says he could not in October, 1835, have realized by a sale over half the nominal amount of all his securities by notes, and that since, as before remarked, every signer of them has failed, except two persons, and half the small claim against them is doubtful; that set-offs existed against many of the rest, and none were secured by mortgages, or sureties. Could something more and trustworthy as security have been got, and his demands against Cross were genuine, is it probable he would not have obtained it, when his existing securities were proving to be so worthless, and he had been so anxious even in October to be made safe?

The next misrepresentation, set up as made by Cross in August, October, and before the sale in November is, that he owned the whole township A No. 2, having repurchased it of the First Boston Company at an advanced price, and from a conviction of its superior qualities. Clearly from the evidence, such a statement seems to have been made in August, during the negotiations as well as at the time of the negotiation in October, and the sale in November. Indeed, it is quasi admitted, being justified as true on the ground, that having obtained a bond for a deed in August, and given a bond to take and pay for one on the 19th of October, he was virtually the owner till that date; and that though he then failed to obtain a deed from his inability to make the promised payments, yet he obtained a parol extension of the time for having the deed and for making payment, thirty days longer. However such a contract for a purchase may in law or equity confer certain rights to the land, which may be sustained on making, subsequently, the payments stipulated (1 Sugd. Vend. 171; 1 Atk. 572; 7 Ves. Jr. 265, 274), yet it is difficult to see how they amount to an actual sale till the condition precedent is fulfilled, and which usually is the payment or tender of the consideration.

As between the parties where there is a contract to sell and buy, chancery, by considering that done, which ought to be done, may regard the buyer as owner, and if he is to mortgage back, as mortgagor. Longworth v. Taylor [Case No. 8,490]. This must be, however, only between them and not third persons, and even a court of equity could not consider a deed as executed, unless the consideration was paid or secured. So what is to be conveyed is regarded as personalty, if the vendor die before conveying. 7 Ves. Jr. 436; McKay v. Carrington [Case No. 8,841]. Here, too, not a dollar of the money was tendered or paid at the time agreed, nor till after Cross had himself conveyed to the plaintiff and others, and obtained notes and money to pay over to Montague, who then, and not till then, delivered to Cross the several conveyances of one tenth each, which had been signed by the trustees, and which conveyances they did not mean should have any effect till payment and delivery. This was as fully known to Cross as to themselves. It is equally difficult to see, how such an inchoate and imperfect claim to have the land in a certain event, which had not then happened, and did not happen at the time agreed, nor till after he had made the very sale, now in controversy, could, in common parlance, be regarded as making him the owner or purchaser till that event. Much less can it be regarded so in the sense, and for the purpose and effect manifestly intended in making those representations here, and as they were probably understood by others, who re-

lied upon them. The impression undoubtedly made was, that the land was of such clear and high worth from its great amount of timber and other circumstances, as to be sold over again, by those purchasing from himself, and even to one, so well acquainted with it as a former owner was presumed to be, and at an advanced price on the advanced price which he had before obtained for it, and that owner also a man of great responsibility and wealth willing to be risked in this way.

But if the naked truth had been developed at the sale, that the money had not been paid to Cross by the First Boston Company, for the enhanced price then given by them, if it has been to this day, except in part; that Cross himself was one of the purchasers in interest from himself at that enhanced price, to the extent of one tenth of the township; that the next purchase back by him at a still further enhanced price had never been completed, nor a dollar of money paid for it, nor any likely to be, until he could accomplish another sale of the land, and thus raise the means; that this had been attempted with a second Boston company, a part of whom were also members of the first one, buying from themselves at an advance, but never paying any thing, from a conviction among some at least, that the pine timber on the land had been greatly overrated; looking at all this, can any person suppose that the purchase back, represented by Cross to have taken place to himself, accorded, as understood by the grantees in Long Island, or was meant to accord with the whole truth? or that it was supposed by him to be understood by the plaintiff, and other grantees, in conformity with what he knew to be the truth in relation to what had happened as to that repurchase? And can any one for a moment believe, that the real facts as to it, if all disclosed, would have made the same impression on them, or held out the same inducements to buy as the representations did, which Cross then actually made? I think not. But when you add to this the further representation by Cross, that he had purchased this land back from a conviction of its superior qualities, there can be little doubt of the influence he meant to produce by the whole statement, and that it was at variance with the real gist of the whole transaction.

There was still another matter, connected with the land and the sale, which appears to have been stated by Cross in a manner not according with the facts as proved by various witnesses. The value of all the timber on the land depended much on the facilities, and speed, and certainty of getting it to a market. Cross represented that it could be sent to market, yearly, by a stream running through a portion of the township, while in truth it cannot be so sent, usually, short of two or more years; and he thus impressed on the plaintiff and others a belief of a fact, which would naturally lead to a great overestimate of the value of what timber did exist on the land, independent of the other impression he attempted to make, of a quantity of pine timber being there so greatly beyond the truth as since developed, and as before referred to. But, besides these departures from what was open, upright and truthful in the transaction, certain other measures were resorted to with a view to produce the sale, which were reprehensible, and tended to suppress the real character of the transaction. In such cases there is little if any difference between suppressio veri and suggestio falsi.

Thus the whole matter as to the Second Boston Company, whose agent it is now said by some of the defendants he was, and whose bond of August, 1835, he carried to New York in his pocket, and who in that bond state they had purchased this township of him, when they had not, but whose failure to purchase and pay took place in October, and were well known to him in November, as well as the cause of it, in the deficiency of timber on the land, which had been assigned to him by some of them,—I say, the whole of this seems from the evidence to have been carefully concealed or suppressed, and did not become known to some of the grantees, if to any of them, before the ensuing spring. Had it all been made known before the sale, it cannot be doubted that its influence would have been decisive to prevent the sale, and could hardly have been overcome except through another concealment which existed in the case, and which is among the most censurable of the whole, and was at the start resorted to by Cross, and must throughout the whole of it have naturally exercised a controlling influence over the minds of the plaintiff and others. This was the employment of Chalmers, residing in New York, and a former partner of Cross, and an acquaintance of the grantees, as a secret agent of Cross, to promote the sale, on high commissions for the service, while Chalmers was to hold himself out to the grantees as a friend of theirs in the trade, a counsellor, and a purchaser of several shares in common with them.

The proof of all this, though denied by Cross in part, is satisfactorily made out by Chalmers' own testimony and various corroborating facts. If Chalmers, thus conducting, stood alone to disprove the answer of Cross, thus conducting, the rules of evidence might require us to hesitate as to the proof of this charge being sufficient, unless believing Cross to be otherwise much more discredited by the contradictions to many of the allegations in his answer than Chalmers is. But, beside such a consideration, Cross admits some circumstances which go to support Chalmers. Cross admits he had been his former partner, and Cross was thus likely to use his services, and was not so likely to mislead him, as a stranger, in making a sale

to him. Cross needed the services of some one to make him acquainted with the New York grantees, and he admits that certain notes were executed between them, which Chalmers avers to have been part of this corrupt transaction. Cross admits, that he abated $1000 on one note as a compromise of "Chalmers' claim," and "to pacify him." Nor does he deny the averment in the bill, that Chalmers signed an obligation to take two thirtieths of the township at nine dollars per acre, to be afterwards shown to the Long Island purchasers. He also made Chalmers the correspondent in relation to this sale during his absence; and letters of Chalmers put into the case, written to some of the purchasers, as well as to Cross, pending the negotiation, are of a character to indicate the double capacity in which he was acting, or rather show much more of the agent for Cross, than the ordinary purchaser. One of them, written a few days after the sale, and addressed to E. Wyer, another former partner of Cross, recommends the responsibility of the signers of the notes, and shows Chalmers still continuing to act in aid of Cross and his interests. The evidence of Miller and others proves, likewise, Chalmers' efforts to smooth over any difficulties in the way of the sale, which were much more in conformity with his agency for Cross, than with his action merely as a common buyer with the rest from Cross. The influence which Chalmers, thus situated, could and did exercise, would be sinister, and almost impossible to thwart or resist. While confiding in him as their friend and copartner in interest, even affixing his name to and heading the written subscription to take shares, and expressing solicitude as to the purchase, and actually receiving conveyances as if a bona fide purchaser from Cross, they in reality were cherishing in him, the hired agent of Cross, with a deep interest, to tempt them to purchase, though ruinously, and himself taking really no share in the purchase, except as in payment for his fraudulent services.

The notes given to Cross were, as Chalmers states, but a cover to blind the eyes of all concerned, in Boston and New York, with counter notes given by Cross to him, to be subsequently exchanged or arranged so as to exonerate Chalmers from any other payment than his commissions as agent. Had the grantees known Chalmers' position, it cannot be supposed, for a moment, that the trade would probably have been consummated. Connected with this, and the diminished confidence to me placed in Cross's statements when to the contrary, and connected with his general behavior as to fairness throughout the whole business, is the change in his answers and oaths respecting the form of the written contract with Noble. The lame account also given of his exaggerations concerning the amount of his property; his apparent tampering with some of the certifiers and persons living near the land; his concealments as to the Second Boston Company, and of the disclosures made to him by Cordis; his antedating all the writings in November; his antedating the paper signed by Gregg; his having certificates addressed double, as if made either at his request or Babcock's; his failure to produce the Reed bond; his claim at one time to have Noble retain property to pay it, and then avoiding it when sued; his pretensions to be immensely rich in 1835, and yet, in that very year, allowing himself to be prosecuted, defaulted, and no payment made, and assigning most of his estate to other creditors; his assumed ability to fulfil all his extravagant guarantees, and yet going into hopeless bankruptcy; his avowed loss of the written contract made with Noble, but preserving one not made; the looseness evinced in his deposition respecting his various debts, and the securities for them, lodged with Noble, and not accounted for in his bankrupt schedule; and, finally, his eagerness to sell what he stipulates and guarantees shall yield a profit of $1,296,000, thus throwing away at once that immense profit! —from all these, and from the considerations before explained, I regret that it is impossible to divest my mind of the conviction, that the conduct of Cross, in this transaction, has been such as to render his answer entitled to diminished confidence, and the sale to the plaintiff void on account of material misrepresentations, which could not but have influenced the plaintiff to make the trade, and which have turned out to be unsupported by facts. Nor do I entertain much doubt, that the bill, in this case, alleges enough to justify setting aside the sale on account of a gross and great mistake in the quantity of pine timber on the land; there being clear evidence not only of that mistake, but that the quantity of such timber formed a principal inducement to the purchase by the plaintiff and others.

But there is no substantive, distinct claim in this bill to set the sale aside for a mistake alone; and though all the averments necessary to recover for a mistake may be included in the higher charges of fraud, and there are some analogies to justify the waiver of what is surplusage in cases at common law, such as finding a prisoner guilty of manslaughter under an indictment for murder, and of larceny under one for burglary; yet it is not certain that the respondents, under this bill, would come fully prepared to make such answers and proof as they would make, in case of a bill asking specifically to have the sale set aside for a mistake. The case of Daniel v. Mitchell [Case No. 3,562] seems to sustain such a course; but the printed report of it does not set out the bill so fully as to enable one to judge, with certainty, whether it is a precedent in point or not on this question. The manuscript bill, however, on being examined by me, is found to declare the representations there made not to be true. It uses the words "'knowingly' and 'wilfully' misled

the explorers, with intent to deceive them;" that, relying on them, they purchased as if true; that, in fact, the land did not contain so much timber, nor of such quality, nor were the certifiers honest or acquainted with business; that the respondents knew so; and that the plaintiff had not seen the true tract of land, and the defendants combined to deceive him, &c. &c. The words "fraud" or "mistake," ipsissima verba, are not used, though the bill seems to rely chiefly on the former. But if the doubts first expressed on this subject are somewhat shaken by this state of the record, in Daniel v. Mitchell [supra], it is manifest that Tuthill, one of the purchasers, had some means of knowledge to correct mistakes; and that, through him, some opportunities for information were enjoyed by all the parties, which possibly might prevent them from setting the contract aside for a mistake alone, if no falsehood or fraud were employed to prevent the full and fair use of those means, and to make the parties enter into the trade, partly on account of other circumstances, tainted by such falsehoods.

I have therefore turned my attention to the matter of falsehood and fraud, as perhaps necessary, and have inquired what misrepresentations were made, which were material in the trade, rather than looking to mere mistakes; and am convinced that falsehood and fraud were practised in all the means used by Tuthill, so far as those means are proved to have come to the knowledge of Smith, the plaintiff; and in that mode, as well as directly, they extended to other essential elements in the trade, so as entirely to destroy its validity in respect to the respondent, Cross. More especially is this the case as to many details, where the purchaser, confiding in the representations and guarantees of Cross, who claimed to be a man of great wealth, would be less particular, and surely would be far less so as to matters laying more within Cross's private knowledge. Mason v. Crosby [Case No. 9,234]. As to these, still trusting to him, they would look only to general appearances and general considerations. There is, to be sure, much in extenuation as to Cross, that shows him to have been, in such an insane era as 1835, in many respects duped as well as duping; and after conforming heedlessly to a false standard of the times, acting, without doubt, from recklessness and want of sober reflection, in respect to his statements, more than with a view wilfully to misrepresent and defraud. One striking illustration of this existed in his presumption to guarantee that the land, even at the high price it was sold for, should yield over a million of dollars in profits. Nor is there any solution of this, independent of extreme credulity and inconsiderate folly, except what is worse, a conviction that he was worth nothing, and hence was risking nothing, though professing to be so wealthy. His temperament seems to have been sanguine, and his operations hasty; and hence he perhaps often believed what others, even in that credulous epoch, distrusted. But it is to be remembered, that in all these cases, the court is bound to look only to civil obligations and duties. It is not necessary, except in criminal prosecutions, to find that the mind was evilly disposed, or knowingly deceiving under an entire loss of its moral tone. But it is enough if statements were made, whether with or without knowledge, which were material to the trade and were relied on, and which turn out to have been clearly unfounded. He, who hazards such statements, should be made to suffer from them civiliter, rather than those whom he misleads by them; the author of them should suffer rather than their victims. According, then, to this respondent, all which charity and the facts may justify, he must still be answerable to the plaintiff for all the money and notes he obtained from him. What aid he ought to receive from the other parties to the bill in meeting this liability, and on what terms or conveyances back by the plaintiff, will be seen after examining the rest of the case

The next inquiry is, how does the case stand in respect to the other defendants, who were members of the First Boston Company? They were owners, as cestui que trusts of certain shares in common and undivided with Cross. Besides this, they had recently bought the land of him, and united with him in making a new survey of the timber on it; and some of them had visited the premises in company with him. He held a large amount still due from them in notes; and in a few weeks, if not days, after taking them, during the very next month, entered into a negotiation with Babcock and Glover, the trustees authorized to sell and manage the land, to repurchase it from them at the advanced price of five dollars per acre, when they had given only $3.50. This was done, either because he believed, after so short a time, that he had parted with it much below its real value, though at nearly treble the price he had agreed to pay Reed for it, which belief would be not a little extraordinary; or from a conviction, which he had impressed on the minds of the trustees of the company, that although not able to pay them so large a sum as the advanced price would amount to, even after deducting their own notes to him, he could in a short time accomplish it, if they would give him a bond for a deed by the 19th of October ensuing; and, in the mean time, would co-operate with him in effecting a sale to a second company in Boston at a still further advance, and then enable him to make still another sale at a still further advance for the second company in New York or elsewhere. The whole seems to have been parts of one plan; that plan or arrangement was to effect a sale by and payment to the own-

ers at an advanced price, and for profit to them as well as Cross. It was a leading object to secure payment no less than a sale, in order to discharge their notes to Cross as well as realize large gains soon, and, taking this idea with us, many of the apparent discrepancies will be reconciled. They doubted Cross's responsibility, as has been already shown, and were under heavy liabilities for the considerations, which they must have been anxious to provide for and seasonably meet. To accomplish this arrangement or object through Cross, it was indispensable that he should have the aid of his associates in the First Boston Company, in order to obtain and to give titles, and to make them in a satisfactory degree sure, as to being paid such a large consideration as they were to receive, or even the smaller, but still large one, they were already liable to pay to him. That this was not intended as an actual sale to him, it appears that they did not, with all Cross's exaggerated wealth, seem willing to trust him with a deed, and take his note for the balance beyond what they owed him.

It is a very decisive fact, to show it was not meant as a sale to Cross, that they did not execute to him a deed at once, and after taking up their own notes, receive for the balance a mortgage from him on the whole premises, in order to secure it, and which they could not doubt, after just giving three dollars and a half per acre for the land, would make them entirely safe. Nor could Cross object to this, if the sale was bona fide, though at a price so much beyond what he had just sold it for; because in this way he would secure the first notes that run to himself, and all the consideration for his original sale to them, and only be liable to pay, beside, what he had become convinced was the increased value of the township. Nor would its being incumbered by a mortgage be any bar to his subsequent sale on his own account at an expected price still higher, as the mortgagees would discharge it on receiving a due portion of the consideration, and a good title could then be made by him, and the balance would be his own regular gains. But not doing this, and resorting to the form of a bond on the 15th of August, to convey to him on his making payment by the 19th of October, and receiving back a bond from him to make the payment, is much more reconcilable with the idea, that the sale was either conditional and to depend on his success in other sales by their aid; or was rather, and as is most likely in the usages of that day, regarded merely as one mode of enabling Cross, as their agent or attorney, to get more confidence as an apparent buyer. He might thus be able to make an absolute sale, if he could, for them, before the 19th of October, and then, on letting them have the money and securities to the amount of five dollars per acre, convey a title, and retain the residue of the consideration for his services and gains. In the usages as to land sales in Maine, in 1835 and 1836, the agent was frequently clothed with papers as an actual or expected purchaser, though in truth a mere agent. Because his statements as one, who had himself ventured to buy, and was more responsible as an owner, would be more confided in than those of only an agent. Doggett v. Emerson [Case No. 3,960]. At first the "bonds," so called, were not sealed, but were mere written slips, agreeing to give a refusal a certain length of time at a certain price. But others were soon drawn by lawyers in common form. They appeared in that form more like real sales, and hence misled more in getting credit as owners, and at last that form was generally adopted. Cross also would be perfectly willing to enter into such an arrangement, if confident he could sell the land with the company's cooperation at a higher price, as he would thus obtain not only the excess, but the payment of his notes held against the company for his sale to them, and great profits on his one tenth still owned in the township. This direct interest of his seems, before the proceedings were closed in November, to have increased to two tenths, if not more, thus making him a larger owner in the first company, and hence more likely to be employed as its agent; and though an agent, this large private interest accounts also for the circumstance of his being willing to indorse the notes he procured to the company, having it also in his own power to take only good ones, and to secure them, as he did in this instance, by mortgages, which he seems afterwards to have proceeded to foreclose with dexterous speed. What appears to have next been done, in order to render this arrangement successful? The first company engaged to unite with other signers, to form a second Boston company to purchase the township of Cross forthwith, at even a dollar in advance on an acre, or over $28,000 advance in the aggregate on the price they had just agreed to sell it for to Cross. It is proved that they agreed, as a company, to take something like one third of the new shares, divided into thirty instead of ten, as in the first company, and three of the old members actually headed a subscription for seven shares in the new company. How can this be accounted for, if the sale to Cross had been absolute or bona fide, and not a mere mode of enabling the first company to effect in that way to others, if possible, an absolute sale, in order that they might realize five dollars an acre from Cross, for what they had just before engaged to pay to him only three and a half?

If they really wished to remain interested in the land, why sell to Cross any but the portions which they did not wish to retain? And why, if so wishing, agree to pay a dollar per acre more than they were getting from him for the very same premises? If the old company did not still remain owners,

and Cross their agent, why not pay Cross the one third they agreed to take in the second company, and convey to him to that amount in the township, under their contracted sale to him? And why in the end, in November, did they not take the balance of the township back from Cross, or retain it, and pay the enhanced price as agreed? But considering him in both these arrangements as their agent and a large part owner, and thus acting for them, rather than for himself alone, and these last acts become consistent and are left unfinished, as would be natural, while, on any other hypothesis, they are inexplicable. So if this subscription was not intended to be a real bona fide transaction, a sale and repurchase on the part of the first company, to this extent and in this way, but only a cover, to induce others to buy into the township at an enhanced price througn Cross their agent, though apparently to be a grantee, calling himself the actual purchaser from them, and being called by the new company their vendor, it is then reconcilable throughout. But without this hypothesis it cannot be. Thus reconciled, it is manifest the whole transaction operated deceptively, and was calculated to inflame the minds of new subscribers or purchasers with high hopes of still greater gains, seeing this township pass so rapidly through the hands of so many buyers, and each sale at a price constantly increasing. In order to heighten the delusion still more, in this writing of the Second Boston Company, which is produced and signed by the members, it is not only stated that they had bought the land of Cross at six dollars per acre, and the statement is headed by three of the old members, but that Cross was to be their agent to effect another sale at seven dollars and a half; taking to himself for his services the excess he might get beyond that, and paying himself out of it also the six dollars per acre they had engaged to give him. There is some evidence of other papers having been signed in connection with this, and certain guarantees having been made by Cross on them as to the quantity of timber on the land, in order to induce some of the subscribers to enter into this arrangement. But there being no deed produced from the first company, at that time to Cross, and none from Cross to the second company, and no proof of any notes being executed to him by any of its members for the consideration, or any bonds given to take any portion of the land, except in two or three instances; the whole real interest and title still continued in the first company, and Cross seems in reality, and throughout, to have been merely their agent, in order, if possible, to accomplish a sale, which would enable them to realize their expected five dollars per acre, and thus be able to pay Cross for the original purchase of him, as well as realize large profits, before they would convey a title to any one. The representation of an actual sale to Cross by the first company, made by him and some of the other members, when they never had executed a conveyance to him, and never agreed to, except on a condition, which he had not performed, and did not perform seasonably; and when they were very careful never to make such a conveyance, till he had sold and obtained the means, and delivered them over to their agent, to pay them for the land; was pretty obviously a representation made, not because such a sale had been perfected, or was meant, to be, till they were paid, but because, in that way, he might obtain more confidence for his statements in selling, and might sell or profess to sell to another company, which they could aid in getting up, in order to have the means raised to pay themselves, by that other company, or by some subsequent persons, thus induced the more readily to buy of the second company under Cross's agency. Without such a professed sale by them to Cross, it would have been too barefaced to join in a company to buy again of themselves rather than of him. But amidst the whole of this complicated machinery, and unusual as complicated, except in times like those of 1835, no actual conveyance was ever made by the trustees of the first company, until the sale was completed to the plaintiff and his associates; and not a dollar of money appears to have been paid to them for any proposed or actual sale, till that now in question. The second company do not, in fact, appear ever to have received any deed either from Cross or the first company; and after the failure of the second company (October 17) to go on, Cross could act for nobody except himself or the first company; and as he had no deed from them, then or previously, he must, of course, in law, have been acting for them or nobody. Indeed, so much were they, from the start, using Cross as a mere instrument to accomplish a sale in their behalf, that some of their members aided him in the surveys of the timber; some united in the Second Boston Company to buy or profess to buy from him; some joined in puffing the lands to the New Hampshire purchasers, as if still deeply interested; some accompanied him to Long Island, where the sale was to be completed; and some received there the consideration, as well as delivered there the deeds.

It is difficult, then, to resist the conclusion, that, however, in form they may have given Cross a bond, to convey to him on condition, and however they did in form convey to him in the end, after he had made the bargain with and given a deed to the plaintiff; the whole was but a mode of making a sale by them, through him, as a part owner and agent. He was to fix the terms within certain limits, negotiate the times of payment and amounts, and they then, and not till then, were to receive the consideration and deliver a deed, to and through him, for the purchasers. That this was the real nature of the transaction, several circumstances, be-

side those already specified, tend to confirm. They are such as the decline in value, which, for some months, had been going on in that kind of property; such as the refusal of most of the Second Boston Company to buy, and some of them on account of the quantity of timber having been over-stated by Cross; such as Cross's inability to pay them, and take a deed on the 19th of October; such as the acquaintance of Cross with this kind of business, and his supposed usefulness as an agent to aid them; and such as his being almost in form, as well as substance, the agent of the second company also. If all this shows that the first company had never sold, and never meant to let Cross or others have the land till they were well secured for the consideration, these various negotiations were virtually made to enable them to get their price paid or well secured, and then, and not till then, to part with the title. In accomplishing this, whether Cross acted as part owner, and thus largely interested to succeed, or as agent, or as both, is not very material, as, in point of law, the acts were, in a great measure, for all the owners, for their benefit, to complete their sale, and secure to them their price. They could not, as Mr. Justice Story said in substance, in Doggett v. Emerson [supra], take the benefit of these negotiations, and some of them join in them, without taking the burthen. If they adopt one part of the res gestæ, they must the whole. They cannot repudiate a part, and yet derive all the advantages from it. If one claims under an agent, he must take the case cum onere, with his knowledge and acts. Hovey v. Blanchard, 13 N. H. 149. If Cross proved an unfaithful agent or associate, it should be their misfortune and loss, rather than those of strangers. A principal is answerable for the deceit of his factor civiliter, though not criminaliter, because, as somebody must lose, it is better to be him who employs one dishonest, than him who is defrauded. Bull. N. P. 31, b; 1 Salk. 289. And it is of no consequence, whether they specially and beforehand empowered Glover and Babcock, the trustees, to appoint Cross as the agent of the owners or not, if they ratified his doings, and thus adopted them, and strove to profit by them. See Doggett v. Emerson [supra]. The whole sale is to be set aside, then, as void for fraud.

The measure of the liability of each of the respondents in this class will be the amount each was entitled to receive, and did receive from Cross and the trustees, which was paid by the plaintiff, and any notes of the plaintiff either may have received from Cross towards his share. When a master has reported on this, the final decree can be made up to correspond with the report of the master. If any of the respondents be dead since the pleadings closed, a scire facias can issue against his executor, to show cause why judgment should not be entered, to that extent, against his goods and effects. To this extent they will come, in aid of Cross's general liability.

The last inquiry is in respect to the liability of Noble. He is the holder of some of the notes, taken for this sale to Smith, and if he took them before due and in the usual course of business, as an absolute purchase of them for a present or past consideration, and without notice of any fraud by Cross in the procurement of them, or any want of an adequate consideration to the makers, he is a bona fide purchaser, and cannot be required to surrender them till paid. But, on the contrary, if it is satisfactorily shown, that he knew what was the consideration for them, and that it was either fraudulent or of little value, or if he took them without such knowledge and notice, yet not as a purchase in the usual course of business, whether for a new or past consideration, but rather as a pledge to secure existing liabilities; and, much more, if he took them to secure future liabilities, the notes are open to any defence they would be if still continuing in Cross's hands. Among those defences is fraud, or want of adequate consideration, or a set-off against the promisee. Without regard to notice of fraud, or of enough to cast a shade on their consideration, the first and best test on this subject strikes me as being, whether there was an absolute sale of the notes? Was there any residuary interest left in the vendor, the indorser? Any equity of redemption? Any right to have a return of them on the payment of money or performance of some act? If so, it was not within the principle of protection to negotiable paper in the market, as that principle is to protect a purchaser, and not a mortgagee, who takes the notes as security only for other matters, instead of buying them in market overt as negotiable paper. He thus holds them merely as he would unnegotiable paper, or personal property pledged for a like purpose; as some personal property and even land were pledged in this case to Noble. In such an event, he does not hold them for an agreed price paid outright for the notes, or credited for them on a former debt at the time of receiving them instead of when collected; nor as other property bought and not lodged merely as security. The destruction or loss, or failure in any way of this last property would fall on the assignor, while of the former it would fall on the assignee or buyer.

These seem the natural and truest tests of such transactions, rather than the fact of the consideration being new or pre-existing. 10 N. H. 266; Williams v. Little, 11 N. H. 66; 20 Johns. 637; 6 Hill, 93; [Swift v. Tyson] 16 Pet. [41 U. S.] 1; [Coolidge v. Payson] 2 Wheat. [15 U. S.] 66; [Townsley v. Sumrall] 2 Pet. [27 U. S.] 170; 4 Hill, 93; McNiel v. Holbrook, 12 Pet. [37 U. S.] 84. A pre-existing debt is a good consideration for the sale of a note when it is sold actually, or taken in actual payment. But, whether the consideration be one or the other of these, new or pre-existing, seems of little consequence, except as one species of evidence in relation to the fact of

the transfer being absolute or merely conditional. It is more likely to be conditional, when the debt is pre-existing, being more often then taken only to secure the debt; whereas when a new consideration is given, it is generally to make a purchase, and the transfer is more likely to be absolute. Yet, in either event, there may be other and much more decisive evidence than the oldness or newness of the consideration as to the transfer being absolute or otherwise, such as a written acknowledgment that it was a pledge or a promise to account for the balance after collected, or no receipt being given of payment of the old or new consideration. While these would satisfy most persons of the fact, that the property or notes were pledged merely, the reverse of them would prove that there was an absolute sale. And the character of the sale or the transfer, whether absolute or conditional, and not the consideration only, must show, in my apprehension, whether the interest has been all parted with or not, and whether it is all to be shielded or not in the hands of a purchaser of commercial paper, in the usual manner and in the usual course of business, in disposing of such paper. If the general as well as residuary interest in the notes has never been parted with, but any loss of them, or any loss in their collection, is to fall on the assignor, and not the assignee, then the transfer is not absolute, and is not entitled to protection as negotiated paper, sold outright in the usual course of business.

Now there can be no doubt, that Noble took the notes and other property of Cross in October, 1835, as collateral security for certain debts belonging to him and his partner, Wyer, and liabilities for which Cross was responsible, and that he was to apply their proceeds in discharge of those debts and liabilities, and return any balance to Cross. A similar account is given of the transaction by Noble, in his answer in Tuthill's Case, even after the alleged discovery of the mistake in the authenticity of document C, as to his agreement with Cross. But whether the property so assigned, was to be held as security for any new and future liabilities by them, on account of Cross, during the ensuing four years, is a matter about which there is much controversy, and is in the former view, as to the character of the transfer, not very material. So it is equally certain, that when the present notes were handed to Noble by Cross, in November following, it was done under a like arrangement as to their being security for the former debts and liabilities, and any balance was to be accounted for as with the others. But the same doubt exists, whether they were intended to cover any future liabilities or debts between the parties, and an additional doubt, whether any new responsibilities, before not included and not assumed, were to be covered by the pledge of these last notes. It is also quite clear, that some of the former notes, to the amount of about $4,800, were given up, when these last, amounting to about $29,000, were lodged with Noble in November. I speak of what is clear, as contradistinguished from what is controverted, because the writing itself, given by Noble to Cross, October 22, 1835, whether in the form as now contended by them, or as they originally, in the pleadings in this case, set it up to be in respect to future debts and liabilities, is conceded on all hands to have been an obligation to account for the proceeds with Cross, and pay over to him any balance.

Such is its language, as to this, under either view; such the averments in the answers, as well as the bill; and such the nature of the transaction. Neither the real, nor personal estate, nor notes were appraised at certain sums, and sold, or pretended to be sold, and Cross discharged or released from debts to that amount. The same remarks are applicable to the pledge of the last notes, except that some of the former ones were given up then; and there is some contest, whether some new debts or liabilities were not also to be covered by these. Giving those up is likewise another evidence that they had not been purchased outright. It will be seen, that, under these circumstances and views, it becomes unnecessary to settle the much controverted question, whether the writing given back by Noble to Cross covered any liabilities not existing at the time; and whether its operation would then be different in respect to this case, however it might be as to subsequent attaching creditors of the property. For, in either event, it is in other respects on its face, and as proved by the nature of the whole transaction, and as admitted in Noble's and Cross's answer, decisive that the notes were not sold absolutely, but only lodged as collateral security; the proceeds to be accounted for afterwards, and any balance to be paid over to Cross, and no past nor present consideration having been discharged or released at the time between the parties, and no fixed sum having been agreed on, for which the notes were sold or bought. Indeed, Noble admits, that no specific value was fixed or computed by him as to the property or notes originally assigned, so little did he think of making a purchase of them.

Again, it is unnecessary to settle another moot point, whether when the new notes, including that in this case, were pledged, Noble assumed any new liabilities or not. For if he did, they were only for the amount of a part of the notes; and of those formerly pledged, a part were given up, and the whole left were held as the others had been, only for security for what was due at the time they were pledged, whether consisting of old or new matter. It was no more an absolute sale for one set than the other; and they both were understood to be held in pledge the same way and to the like extent, and on like terms, though they might be in

pledge for some new as well as old responsibilities. This renders it not necessary to decide still another point much discussed, which is, whether these notes, being made in New York, and to be paid there, must not be governed by the New York laws, as expounded by the decisions in the New York tribunals. It is conceded, that they must be in such a case, if local statutes existed there, changing the law merchant. Towne v. Smith [Case No. 14,115]; 2 Kent. Comm. 459; Story, Confl. Laws, 261, 262; [Bank of Washington v. Triplett] 1 Pet. [26 U. S.] 25; 9 Barn. & C. 209; 1 Adol. & E. (N. S.) 43; 12 N. H. 520; 3 Mass. 77. This is a different question, where there is no such statute, from what it would be to decide in a suit in this court on a contract, made elsewhere than in New York, or to be performed elsewhere, whether one of the parties belonging there, or even the suit being brought there, the judges of the United States would feel obliged, as a matter of course, to conform to the New York decisions on a general commercial question. I think it is clear they would not. Swift v. Tyson, 16 Pet. [41 U. S.] 2, holds, that state decisions on commercial paper do not bind us, except when on state statutes and peculiar local laws,—[The Orleans v. Phoebus] 11 Pet. [36 U. S.] 175,—and these last bind, though on commercial paper. But the question here is, whether, in considering a contract, the lex loci contractus is not to govern the construction of that particular contract, when the law on it is the law expounded and settled in their courts, as much as that is the law which is there expounded on their statutes. I give no opinion on this.

There is so much in this long and complicated case, which it is necessary to decide, in order to dispose of it properly among so many parties, and such conflicting interests, that I am inclined not to agitate and decide either facts or points of law which arise, unless their decision seems to be, in some degree, either necessary or expedient to a correct judgment of all the merits. But when it so seems, it is the duty of the court, however unpleasant to itself or the parties, to probe the truth to the bottom, and announce it fearlessly without regard to consequences. I am more inclined, also, to forbearance, whenever justifiable, if the questions involve imputations on character and moral turpitude, such as fraud and palpable misrepresentations, made with a view to deceive. For these reasons, I have offered an opinion on the character of Cross's conduct in this case, because obliged to do it in order to dispose of the merits justly; but I have not expressed any opinion on the evidence, implicating several of the First Boston Company in respect to representations, covering the quantity of timber on the township in dispute, and concerning Cross's title, and which have not been shown to be true. It is not necessary to a just disposal of the case, to pass on the character of their own acts, or those of some of them, whether fraudulent in design or not. Because, without that, I hold the members of that company, in law, responsible for the statements and conduct of Cross, as their agent, and a part-owner in selling the land. The sale was for their benefit, and the proceeds of it were received by them to the extent of their claim on Cross, and for whose statements and conduct, while so acting, they must, in a civil point of view, be liable, if they choose to take the benefit or fruits of his doings, whether intending themselves to have defrauded the purchasers or not.

In like manner, and for like reasons, I do not intend to express any opinion on the conduct of Noble, in respect to his books, some of it very remarkable, or on his various answers as to the paper C, containing what purports to be the contract between him and Cross, neither of them professing to preserve the true contract, but both preserving what was wrong, and losing what was right; or, on the looseness and imperfections of his exhibits and accounts, connected with this large transaction; or the variances of dates, sums, and positions, taken at different times; or on his knowledge of any thing false or fraudulent in the proceedings of Cross in selling this land to the plaintiff and others, so as to obtain the notes now in dispute for his own security; or on his collusion in any way or to any extent with Cross, either to defraud his creditors by the conveyances to Noble; or to defraud the plaintiff and others by having their notes forthwith negotiated to himself, so as to prevent defences to them, or the satisfaction of any judgments which might afterwards be recovered against Cross on guarantees, or warranties, or bonds. But in respect to the fact of notice to Noble, or knowledge by him, that these notes were part of a large consideration paid by the plaintiff and others, for township A., No. 2; and that the land was of little value in comparison with the price obtained, if it were necessary to decide, no great doubt can exist, looking to all the circumstances and proofs. It probably is not necessary to show, that Noble had such knowledge, if he held the notes merely as collateral security. 10 N. H. 226; 11 N. H. 66. But if this knowledge was necessary, it is well made out, and the facts involved were enough not only to excite inquiry, but to "cast a shade" over the notes themselves, and bring them so as to be open to this defence on other well settled principles. Chit. Bills, 281; Story, Bills & Prom. Notes, §§ 194, 197. The fact of his knowledge does not, as is argued, depend merely on the testimony of George Miller. If it did, the position of Miller, as one of the associate purchasers, and the attorney and adviser of the rest, would require a close scrutiny; and after all, it would be but the evidence of one person to overcome the denial of Noble in his answer. But it besides rests on the evidence

of Lord about Noble's conversation with him, disparaging the value of this township, on the evidence of Reed as to Noble's repeated inquiries of him concerning the timber, and Reed's opinions that the quantity was small; on the fact that Noble himself was a dealer in such lands and likely to know the value of lots owned by those so intimate with him as Cross, a former clerk, a present limited partner, a large debtor to him; on the fact, that Cross's bond to Reed for the price of this very tract, was signed by Wyer, another partner of Noble, and that property was assigned to Noble to secure Wyer for this liability, as well as others on account of Cross; on the further fact, that Noble was a witness to one of Cross's deeds of these premises, was a traveller or visitor near to them with Cross when about to explore them, was with him when Tuthill was negotiating at Portland for his purchase of a share in them, was in New York pending the negotiations there for them, was suspected of interfering there, and did there speak disparagingly of them, and actually is shown to have made inquiries about them, not only of former owners who considered its timber as small in quantity compared with the surveys, but an inquirer of others, such as Cordis, who had proposed to buy but refused, because the quantity of timber was believed to have been much exaggerated.

Now, after all those intimacies and confidences, and connections, that he should become the assignee of Cross to the large amount of $80,000 or $100,000 worth of property, and then take in addition to it near $30,000 more in notes, and not ask Cross the consideration of them; and that Cross, when so asked by such a friend and creditor and trustee, should have concealed from him that the notes were given for this land, and the price per acre; and that Noble did not know the purchasers must have given such a price, under the supposition that the quantity of timber was much larger than Noble knew to be probable; it is exceedingly difficult to believe. This conclusion is strengthened, moreover, by the testimony of Gregg, that Noble told him that Cross had frequently said to him he was agent of the Boston Company; showing that they were in the habit of conversing about the land and its sale. For reasons like these, and those first detailed, without going into the specific question of any fraud being known or intended by Noble, it seems to me equitable as well as legal, that he should be considered as holding the notes subject to any equities or defences, existing against Cross at the time of their indorsement by him. In holding this, if a loss must happen somewhere, it is more proper in justice, as well as law, that it fall on Cross, and those representing him, and holding the notes for him, and for his benefit as well as their own, rather than on those whom Cross had deceived and misled in order to obtain them. But, at the same time, though in this view it seems right to require the notes of the plaintiff held by Noble to be surrendered, and it must be done, yet it is proper that Noble should have the same lien on what is to be re-conveyed to Cross or the First Boston Company, and what constituted the consideration for the notes, as on the notes themselves. Hence Cross's two or three tenths, as owned at the time he got these notes, should go in pledge to Noble till his claims are satisfied, rather than go to the general assets of Cross as a bankrupt, for the benefit of all his creditors, pro rata. The re-conveyance by the plaintiff might be made so as to do justice in two or three ways. But the most natural one is for it to run to Cross, on the plaintiff's receiving his money and notes, in trust for Noble to the extent of the shares owned by Cross at the time of the sale, and to be conveyed by Cross to Noble as collateral security after the notes of Smith are surrendered to him, and the residue held in trust for each of the First Boston Company, and to be conveyed to each, according to his shares in the land, after his making the payments of money directed by the decree in this case.

Let a master be appointed to ascertain and fix the sums of money to be paid by Cross, and refunded to, or in aid of, him, by each owner, and also to prepare the form of the conveyance to be executed by the plaintiff, and by Cross to the other parties; interest to be computed on all that has been paid by the plaintiff, from the times it was paid, and the usual deductions made for timber cut, or rents received by him.

During the argument of this case, and after the pleading and evidence were closed and printed without any reference to the bankruptcy of Cross, or any other of the respondents, it was moved that he might have leave to file and avail himself of a certificate of discharge as a bankrupt, which he had obtained since this bill was instituted. The motion was made in May, 1846. Afterwards it was found, that such a plea had been made by him and others, after the case was printed, but had been lost; a duplicate was allowed to be filed. Since that motion was made, this court, in the Maine district of this circuit, overruled a like motion, both for being made too late, and for being, as to a claim, not provable before a commission in bankruptcy. The grounds of this decision were fully explained in the opinion in that case, and may be seen in the concluding part of it. Doggett v. Emerson [Case No. 3,962]. Where others, or Cross himself, pleaded a discharge in bankruptcy at the next term after obtained, the objection as to improper delay might not apply, but the other objection as to the nature of the demand, being one merely in equity, and tainted by fraud, applies in full force to the whole of them. These pleas are, therefore, overruled.

It is stated, also, since the case has been

argued, that pleas in bankruptcy were filed for all the other respondents, except Noble, and Whitney & Haskell; some of them in A. D. 1843, and some in 1844. But they are not printed in the record book in this case, nor have they been argued, or any reply made to them. But this is of little importance, as from the views just expressed, they could not avail any of the parties, in respect to an equitable claim, like this, to rescind a contract pending in a court of equity, and growing out of fraudulent misrepresentation. The pleas in bankruptcy are, therefore, overruled.

Case No. 13,010.

SMITH v. BAKER.

[1 Ban. & A. 117;[1] 5 O. G. 496; 19 Int. Rev. Rec. 149; 10 Phila. 221; 31 Leg. Int. 126; 21 Pittsb. Leg. J. 141.]

Circuit Court, E. D. Pennsylvania. April 6, 1874.

EXECUTORS — REVIVOR — PATENTS — ENGLISH AND AMERICAN RULE—COURTS—FEDERAL EQUITY JURISDICTION.

1. Where the defendant, in a suit for an injunction to restrain the infringement of a patent and for an account, dies before the decree, his equitable liability as an infringer is not determined by his death, and a bill of revivor against his personal representatives will lie, to prevent the abatement of the suit.

2. The English rule, that, as, upon the death of the defendant, there can be no decree for an injunction, therefore there can be no decree for an accounting, because the equity for an account is incident to the injunction, is inapplicable to the equitable jurisdiction of the federal courts of the United States, conferred upon those courts by the patent laws, and especially since this jurisdiction has been amplified by the act of 1870 [16 Stat. 198], to embrace the allowance of damages in an equitable proceeding for infringement, which were before recoverable only at law.

[Cited in Gordon v. Anthony, Case No. 5,605: Atwood v. Portland Co., 10 Fed. 284.]

In equity.

Horace Binney, 3rd, and George Harding, for complainant.

Lewis Stover and J. C. Fraley, for defendants.

McKENNAN, Circuit Judge. The complainant's original bill prayed for an injunction and an account of profits derived by the defendant, Samuel Baker, from the alleged infringement of a patent therein described. Before any decree was rendered, Samuel Baker died, and the present bill is filed against his personal representatives to revive the original suit, to the end that they may be required to account for the profits so received by their intestate. To this bill the defendants have demurred, on the ground that, by the death of the defendant, the original bill abated and cannot be revived, because the cause of action springing from a tort committed by him does not survive against his personal representatives.

At common law all actions for personal wrongs abate by the death of either of the parties. But, the rule is operative upon the form, rather than upon the cause of the action. While, therefore, personal actions in which the general issue is, "not guilty" are ended by the death of either party, yet where, by means of the wrong, the wrong-doer has acquired beneficial property, an action will survive by or against the personal representatives of the deceased party to recover the value of such property. U. S. v. Daniel, 6 How. [47 U. S.] 11.

An analogous principle is applicable to proceedings in equity, and hence if an interest or liability, which a suit has been instituted to enforce, is not determined by death, an abatement, by reason of the death of any litigant, may be averted by a bill of revivor.

An infringer of the rights of a patentee, is accountable, in equity, for the profits accruing to him by the appropriation to his own use, of the patentee's invention. These profits are property acquired by the infringer, which rightfully belong to the patentee. He may, therefore, instead of resorting to an action at law, to recover damages, commensurate with the loss caused by the unlawful act of the infringer, elect to treat him as a trustee of the profits realized by him, and enforce his accountability for them in that character in a court of equity. Cowing v. Rumsey [Case No. 3,296]. Upon such a basis, the equitable liability of an infringer is, clearly, not determined by his death, and a bill of revivor against his personal representatives will lie to prevent the abatement of the suit brought in his lifetime to enforce it.

It is urged, further, that, as there can be no decree for an injunction, the respondents cannot be compelled to account, because the equity for the account is strictly incident to the injunction. This is the doctrine of many of the English cases, of which Jesus College v. Bloom, 3 Atk. 264, is the leading one. Grierson v. Eyre, 9 Ves. 346; Baily v. Taylor, 1 Russ. & M. 73; Adams, Eq. 219. The reason of it, is that, as the grant of an injunction necessarily presupposes that the complainant has sustained a loss by the defendant's act, for which, in strict right, he is entitled to compensation in damages, of which a court of law appropriately has cognizance, and as a claim for such damages would involve the necessity of proceeding in two courts at once, in equity for injunction and at law for damages, the court of chancery having jurisdiction for the purpose of the injunction, will prevent that circuity and expense; and although it cannot decree damages for the complainant's loss, it will substitute an account of the defendants' profits. But, as was observed by Mr. Justice Grier, in Sickles v. Gloucester Manuf'g Co. [Case No. 12,841], "the exceptions to the rule have become so numerous, that the rule can hardly be recognized as existing," and, therefore, "whenever the subject-matter cannot be as well inves-

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

tigated in" an action at law, "a court of equity exercises a sound discretion in decreeing an account. See Corporation of Carlisle v. Wilson, 13 Ves. 276." The reason of the rule is, however, inapplicable to controversies in the federal courts, involving the rights of patentees of inventions under the laws of the United States, for, as Judge Grier further says: "Exercising our jurisdiction in these controversies, not by assumption for a special purpose only, or as ancillary to other tribunals, but, under plenary authority conferred by statute, the technical reason which compelled the English chancellor to refuse a decree for an account, where he could not decree an injunction, can have no application." And as this authority is amplified by the patent act of 1870, so as expressly to embrace the allowance of damages in an equitable proceeding for infringement, which were before recoverable only at law, there is no longer the semblance of reason for an imperative observance of the English rule in such contentions as this.

The demurrer is, therefore, overruled.

SMITH (BAKER v.). See Case No. 781.

Case No. 13,011.

SMITH v. BANK OF COLUMBIA.

[4 Cranch, C. C. 143.][1]

Circuit Court, District of Columbia. May Term, 1831.

EXECUTION—LIEN—DISCHARGE—RIGHT TO COUNTERMAND—ALIAS WRIT—BANKS—CHARTER—REPEAL.

1. A fieri facias issued by the order of the president of the Bank of Columbia, under the 14th section of its charter, bound the lands and goods of the debtor from the time of the delivery of the writ to the marshal, if it bound them at all.

[See Bank of Columbia v. Bunnell, Case No. 863.]

2. The 14th section of the charter of the Bank of Columbia granted by Maryland was repealed by the 8th section of the act of congress of the 2d of March, 1821 [3 Stat. 618], except as to debts contracted with the bank previous to the passing of that act.

3. Notes, given after the date of that act and discounted by the bank for the purpose of applying the proceeds of such discounting to the payment of debts due before the passing of that act, are not within the exception in the repealing act. By taking and discounting the new notes the bank relinquished the right to the summary remedy annexed to the old debt.

4. A writ of fieri facias returned executed, that is, levied upon property, is a discharge of the debt as to the debtor, unless, by an actual sale of the property seized, the value should appear to be insufficient to discharge the debt. Until that appears, the plaintiff cannot have a new execution.

5. A plaintiff has no right to countermand a fieri facias after it has been executed.

6. The clerk has no authority to issue a second or alias writ of fi. fa. upon the same order upon which the first was issued. There should have been a new order founded upon a new affidavit, &c.

7. The clause of the 14th section of the charter, which provides that "such executions shall not be liable to be stayed or delayed by any supersedeas, writ of error, appeal, or injunction from the chancellor," was only applicable to such writ of supersedeas, error, and injunction as the debtor himself might attempt to interpose, or as might be interposed by some person who has involuntarily subjected himself to the summary remedy by becoming a party to a note expressly made negotiable at the Bank of Columbia.

8. That clause could only regulate courts established under the authority of Maryland.

Bill for an injunction to stay the sale of lot No. 46, in Georgetown, under four writs of fi. fa. issued by order of the president of the Bank of Columbia, returnable to the October rules, 1822. The bill states that on the 1st of February, 1822, Bunnell and Robinson sold and conveyed to Clement Smith part of lot No. 46, in Old Georgetown, for $3,850. That Bunnell and Robinson being indebted to the Bank of Columbia on four notes at sixty days; namely, one for $250, dated March 22d, 1821; one for $200, dated March 8th, 1821; one for $200, dated February 22d, 1821; and one for $200, dated February 1, 1821; the president of the Bank of Columbia, on the 21st of January, 1822, ordered the clerk to issue four writs of fieri facias, under the 14th section of the charter, which writs were, on the 29th of March, 1822, levied on lot 112 of Beatty and Hawkins's addition to Georgetown; but the property was never sold, nor have the executions been quashed; but after the levy, the writs upon the second and fourth of the said notes, were countermanded. That the four writs were returned to April term, 1822, and thereafter other writs of fieri facias were sued out on all the said notes, returnable to October rules, 1822, and were levied on the said part of lot No. 46, to the abandonment of the first levies, and have not yet been returned. That the complainant never assented to the said abandonment of the first levies; and avers that the Bank of Columbia had no right to abandon them and levy on lot 46, until the property first levied on had been exhausted, or the levy quashed. That under the 8th section of the act of congress of March 2, 1821, the first and second of the said writs were issued illegally and irregularly. That, since the said levies, the notes and executions have been assigned by the Bank of Columbia to the Bank of the United States. That the complainant has, by way of compromise, offered to pay the amount due upon the third and fourth notes, if the Bank of the United States would assign them to him; which they refuse to do, except upon terms and conditions oppressive and unreasonable; and have caused that part of lot 46 to be advertised for sale under all the said four last writs of fieri facias by the marshal. That Bunnell and Robinson are wholly insolvent. That the

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

complainant has sold the said lot with warranty, and is therefore liable to make good the title. The bill prays for general relief; that the plaintiff's title may be perpetually quieted, and that the defendants may answer, &c.; "and meanwhile, and until the further order of the court," "to command and enjoin" them and their agents "that they desist and forbear further proceeding to advertise and sell the said part of lot No. 46, under the said executions or any of them."

The joint answer of the defendants admits the dates of the notes; the issuing and the levying of the executions; and avers that they created a lien, from the time of their issue, upon lot 46 in the hands of Bunnell and Robinson, or of any purchaser from them with notice of the said writs; and that, being of record, they were, of themselves, notice to the complainant of the lien. That by the charter of the Bank of Columbia, the said writs were as valid and effectual, in law, to all intents and purposes, as if the same had issued on judgments, regularly obtained in the ordinary course of proceeding, and should not be liable to be stayed by any supersedeas, writ of error, appeal, or injunction from the chancellor; so that the injunction, by force of the act of assembly, ought to be dissolved. They do not admit the circumstances and times of issuing, levying, and returning the said executions, but require proof thereof, by the record of the marshal's returns or otherwise.

The order of the president of the Bank of Columbia to the clerk to issue the writs of fi. fa. is dated January 21, 1822. They were issued on the same day, and delivered to the marshal on the 23d day of January, 1822, at 3 o'clock, p. m. The fi. fa. No. 250, was returned to April term, 1822, "levied as per schedule." This execution issued on the note dated March 22d, 1821. The execution No. 252, was returned levied, as "per schedule in No. 250, and countermanded by cashier." This execution was issued on the note of March 8th, 1821. The execution No. 257, was returned levied as "per schedule in No. 250." This execution issued upon the note of 22d of February, 1821. No. 259 was issued on the note dated February 1, 1821, was returned "levied as per schedule in No. 250, and countermanded by cashier." The above writs of fieri facias were levied on lot No. 112, in Beatty and Hawkins's addition to Georgetown, on the 29th of March, 1822, and valued by the marshal at $4,000, as appears by the schedule referred to in the marshal's return, which is in these words: "Schedule of the lands and tenements of Eliab Bunnell, and William B. Robinson levied and taken in execution by Tench Ringgold, marshal of the District of Columbia, in virtue of writs of fieri facias Nos. 250, 252, 257, and 259, judicials, to April term, 1822, issued from the clerk's office of the said district for the county of Washington, to the marshal directed at the suits of the Bank of Columbia versus said Bunnell and Robinson. Schedule. Lot No. 112, in Beatty and Hawkins's addition to Georgetown, with all the improvements thereon valued at $4,000. Georgetown, March 29, 1822, Tench Ringgold, Marshal, District Columbia." On this schedule was indorsed the written consent of Bunnell and Robinson to the valuation; and dispensing with appraisers; dated the same day.

C. Cox, for plaintiff. The levy of the writs of fieri facias, countermanded, is satisfaction. There was no judgment to bind the lands. This fieri facias had no greater effect on lands than a fieri facias has upon goods and chattels. It has only the effect of an execution; not of a judgment; it only binds lands from its delivery to the marshal. When the first writ was countermanded the lien was abandoned; and the second writ of fi. fa. was the commencement of a new suit under the 14th section of the charter. Wood, Inst. Eng. Law, 608; Clerk v. Withers, 1 Salk. 323, 2 Ld. Raym. 1072; Mildmay v. Smith, 2 Saund. 344, note 3; Wilbraham v. Snow, Id. 47; Holbrook v. Ross, in this court at Alexandria, November, 1824 (not reported).

Mr. Lear, contra. The 14th section of the charter declares that the execution issued by order of the president of the bank shall be as valid and effectual as if issued upon a judgment. The order of the president of the bank to the clerk to issue the executions was made on the 21st of January, 1822, and they were issued on that day. The deed from Bunnell and Robinson to the complainant, C. Smith, was executed on the 1st of February, in the same year. In England the judgment does not bind the lands. The lien does not exist until the eligit is issued, when it relates back to the first day of the term in which the judgment was rendered; and such also was the case as to goods and chattels at common law, until the statute of frauds, 29 Car. II. c. 3, §§ 13–16, which limits the lien to the time of putting the execution into the hands of the sheriff. The execution, therefore, as to lands, binds from the time of its issuing, and the lien does not wait till the execution gets into the hands of the marshal. In lot No. 112, the defendant, C. Smith, had only an equitable title. The legal title had been conveyed to Richard Smith on the 28th of February, 1821. But an injunction will not lie to stay an execution issued by order of the president of the bank under the 14th section of the charter, which expressly prohibits it. The only remedy is by motion to quash the execution. It is true that two of the notes bear date since the repeal of the 14th section; but they were given in renewal of notes dated before the repeal, (March 2d, 1821.)

C. Cox, in reply. By taking new notes since the repealing act of the 2d of March, 1821, the bank has relinquished its right to the short process given by the 14th section of its original charter. The levy of the first

executions was not void by reason of the insufficiency of the property. The plaintiffs in the execution ought to have pursued it to a sale. The charter only prohibits the debtor from obtaining an injunction; not a third party. Mr. Smith, the complainant, was no party to the execution, and could not move to quash it.

Mr. Jones, on the same side, to show that the prohibition of injunction does not extend to third persons, nor even to the parties, cited the following cases, in this court: Mason v. Wilson (not reported); Bank of Columbia v. Okeley (not reported); Young v. Bank of Alexandria, 4 Cranch [8 U. S.] 396; Bank of Columbia v. Dawes, at May term, 1829 (not reported).[2]

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

CRANCH, Chief Judge, after stating the case, delivered the opinion of the court:

This cause is set for hearing, by consent, on bill, answers, general replication, and exhibits. It is not important, in the present case, to decide whether the lands of Bunnell and Robinson were bound by the order of the president of the Bank of Columbia, to the clerk, to issue the executions under the 14th section of the charter of that bank, or by the issuing of the executions; because they were, on the 23d of January, 1822, delivered to the marshal to be executed, and the deed under which Mr. Smith claims the lot No. 46, bears date nine days afterwards, namely, on the 1st of February, 1822; and there is no question that they bound the land and goods from the time of such delivery, if they bound them at all. But the 14th section of the original charter of the Bank of Columbia, which was the only act under which the clerk of the court had authority to issue executions upon the order of the president of the bank without a previous judgment of the court, was repealed by the 8th section of the act of congress of the 2d of March, 1821 (3 Stat. 618), which has this proviso: "That the said 14th section shall remain in full force and effect in relation to all debts contracted with the said bank previous to the passing of this act." Two of the notes, upon which two of these executions were issued, bear date after the passing of that act, namely, on the 8th and 22d of March, 1821. These two executions, therefore, were absolutely void, because the clerk had no authority whatever to issue them; and the two subsequent executions, issued upon the same notes, were equally void, for the same reason. It has indeed been contended that these notes were given for a debt previously due to the bank, and therefore to be still considered as evidence of the old debt. But when these notes were discounted by the bank, the proceeds were applied by the bank to the extinguishment of the old debt; and it is presumed that the bank will not admit that the makers of those notes had a right to plead the statute of limitations to these new notes. By taking the new notes, the bank has relinquished the right to the summary remedy annexed to the old debt. But there is no evidence, in this cause, that these notes were given for a debt due before the 2d of March, 1821. The question therefore cannot be made in this case.

The notes, upon which the other two executions were issued, bear date before the 2d of March, 1821, namely, on the 1st and 22d of February, 1821, and were therefore subject to the summary remedy. But the writs of fieri facias, issued upon these notes, were returned executed; that is, levied upon property valued by the marshal at $4,000. This was a complete discharge of the debt, as to Bunnell and Robinson, unless, by an actual sale of the property seized, the value should appear to be insufficient to discharge the debt. The plaintiff cannot have a new execution; and the marshal is liable to the plaintiff, to the amount of the debt, or to the value of the property as returned by him, if it be less than the debt, unless he has been prevented by the plaintiff from proceeding to complete the execution; or the execution be quashed by the court. The law to that effect is clearly laid down, in the case of Clerk v. Withers, 2 Ld. Raym. 1072, in error to the court of common pleas, and affirmed by the unanimous opinion of the court, after argument seriatim by all the judges. See also the following authorities, some of which were cited by the judges in their arguments in that case: Rook v. Wilmot, Cro. Eliz. 209; Atkinson v. Atkinson, Id. 391; Langdon v. Wallis, Lutw. 588; Mountney v. Andrews, Cro. Eliz. 237; Dyke v. Mercer, 2 Show. 394; Ayre v. Aden, Cro. Jac. 73; Thoroughgood's Case, Noy, 73; Cleve v. Veer, Cro. Car. 459; Wilbraham v. Snow, 2 Saund. 47, note 1, p. 47m; Id., 1 Lev. 282; Harrison v. Bowden, Sid. 29; Mildmay v. Smith, 2 Saund. 343; Slie v. Finch, 2 Roll. 57, Cro. Jac. 514; Coriton v. Thomas, Id. 566.

It is averred in the answer, that the lot 112 had, before the issuing of the first executions, been conveyed by Bunnell and Robinson to Richard Smith, in trust, to secure a debt of $2,000 to the Bank of the United States, and had, by him, been sold under that trust, before the defendants' resorting to the other property of Bunnell and Robinson, namely, part of lot No. 46, had been enjoined, &c. But the answer, in this respect, not being responsive to the bill, is not evidence of that fact; and, if it were, still the return of the marshal, being matter of record, would be conclusive. There must have been a sale, to ascertain the value of the lot 112, or the marshal must have amended his return; or the executions must have been quashed before new executions could be lawfully issued, if they could be issued at all,

[2] [See Bank of Columbia v. Baker, Case No. 862.]

without a new affidavit and order by the president of the bank. Upon one of those executions, namely, that which was issued upon the note of the 1st of February, 1821, the marshal returned "levied as per schedule in No. 250, and countermanded by cashier," meaning the plaintiff's cashier. But the plaintiff, in that case, had no authority to countermand the writ after it was executed, nor had the clerk any authority to issue a new writ upon such a return. Besides, in the case of Bank of Columbia v. Dawes [supra], this court, in May, 1829, decided that the clerk could not issue a second, or alias, writ of fi. fa. upon the same order upon which the first was issued, but must have a new order founded upon a new affidavit, &c. This objection, alone, is fatal to the new set of executions.

It has, however, been suggested by the answer, and insisted upon in argument, that by the 14th section of the original charter of the Bank of Columbia, "such executions shall not be liable to be stayed or delayed by any supersedeas, writ of error, appeal, or injunction from the chancellor." It is evident that this clause was only applicable to such supersedeas, writ of error, appeal, or injunction as the debtor himself might attempt to interpose, or as might be interposed by some person who had voluntarily subjected himself to the summary remedy, by becoming a party to a note expressly made negotiable at the Bank of Columbia. It never could be intended to apply to a stranger to the note, whose property might be seized under the execution. But if this is not an answer to the objection, yet the case of Young v. Bank of Alexandria, in the supreme court of the United States, 4 Cranch [8 U. S.] 397, seems decisive as to this point. The question there arose upon these words, in the charter of that bank: "And from the judgment given in such cases, there shall be no appeal, writ of error, or supersedeas;" and the cause came on upon a motion to quash the writ of error, because issued in violation of that prohibition. Mr. Chief Justice Marshall, in delivering the opinion of the court, said: "The act incorporating the bank, professes to regulate, and could regulate, only those courts which were established under the authority of Virginia. It could not affect the judicial proceedings of a court of the United States, or of any other state. There is a difference between those rights on which the validity of the transactions of the corporation depends, which must adhere to those transactions everywhere, and those peculiar remedies which may be bestowed on it. The first are of general obligation; the last, from their nature, can only be exercised in those courts which the power, making the grant, can regulate. The act of incorporation, then, conferred on the Bank of Alexandria a corporate character, but could give that corporate body no peculiar privileges in the courts of the United States not belonging to it, as a corporation. Those privileges do not exist unless conferred by an act of congress."

For these reasons, we are of opinion that the writs of fieri facias, executed upon Mr. Smith's part of lot 46, in Old Georgetown, are void, and that the defendants ought to be perpetually enjoined from selling the same under the said writs, or either or any of them.

SMITH (BANK OF THE UNITED STATES v.). See Cases Nos. 935 and 936.

Case No. 13,012.

SMITH v. BARKER.

[Brunner, Col. Cas. 52;[1] 3 Day, 280.]

Circuit Court, D. Connecticut. Sept., 1808.

AFFIDAVIT FOR CONTINUANCE—EXTRINSIC EVIDENCE NOT ADMISSIBLE TO EXPLAIN.

An affidavit in support of a motion to put off a cause for the absence of a witness cannot be explained by matters extrinsic.

[This was an action of assumpsit by Nathan Smith against Jacob Barker for breach of a contract. The cause is now heard on a motion for a continuance.]

Mr. Goddard, in support of a motion for a continuance of this cause, read an affidavit of the absence of a witness.

Mr. Daggett, contra, contended that there had been negligence in procuring the attendance of the witness.

Mr. Goddard was about to make some remarks in explanation, when he was interrupted by—

LIVINGSTON, Circuit Justice. When an affidavit is relied upon the court will not go out of it. I shall, therefore, decline hearing any ore tenus explanation. The name of the witness must always be disclosed in the affidavit unless there are circumstances to show that the party, without any fault of his, was unable to learn his name. Hereafter when a cause is ready for trial no application for a continuance will be successful unless upon an affidavit conformable to the English practice.

His honor remarked upon the inconveniences of putting off a cause ready for trial in this court, and said the English courts, and the courts in those states which follow the English practice, were growing more strict upon this subject.

[For the hearing in this cause, see Case No. 13,013.]

Case No. 13,013.

SMITH v. BARKER.

[Brunner, Col. Cas. 78;[1] 3 Day, 312.]

Circuit Court, D. Connecticut. April, 1809.

PLEADING AT LAW—PROOF—VARIANCE—AMENDMENT.

1. Where the declaration alleged an undertaking in consideration of a contract entered

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

into by the plaintiff to build a ship, and the evidence was of a contract to finish a ship partly built, it was held that the variance was fatal.

[Cited in Stone v. Lawrence, Case No. 13,484.]

2. A declaration may be amended in any stage of the trial, before the case is actually committed to the jury.

[Cited in Tiernan v. Woodruff, Case No. 14,027.]

The declaration was as follows: "That before the 8th day of February, 1806, the plaintiff had entered into a certain contract with the defendant to build him a ship, which, on said 8th day of February, was building, the same not being finished; and the defendant, on said 8th day of February, in consideration of the plaintiff's building said ship, and the sums which would become due to the plaintiff for building said ship pursuant to said contract, and in part payment thereof made, executed, and delivered to the plaintiff his certain writing or note, in the following words, to wit: 'Dollars, five hundred. Whereas Nathan Smith is building a ship for me on the contract, for which I shall have to pay him a considerable amount, when said contract is completed, I hereby agree to pay said Nathan Smith, or order, five hundred dollars, as soon as that amount shall become due per said contract. Jacob Barker'; as per said note which, without date, was in fact executed and delivered at New York on said 8th day of February, now ready in court to be shown, will fully appear. And the plaintiff says that he did afterwards complete and finish said ship according to contract, and said sum of five hundred dollars became due to the plaintiff in the month of May, 1806, when said ship was completed and finished, and to the defendant delivered, and by him received; which sum of five hundred dollars the defendant hath never paid, nor any part thereof, according to the tenor of said writing, but the same is now justly due. Whereupon the plaintiff says that by reason of the premises, and by force of said writing, the defendant, on or about the first day of May, 1806, after said ship was completed and delivered to the defendant, became justly indebted and liable to pay him said sum of five hundred dollars, and being so liable and indebted, the defendant did afterwards, on said 1st day of May, in consideration thereof, assume upon himself, and to the plaintiff faithfully promise," etc.

The plea was non assumpsit. The plaintiff, to make out his case, read in evidence the following contract: "New London, 26th of October, 1805. I agree to finish the ship I am now building at Stonington, in about one month, in a workmanlike manner, with patent windlass, flush decks, etc. (particularly specifying the manner in which the decks, hull, masts, etc., were to be made), when I agree to sell her to Jacob Barker at thirty dollars per ton, carpenter's tonnage, payable one thousand dollars cash in all next month, pay my draft at sixty days for five hundred dollars, one hundred dollars of prime flour in New York at the market price, two thousand five hundred dollars in six months after the ship is completed, and the other half in merchandise, at the market price, such articles as I may want. If, however, the ship don't suit Captain G. Barney, the said Barker is to take only one half of her at the above rates, and these payments to be in proportion. Nathan Smith. Jacob Barker."

Goddard & Cleaveland, for defendant, insisted that the contract proved was not the same with that described in the declaration.

First, the consideration is not the same. The declaration states the contract to be for the building of a ship. The consideration of the contract proved is the finishing and selling of a ship to Barker.

Secondly, the declaration states that the money was due on the 1st of May. The proof is that it was not due until November, six months afterwards.

Thirdly, the contract proved says that the ship, when finished, was to be sold to Bárker. But on this point the declaration alleges nothing.

Mr. Daggett, in reply, observed,—

First, that the consideration stated in the declaration, to wit, the building of the ship, was taken from the words of the note on which, etc. As the note recites the consideration, we are correct in taking the description of the contract which the note has given.

Secondly, that the money is proved, as we contend, to have been due, as stated, on the 1st of May. This is a question of fact which the jury must determine.

Thirdly, that if the declaration is defective for want of more allegations, advantage may be taken of such deficiency by motion in arrest, but it is no variance.

LIVINGSTON, Circuit Justice. It is the opinion of the court that the consideration alleged is so different from the one proved that we cannot let it go to the jury. The consideration alleged is the building of a ship. The consideration proved is the finishing of the ship Eliza, already built in part, and the selling it to the defendant. Every one knows that to build a ship for another is an essentially different thing from finishing one partly built, or selling one finished. This ship was Smith's, while she was building, till she was finished, and till she was sold and delivered. Without deciding any other points which have been made,[2] we are of opinion that none of the proof offered with respect to the contract in this case can go to the jury.

The plaintiff then moved to amend. This was objected to on the part of the defendant, on the ground that it was too late.

THE COURT said that the plaintiff could

[2] Several other points of law were made by counsel in the course of the trial; but as no decision was had upon them, it was not thought best to state them particularly in this report of the case.

amend in any stage of the trial if the case had not been actually committed to the jury.

The declaration was accordingly amended by inserting and declaring upon the contract above recited. Then there was inserted a letter from the defendant to the plaintiff, dated November 21, 1805, in which the defendant concludes to take the whole ship, and introduces a Captain Waterman as his agent, to superintend the finishing of the ship. Then it was averred that Waterman did superintend the finishing and rigging of the ship; and that the defendant, on the 8th day of February, 1806, in pursuance of the contract, executed the note on which, etc. The plaintiff then introduced an averment that he finished the ship in all respects as specified, sold her to the defendant on the 30th of April, 1806, and delivered her with a bill of sale to Waterman, as the agent of the defendant; that Waterman received the ship, and made an indorsement upon the contract in the following words: "Received the ship of Captain Nathan Smith, agreeable to the within contract; and I, as attorney to Jacob Barker, do discharge said Smith from all demands that said Barker has by law or equity, for not delivering her before; as witness my hand this 30th day of April, 1806. D. Waterman, attorney for J. Barker."

The plaintiff then averred that by said writing of the 8th of February, 1806, the defendant assumed and promised to pay the plaintiff, or his order, five hundred dollars, as soon as that amount should become due by said contract; and that on the 30th of April, 1806, said sum was due from the defendant to the plaintiff by said contract, and by the completion, delivery, and sale of said ship.

After the declaration had been thus amended, it was agreed by the counsel to submit the case to the same jury who had heard the evidence adduced in the former stage of the trial.

LIVINGSTON, Circuit Justice, in his charge to the jury said that the contract now stated in the declaration was that Smith should finish the ship Eliza in a workmanlike manner, and sell her to Barker in about one month. The defendant had objected that this contract was not complied with, because the ship was not built in a workmanlike manner. Little proof had been adduced by the defendant to this point, and he considered it as not much insisted on by his counsel. As to the time, it was proved that the ship was not delivered till after six months had elapsed. Nobody could consider this as the fulfillment of a contract to deliver in about one month. But it was insisted for the plaintiff that whatever breach of contract there has been on his part, all advantage to be derived from it had been waived expressly by the defendant. But this note was to become payable when the sum of five hundred dollars should become due on the contract. If the contract was not complied with, this note could not have become due. The court were decidedly of opinion that if Barker had expressly waived all exceptions arising from want of fulfillment of the contract by writing under hand and seal, yet this note would never have become due.

The plaintiff thereupon suffered a nonsuit.

NOTE. Amendment of Declaration, when Allowed. Amendments at any stage are within the discretion of the court. Tiernan v. Woodruff [Case No. 14,027], approving above case.

Variance between Allegation and Proof. See Stone v. Lawrence [Id. 13,484], citing case in text.

SMITH (BEAN v.). See Case No. 1,174.

SMITH (BELDEN v.). See Case No. 1,242.

SMITH (BERRY v.). See Case No. 1,359.

Case No. 13,014.

SMITH v. BILLING et al.

[3 Cranch, C. C. 355.] [1]

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

ADMINISTRATORS — SALE SET ASIDE — TITLE TO GOODS SOLD — PERSONAL REPRESENTATIVES — ORPHANS' COURT OF DISTRICT OF COLUMBIA.

1. The orphans' court set aside the administratrix's sale, as being fraudulent, and charged her with the goods at the appraised value. *Held*, that such charge did not vest the title of the goods in the administratrix in her own right.

2. The administrator de bonis non of R. B., and not the distributees of the estate of R. B., is his personal representative.

3. The orphans' court had no jurisdiction between the parties.

Replevin [by Nathan Smith, administrator of Robert Brown, against W. W. Billing and James Kennedy, executors of Margaret Brown] for a slave, named Henry, and a clock, the plaintiff claiming them as unadministered assets of the estate of Robert Brown, of which estate his wife, the late Margaret Brown, deceased, was administratrix. Plea, property in the defendants; general replication and issue.

Mr. Wallach, for defendants, offered in evidence a transcript of the record of the proceedings of the orphans' court, on the 1st of April, 1826, stating that, "Pursuant to an application made to this court," (the orphans' court,) "by the attorney for the representatives of Robert Brown, deceased, claiming their respective portions of the residuary balance of his personal estate, summonses were issued to the securities of his administratrix, the late Margaret Brown, his widow, and against the executors of the said Margaret, now deceased, to appear before this court," (the orphans' court,) "on the 25th of March last, to show cause why the prayer of the applicants should not be granted; it being alleged by them that the said Margaret, administratrix of the said Robert Brown, in

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

the administration of the estate of her deceased husband, had been guilty of fraud, which rendered her and her securities liable for the full amount of the appraisement of the personal goods, chattels, and effects of the said Robert Brown. The parties, except the securities of the said Margaret Brown, appearing, by mutual consent the case was postponed till Thursday, the 30th of March aforesaid, when the depositions of Thomas Donoho," and others, were taken and filed, tending to show that the sale of the personal estate was not fairly advertised, and that the administratrix fraudulently purchased the property at a price far below the appraisement. The orphans' court, after stating the testimony, proceeded thus: "The court, therefore, is obliged to pronounce the sale which was thus made by the administratrix, to have been unfair and fraudulent; and further to pronounce, on the testimony of Nicholas Cassidy, that the articles purchased by him were bought especially and solely for the administratrix; and that the negroes were purchased by herself, at a price far below the appraisement, as proved by the last-mentioned deponent, and the account of sales, as furnished by the auctioneer, David Bates, and returned and sworn to by the administratrix, Margaret Brown. On a review of the above facts, the court is of opinion that the sale of the said goods, chattels, and effects of Robert Brown, deceased, by his administratrix, was without due notice, and was so made for the purpose of purchasing in the same at a price below their value or appraisement, for her own benefit; therefore she has incurred the penalty affixed to such a transaction by Act 1798, c. 101, and in the third section of the eighth chapter of said act; and, therefore, in the settlement of her accounts ought to have charged herself with the whole amount of the appraisement contained in the inventory. Is is consequently decreed that the register of wills make out a statement, charging the administratrix aforesaid with the amount of said appraisement, and with all moneys received by her, and crediting her with the payments made by her, and that he allow her a commission of seven and a half per cent. on the amount of said inventory, and of the moneys received by her; and that the balance appearing to be due by her be divided into two equal parts; one part being due to her, as her share of the residuary personal estate of her late husband, Robert Brown; the other part being due to the legal representatives of Robert Brown entitled to receive the same, each according to his rightful portion, on the 18th of February, 1817, that being the time,—as she had, in fact, made herself the purchaser, and liable for the full appraised value of the goods, chattels, and effects of the deceased,—when she might have finally closed her administration, having assets in her hands sufficient therefor." The counsel for the defendants contend that, by this decree of the orphans' court, the title to the goods passed to her in her own right; and that she was, and her sureties were, and now are, liable to the distributees for their share of the balance; and if the plaintiff recovers in this action, which is brought for the use of the distributees, they may still recover against the sureties of the administratrix, and the recovery in this action would be no bar to that.

Mr. Coxe and Mr. Jones, contrà. The decree passed no title. It only prevented the administratrix from having credit for the difference between the appraisement and the sale; and she only remains chargeable for the amount of the inventory, as she was originally. She never made another sale. The first sale was void. If she had afterwards sold it for more than the appraisement, she would have been liable for the surplus. If lost without her fault, she would be credited for the same, at the appraised value.

Mr. Key, in reply. She could not be thus credited, for the decree of the orphans' court is conclusive against her. She is charged, absolutely, for the whole inventory; and it would be unjust to charge her unless the property became hers absolutely, and in her own right.

THE COURT (nem. con.) instructed the jury, that the decree of the orphans' court did not change the title of the property.

Mr. Key, for the defendants, then prayed the court to instruct the jury, that the decree of the orphans' court is void, because that court had not jurisdiction between the parties, namely, "the representatives of Robert Brown," (not naming them,) against the executors of Margaret Brown, who was the administratrix of Robert Brown, and her "securities," to set aside a credit claimed by her in her administration account, and to compel a distribution.

Mr. Coxe, contrà. The decree is the defendants' own evidence, and they cannot impeach it.

THE COURT (nem. con.) was of opinion that the orphans' court had not jurisdiction of the cause; and that the decree was void, because it was coram non judice. The administrator de bonis non of Robert Brown was the only party who could call on the executors of Margaret Brown for the assets of the estate of Robert Brown, which came to the hands of Margaret Brown.

Verdict for the defendants. Motion for a new trial refused.

SMITH (BLAKE v.). See Case No. 1,502.

SMITH v. The BLOSSOM. See Case No. 1,564.

SMITH (BLOSSOM v.). See Cases Nos. 1,565 and 1,566.

Case No. 13,015.

SMITH v. BOHN.

[4 Wash. C. C. 127.][1]

Circuit Court, E. D. Pennsylvania. April, 1821.

WRITS — LIMIT OF TIME OF SERVICE — COMMON APPEARANCE.

To entitle the plaintiff to file a common appearance for the defendant, under the act of the assembly of Pennsylvania of the 20th of March, 1724, the summons must have been served ten days before the return day. But if it was not served that length of time, the writ is not to be dismissed, but the plaintiff must proceed regularly to enforce an appearance.

Rule obtained by the defendant on the plaintiff, to show cause why the writ of summons should not be set aside for irregularity, the service not being ten days before the court to which it was returnable.

Mr. Sergeant, in support of the rule, contended, that under the act of assembly of the 20th of March, 1724 (1 Smith's Laws), 165, the practice in the state courts has been to set aside the writ of summons, where it appears not to have been served ten days before the return day. The first section of the act provides, that (with certain exceptions) the process against a freeholder inhabiting the province, shall be by summons; and that if the defendant shall not appear at the day of the return thereof, but makes default, and if the officer who served the writ, shall certify on oath or affirmation that on or before the return day, he summoned the defendant in the way prescribed by the act; "upon the return, if the defendant has been so served ten days, and the plaintiff had filed his declaration within five days, before the court to which such writ is returnable, it shall be lawful to and for the plaintiff in such action, to file a common appearance for the defendant so making default, and proceed to judgment and execution by nihil dicit."

Mr. Wallace, for plaintiff, admitted, that unless the writ be served ten days before the return day, the plaintiff cannot proceed under the act to obtain judgment by nihil dicit; but the service is good, and the plaintiff may proceed in a regular way to obtain judgment.

WASHINGTON, Circuit Justice. The reasonable construction of this act seems to be, that, to entitle the plaintiff to file a common appearance for the defendant, and to enter up judgment against him by nihil dicit, the writ must have been served ten days, and the declaration filed five days before the return day. But if the plaintiff does not seek to avail himself of this privilege, but is content to proceed in like manner as if the defendant had not made default, there can be no reason for setting aside the writ, or why the plaintiff may not file his declaration at any time after the five days, and proceed as if the defendant had entered an appearance.

Let the rule be discharged.

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

SMITH (BOOTH v.). See Case No. 1,649.
SMITH (BOURNE v.). See Case No. 1,701.
SMITH (BRENT v.). See Case No. 1,841.
SMITH (BREST v.). See Case No. 1,843.
SMITH (BROMLEY v.). See Case No. 1,922.
SMITH (BRUNE v.). See Case No. 2,053.

Case No. 13,016.

SMITH v. BUCHANAN et al.

[8 Blatchf. 153;[1] 4 N. B. R. 397 (Quarto, 133); 3 Am. Law J. 97.]

Circuit Court, N. D. New York. Jan. 18, 1871.

BANKRUPTCY — PETITION — SUBSEQUENT TRANSACTIONS—JUDGMENT—WHEN A VALID LIEN.

1. After the filing of a petition in involuntary bankruptcy, no person can acquire any interest, by a receivership created by a state court, or otherwise, in the property of the debtor, which the decree in bankruptcy will not displace or override.

2. A creditor, with reasonable cause to believe that a corporation, his debtor, was insolvent, sued it, in a state court, with a view to secure payment, without regard to other creditors, and whether the latter were paid or not, knowing, that, if he obtained payment in full, it must be at the expense of other creditors, who could not be paid in full, and that, if he succeeded, he would secure a preference: *Held*, that a preference obtained by such suit could be set aside at the suit of the assignee in bankruptcy of the corporation.

[Cited in Haskell v. Ingalls, Case No. 6,193; Vanderhoof v. City Bank of St. Paul, Id. 16,842; Re Lord, Id. 8,503; Buchanan v. Smith, 16 Wall. (83 U. S.) 308; Warren v. Delaware, L. & W. Ry. Co., Case No. 17,194; Warren v. Tenth Nat. Bank, Id. 17,202; Re Jacobs, Id. 7,159.]

In equity. This was a bill filed by [Gabriel L. Smith] an assignee in bankruptcy [of the Cascade Manufacturing Company of Penn Yann against Coe S. Buchanan and others] to set aside the apparent lien of certain judgment creditors upon the estate of the bankrupt.

George Gorham, for plaintiff.
Bangs, Sedgwick & North, for defendants.

WOODRUFF, Circuit Judge, stated his opinion orally, in substance, as follows:

The defendants herein, before the debtor was decreed a bankrupt, and before the petition therefor was filed by other creditors, prosecuted suits, and recovered judgments, and caused executions to be issued and levied on certain personal property of the bankrupt, and commenced proceedings supplementary to execution in a state court, and procured

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

the appointment of a receiver of certain choses in action of the bankrupt. On the petition of other creditors, filed September 9th, 1869, a decree in involuntary bankruptcy was, on the 24th of September, 1869, obtained, and, after this, the receivership aforesaid was extended by the state court to all the property of the bankrupt. The proceeding for the last named extension was begun before the filing of the petition of the creditors, and the assignee in bankruptcy was not thereafter made a party thereto.

The appointment of the assignee in bankruptcy relates back, and gives to him title to all the estate real and personal, legal and equitable, rights, interests and things in action which belonged to the debtor on the presentation of the petition. I find, therefore, no room for hesitation in saying, that, from and after the filing of the petition, the defendants could acquire no interest, by receivership or otherwise, in the property of the debtor, which the decree in bankruptcy would not displace or override, and that, therefore, the defendants are, on that ground, entitled to no benefit or advantage, as against the plaintiff, from anything done under the orders of the state court, made after the petition of the creditors was presented.

But this discrimination is not necessary. I am constrained to find, as facts, that every step of the proceeding by the defendants, from and including the time of the commencement of their suits against their debtor, was done with reasonable cause to believe, and with actual apprehension, if not actual belief, that their debtor was insolvent. That debtor is a corporation, and the defendants acted in the further belief, that the officers of the corporation were either fraudulently disposing of or appropriating its property, or that they were paying other creditors in preference to the defendants. The defendants, with such reason to believe that the debtor was insolvent, had, therefore, reason to believe that the conduct of the debtor, in neglecting to make payment of its debts, in submitting to suit, and in neglecting to take the steps contemplated by the bankrupt law for the proper and equal benefit of all its creditors, according to the plain intent and purpose of that law, was acting in fraud of the law itself. The defendants commenced and prosecuted their suits and all the proceedings therein, with a view to secure payment, without regard to other creditors, and whether the latter were paid or not. They knew, that, if they obtained payment in full, it must be at the expense of other creditors who could not be paid in full, and that, if they succeeded, they would secure a preference. In this condition of things, if the debtor had paid them the money, such payment would have been an act of bankruptcy, and the plaintiff would be entitled to recover it back from them. How, then, can they be permitted to secure it by legal proceedings, and their debtor suffer those proceedings to be prosecuted to full and final effect, without taking measures to be declared a voluntary bankrupt, and the preference accomplished in that mode be permitted to stand against the other creditors, against the title of the assignee, and against the fundamental principle of the bankrupt law and that which it aims to secure, namely, the equal distribution of the property of the bankrupt among his creditors, pro rata?

It is true, that, until the debtor commits an act of bankruptcy, any creditor may lawfully sue him and proceed to judgment, execution, levy and sale. It is also true, that mere insolvency is not declared bankruptcy, in such sense that the creditor can obtain an involuntary decree against him. But, every such suit against an insolvent is prosecuted subject to the consequence, that, if the debtor suffers the plaintiff to obtain any advantage, by judgment, or otherwise, over the other creditors, that will be, of itself, an act of bankruptcy, and all such advantage obtained by the creditor having reasonable cause to believe the debtor to be insolvent, must give way to the rights of the assignee. This is, of course, subject to the qualification which the 39th section of the act implies, namely, that the other creditors file their petition within six months.

There must be a decree according to the prayer of the bill of complaint.

Case No. 13,017.

SMITH v. BURLINGAME.

[4 Mason, 121.][1]

Circuit Court, D. Rhode Island. Nov. Term, 1825.

INSANITY—GUARDIAN—POWER TO APPOINT—NOTICE.

The courts of probate of Rhode Island cannot appoint a guardian of a person, as incapable of taking care of her estate, under the statute of 1798 (page 316), without notice to the party and an adjudication on the facts.

[Cited in North v. Joslin, 59 Mich. 647, 26 N. W. 810.]

Trespass and ejectment [by Mary Smith against Stephen Burlingame]. Plea, general issue. At the trial the defendant claimed title to the premises under a lease made by one Joseph Cady, as guardian of the plaintiff, appointed under the laws of Rhode Island, which authorize the courts of probate "to appoint guardians of all persons who are delirious, distracted, or non compos mentis, or who, for want of discretion in managing their estates, are likely to bring themselves and families to want and misery." Dig. R. I. Laws 1798, p. 316, § 2. It was under this latter clause that Cady was appointed guardian by the court of probate; but no notice was given to the plaintiff previous to such appointment.

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

Steere & Searle, for plaintiff, contended that, independent of all other objections to the appointment,—and they were prepared to make others,—the want of notice was a fatal objection, and had been so held in other states under statutes giving courts of probate a like authority.

Whipple & Tibbets, for defendant, argued e contra.

STORY, Circuit Justice. My opinion is, that the objection is fatal. The courts of probate have no right to put a person under guardianship, as unfit to manage her affairs, without notice to the party, and an adjudication on the facts; and until such adjudication, no letters of guardianship can legally be issued. The case of Chase v. Hathaway, 14 Mass. 222, is directly in point, and with that case I entirely concur.

Verdict for the plaintiff.

Case No. 13,018.

SMITH v. BURNHAM.

[2 Sumn. 612.] [1]

Circuit Court, D. Massachusetts. May Term, 1837.

PLEADING IN EQUITY—PROOFS—CHARGE IN BILL—EQUITY PRACTICE IN FEDERAL COURTS.

1. The confessions, conversations, and admissions of the defendant need not be expressly charged in a bill in equity, in order to entitle the plaintiff to use them in proof of facts charged, and in issue therein.

[Cited in Nesmith v. Calvert, Case No. 10,-123.]

2. The practice of the English court of chancery, and not that of the court of exchequer, forms the basis of the equity practice of the courts of the United States.

Bill in equity, wherein the plaintiff [Frederick Smith] asserted an agreement between himself and the defendant [Daniel Burnham] to become copartners in the business of purchasing and selling lands and lumber in the state of Maine, and the purchase, by the said defendant, of lands and lumber, in pursuance of this agreement, for which he has never accounted to the plaintiff, and praying an account thereof, and a conveyance to the plaintiff of his share of the property, which remained unsold. Admissions by the defendant of the asserted copartnership were alleged in the bill in the following terms: "During all the time aforesaid, as well as at divers other times, through all the negotiations aforesaid, as well as in many other negotiations in relation to the contract aforesaid, the said Daniel Burnham constantly spoke of the said interest in the said lands of the said Black, as belonging to the said copartnership, and spoke of, recognized, and treated your orator as having an equal and copartnership right therein." The particulars of the time, place, and circumstances of the admissions were stated in the bill. Among the interrogatories, filed by the plaintiff, for the examination of witnesses, were several which related to the alleged admissions of the copartnership by the defendant. On petition of the defendant, these were referred to a master for impertinence, who, after looking into the interrogatories objected to, and the bill and answer, certified that the interrogatories were not impertinent or inadmissible. To this report of the master, an exception was filed by the defendant, as follows: "For that the said master has certified, that the interrogatories referred to, are not impertinent or inadmissible, whereas he ought to have certified, that the same are impertinent and inadmissible."

The exception was now argued by B. Rand for the defendant, and by B. R. Curtis for the plaintiff.

STORY, Circuit Justice. The main question arising out of this exception is, whether, where a fact is charged, and put in issue in a bill, the examinations of witnesses to the confessions, conversations and admissions of the defendant, are admissible to prove the fact, unless such confessions, conversations, and admissions are expressly charged in the bill, as evidence of such fact. The argument for the defendant is, that they are not; for unless they are so charged, the defendant has no opportunity given to deny them by his answer, or to explain them; and thus is liable to be taken by surprise.

The case of Hall v Maltby, 6 Price, 240, 258, 259, is relied on in support of the exception; and certainly, if the language of that decision is to be taken in its full latitude, it is directly in point. In that case there was a charge of a fraudulent withdrawal of tithable sheep from tithes; and Chief Baron Richards, at the hearing, rejected the evidence of conversations of the defendant, establishing the fact; because, though the fraudulent withdrawal was charged in the bill, the conversations were not. His language on this occasion was: "I, however, entirely lay out of this case all that the witness has sworn, as to the declaration of the defendant concerning the fraud, and his confessing, that it was his intention to defraud the tithe owner; and my reason is, because there is nothing of that kind stated in the bill; so that the defendant could have had no opportunity of answering or explaining it, and he could not, therefore, have been aware, that any such matter was intended to be proved; and, in cases of fraud, declarations of a fraudulent purpose are often the very gist of the case. He had no sort of intimation of it, so as to enable him to cross-examine the witness on that fact. I am the more anxious to state, that we are not now to be allowed to enter upon that part of the evidence in this case, there being no ground laid for it by the allegations in the bill: because I wish to have it make a due impression on those, who are

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

in the habit of drawing pleadings in equity, in order that they may take care, that that, which is the gist of the cause, should be stated on the record; for it is too much for a defendant to be overpowered by evidence, which he could have no idea, from any statement in the bill, would be brought forward at the hearing, when he might otherwise, perhaps, have been able, if he had been aware of it, to explain it to the satisfaction of the court. This, however, I am aware is a delicate matter for the consideration of the pleader, as it is often dangerous to reveal the evidence intended to be used. But the bill and answer have very great effect on the decision of every cause; and although we would wish to avoid prolixity, and all unnecessary matter, generally speaking; yet it is indispensably necessary to state a defendant's declaration of fraud on the record, if it is intended to be used against him on the evidence at the hearing. In this case, that declaration, not being mentioned in the pleadings, cannot be suffered to be given in evidence in the cause; for if that acknowledgment were proved to be true, there would be no necessity for any further proof on the subject. In the present case, however, I think the evidence of fraud is abundantly strong, without reference to the evidence of the defendant's declaration, which is not warranted by the pleadings. I am of opinion, under the circumstances, which appear by clear legitimate evidence, the fraud is here sufficiently apparent; but I must repeat, that although, generally speaking, it may not be necessary to state on the record declarations by the defendant; yet in a case, charging fraud, where such declarations are often the gist of the cause, great injustice would be done to the party, if evidence were received of such declarations, where they are not charged in the bill. In the case of Evans v. Bicknell, 6 Ves. 183, the lord chancellor, very soon after he came to the great seal, so determined, on occasion of an attempt to introduce evidence of this kind, without previous intimation to the party, against whom it was to be used, by alleging it in the bill. He has held the same opinion, I believe, ever since; and no man can differ from him in thinking, that such a thing cannot be done. For that reason, as I said before, I put this evidence entirely out of the question."

It is true, that in this case, there was a charge of fraud; and the chief baron seems to rely on that as important to his decision. And Lord Chancellor Hart, in Mulholland v. Hendrick, 1 Mol. 359, Beat. 277, in affirming the same doctrine, seems to have placed some reliance on the same fact, of its being a charge of fraud, considering fraud as an inference of law from facts, and not a mere fact. In other cases, however, he does not seem to rely on any such distinction. Indeed, it is very difficult to understand the ground of such a distinction. The facts to be established by such confessions, and conversations, and admissions, are not so much fraud in the abstract, as evidence conducing to establish it. If, upon a charge of fraud in a bill, stating that certain acts done were fraudulently done, evidence of confessions admitting the acts and the intent cannot be given in evidence, unless those confessions are also charged in the bill, as evidence of the fraud; it seems to me, that the principle of the rejection of the evidence must apply equally to all other cases of confessions to establish facts, which are to prove any other charge in a bill. Take the present case. The main object of the bill and of the interrogatories is, to establish a partnership in certain transactions between the plaintiff and defendant, out of which certain rights of the plaintiff have sprung, which he seeks to enforce by the bill. The confessions and admissions are not charged in the bill; but the partnership is. Now, partnership itself is not, in all cases, a mere matter of fact, but is often a compound of law and fact. And, I cannot see a single ground, upon which the evidence of confessions and admissions ought to be rejected in the case of a charge of fraud, which does not equally apply to the charge of partnership. In each case the evidence is, or may be, equally a surprise upon the party; and in each of them he is equally prevented from giving, by his answer, such denials and explanations, as may materially affect the whole merits of the cause. It seems to me, then, that the doctrine, if it exists at all, must equally apply to all cases, where the fact charged, in respect to which the confessions, conversations, or admissions are offered, as proofs, constitutes the gist of the matter of the bill. And yet I do not understand, that such a doctrine, so universal, is anywhere established, unless it is so in Ireland by Lord Chancellor Hart, who has discussed the subject in a variety of cases, and seems to assert it in broad terms. He has expressly refused to apply it to cases, where written papers, letters, or documents, are relied on as proofs of general facts charged in the bill; although such papers, letters, and documents are not charged as proofs in the bill (Fitzgerald v. O'Flaherty, 1 Mol. 350); unless, indeed, those papers, &c. are relied on as confessions of the party, which he treats as an exception to the general rule of evidence. "The general rule" (said he on one occasion) "is, that all evidence, intended to be relied on at the hearing, should be founded on some allegation, distinctly put on record, of fact, which it is calculated to support." "It is a very old principle, to be found very clearly stated in Vernon, (Whaley v. Norton, 1 Vern. 483); but I must be greatly misread, if the evidence, and not only the fact to be proved by the evidence, must be put in issue, to entitle the evidence to be read." Fitzgerald v. O'Flaherty, 1 Mol. 351, 352. See, also, Houlditch v. Donegal, Id. 364; Farrel v. ——, Id. 363. He repeated the same remark with the same exception in Blacker v. Phepoe, Id. 357, 358.

The doctrine of Lord Chancellor Hart, to be deduced from all the cases decided by him,

seems to be this;—that, wherever confessions, conversations, or admissions of the defendant, either oral or written, are relied on in proof of any facts charged in the bill, they are inadmissible, unless such confessions, conversations or admissions are charged in the bill; because they operate as a surprise upon the party, and he is deprived of any opportunity to deny or explain them in his answer. He admits the general rule to be the other way; and insists upon this as an exception to it.

The question, then, really is, whether the exception, either in its general form, as asserted by Lord Chancellor Hart, or in its qualified form, as asserted by Lord Chief Baron Richards, has a real foundation in equity jurisprudence. Both of these learned judges rely on the case of Evans v. Bicknell, 6 Ves. 174, in which they were counsel on opposite sides, to support their doctrine. Lord Chief Baron Richards says, that it was so decided in that case. See 6 Price, 260. Lord Chancellor Hart does not agree to that; but admits, that he drew the bill in that case with a full knowledge of the exception. See 1 Mol. 360, 361. It is very certain, that the point was not decided in the case of Evans v. Bicknell, if we are to trust to the printed report in 6 Ves. 174. And, upon the state of the pleadings, I do not see, how the point could have arisen. The bill, in that case, charged, that Bicknell "has admitted or declared, upon different occasions, and in the hearing of different persons, and that Stansell, at the time of the application, informed him, he wanted them (the deeds) for the purpose of obtaining credit; and he made such declaration or admission in the presence of the plaintiff, and Hawkins, the solicitor, and the defendant Taylor." The answer alleged, that the defendant "never did admit or declare, in the presence of Hawkins, Taylor, or any other person, nor did Stansell, when he applied for the deeds, or at any time, inform him, that he wanted to obtain money by way of mortgage or otherwise; but he admitted, Stansell did inform him he wanted the use of the title deeds merely to show or convince some person or persons, with whom he was in the habit of taking credit in the way of trade, that he and his wife were legally in possession of the rents and profits of the freehold and leasehold estates." The defendant, Taylor, was also examined as a witness, who stated, "that E. Evans and Hawkins (the attorney) came to him about the mortgage, and they and the deponent went to Bicknell, who strenuously denied, that he had delivered the deeds for the purpose of a mortgage; but at length, after much altercation and abusive language between him and Hawkins, informed them, that Stansell had desired him to lend him the title deeds, &c., to show to some person, who would credit him with goods in his trade to the amount of £40 or £50, upon seeing them; and the person to lend the money was to receive two years' rents; that he promised to return them in an hour, that he (Bicknell) had lent them; and had often sent, and could never get them: and he denied, that he knew of the mortgage." It is observable, that the testimony here stated, contains some particularities as to the confessions of Bicknell, not contained in his answer; which particularities were not charged in the bill, and, therefore, not met in the answer. And the question was, not whether the evidence on this account ought to be rejected; but whether the omission in the bill ought to prejudice the defence set up by the defendant in his answer. It was to this view, that Lord Eldon addressed himself in the passages cited at the bar, in support of the argument, that more credit ought to be given to the defendant's answer than to the assertion of one witness, Taylor. "The bill (said he) being amended, and this being a case, in which the court ought to be particularly sure of the ground, on which it decides upon a fact, equivocal, or a declaration more or less according to the recollection of the precise terms by the witness, it is not unfair to observe, that probably before the amendment the plaintiff must have collected the account of it from Taylor; if he was the only person from whom she could have got the account; and the bill was then amended, in order to introduce the allegation as to Stansell's representation to Bicknell. Taylor does not recollect half as much in his answer, as in his evidence; and that is a very material circumstance, when the defendant is to be charged upon this ground; that more credit is to be given to the defendant's denial than to the assertion of one witness. It ought to be with reasonable certainty put in issue by the allegations of the bill. Taylor's account is not necessarily inconsistent. I do not say it is necessarily consistent, with Bicknell's. But it must be necessarily inconsistent, and more credible than the denial by the answer, before the decree can be made. He says, the purpose, as represented by Bicknell, was to show the deeds to some person, who would let him have credit in the way of his trade; and in the same conversation they were to be brought back in an hour. That negatives the very idea, that the estate was to be pledged. That mode of representing the conversation, instead of opposing, confirms Bicknell's answer. Upon his answer, therefore, and Taylor's evidence, there is not that sort of contradiction, that entitles the plaintiff to a decree against Bicknell on the ground of fraud. The circumstance of Taylor's examination shows the danger; for Bicknell had no opportunity of answering the farther evidence of express charge. It is very extraordinary to say, this court will not act upon the evidence of one witness contradicting the answer, and yet it will act upon that evidence, in order to charge the defendant in a circumstance, to which he has had no opportunity of stating himself. That therefore could only be a ground for inquiry." He afterwards added, "I hesitate also in giving Taylor credit for his evidence, carried in the depositions so much farther than the answer; and the bill containing no allegation to give Bicknell the benefit of his answer; with the conversation,

that the money was to be repaid by two years' rents; and the circumstance, that in the security the rents are really devoted to the principal, as well as the interest." So that, it is apparent, that Lord Eldon's remarks were addressed to the comparative credibility of the answer of the defendant, and the testimony of Taylor as to conversations and circumstances not alluded to in the bill; and not to the admissibility of the evidence itself.

The case of Evans v. Bicknell, 6 Ves. 174, 189, 192, does not sustain the doctrine of Lord Chief Baron Richards, or of Lord Chancellor Hart; and I have not been able to find a single decision in the English court of chancery, which does sustain it. And yet, if the doctrine had been well established, it seems to me almost impossible that it should not be found clearly stated in the books, as it must be a case of so frequent recurrence in practice. On the contrary, it seems to me, that the case of Earle v. Pickin, 1 Russ. & M. 547, shows, that no such rule is established in chancery. There, the question in the cause turned upon the fact of notice of a settlement, which was charged in the bill. But the names of the witnesses, and the particular facts of notice, and the admissions and conversations with the defendant, which amounted to notice, were not stated in the bill, so that the defendant had no opportunity to meet the testimony. The counsel for the defendant objected to the admission of this testimony on this account, insisting, that the bill ought to have charged the particular facts of notice, and the conversations stated in the evidence, and the defendant might then have disproved them. As to the admissions of notice, they insisted, that the rule of pleading was, that a party could not rely on an admission made by his adversary, not appearing in the pleadings, unless it were put in issue, so that he, whom it sought to bind by it, might either disprove it, or explain it. For this defect, the counsel insisted, that an inquiry ought to be directed before the master, so as to give the defendant an opportunity of meeting a case, which had been opened against him by surprise. The counsel for the plaintiff denied, that any such rules of pleading existed, as those, on which the argument for the defendant was founded; and resisted the inquiry. The master of the rolls directed the inquiry respecting notice before the master upon the ground, that neither the names of the witnesses, nor the particular facts of notice were stated in the bill. Upon appeal, the lord chancellor (Lord Lyndhurst) thought the direction of the master of the rolls at first right, and afterwards varied the order by directing an issue as to the supposed time of the conversations.

Now, upon this case it is material to remark, that, if there existed any such rule, as is supposed, the evidence of the admissions and conversations ought to have been rejected, and then there would have been an end of the cause; whereas the counsel, who raised the objection, only asked for a further inquiry before the master. The counsel for the plaintiff utterly denied the existence of any such rule. And no authority on either side was quoted for the doctrine. If the master of the rolls, or the lord chancellor, had recognised the existence of such a rule, the order made by each of them would have been impertinent and incorrect. So that it seems to me very clear, that no such rule has been established in chancery.

If then, in the absence of authority in favor of the rule, we look to principle, it seems to me impossible, that it can be supported. There is no pretence to say, that in general it is true, that, as to the facts to be put in issue, it is necessary, not only to charge these facts in the bill, but also to state in the bill the materials of proof and testimony, by means of which these facts are to be supported. Lord Chancellor Hart has admitted this in the fullest manner, saying: "The evidence of facts, whether documentary or not, need not be put in issue; evidence of confessions, whether documentary or not, must." Fitzgerald v. O'Flaherty, 1 Mol. 352. Why admissions or conversations, as materials of proof, should be exceptions from the general practice, I profess myself wholly unable to comprehend. Other papers and testimony may be quite as much matters of surprise, as documents or testimony, as conversations or admissions; and the circumstance, that conversations or admissions are more easily manufactured than other proofs, furnishes no ground against the competency of such evidence, but only against its cogency as satisfactory proof.

Two grounds are relied on to support the exception. The first is, that the defendant may not be taken by surprise, and, (as it has been said) admitted out of his estate; but may have an opportunity to cross-examine the witnesses. The second is, that the defendant may have an opportunity, in his answer, fully to deny, or to explain the supposed admissions or conversations. Now, the former ground is wholly inapplicable to our practice, where the interrogatories and cross interrogatories put to every witness are fully known to both parties; and, indeed, in the laxity of our practice, where the answers of the witness are usually as well known to both parties. So that there is no general ground for imputing surprise. Indeed, in this very case, it is admitted by the learned counsel for the defendant, that there has not been any surprise. The second ground is applicable here. But, then, proofs, documentary or otherwise, may be offered as evidence of facts charged in the bill, as well as admissions and conversations, which it might be equally important for the defendant to have an opportunity to deny or to explain, in order to support his defence. Yet the evidence of such facts is not, therefore, inadmissible. So that the exception is not coextensive with the supposed mischief.

But it seems to me, that the exception would itself be introductive of much of the mischief, against which the practice of the English court of chancery is designed to guard suitors. In general, the testimony to be given by witnesses in a cause at issue in chancery, is studiously concealed until after publication is formally authorized by the court. The witnesses are examined in secret upon interrogatories not previously made known to the other party. The object of this course is to prevent the fabrication of new evidence to meet the exigencies of the cause, and to take away the temptations to tamper with the witnesses. Now, if the exception be well founded, it will (as has been strongly pressed by counsel) afford great opportunities and great temptations to tamper with witnesses, who are known to be called to testify to particular admissions and conversations. So that it may well be doubted, whether, consistently with the avowed objects of the English doctrines on this subject, such an exception could be safely introduced into the English chancery. There is another difficulty in admitting the exception; and that is, that there is no reciprocity in it; for while the defendant in a suit would have the full benefit of it, the plaintiff would have none, since his own admissions and conversations might be used, as rebutting evidence, against his claims asserted in the bill, although they were not specifically referred to in the answer.

Several cases have been referred to, both in the English and the American reports, in which the case has been mainly decided upon the admissions or conversations of the parties, which were not specifically stated in the bill, or other pleadings. I have examined those cases; and although it is not positively certain, that there were not, in any instance, any such admissions or conversations charged in the bill; yet there is the strongest reason to believe, that such was the fact; and no comment of the counsel or of the court would lead us to the supposition, that there was imagined to be any irregularity in the evidence. I allude to the cases of Lench v. Lench, 10 Ves. 511; Besant v. Richards, 1 Tamlyn, 509; Neathway v. Ham, Id. 316; Nerot v. Burnand, 4 Russ. 247; Park v. Peck, 1 Paige, 477; Marks v. Pell, 1 Johns. Ch. 594; and Harding v. Wheaton, 11 Wheat. [24 U. S.] 103; s. c. [Case No. 6,051]. So far as my own recollection of the practice in the courts of the United States has gone, I can say, that I have not the slightest knowledge, that any such exception has ever been urged in the circuit courts, or in the supreme court, although numerous occasions have existed, in which, if it was a valid objection, it must have been highly important, if not absolutely decisive. Until a comparatively recent period, I was not aware, that any such rule was insisted on in England or America, notwithstanding the case of Hall v. Maltby, 6 Price, 250, 252, 258. Indeed, Mr. Gresley, in his late treatise on Evidence, has not recognized any such rule, although in one passage the subject was directly under his consideration, and he relied for a more general purpose on that very case. See Gres. Ev. 161. If it had been clearly settled in England, it would scarcely have escaped the attention of any elementary writer, professedly discussing the general doctrines of evidence in courts of equity.

My opinion is, that the principle to be deduced from the case in 6 Price, 250, before Lord Chief Baron Richards, supported, as it is, by the other cases already cited before Lord Chancellor Hart, is not of sufficient authority to establish the exception contended for, as an exception known and acted upon in the court of chancery in England, whose practice, and not that of the court of exchequer, furnishes the basis of the equity practice of the courts of the United States. I have a very strong impression, that in America the generally received, if not the universal, practice, is against the validity of the exception. If the authorities were clear the other way, I should follow them. But if I am to decide the point upon general principles, independent of authority, I must say, that I cannot persuade myself, that the exception is well founded in the doctrines of equity jurisprudence, as to pleadings or evidence. The exception, therefore, to the master's report must be overruled. It would be a very different question, if the bill should contain no charges, as to admissions or conversations of the defendant, and the defendant should be surprised at the hearing by evidence of such admissions and conversations in support of the facts put in issue, whether the court would not, for the purposes of justice, enable the defendant to countervail such evidence, by giving him leave to offer other evidence, explanatory or in denial of it, upon reference to the master, or by an issue, as was done in the case of Earle v. Pickin, 1 Russ. & M. 547. I imagine, that one reason, why, when evidence of admissions or conversations of the defendant is intended to be introduced, in support of facts charged in the bill, and put in issue, such admissions and conversations are so often charged in the bill, is to avoid the very difficulties, in which the omission must leave the cause; viz. the little confidence, which the court would give to it, as a species of evidence easily fabricated, and the inclination of the court to endeavor, by a reference or an issue, to overcome its force.

I have not thought it necessary, in the view, which has been taken of the exception to the report of the master, to consider with much care the other objection made to the exception; to wit, that the admissions and conversations are sufficiently charged in the bill to let in the evidence, even if the rule were, as the plaintiff's counsel has contended it to be. The only charge bearing on this matter is, that "at all the times aforesaid, as well as at

divers other times, through all the negotiations aforesaid, as well as in many other negotiations in relation to the contract aforesaid, the said Daniel Burnham (the defendant) constantly spoke of the said interest in the said lands of the said Black, as belonging to the said copartnership, and spoke of, recognised, and treated your orator as having an equal and copartnership right therein." This language is somewhat indeterminate; for it is not charged, whether the defendant spoke to the plaintiff, or to third persons; and no persons in particular are named, with whom he held any conversations on the subject. If the rule contended for existed, I should greatly doubt, whether such an allegation, in such loose and uncertain terms, was a sufficient compliance with it; for it would lie open to all the objections, against which the rule is supposed to be aimed. The defendant, to so general a charge, could do no more than make a very general answer. So, that he would be deprived of all the benefit of all explanations and denials of particular conversations. But it is unnecessary to dwell on this point, as the other is decisive.

The exception was overruled.

[NOTE. The cause was subsequently heard on a motion for an account and a dissolution of partnership, and for other relief. The bill was dismissed. Case No. 13,019.]

Case No. 13,019.

SMITH v. BURNHAM.

[3 Sumn. 435.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1838.

PARTNERSHIP—EVIDENCE TO ESTABLISH—SPECIFIC PERFORMANCE—STATUTE OF FRAUDS.

1. The evidence in the present case was *held* to be too loose and general in its texture, to establish the case, stated in the bill, of a general copartnership in land and lumber speculations in Maine.

2. Evidence by confessions, especially where it goes to the whole merits of the case, is open to much objection.

[Cited in Borland v. Zittlosen, 27 Fed. 134.]

3. A court of equity will not interfere to direct a specific performance of an agreement, where the terms of the contract are not definite and full, and its nature and extent are not made out by clear and unambiguous proofs.

[Cited in Brown v. Brown, 47 Mich. 385, 11 N. W. 205. Cited in brief in Brown v. Volkening, 64 N. Y. 78. Cited in Perry v. McHenry, 13 Ill. 233. Cited in brief in Pinnock v. Clough, 16 Vt. 504. Cited in Shaffer v. Fetty, 30 W. Va. 257, 4 S. E. 278; Wheeler v. Reynolds, 66 N. Y. 235; Whiting v. Gould, 2 Wis. 590.]

4. A promissory note on interest cannot be treated as a mere memorandum of an advance for a purchase upon a copartnership account.

5. A parol agreement, to become copartners in the business of purchasing and selling lands and lumber in the state of Maine, is a parol contract respecting an interest in lands, and void by the statute of frauds, so that it will not be enforced by a court of equity.

[Cited in Re Warren, Case No. 17,191; Re Farmer, Id. 4,650; Young v. Wheeler, 34 Fed. 99.]

[Cited in Bailey v. Hemenway, 147 Mass. 328, 17 N. E. 645; Barker v. Wainwright, 36 Md. 353. Disapproved in Bates v. Babcock, 95 Cal. 484, 30 Pac. 605. Cited in Bird v. Morrison, 12 Wis. 156; Burden v. Sheridan, 36 Iowa, 130; Chester v. Dickerson, 54 N. Y. 7. Disapproved in Holmes v. McCray, 51 Ind. 363. Cited in brief in Kilbourn v. Latta, 5 Mackey, 305. Cited in Parsons v. Phelan, 134 Mass. 109; Perry v. McHenry, 13 Ill. 236; Printup v. Mitchell, 17 Ga. 558; Richards v. Grinnell, 63 Iowa, 53, 18 N. W. 668. Distinguished in Trowbridge v. Wetherbee, 93 Mass. (11 Allen) 364.]

6. The bill did not state, in what state the parol agreement for copartnership was actually made, though it might be taken from the allegations to have been made either in Massachusetts, Maine, or New Hampshire. Semble, that this would be a fatal omission, if properly presented to the court.

[7. Cited in Richards v. Richards, 9 Gray, 315, to the point that equitable as well as legal interests in land are embraced in the statute of frauds.]

Bill in equity [by Frederick Smith against Daniel Burnham]. This case had already been before the court on an interlocutory matter. [Case No. 13,018.] The bill stated, that "about the first of June, 1834, the plaintiff and the defendant entered into an agreement, to become copartners in the business of purchasing and selling lands and lumber in the state of Maine," upon a joint capital, to be furnished by both, and the profits and losses to be equally shared between them. The bill then proceeded to state, that certain purchases and sales of land and lumber (enumerating them), were made by the defendant, in pursuance of the agreement, and that certain advances of money were made by the plaintiff to the defendant, on the same account. It called for an account of all the dealings and affairs of the copartnership; and then prayed, that the copartnership might be dissolved, and that, if any of the purchased lands remained unsold, the defendant might be decreed to convey to the plaintiff his just and equitable share; and for further relief. The answer denied the existence of any such agreement of copartnership, and that any purchases were ever made in pursuance thereof; and that any advances of money were ever made by the plaintiff, as asserted in the bill. And it proceeded to answer, in full terms, all the allegations of the bill, and all the merits thereof, and also relied upon the statute of frauds, as a full defence to such pretended agreement.

B. Rand, for plaintiff.

C. P. & B. R. Curtis, for defendant.

STORY, Circuit Justice. The main questions in the cause are, (1) in the first place, whether there was an agreement of general copartnership; (2) in the next place, whether any such advances or purchases were ever

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

made in pursuance thereof, as are charged in the bill; (3) and, in the next place, whether, if there was any such agreement, it not being pretended to be in writing, but merely by parol, it is not utterly void within the statute of frauds. To enable the plaintiff to maintain his suit, it is indispensable that he should make out the affirmative upon each of these points; that there was such a copartnership; that such advances and purchases were made; and that the agreement is not within the statute of frauds. The answer having positively denied the two former, as matters of fact, and the denials being responsive to the allegations of the bill, it follows, of course, that it is incumbent upon the plaintiff, by competent and satisfactory evidence, to overcome the answer, and falsify its statements by two witnesses, or by one witness and other equivalent proofs, or it must stand for verity. It will not be sufficient, that some of its statements may be brought into doubt. They must all be positively overcome, so far at least as the merits of the controversy are concerned. And, first, as to the existence of the agreement of copartnership. And, here, it is most material to remark, that there is not a single scrap of paper in the cause between the parties, alluding to, or in any manner whatsoever touching, the matter of such copartnership. Although, as the allegations of the bill show, large operations in the purchase and sales of land were contemplated, and large advances might from time to time be required to meet the exigencies of such a business, and entire confidence must have existed between the parties, not a single letter is produced, which alludes to any negotiations or speculations or advances. The absence of all such documents, in a case of this sort, during the whole period of the supposed operations of the partnership, is certainly an awakening circumstance, difficult to account for in a satisfactory manner, if the agreement be real; but of easy and natural explanation, if it be a mere figment, or an unexecuted proposal. In the next place, there is no exact proof of the agreement—its terms, its nature, its extent, its duration, or its objects—from any witness present, when it was formed. All, that we know about it, is derived from after conversations and loose confessions of the defendant, testified to by certain witnesses, which conversations and confessions, if entirely confided in, still leave the nature and terms of the agreement so loose and indefinite, that it is utterly impossible to ascertain its exact and full import in all respects, so as to enable a court of equity to execute it with a confidence that it understood the whole intentions of the parties. For example, in what proportions were the parties to be interested, and to supply funds? To what purchases was the copartnership to extend? To all purchases of land or timber made by either of them respectively, or to those only made on joint account? If the latter, how were the purchases to be ascertained, and, as it were, ear-marked? What was to be the duration of the partnership? During pleasure, or life, or for a limited period? All these are questions, which must be answered with definite exactness and clearness before the court could make a satisfactory decree; and yet, looking to the whole evidence, it is scarcely possible to find sufficient materials for satisfactory answers to them; or, at least, for such answers as a court of equity might rely on with undoubting confidence. And then, again, the whole substance of the case is to be made out, as has been already intimated, by confessions. Now, evidence of this sort, especially where it goes to the whole merits of the case, is certainly open to much objection. It was well remarked, by Sir William Grant, in Lench v. Lench, 10 Ves. 518, where an attempt was made to establish, by parol declarations and confessions of a party, a trust in real estate, that "it is in all cases most unsatisfactory evidence, on account of the facility with which it may be fabricated, and the impossibility of contradicting it. Besides; the slightest mistake or failure of recollection may totally alter the effect of the declaration." He added, in reference to the case before him, what is equally true in the case before us, that "there are no corroborating circumstances by any writing under his (the party's) hand. In most of the cases there has been at least something in writing, some account by which it appeared that the fund was laid out. This case has not the circumstance, considered of weight in other cases, the inability of the defendant to make the purchase with other funds." Indeed, it is scarcely possible to avoid feeling, that this language meets the very difficulties of the present case. Here there is no writing, no account, no proof of the funds of the plaintiff being actually laid out in any lands, and no proof of inability of the defendant to make the purchases, which he did make, without the money or credit of the plaintiff to aid him.

I have read over the whole evidence in this case; and although there is much from the confessions of the defendant, which, if it stood alone, might lead one to the conclusion, that there was some sort of partnership, or joint interest, intended by the parties, in certain purchases, made or to be made of lands and lumber in Maine; yet I am not entirely satisfied, that it is so definite and satisfactory, as to its nature or extent, or the proportions of the parties, as would lead a court of equity to enforce it; for it is a general rule of such courts, not to interfere to direct a specific performance of any agreement, where the terms of the contract are not all definite and full, and its nature and extent are not made out by clear and unambiguous proofs. See 2 Story, Eq. Jur. §§ 751, 764, 767, and the cases there cited. But the countervailing proofs, on the part of the defendant, do certainly throw great doubts and uncertainties over the proofs on the other side, and lead us to the conclusion, that there may have been

some mistakes and misapprehensions, to say the least, on the part of the plaintiff's witnesses, as to the purport and effect of the conversations of the defendant, to which they testify.

But, if this difficulty could be overcome, there are other considerations of very grave importance, touching the next point, namely, of the advances, made by the plaintiff on account of the asserted copartnership; and, if such advances were made, of the actual investment of such advance moneys in any lands or timber on account of the asserted copartnership. Upon this subject, the bill states, that about the 20th of June, 1834, the plaintiff and defendant, being in the state of Maine, for the purpose of prosecuting the business of the copartnership, purchased of one Babbitt, at Bangor, "one undivided moiety of a large quantity of logs or timber, for the sum of thirty-five hundred dollars, or thereabouts"; and the other undivided moiety was at the same time purchased of Babbitt by one Robert M. N. Smith, for the like sum of thirty-five hundred dollars, or thereabouts; and by the terms of the sale, a credit was to be given for some part of the purchase-money (but for what part the credit was to be given, the bill does not state); and thereupon it was agreed, that Smith should have the management and control of the timber, and sell the same, and account with the plaintiff and defendant for their moiety thereof; that the plaintiff then advanced to the defendant on account of the purchase, and for his share of the money then to be paid, the sum of one thousand dollars, or thereabouts; that, afterwards, about the first of January, 1835, Smith accounted with the defendant for the proceeds of some part of the sales of the timber, and paid to the defendant the sum of two thousand dollars on account of the plaintiff and defendant, and thereupon the plaintiff directed the defendant to retain the same, to be paid on account of certain lands, purchased on joint account, of one Black, and which will be hereafter mentioned.

The bill then states, that, in further prosecution of the copartnership, the plaintiff and defendant, about the first of October, 1834, contracted with one Packard, that he should convey to the plaintiff, or his assigns, a certain tract of land in Maine, and thereupon Packard executed and delivered to the plaintiff his bond, conditioned to convey the land to the plaintiff, or his assigns, upon the making of certain payments by the plaintiff, or his assigns; that about the first of December, 1834, the plaintiff delivered the said bond to the defendant, to enable the latter to comply with the conditions, and obtain a conveyance of the land; that the defendant, instead of so doing, gave up the bond to Packard to be cancelled, alleging that it was not for the benefit of the copartnership to receive a conveyance. The bill then states, that about the 12th of December, 1834, it was ascertained, that one Black, in his own right, as agent or trustee, was desirous of selling several townships of land in Maine, and that one David Webster was ready and willing to purchase one undivided moiety thereof, and thereupon the plaintiff and defendant agreed, that their copartnership should purchase the other moiety thereof; and that the defendant should proceed without delay to make a contract with Black for the sale and conveyance thereof; and that the sum of one thousand dollars retained by the defendant should go and be applied by the defendant, in and towards the first cash payment for the sale and conveyance of the said moiety by Black; and that, if the defendant should want more money for the purpose, he should give notice thereof to the plaintiff, who was to assist him in raising the requisite funds. The bill then states, that the defendant accordingly contracted with Black for the one moiety of nine and one half townships of land; and Webster contracted for the other moiety thereof; that the defendant then paid Black the sum of one thousand dollars, and no more, toward the purchase money, and to bind the bargain; that the contract in writing of Black, for such sale and conveyance thereof, was, by agreement between defendant and Webster, to run to them both, to convey the whole lands to them, of which Webster was to be the owner of one moiety, and the defendant of the other; but whether Webster then knew, that the purchase was then made by Burnham for the benefit of the copartnership, the bill alleges the plaintiff to be ignorant. The bill then states, that Black executed the contract in writing accordingly. The bill then alleges, that the plaintiff and defendant afterwards, jointly and separately, offered the interest of the copartnership in the said townships for sale, and endeavored to effect a sale thereof; and that the defendant constantly spoke of the interest in the said lands as belonging to the copartnership, and spoke of, and recognized, and treated the said plaintiff, as having an equal and copartnership right therein. The bill then states, that afterwards, about the 12th of February, 1835, the time approaching, when another payment would become due to Black, the plaintiff made a further advance of four thousand and four hundred dollars to the defendant, to be applied towards such payment to Black. That soon afterwards the defendant sold the interest of the copartnership in seven and one half of the said township, at a great profit; that the plaintiff was ready to have made any further advances on account of the copartnership, to enable the defendant to comply with his contract with Black, and had actually deposited in a bank at Bangor for the purpose the sum of five thousand dollars, to his own credit; but the defendant never asked for any further advances; and the plaintiff understood that Black did not exact strict payment, so that no more money was wanted. The credit was

accordingly extended; and payment was subsequently made, by means of the proceeds of the sales of the copartnership interest in the lands aforesaid, of all the sums due to Black under the contract, and that the defendant has sold the interest of the copartnership in the remaining portion of the land, and realized therefrom a large profit, amounting to forty thousand dollars.

These are all the specifications in the bill of any advances, for investments made under the asserted copartnership. As to the purchase of Babbitt, the answer gives a very different account of it from what is stated in the bill. It positively denies that there was ever any such copartnership interest therein; and as positively denies, that the plaintiff ever advanced the sum of one thousand dollars, or any other sum, to the defendant, as the plaintiff's share of moneys to be paid for the logs. On the contrary, the answer asserts, that on the 23d of July, 1834, the plaintiff lent one thousand and ten dollars to the defendant, and took the defendant's promissory note therefor, payable on demand, with interest. The bill admits the giving of this note, and insists, that it was taken and preserved as a memorandum of the amount and time of such advance, and that this is a customary mode of doing business in like cases. A copy of this note is annexed to the bill, and it is for the payment of one thousand and ten dollars, to the plaintiff, or order, on demand, with interest. Now, no satisfactory proof has been offered in this case, that in transactions of this nature notes in such a form are ever given as mere memorandums of advances. That notes should be given in such cases, payable on demand, would seem to be sufficiently singular, and so inexpressive of the real intent of the parties, as to excite some doubt whether it could be a usual course of business. But that such notes should be given, payable with interest, would seem to be utterly repugnant to all notions of propriety in the conduct of such business. Prima facie, such notes must be presumed to import a present absolute indebtment of money, for which interest is to be paid. And to allow parol evidence to shew, that such was not the intention of the parties would be, not only to vary, but to contradict, the very words of the instrument. It appears to me, that this very note is written evidence directly contradicting the allegations of the bill, that there was an advance of one thousand dollars on copartnership account, towards the purchase of the timber from Babbitt. I know not, indeed, where a court of equity could stop, if it could, under such circumstances as are presented in the present case, allow such a note to be treated as a mere memorandum of an advance, for a purchase upon a copartnership account. The defendant has, in his answer, also, expressly denied, that he has ever received from Smith any moneys or notes, on account of the timber, beyond the moneys which he had advanced without any interest therefor. But, as the case made by the bill is met by such direct denials of the copartnership, and of the advance of the one thousand dollars on account thereof, and is unsupported by any sufficient evidence, the question of such advance may be dismissed from any further consideration. The testimony of R. M. N. Smith, who is principally relied on to establish this part of the plaintiff's case, is to the following effect: That he saw the plaintiff and Burnham, at Bangor, in the summer and fall of 1834; that they were there for the purpose of speculation in lands and other matters. That he was employed by them to use his influence and information for getting bonds for lands for them; and was to receive, for his compensation, half of the profits made on the sale of such bonds, and the plaintiff and Burnham were to share the other half, equally, between them. That both the plaintiff and Burnham stated to him that they were jointly and equally interested in any speculations they should make. That they jointly with him purchased a lot of logs of Babbitt, in the early part of the summer of 1834; his interest to be one half and that of the plaintiff and Burnham, the other half, jointly and equally, between them. The plaintiff did not make any advance of money for the purchase of the logs; but it was to be made, and was made by Burnham. That when the bargain was closed the plaintiff offered to go and get a sum of money to pay, and Burnham told him he had money enough in his pocket-book to pay what was required; and that the plaintiff and he could settle afterwards; and Burnham accordingly paid the advance money, about two thousand dollars. The witness gave to Burnham two notes, or receipts, to account for the advance, which were afterwards returned to him by Burnham, on a settlement in the following autumn. The witness was to take the lumber, and saw it up, and sell it, and then he was to have half the profits, and the plaintiff and Burnham the other half. On the settlement he paid the whole advance of two thousand dollars; but no more is stated by him to have been paid to Burnham. That in December, 1834, he saw Burnham at Bangor. Soon after he and Burnham, and Colonel Webster, went to see Black at Ellsworth, and there Burnham and Webster concluded a bargain for the lands with Black. That the witness had no interest to the purchase; but that Burnham told him, that "Webster was to have one half, and the plaintiff and himself the other half together, they being jointly and equally interested in any purchases of land;" adding, that the plaintiff's capital was not large, but his credit was good, and that they could make out their parts of the payment well enough. The witness added that "in various conversations Burnham told him, that he and the plaintiff were equally and jointly concerned in any operations to be made by either."

Now, giving the fullest effect to this testimony, as to the Babbitt purchase, we see, that even Smith, the co-purchaser of the logs, does not pretend, that he ever knew of any such advance made by the plaintiff to the defendant, on account of the logs. On the contrary, he admits, that the whole money (two thousand dollars) was paid by the defendant, out of his own funds; and if afterwards the plaintiff had repaid to the defendant his share of such advance, the note already alluded to could not have been given to the plaintiff in that account, but would seem to be utterly irreconcilable with the very nature of such a transaction. It is remarkable, too, that Smith confirms the answer, as to his repayment of the money to the defendant, which was advanced to him; and he does not even pretend, that in his settlement with the defendant he ever paid him a cent beyond that advance. So far, then, as the Babbitt transaction goes, no case is made out in evidence, which shews, that the defendant has ever received any money beyond his advance from Smith on joint or copartnership account; and consequently the bill on this point is not maintained. Indeed, it is not averred in the bill, that any profits were in fact made thereon. It should be added, that if this objection were not decisive, it would be impossible for the court to maintain jurisdiction, to decree an account of this matter without Smith being made a direct party to the bill, as the proper and ultimate accounting party. I have not thought it necessary to comment at large upon the bearing of Smith's testimony as to the Babbitt transaction and purchase, and the joint interest of the plaintiff and defendant therein, or as to the purchase from Black on their joint account. It certainly is, in some particulars, strong and direct to the purpose. But it consists wholly of asserted confessions of the defendant, and does not satisfactorily establish any general copartnership, such as is charged in the bill, between the plaintiff and the defendant, whatever might be its force as to a joint interest in the Babbitt purchase, or the Black purchase. Similar remarks are applicable to the testimony of Woodman as to the Babbitt purchase. He testifies to conversations of the defendant of a very general nature, and in very general terms, in the autumn of 1834, in the latter part of September, or the beginning of October, to this effect; that the plaintiff had gone into land speculations with him; that he and the plaintiff had purchased logs, on which they had made, or should make, sixteen hundred dollars; that they had made a large purchase of lands, or had the refusal of a number of townships; that they should make on lands a large sum, say eighty thousand dollars; and that in the whole conversation the defendant used the word "we," coupling himself and the plaintiff together, though he did not use the word partner, partnership, or joint interest. Now it is impossible not to perceive, how very loose and unsatisfactory such statements are to found any satisfactory proofs of a definite fixed copartnership. It is also to be remembered, that though this conversation was long after the Babbitt purchase, yet it was long before the purchase of Black; so that, as to the latter, nothing more could have been contemplated, giving the fullest effect to the language, than future speculations in those lands on joint account. The testimony of Pearson Cogswell, as to the purchase of the lumber, is equally loose and unsatisfactory. All that he says is, that some time previous to December, 1834, on board of a steam-boat, Burnham said to him, "I," or "Frederick Smith and I, have let Robert M. N. Smith have money to purchase lumber." In respect to the purchase from Black, he is more full; but still very general. He states in effect, that in various conversations with him Burnham acknowledged, that the purchase from Black was made (with Webster), on the joint account of himself and the plaintiff; that he and the plaintiff were in partnership in purchasing the bond from Black, and other land and lumber in Maine, and in their Eastern speculations; and that he often spoke of the plaintiff's having an interest in their purchases, and being engaged in the business of their purchases in Maine. But at the same time, he says, that Burnham did not, as he recollects, state, what interest, or what proportion of interest the plaintiff had with him in any lands, or the precise terms, nature, limits, commencement, duration, or extent of their connection.

The testimony of Dudley Smith, the brother of the plaintiff, is even more general and loose. In relation to the lumber purchase, he says, that on the last of August, or the first of September, 1834, he was present at a conversation, in Gilford (N. H.) between the plaintiff and Burnham, respecting the buying and selling of land in Maine. They spoke of having been in company in that, and selling lumber; and among other things, Burnham asked the plaintiff, if he wished to continue on in company in the lands; and the plaintiff answered, yes. They then agreed, that Burnham should go to Boston and to Maine, on the business, where the plaintiff was to join him, and to pay half the expenses. A few days after, Burnham said to him: We (meaning the plaintiff and Burnham) shall make something on our lumber; but I do not see how your brother (the plaintiff) is going to make out his part of the money? The witness states further, that on the 10th of February, 1835, at Gilford, he was present at another meeting and conversation, between the plaintiff and Burnham; that they spoke of going to the state of Maine together. That afterwards it was concluded that Burnham alone should go, as it was not necessary to go on the land, and that Burnham should take the money. That the witness got $500 from the village bank,

and delivered it to the plaintiff, who handed $400 of it to Burnham, and also gave him a bundle of bank bills, which he said contained $4,000. Burnham received it without counting it. The witness further adds, that the business spoken of in this conversation, as well as on another on the next day, as belonging to their (the plaintiff's and Burnham's) common interest, was the buying and selling of lands in Maine, and disposing of lumber. But he does not remember that Burnham mentioned the precise nature, limits, commencement, duration, or extent of that connection. Taking this testimony altogether, it seems to me far too loose and general in its texture, to establish the case, stated in the bill, of a general copartnership in land and lumber speculations in Maine. There may have been an agreement, that the Babbitt purchase should be made upon joint account, or that the plaintiff should have an interest therein, at his election. But if there was, it does not appear to have been consummated by any joint advance made by him; and, at all events, Smith, the witness, and not Burnham, is the proper accounting party, as Burnham is not proved to have received any money thereout except for his advances. We may then dismiss this transaction from any further consideration.

In the next place, as to the purchase of land from Packard, or rather the bond for a conditional purchase from Packard. As the bond in this case was actually given up, and nothing was ever obtained under it, and no case is made by the bill for any relief touching the same, the only aspect, in which it can become material, is as a link of evidence to establish a particular copartnership in those lands, or an act of purchase under the asserted general copartnership. It is in the latter view, that it is presented in the bill. Does it establish this latter view? In the first place, the bond was taken from Packard in the name of the plaintiff alone; and so far as this fact goes, although the bill asserts the bond to have been taken on joint account, it is written evidence of a sole right, if not contradicting, at least not confirming, the notion of a joint interest. In the next place, the answer expressly denies, that there was any copartnership or joint interest in the bond, or that it was taken on partnership account; and it insists on the contrary, that, although the bond was taken in the name of the plaintiff, yet it was so for the sole account and benefit of the defendant and one John B. Morgan. The reason assigned in the answer for this mode of transacting the business is, that before the making of the bond, it came to the defendant's knowledge, that, in consequence of certain writings between one Asa W. Babcock and the said Packard, Packard could not, as the defendant believed, make the bond to the defendant, without in some way affecting a certain contract for taking timber from the said land, or interfering therewith. That, on this account, the bond was arranged to be taken in the name of the plaintiff, without his knowledge or authority, for the benefit of the defendant and Morgan. That the plaintiff came to Bangor before the bond was executed, and the circumstances were mentioned to him, and he was told by the defendant, that if he wanted to have any share in the contract he might have it; that the plaintiff made no objection to the bonds being made as aforesaid; and it was so executed, accordingly, and delivered to the defendant. That the plaintiff said he would take a share therein; but did not say what share, nor was it understood or agreed, what share he should have; but that it was never understood or agreed, that the plaintiff and the defendant should have any copartnership interest therein. The answer further denies, that the plaintiff ever gave to the defendant the sum of $2,300, or any other sum to enable him to comply with the conditions of the bond. The answer further avers, that it was agreed between the plaintiff, the defendant, and Packard, that the defendant should give a counter bond or contract to Packard, and the plaintiff; and the defendant accordingly did give such bond or contract to the effect, that the plaintiff and the defendant would take the land at $1.25 per acre, to be paid for at certain given times by instalments, the plaintiff agreeing to take an interest in the lands, if they could be obtained at the price last mentioned, but not as a copartner, as the defendant understood the agreement. The answer then goes on to state, that Packard refused to part with the land at less than $1.50 per acre; and thereupon the contract was rescinded by the consent of the parties, and the bonds mutually given up.

The testimony of Morgan, the other supposed co-contractor, is in the case. He states, that in the autumn, and, as he thinks, in September, 1834, he had a conversation while riding with Burnham, and that in the course of the ride, Burnham spoke freely of the connection in business subsisting between himself and the plaintiff, and informed him that the plaintiff had agreed to furnish $12,000; that the agreement between him and the plaintiff was, "that they should be equally interested in all purchases of land, &c., to be made." Burnham added, that the agreement between the plaintiff and himself was not in writing, and he could work the plaintiff out of it; and that he would take hold of the purchase with him (Morgan), and take one half on his own account alone. He adds, that he was connected in the autumn of 1834 with the plaintiff and Burnham in the purchase of the Packard lands, his interest to be one third, and that of the plaintiff and Burnham to be one third each. Afterwards in the same autumn, the parties all met at Portland, and it was then agreed, that Burnham should go to Packard, and endeavor to purchase the

land of him at $1,25 per acre, if possible, if not, at $1,50 per acre; that the plaintiff should pay to Burnham a sum of money, to be employed in the purchase; and, accordingly, the plaintiff did pay to Burnham, a large package of bank bills, how much, he does not know. Burnham went away, and on his return, stated, that he had not been able to purchase the land of Packard; and that the bonds had been given up. The witness adds, that Burnham's explanation and conduct were not satisfactory to him, or to the plaintiff. The witness further, in his cross-examination, states, that in the course of his ride with Burnham, as above mentioned, Burnham told him, that he and the plaintiff had agreed to be jointly concerned in equal shares in buying land and lumber; that there were no limits to their plans except their means; and that this connexion, between him and the plaintiff, had subsisted somewhat more than a year. In this last statement, the witness must certainly be under a mistake; for the bill itself assigns the connexion or copartnership to have commenced in June, 1834. The witness also adds, that Burnham particularly mentioned, that he and Smith had a joint interest in the land to be purchased of Packard, and in certain other land, which the plaintiff had gone to Hallowell to secure; and that within two years before the time of taking his deposition (which was in June, 1837), Burnham had declared to him, that no one was concerned with him in the purchase of the land from Black, except Colonel Webster; or something to that effect. This is the only evidence, strictly applicable to the Packard purchase. It has been asserted in the argument for the plaintiff, that the money, paid in Morgan's presence was undoubtedly that, for a part of which the second note stated in the bill, dated on the 11th of December, 1834, for $1000, was given as a memorandum. The bill does not (as far as I recollect) contain the same assertion. The terms of the note seem, however, inconsistent with any notion of its being a mere memorandum; for it contains a promise to pay the $1,000 to the plaintiff or order on demand, with interest. Like the other notes in the case, it is negotiable, and on interest, which would seem to show that it was a business transaction between debtor and creditor, and not a mere deposit of money with a partner for partnership purposes. The answer admits that the defendant borrowed $1,000 of the plaintiff on the 11th of December, 1834; and that he gave a note for the same of the same date; but it positively denies that it was any thing but a private loan, and as positively denies that it was received for any copartnership business, or as a part of the capital stock thereof. Morgan states nothing on this point. But his testimony is inconsistent with the bill in one particular; for it states that the purchase of Packard was on the joint account, and for the mutual benefit of the plaintiff and the defendant; whereas, upon Morgan's testimony, he was interested therein to the extent of one third. But the main difficulty remaining in this part of the case is, that Morgan is a single witness against the answer; and whatever may be the scruples of the court in giving entire credit to the statements of the answer as to the Packard purchase, there is no inconsiderable difficulty in giving effect to all the statements in Morgan's testimony, as well from the looseness of some parts as from the want of exact facts in others. If the transaction with Packard, as it is presented to the court upon a full survey of the bill, the answer and the evidence satisfactorily establishes any thing, I cannot admit it to go farther than to show an intended interest of the plaintiff in that particular transaction; but not clearly, of itself, to establish a general copartnership. If a general copartnership were established, aliunde, by the evidence, it would be easy to refer this transaction to that source.

In the next place, as to the purchase from Black, which, after all, constitutes the main hinge of the controversy. In regard to this part of the case, there is much testimony of confessions of Burnham, at different times, to different persons, and in different places, that the plaintiff was jointly interested with him in that purchase, as well as in his Eastern speculations generally, in lands and lumber. Some of this testimony has been already stated; and much of the remaining part is of the same general character, consisting of loose declarations of joint interest and copartnership between Burnham and the plaintiff. I do not pretend to go over the particulars of this testimony, though some of it is abundantly open to comment. The testimony of Clark is clearly not admissible, since he was not examined on the cross-interrogatories. If it were admissible, it seems to me utterly discredited by the contradictions between that and his petition and affidavits, filed in the cause of Clark v. Burnham [Case No. 2,816], in the circuit court in Maine. Perhaps the strongest testimony is that of William M. Kimball to conversations, which he states, that he had with the defendant at several times. First, in January, 1835, at Boston, soon after the purchase of Black, in which he says, that the defendant told him, that he and Frederick Smith had lately purchased several townships in the state of Maine, but he does not remember the number of townships, nor the precise sums paid for them; but it was several hundred thousand dollars; and that the land was in the Bingham purchase. That the defendant added, that he and Smith had purchased together; that they were partners in the purchase; that they both advanced money towards the purchase; and that Smith had not advanced so much as he had expected him to advance. Next he states a conversation with the defendant in Febru-

ary of the same year, at Meredith Bridge, in New Hampshire, in which the defendant said, that he and Smith were connected together in the purchase of the townships in Maine; that Smith had not made out so much money as he expected he would; and he was sorry he had taken him into partnership; that he might have made out all the money for the purchase, and have had all the profits; that Smith would finally make something by the trade, and the witness thinks he said forty or fifty thousand dollars. In the next place, he states a conversation with the defendant, in January, 1836, in Boston, in which the defendant made statements of the same purport as the other conversations respecting Smith's interest. In respect to this testimony, it is open to the remark, that its whole force, so far as the purchase from Black is concerned, depends upon this, whether the conversation related to the lands so purchased, or to other lands in the Bingham purchase. Now, it is expressly stated by other witnesses (Jordan and Stuart), that Smith and the defendant were jointly interested, as they understood from them, in other lands in the Bingham purchase, or at least in township No. 1 in the Bingham purchase. But I do not dwell on these or some other circumstances affecting this testimony, although I cannot but think, that the letters annexed to the bill, which passed between the plaintiff and the defendant, in November, 1835, have a strong tendency to shake the credibility of Kimball's statement as to all the conversations testified to by him, and especially that in January, 1836. These letters show, that as early as the spring of 1835, the plaintiff utterly refused to recognize the rights contended for by the plaintiff, and that there was then a controversy subsisting between them.

If the testimony to the conversations and confessions of Burnham, that the purchase from Black, was made upon joint account, or partnership account, stood alone, it would, from the considerations already suggested, lay open to some doubt and difficulty, owing to the intrinsic infirmity of all such evidence. But it seems to me, that it has to encounter so much opposition, if not contradiction, from other unexceptionable evidence in the case, that a court of equity ought to hesitate a great while, before it should lend entire credence to it, for the purpose of establishing the plaintiff's claim. In the first place, to meet this claim at the threshold, we have the written contract of Black, by which he binds himself to deliver to David Webster and Daniel Burnham, their heirs or assigns, a deed in fee, with warranty, of the lands in controversy. This contract, therefore, being for the purchase of lands, is confined to the immediate parties, Webster and Burnham, without any mention of the plaintiff, or of any other person being interested therein. The presumption therefore is, that no other person had any such interest therein, except Webster and Burnham. How then is the interest of the plaintiff to be made out? It must be by showing, that there is a trust created in his favor in the very lands. Now, this is not attempted to be shown by any written evidence or document. The sole reliance of the plaintiff is, and must be, either, that Burnham and he were, at the time, copartners in business, and that the purchase was made out of the partnership funds; or that the plaintiff actually advanced his own funds on joint account, which were applied to the purchase. Now, the bill does not contain any direct allegation, that the moneys of the copartnership, or of the plaintiff, were actually applied to the purchase from Black. The answer explicitly denies, that any such moneys were applied; and as explicitly denies, that any person, except the defendant and Webster, had any right or title, or interest in the purchase. It is true, that the defendant admits in his answer, that he did apply the $4400, for which he gave to the plaintiff a negotiable note on the seventh of February, 1835, with other moneys of his own towards the purchase. But he positively states, that the $4400 was a mere private loan to himself, and was not so applied as the moneys, either of the plaintiff, or of the supposed copartnership. The note itself on its face supports the answer in this respect; for its terms are just such as ought to exist in the case of a loan, and seem altogether irreconcilable with such a transaction, as the bill asserts, a mere advance to one partner on partnership account. Another striking fact in this part of the case is, that although the purchase money exceeds two hundred thousand dollars; yet there is not a scrip of paper, showing the assent of the plaintiff thereto, or his obligation to pay any part thereof, or his being a co-purchaser with Burnham. Now, certainly, in so large a purchase, it is scarcely credible, that a person of limited means, like Burnham, should take upon himself the whole personal responsibility of paying the whole money without having his partner a party to the contract, or bound to contribute towards the payment, or even without having any proof in writing to show that he was a partner. Suppose the speculation had turned out in the event to be a very losing bargain; what recourse could Burnham have had against the plaintiff? And if the plaintiff had a known fixed copartnership interest, how happens it, that there is no correspondence showing the fact, and calling upon the plaintiff to provide his share of the money? And how happens it, that the plaintiff's name does not appear upon the face of the notes given for the purchase money?

There is another most important portion of testimony, bearing upon this part of the case, which has not been contradicted, or even its credibility doubted. Webster was deeply interested, not only in his own half of the pur-

chase; but also in knowing who were the persons liable for the other half, as the notes included a joint responsibility for the whole purchase money. Now Webster positively states, that the purchase was made on the joint and exclusive account of Burnham and himself; and that he never knew of any other person being interested therein. He further states that when the purchase was about to be made, Burnham offered the plaintiff one half of his proportion, and went on to propose to the plaintiff to become interested, and to join with Webster and himself, or either of them, in the purchase, each taking one third; and that the plaintiff "declined undertaking the purchase either way, observing that it was too great a thing, and that he did not dare to take hold of it." Webster further adds, that the plaintiff was present, when the agreement was finally concluded between Burnham and himself, to make the purchase upon their own exclusive account; and the plaintiff declined to take any interest in the purchase. He then asserts, that the plaintiff "never had, or took any part, share or interest in this contract or purchase." Now, it seems exceedingly difficult to resist the cogency of this testimony. It stands uncontradicted, and comes from a witness deeply interested in, and a party to the purchase, and who had the most complete knowledge of all the preliminary arrangements. What gives it additional weight is, that it stands in entire harmony with all the written documents in the case. They are just such as ought to exist, if the testimony be true; and such as naturally followed from the transaction. And they are just such, as would not ordinarily exist, if the purchase had been made on the joint account of the plaintiff and defendant and Webster. But an additional circumstance, which strikes me as of great weight in this connection is, that if the purchase from Black had been made on the joint account of the plaintiff and the defendant, in the total absence of all written communications and correspondence between them on that subject, either contemporaneous, or subsequent. The purchase was one of great magnitude and responsibility; large sums were to be raised to pay the purchase money; notes were to be given; and yet not a single letter passed between the parties, communicating information, proposing arrangements, or asking advice or assistance respecting it. Such a deep and unbroken silence long continued, does, I confess, lead my mind to distrust the existence of the partnership. It would have a strong tendency to create doubts, even if the testimonial evidence was far more full, and direct, and distinct, than it can be admitted to be. But when it is brought in connection with the other facts of the case, already mentioned, it is impossible not to feel, that it has, and ought to have, much influence in confirming pre-existing doubts, and sharpening other objections.

But, supposing the objections already stated not to be insuperable, we come, in the next place, to the consideration of the important point, whether a parol contract of this sort, for a partnership in speculations in land, to be bought and sold on joint account, is not within the true intent of the statute of frauds. It seems to me, that it must be so considered, both upon principle and authority. There is no substantial difference in the language of the statute of frauds of Massachusetts, New Hampshire, and Maine on this subject; or between them and the English statute of frauds of 29 Car. II. c. 3.[2] The doctrines, therefore, decided upon this point in England, as well as in each of these states, bear directly upon the present case, if not as absolute authorities, at least as containing the opinions of the most enlightened judges upon the language and the intent of the provisions of the statute. I do not perceive that the bill has stated in what state the supposed parol agreement for the copartnership was actually made; and of course the court cannot, strictly speaking, say by what local law it is to be governed. But as, from the allegations in the bill, it may be taken to have been made, either in Massachusetts, or in Maine, or in New Hampshire, it is not of much importance to insist on this defect in the bill, although, perhaps, in strictness, it might be deemed a fatal omission, if properly presented to the court. But as the statutes of frauds in all these states have received, and indeed require the same construction, the objection may well be passed over. Then, in the first place, upon principle, how stands this case? It insists upon a parol copartnership for the purchase and sale of lands for the joint account of the partners. If so, this is clearly the case of a parol contract, respecting an interest in lands. It was contemplated, according to the very structure of the bill itself, that, upon every purchase made under the supposed contract of partnership, the plaintiff should have an interest in the lands purchased, to the extent of one moiety, or his share in the partnership. Now, if the purchase was made in the name of Burnham, as to one moiety, it was to be in trust for the plaintiff. By the statute of frauds all estates made or created by parol, and not put in writing, and signed by the party making or creating the same, are mere estates at will. And all grants and assignments, as well as all declarations or creations of trusts or confidences in lands are also to be manifested and proved by some writing, signed by the party, who is by law enabled to grant, assign, or declare such trust, otherwise the same are utterly void, and of no effect. And all contracts for the sale of lands, or of any interest in or concerning the same, are also re-

[2] The clause in the Massachusetts statute of 1783, c. 37, § 3, respecting parol trusts, not resulting trusts, was not incorporated into the Revised Statutes of Maine. in 1821, c. 53. But this omission was cured by enacting it in the statute of Maine of the 14th of February, 1827, c. 358.

quired to be in writing, otherwise no action is maintainable thereon. There is an exception of trusts and confidences, which arise or result by the implication or construction of law, or are to be transferred or extinguished by an act or operation of law.

Now, taking these clauses together, or separately, the same conclusion would seem to follow, as to the parol agreement in the present case. If the agreement could be treated as a sale by the defendant to the plaintiff of any interest in the lands to be purchased, it would be within the statute. If it could be treated as the case of an estate created in lands, it would be a mere estate at will, which would defeat the whole intention of the agreement, and the whole object of the bill. I incline to think, that it properly falls under neither of these predicaments; but that it is the case of the declaration or creation of a trust or confidence in lands, not arising or resulting by implication or operation of law. The trust arises eo instanti upon each purchase, and is then to attach, if at all. If the land is not sold, the plaintiff would still be entitled to his moiety of the land as a trust in equity, just as much as he would be entitled to a moiety of the proceeds upon a subsequent sale. Suppose the defendant should die after any particular purchase, and before the sale, would it not be clear that the trust, if it had any legal existence, would attach in favor of the plaintiff, as to his moiety, just as much against the heirs of the defendant, or persons purchasing under them with notice, as against the defendant himself? Certainly it would. It has been ingeniously argued, that the interest of the plaintiff is in a moiety of the profits, or proceeds of the sale, and not in the land itself; and that, therefore, at least, when the land has been sold by the defendant, the agreement attaches to the moiety of the proceeds. But the agreement, if good at all, attaches also to the land at the time of the purchase; and it is then an agreement for an interest by way of trust in the land, a sort of springing trust; and it is in virtue of this trust estate, and of this only, that any right can attach to the moiety of the proceeds. The right to follow the proceeds is a right which, if it exists at all, flows from the interest in the lands, and the trust created in favor of the plaintiff. It is not collateral; but direct. Indeed, the bill puts the agreement as one of a copartnership for "purchasing and selling lands," by means of a capital to be furnished by the partners, the profits and losses to be equally shared by them. Then, again, it is suggested, that the agreement is not within the statute of frauds, because it did not so much contemplate an interest in the lands purchased, as an interest in the contracts to convey lands obtained by the defendant for the partnership, and the profits made on the sale thereof. But it is a sufficient answer to this suggestion, that such is not the agreement set up in the bill. It is not an agreement to purchase contracts for the conveyance of lands to be sold for the partnership; but an agreement for the purchase and sale of lands for the partnership. But if the bill had stated the agreement to be, as the argument has supposed, it would not have changed the legal posture of the case. A contract for the conveyance of lands is a contract respecting an interest in lands. It creates an equitable estate in the vendee in the very lands; and makes the vendor a trustee for him. A contract for the sale of an equitable estate in lands, whether it be under a contract for the conveyance by a third person, or otherwise, is clearly a sale of an interest in the lands within the statute of frauds. See Hughes v. Moore, 7 Cranch [11 U. S.] 176, 192–194. A partnership to buy contracts for the sale of lands, is a partnership for the purchase of an equitable interest in those lands. If the transactions are to be carried on by and in the name of one partner, the partnership is to create a trust for the other in those contracts; and consequently, if the agreement for the partnership is by parol, it is to create such trust by parol. This would bring the case within the purview of the statute of frauds. Let us apply this doctrine to the case of the purchase from Black. Webster and the defendant only entered into the written contract with Black for the purchase of the lands. They alone were the parties to it. They alone, at law, have the legal rights growing out of it. How then does the plaintiff make out any title or interest in that contract? It is by setting up a parol trust to the one moiety of the land purchased by the defendant by that contract, under the parol agreement for the partnership; that trust being one of the express terms of that agreement.

Then, it seems clear, that this is not the case of a resulting trust by implication or construction of law. It is not the purchase of an estate by one man in the name of another, where the purchase money is paid by the former, and the deed taken in the name of the latter. It is not the case of a purchase, confessedly paid for out of the funds of an existing partnership, for partnership purposes, and the deed taken in the name of one partner. In each of these cases a resulting trust will arise by operation of law, in favor of the party or parties advancing the money. See Sugd. Vend. (9th Ed.) pp. 134, 135, c. 15, § 2; Dyer v. Dyer, 2 Cox, Ch. 92, 93; 2 Story, Eq. Jur. §§ 1201–1207. Here no partnership funds, as such, existed; and no partnership funds, as such, are shown to have been applied. Lord Hardwicke, in Lloyd v. Spillet, 2 Atk. 150, said, that resulting trusts, or trusts by operation of law, were, first, when an estate is purchased in the name of one person, but the money, or consideration, is given by another; or, secondly, where a trust is declared as to part, and nothing said as to the rest, what remains undisposed of results to the heir at law. And he added he did not know any other instance, besides these two,

where the court had declared resulting trusts by operation of law, unless in cases of fraud, and where transactions have been carried on malâ fide. The trust in the present case, if any there was, was one arising directly ex contractu, and not by implication, or operation of law. I take it to be clear, upon principle, that if one person contracts by parol with another, that he will purchase an estate for the latter, he purchases the estate, and takes the conveyance in his own name, and pays for it out of his own money, and not out of that of the other party, that will not create a trust by implication of law in favor of the other party. The law in such case treats it as a parol contract to purchase and hold in trust for the benefit of another; and not as a trust arising by operation of law. I agree, also, that if trust money is invested in lands, whether rightfully, or tortiously, it may be followed into the land, as a trust created by the operation of law. But then the proof must be clear, that it is trust money which has been so invested. It is the character of the fund, in such a case, that creates and attaches the trust to the land. Lench v. Lench, 10 Ves. 517. Indeed, there is here another difficulty in construing it to be the case of a resulting trust in the lands purchased; for it would defeat the intentions of the parties, as set up in the bill, that the defendant should sell the lands on the joint account. White v. Carpenter, 2 Paige, 241–265; Leman v. Whitley, 4 Russ. 423, 426.

But let us see, how the present case stands, upon authority, as to this objection. Sir Edward Sugden, in the ninth edition of his treatise on the Law of Vendors and Purchasers of Estates (2 Sugd. Vend. 9th Ed., 1834, p. 139), has stated, that "where a man employs another person by parol as an agent to buy an estate, who buys it accordingly, but denies the trust, and no part of the purchase money is paid by the principal, and there is no written agreement, he cannot compel the agent to convey the estate to him, as that would be directly within the statute of frauds." It appears to me, that this is fully borne out by the authorities. It was the very point in Bartlett v. Pickersgill, 4 East, 578, note; s. c. 1 Eden, 515, 1 Cox, Ch. 15. There the defendant bought an estate for the plaintiff; but there was no written agreement between them, and no part of the purchase money was paid by the plaintiff. The defendant articled for the estate in his own name, and refused to convey to the plaintiff, who brought the bill to compel a conveyance. There being no written evidence, that the estate was purchased for the plaintiff, the question was, whether parol evidence was admissible to establish it. Lord Keeper Henley held, that it was not admissible. On that occasion he said: "The question is, whether this evidence be competent or not? That will depend on the statute of frauds. To allow it in this case would be to overturn the statute. The reason for making the statute was the confusion of property owing to perjury either for money or affection. The statute says, 'No trust shall be of land, unless there be a memorandum in writing, except such trusts as arise by operation of law.' It is not like the case of money paid by one man, and a conveyance taken in the name of another." I am not aware that the doctrine of this case has ever been impugned or shaken. On the contrary, Mr. Chancellor Kent has fully recognized its authority on several occasions, and particularly in Boyd v. McLean, 1 Johns. Ch. 582, 589; Steere v. Steere, 5 Johns. Ch. 1, 19; and Botsford v. Burr, 2 Johns. Ch. 405, 409. In this latter case he acted upon its authority it constituting one of the main questions in controversy.

There is another case of Atkins v. Rowe, Mos. 133, where some persons, desirous of obtaining a lease of three houses, agreed that one of them should bid for all the houses, but that the lease should be for their joint benefit. Accordingly he bid, and a lease was made to him; and a bill was filed by the others to have the benefit of the lease, and that the purchaser might be decreed to be a trustee. He pleaded the statute of frauds in bar to the discovery and relief. According to Mosley's Reports, the lord chancellor (Lord King), seemed to be of opinion in favor of the plaintiff; and ordered the plea to stand for an answer, with liberty to except, and the benefit of it to be saved to the hearing. Sir Edward Sugden, however, informs us, that the defendant by his answer denied the agreement, and the cause being at issue, several witnesses were examined on both sides. There was a contrariety of evidence; but the plaintiff proved the agreement by one positive witness, corroborated by circumstances. The lord chancellor dismissed the bill with costs; and his decree was affirmed by the house of lords. 2 Sugd. Vend. (9th Ed. 1834) pp. 133, 134.

There is another case (Lamas v. Bayly, 2 Vern. 627), where two persons entered into a treaty for the purchase of an estate, and one of them desisted, and permitted the other to go on with the intended purchase upon a parol agreement, that he should have the part of the estate he desired. The estate was purchased, and then the purchaser refused to comply with the parol agreement, and a bill was brought to enforce it. At the rolls the plaintiff had a decree, partly upon the ground, that the desisting was a part performance; but chiefly upon the ground, that it was a fraud, and like the case, where a man agreed to purchase as agent for another, and would afterwards retain the purchase to himself. Upon an appeal, the lord chancellor (Cowper) reversed the decree, upon the ground, (as the reporter says,) that it was within the statute of frauds. However, I do not rely on this case; because it appears, from Mr. Raithby's note (1) that the decree in the register's book, is, "that his lordship declared, that the circumstances in this case

appeared too slight to ground a decree for performance of the said agreement."

In Rastel v. Hutchinson, 1 Dickens, 44, the bill charged, that the plaintiff had employed the defendant to purchase a house for him, and he accordingly made the purchase in his own name, and took a conveyance to himself, and refused to make a conveyance to the plaintiff; and that in order to prevent the plaintiff from enjoying the premises, he had reconveyed to the grantor, who was also made a party to the bill; and the bill prayed a performance of the purchase. The defendant pleaded the statute of frauds. Upon the plea being argued, it was ordered to stand for an answer, with liberty for the plaintiff to except, and the benefit saved to the hearing. What afterwards became of the case does not appear. The benefit of the plea being reserved to the hearing, is an order too equivocal in its nature to found any absolute opinion upon it.

Then there is the case of Crop v. Norton, 2 Atk. 74, 9 Mod. 233, 235, where Lord Hardwicke is reported to have said, "that where a purchase is made, and the purchase-money is paid by one, and the conveyance is taken in the name of another, there is a resulting trust for the person who paid the consideration. But this is, where the whole consideration moves from such person. But I never knew it, where the consideration moved from several persons, for this would introduce all the mischiefs, which the statute of frauds was intended to prevent." Now, if this language was meant to apply to all joint purchases, where definite proportions of the estate were to be purchased for each party, as one fourth, one third, or one half, each paying his proportion of the purchase-money accordingly, it cannot be maintained; and the doctrine was overturned in Wray v. Steele, 2 Ves. & B. 388, by the vice-chancellor, Sir Thomas Plumer. But if the language was used (as I conceive it was) with reference to the case then before Lord Hardwicke, where there was a mixture of considerations of different natures, and no such definite proportions of the estate to be purchased and held by each party were ascertained, and no definite proportions of the purchase-money to be paid by each were fixed, then, in my judgment, there is great ground to sustain the doctrine. How, under such circumstances, would it be possible to say, what interest or trust in the property each was to take? Surely it would be too much to say, that it was to depend upon the future valuation of the property, or the future contributions made by the parties respectively towards the purchase, or the possible values of the interests in other property contributed by each. In Crop v. Norton, the purchaser surrendered his own interest in the old lease for one life, upon taking the new, and the other party, claiming as purchaser, paid £1,500 towards the renewal for three lives. But no sum was fixed as the agreed value of the old lease for the one life. Lord Hardwicke would not, under such circumstances, allow the parol agreement to control an express declaration of trust by the purchaser. Sir Thomas Plumer, in Wray v. Steele, 2 Ves. & B. 388, 390, has taken the same view of the case of Crop v. Norton, as that above suggested; saying, that the doctrine laid down by Lord Hardwicke must be understood with relation to the case before him, and not generally. That it was a mixed case, the consideration consisting not merely of money, but of the surrender of an old lease; and it was decided on the particular facts. Mr. Chancellor Jones, in his elaborate opinion in White v. Carpenter, 2 Paige, 241, took the same view of the doctrine of Lord Hardwicke, saying: "The grounds of the decision of Lord Hardwicke show, that Lord Eldon was right in saying, that this case was misconceived, when it was cited as an authority for the rule, that a trust could not result from the payment of part of the purchase-money. The principle is, that the whole consideration for the whole estate, or for a moiety, or a third, or some other definite part of the whole, must be paid, to be the foundation of a resulting trust. And that the contribution or payment of a sum of money generally for the estate, when such payment does not constitute the whole consideration, does not raise a trust by operation of law for him, who pays it. And the reason of this distinction obviously is, that neither the entire interest in the whole estate, nor in any given part of it, could result from such a payment to the party, who makes it, without injustice to the grantee, by whom the residue of the consideration is contributed." Upon the rehearing, Mr. Chancellor Walworth seems to have approved the doctrine of Mr. Chancellor Jones on this point. Id. 265. The same doctrine was fully recognised in Sayre v. Townsend, 15 Wend. 647. Now, under one aspect of this case, namely, the doubtfulness of the evidence to establish the proportions of the partners in the asserted partnership, and the extent of the advances made, or to be made, by the plaintiff towards the joint purchases, this doctrine might have had a most important bearing. But I now refer to it for the more direct purpose of showing that mixed purchases of this sort are held to be within the statute of frauds, when there have not been definite proportions and advances made towards the purchase-money by each of the parties interested.

The case of Leman v. Whitley, 4 Russ. & R. 423, is a strong case to show the general doctrine of the court, as to the admission of parol evidence in cases within the statute of frauds. There a son had conveyed to his father, nominally as a purchaser, but really as a trustee, that the father, who was in better credit than the son, might raise money on the estate by way of mortgage for the use of the son. The father died before the money was raised by mortgage. Upon a bill

brought by the son for a reconveyance, it was held that the case fell within the statute of frauds, and that parol evidence was inadmissible to establish the trust.

The case of Groves v. Groves, 3 Young & J. 163, shows how reluctant the court is to create any trust upon mere confessions, even confessions that the purchase-money had been paid by a third person.

The case of Forsyth v. Clark, 3 Wend. 637, establishes the doctrine, that, if a purchase is made of lands by one partner, it will not create a resulting trust thereon in favor of the partnership, even if the partnership funds have been appropriated to the purpose, unless the appropriation has been in pursuance of an agreement of the partners at the time of the purchase. If there be no funds of the partnership, as such, to be appropriated to the purpose, it would seem, a fortiori, that no such resulting trust could arise. The same point was decided in Hoxie v. Carr [Case No. 6,802].

Some cases have been cited on the other side, the most material of which I shall proceed to mention. Of these the most striking is Lees v. Nuttall, 1 Russ. & M. 53; s. c., 1 Tam. 282. There the defendant, an attorney, had been employed to purchase an equity of redemption of a mortgaged estate for his client, the plaintiff, and the attorney had purchased it in his own name, and insisted upon holding it in his own right. But the master of the rolls (Sir John Leach) held him to be a trustee for his client, and decreed a conveyance to be made to the client upon the payment of the purchase-money. The ground of the decision was, that the subsisting relation between the plaintiff and the defendant, as principal and agent, or client and attorney, disabled the defendant from holding the purchase for his own use. Now, that case is distinguishable from the present in the important fact, that the present purchase was made by the defendant, not as a mere agent, but as a principal in interest, and properly in his own name. If, in that case, the attorney had been authorized to purchase in his own name, in trust for his principal, that would have given rise to the very question now before the court. Then the case of Hess v. Fox, 10 Wend. 436. There a parol agreement was made between the mortgagor and mortgagee of an estate, that the mortgagor should convey an absolute title to the mortgagee, in order that the latter might sell the estate, and that, after discharging his own debt, the mortgagee should pay over the surplus to the mortgagor. The court held the case not to be within the statute of frauds. There, the legal title to the estate was vested in the mortgagee. The sale was executed and surplus money was claimed under the agreement, as the consideration for parting with the title. Now, there was here a plain resulting trust to the mortgagor, upon the conveyance of the equity of redemption, for he had received no consideration therefor. The sale of the equity was then a sale for his use. Then, the case of Bunnel v. Taintor's Adm'r, 4 Conn. 568. That was a case, where there was a parol agreement of the plaintiff and the intestate, to buy and sell lands on joint account. The plaintiff was to make the bargain for the purchasers, and to render all necessary services; the intestate was to furnish the purchase-money, and take the deeds in his own name, and execute the deeds or sales; and the profits were to be divided between them. After the death of the intestate, this action was brought for an account of the profits against the administrator. The case went off upon other points; but it was the opinion of a majority of the court, that the agreement was not "upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, within the statute of frauds of Connecticut"; though it was thought to be a mere point of speculation, not necessary to be decided in the case. Now the point in the present case is not, whether the contract was a sale of lands, or any interest therein, within the statute of frauds; but whether it is the case of a trust in lands, or the proceeds thereof, within the statute of frauds. This case, therefore, may be dismissed from our consideration, as it did not turn upon the point now in controversy. As to the case of Griffith v. Young, 12 East, 513, it is sufficient to say, that in that case the money had been expressly received by the defendant from a third person, to pay over to the plaintiff upon a consideration executed. But Lord Ellenborough said, that if the contract had been executory, it would have been within the statute of frauds. There is a case (Pitts v. Waugh, 4 Mass. 424), which seems to me also to approach nearly to the point of this very question. It was there decided, that the law merchant respecting dormant partners does not extend to partnerships formed for speculations in the purchase and sale of lands; that when lands are sold, no man as a dormant partner can claim any part of the lands by virtue of any conveyance, to which he is not, on the face of it, a party; and that, if the nominal purchaser choose to hold the lands, the party, who has advanced the money, if not named as grantee, can have no title to the land (at law), whatever remedy he may have against him, to whom the land was conveyed (in equity). The court were also of opinion, that a purchase and sale of that sort, by such a partnership, was within the statute of frauds.

These are all the most direct authorities, on which it seems important to comment. It seems to me, that they leave the case of Bartlett v. Pickersgill, 4 East, 577, note; s. c., 1 Eden, 515; s. c., 1 Cox, Ch. 15,—in full force unimpeached and unimpeachable. The true result to be deduced from the authorities seems to me to be, that in the first place the present cannot be deemed the case of a resulting trust in the lands purchased of Black,

or of the proceeds thereof, or in any other lands to be purchased on behalf of the asserted partnership; and, in the next place, that the whole title of the plaintiff resolves itself into a parol trust, created by an express agreement of the parties in the purchase and sale of lands on joint account, which is within the statute of frauds. It seems to me, that to admit the plaintiff to recover in this case, would break down the whole operation and policy of the statute of frauds in regard to trusts. I find, too, that the same view of the matter has been taken by Sir Edward Sugden, a most truly respectable authority upon such a subject, in the last edition of his treatise on Vendors and Purchasers.

Upon the whole, my opinion is, that the bill ought to be dismissed; but, under all the circumstances, without costs to either party.

SMITH (BURR v.). See Case No. 2,196.

SMITH (BURTON v.). See Case No. 2,219.

SMITH (CARDINEL v.). See Case No. 2,395.

Case No. 13,020.

SMITH v. CAROLIN.

[1 Cranch, C. C. 99.][1]

Circuit Court, District of Columbia. Nov. Term, 1802.

NOTES—SUBSCRIBING WITNESS—OBLIGATION TO PRODUCE.

If there be a subscribing witness to an instrument, evidence of the confession of the defendant will not dispense with the testimony of the subscribing witness.

Debt on a promissory note.

Mr. Jones, for plaintiff, produced a note having a subscribing witness who was not present in court, and offered to prove that the defendant acknowledged the note to be his.

Mr. Youngs, for defendant, objected, and cited Esp. N. P. 256, 781.

THE COURT refused to admit the testimony, on the general ground that the non-production of the subscribing witness induces a suspicion that if produced, he would testify something to the defendant's advantage. Peake, Ev. 7, 64-66.

KILTY, Chief Judge, contrà.

The plaintiff became nonsuit.

Case No. 13,021.

SMITH v. CATLETT.

[1 Cranch, C. C. 56.][1]

Circuit Court, District of Columbia. Jan. Term, 1802.

COURTS—KEEPING ORDER—BAIL.

The court will not interfere to prevent the bail from seizing the principal further than to keep order in court.

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

E. J. Lee presented to the court an affidavit, stating that Smith was bail for Catlett in a suit in the Dumfries district court. That Smith had this morning arrested Catlett by virtue of a bailpiece in the market place, but that Catlett forced himself into the presence of the court while sitting. That the marshal refused to suffer Smith to take Catlett by force out of court, and refused to turn Catlett out of court. The motion was to permit Smith to take him in the presence of the court and carry him away; or that the court would command him to surrender himself to his bail.

But THE COURT refused to interfere and commanded the marshal to see that order was preserved in court.

SMITH (CHAMBERS v.). See Case No. 2,582.

Case No. 13,022.

SMITH v. CHASE.

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

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

JUSTICE OF PEACE—BILL OF EXCEPTIONS.

Upon a jury trial before a justice of the peace, under the act of congress of March 1, 1823 [3 Stat. 743], "to extend the jurisdiction of justices of the peace in the recovery of debts in the District of Columbia," the justice is not bound to sign a bill of exceptions, as no writ of error, or appeal, will lie in such a case.

Appeal from a justice of the peace, whose judgment was given upon the verdict of a jury summoned by his order, under the fifteenth and sixteenth sections of the act of congress of March 1, 1823 (3 Stat. 743), "to extend the jurisdiction of justices of the peace in the recovery of debts in the District of Columbia." At the trial, the defendant tendered a bill of exceptions to an opinion of the justice, upon a point of law, which the justice refused to sign, and a motion was now made to compel him to sign it.

Mr. Ashton, for appellant, (the original defendant.) The statute of Westminister (13 Edw. I. c. 31) applies to all courts whose judgments may be reversed by writ of error, or writ of false judgment. Bac. Abr. tit. "Bill of Exceptions"; 2 Inst. 427; 1 Archb. Prac. 230. The justice's court is a court of common law and of record; for, by the act of 1823 (section 3) he is bound to keep a docket, and "therein to record and make regular entries of their proceedings," and they have power to fine and imprison for contempts.

Mr. Elkins, contra. A writ of error will only lie to a court originating from the common law. It does not lie to a court of summary jurisdiction. Tidd, Prac. c. 43. See Maryland Laws 1715, c. 12; 1753, c. 13;

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

1757, c. 11; 1760, c. 10; 1763, c. 21; 1791, c. 68; 1798, c. 70. These acts show that the justices' courts are statutory courts. They have no common-law jurisdiction. A certiorari only lies to such courts; but a certiorari does not lie after issue joined and venire awarded. The third section of the act of congress only requires the justice to keep a docket, and therein record his proceedings. This does not make his court a court of record. He could certify nothing but a copy of his judgment. Congress did not intend to give an appeal in cases tried by a jury. The trial by jury was given in lieu of an appeal. The justice is bound to give judgment according to the verdict.

Mr. Ashton, in reply. By the common law, in a jury-trial, the judge is obliged to give his opinion to the jury, if he be required so to do by either party. By the seventh section of the act, an appeal is given in all cases where the debt or demand exceeds the sum of five dollars. No exception is made of cases tried by jury; and boni judicis est ampliare jurisdictionem, to carry into effect the intention of the legislature.

THE COURT, (nem. con. but THRUSTON, Circuit Judge, doubting,) was of opinion that a writ of error would not lie to the judgment of a justice of the peace upon the verdict of the jury, and that he was not bound to sign a bill of exceptions.

CRANCH, Chief Judge. The court is of opinion that the motion must be overruled. Before I proceed to give the reasons which induce me to concur in the decision of the court in this cause, it is proper that I should state that those reasons are exclusively my own, and that the court is not responsible for them. Several questions arise in this cause. Does an appeal lie to this court from the judgment of a justice of the peace, given upon the verdict of a jury? If an appeal lies in such a case, in what manner shall the cause be tried here? By the court, or by a jury? If this court cannot re-examine the fact here, can it re-examine the law of the case? And how is the question of law to be judicially brought before this court, separated from the fact? And how can this court judicially know the facts upon which the question of law is to be raised? The jurisdiction given to justices of the peace in cases of small debts, is a special authority given by the statute. They have no civil common-law jurisdiction. Their cognizance of such causes is exclusive. No writ of error, nor habeas corpus, nor certiorari, will bring those causes into this court. Hartley v. Hooker, Cowp. 523. By the 6th section of the act, the judges of this court are expressly forbidden to hold original plea in cases within the jurisdiction of the justices of the peace; and it is only in cases of which the superior courts have concurrent jurisdiction with the inferior courts, that a writ of habeas corpus cum causa, or of certiorari will lie, at common law, to remove the cause from the inferior to the superior court. A writ of error lies only to a court of record, after judgment. It does not lie to the county court nor to the court of chancery, proceeding according to equity, because they are not courts of record. Co. Litt. 288b; Brooke, Abr. "Error," 95; 1 Rolle, Abr. p. 744, G. 1, 2; 37 Hen. VI. p. 13. "Wherever a new jurisdiction is erected by act of parliament, and the court or judge that exercises this jurisdiction acts as a court, or judge of record, according to the course of common law, a writ of error lies to their judgments; but where they act in a summary method, and in a new course different from the common law, there a writ of error lies not, but a certiorari." Groenvelt v. Burwell, 1 Salk. 200, 263, 396. "Wherever there is a jurisdiction erected with power to fine and imprison, that is a court of record, and what is there done is matter of record." Same case, 1 Salk. 200, 396. The jurisdiction given to justices of the peace, as single magistrates, being a new and special jurisdiction, to be exercised in a summary way, and not according to the course of the common law, a writ of error, at common law, would not lie to their judgments, nor a writ of false judgment; therefore a bill of exceptions could not be demanded under the statute of Westminster 2 (13 Edw. I. c. 31;) 2 Inst. 246. But whatever might be the jurisdiction of the superior courts of common law in England, this court, which is the creature of the statute, can only exercise such jurisdiction as is given to it by the statute. Its appellate jurisdiction over the judgments of justices of the peace, is derived entirely from the 7th section of the act of the 1st of March, 1823; by which it is enacted, "That in all cases where the debt or demand doth exceed the sum of five dollars, and either the plaintiff or defendant shall think him or herself aggrieved by the judgment of any justice of the peace, he or she shall be at liberty to appeal to the next circuit court to be held in the county in which the said judgment shall have been rendered, before the judges thereof; who are hereby, upon the petition of the appellant, in a summary way, empowered and directed to hear the allegations and proofs of both parties, and determine upon the same according to law and the right and equity of the matter;" "and either of the said parties may demand a trial by jury, or leave the cause to be determined by the court, at their election."

The only means by which a cause can be brought up from the justice of the peace to this court, is an appeal; which is a term, and mode of proceeding, borrowed from the civil law, and unknown to the common law. By the civil law an appeal brings up the whole cause, fact as well as law, to the appellate court; the judgment below is entirely vacated; the cause commences de novo in the appellate court, where the plaintiff, (or actor,) is allowed to make new allegations, and pro-

duce new evidence; "Non allegata allegare, et non probata probare." That this is also the meaning of the term, and the effect of the process, as used in the statute, is evident from its provisions, that the court should in a summary way hear the allegations and proofs of the parties, and determine both the fact and the law of the case. By the 15th and 16th sections of the act, when the sum demanded shall exceed twenty dollars, either of the parties, after issue joined, and before the justice shall proceed to inquire into the merits of the cause, may demand a trial by a jury, whereupon the justice is "required to issue a venire; and to swear the jury, well and truly to try the matter in difference between the parties, and a true verdict give according to evidence." "And the jury, being sworn, shall sit together and hear the proofs and allegations of the parties, in public, and when the same is gone through with, the justice shall administer to the constable" an oath to keep the jury together in a private room, &c., until they shall have agreed on their verdict, when they are to deliver the same publicly to the justice, who is "required to give judgment forthwith, thereon." It will be perceived, that upon a demand of a trial by jury, the cause is taken entirely out of the hands of the justice. He is obliged to summon and swear the jury, and to render judgment according to their verdict. No authority is given him to instruct the jury upon matter of law or fact, nor to set aside their verdict and grant a new trial.[1]

It seems to me that he acts as ministerially in entering the judgment upon the verdict, as the clerk of this court does, in entering its judgments. The jury are not bound by the opinion of the justice upon matter of law; nor do I perceive that he has a right to say what evidence they shall hear. If they disregard his opinion as to the law, or hear evidence which he disapproves, no new trial can be granted. They are to try the matter in difference between the parties; whether it be matter of law, or matter of fact. The jury seems to be a complete substitute for the justice, as to the trial of the cause. If a jury be not required by either party, the justice is to decide the fact as well as the law. If a jury be demanded, they are to decide the law as well as the fact. The right of appeal is given only to him who may think himself aggrieved by the judgment of the justice; not by the verdict of the jury. No man can think himself aggrieved by the judgment of a justice who exercises no judgment at all; who has no discretion—no choice—no will; but who is bound by law to enter up judgment according to the will of another. The 7th section, which gives the right of appeal, declares the mode of proceeding thereupon in the appellate court. That mode of proceeding is coextensive with the right of appeal; and if there be a case in which the appellate court cannot constitutionally proceed in that mode, it is fair to presume that the legislature did not mean to give an appeal in such a case. This construction of the statute seems to me not only reasonable in itself, but is the only construction which will make it consistent with the constitution of the United States, the 7th amendment of which declares that "No fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law." The only appellate jurisdiction given to this court is that which is given by the 7th section of the act; and that is a summary jurisdiction; not according to the rules of the common law. It is a jurisdiction to hear the allegations and proofs of the parties, and to determine upon the same, both as to fact and law; unless either party should demand a trial by jury; and to re-examine a fact by a jury, in an appellate court, which has been once tried by a jury in the court below, is not according to the rules of the common law. By that law, a fact, once tried by a jury, cannot be re-examined but in the same court by a new trial granted by that court. It would, therefore, be equally a violation of the constitution if this court should re-examine the fact in a summary way, either with or without a jury. See Parsons v. Bedford, 3 Pet. [28 U. S.] 446–448.

As, therefore, the act has not given this court any constitutional means of re-examining the facts, in such a case; and has given this court appellate jurisdiction over the judgments of a justice of the peace, only by appeal, which brings up the facts as well as the law, I think there is strong ground to conclude that the legislature did not intend to give an appeal in any case where the cause should be tried by a jury in the court below.

The position occupied by the 15th and 16th sections, (which is at the close of the act,) leads us to suppose that they were added as an amendment of the original bill as it was first drawn; and this is historically known to be the fact. The 7th section, when reported, did not contemplate a trial by jury before the justice. Although this circumstance is not a legitimate ground of construction, yet it corroborates the construction drawn from the language of the act itself, which, in its letter as well as its spirit, applies only to those cases in which the act of the justice is the real cause of the supposed grievance. It is objected, that this construction of the act puts it in the power of either party to deprive the other of an appeal, by demanding a trial by jury before the justice. This is true, but it is because it makes a case in which an appeal is not given; the trial by jury being substituted for it. The one prevents what the other was intended to remedy, namely, the erroneous judgment of the justice.

[1] Such was the limited authority of the steward in the court-baron of the manor; and of the sheriff in the torn. See Erskine's argument (in Case of Shipley, Dean of St. Asaph,) on the rights of juries. Volume 1, New York Ed. 1813) p. 155.

Being, then, of opinion that an appeal, in this case, is not given by the statute; and that this court has no common-law appellate jurisdiction to revise the judgments of justices of the peace, either by writ of error, writ of false judgment, habeas corpus, or certiorari,—I think the appellant has no right to require the justice to sign the bill of exceptions; that this court cannot compel him to do so; and that the appeal should be dismissed, with costs.

[NOTE. An action of debt on the appeal bond was afterwards instituted by Chase. The defendant, Smith, demurred, but the demurrer was overruled. Case No. 2,629.]

Case No. 13,023.

SMITH v. CHASE.

[2 Hask. 106.] [1]

District Court, D. Maine. Nov., 1876.

SEAMEN—SHIPPING ARTICLES—FOREIGN VOYAGES—DISCHARGE.

1. The maritime law requires that contracts touching the service of seamen should be in writing.

2. The statute of United States requiring such contracts with the crew of vessels on foreign voyages does not apply to vessels bound for the West Indies, Mexico, and British North America.

3. Shipping articles not stipulating the time when service shall begin are valid, and the service is to commence in a reasonable time, and parol evidence is competent to show what that would be.

4. A seaman who has signed articles, and does not report for duty on board ship at the stipulated time, or, if no time is stipulated, within a reasonable time, may be discharged from further service.

In admiralty. Libel in personam [by John Smith against Charles H. Chase] for one month's wages as mate. The answer admitted that the libellant signed articles for a voyage from Portland, Maine, to the West Indies, and back to the United States, but denied that he seasonably reported on board ship for duty, and averred his discharge before the commencement of the voyage for that reason.

James O'Donnell, for libellant.

A. W. Bradbury and Bion Bradbury, for respondent.

FOX, District Judge. The Revised Statutes of the United States (section 4511) provide for the execution of an agreement in writing or print with every seaman who is to be of the crew of foreign going vessels, except vessels bound to the West India Islands, Mexico and British North American possessions, and prescribe a form for such agreement. Section 4527 gives the right to recover one month's wages to "any seaman who has signed an agreement" and is discharged without justifiable cause before the commencement of the voyage. As this vessel comes within the exception named in section 4511, the question arises whether section 4527 applies to this case. One construction would limit the application of the last named section to such agreements as are prescribed by the other, and that would deprive the libellant of any claim by virtue of the statute. But a more extended examination of the Revised Statutes, title, "Merchant Seamen," makes it plain that other agreements with seamen are recognized and regulated by the law. Therefore, the words "an agreement" must be taken to apply to any written agreement whatsoever. But what is the agreement here proved? It is in writing, and is in the form of that directed by the statute for vessels not belonging to the excepted classes. Now there are two important omissions in this written instrument. The statute requires that the master shall first sign, and the paper shall be dated on the day of his signature. Inspection shows that this is dated June 2d, while several of the crew signed June 1st. Or if the date affixed to the master's signature is referred to, that will be found to be May 28th instead of the day the contract is dated. This is the first irregularity; the next is, the law dictates as essential, that a time for the seaman to go on board and begin work shall be contained in the written agreement. This requirement is so wholly disregarded in the case of this mate, that if this were a case calling for a statute agreement, it is so defective that it could not be enforced by the owners.

The act of 1790 [1 Stat. 131] provided shipping articles should be signed in case of every foreign going vessel, and rendered the owner liable to pay the highest rate of wages to every seaman carried to sea without his first signing such articles. In the Revised Statutes this provision is so altered as to relate only to vessels going from state to state. The act of 1873 [17 Stat. 410] amended the general shipping commissioners' act so as to relieve vessels named above from the general obligations; and there cannot now be found in the statutes any provision demanding contracts in writing to be made with sailors going on a voyage to the West India Islands. But the general maritime law, independent of statute, requires the contract to be written. Now what contract did this libellant enter into? Upon reading the articles, one is struck with the fact that they nowhere contain any express promise of the crew to perform the voyage. It is implied, but not expressed; and it is doubtful, in case of arrest for alleged desertion by a seaman whose name is here signed, if it would not be the duty of the court to discharge him on habeas corpus.

This contract is in the statute form, and if it were in a case where this form is dictated by law, it would be more satisfactory to overlook its defects. In the present case,

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

though with grave question of the propriety of the construction, it is, as a matter of law, held to be a complete agreement. As no time is fixed for the beginning of service, the law attaches the condition of a reasonable time. The contract being in writing, parol evidence cannot legally be received to vary, explain or contradict its express terms, or to affect its legal construction. But as it was to be performed in reasonable time, such evidence may be received to aid in determining what in fact, under the circumstances, was a reasonable time. The evidence presented fails to show that the libellant reported for duty in a reasonable time, and his libel must be dismissed.

SMITH (CHASE v.). See Case No. 2,629.

Case No. 13,024.

SMITH v. CHESAPEAKE & O. CANAL CO.

[5 Cranch, C. C. 563.] [1]

Circuit Court, District of Columbia. Oct. Term, 1839.[2]

EQUITY—SUIT TO ENFORCE JUDGMENT—MISTAKE.

A court of equity will not lend its aid to enforce a judgment at law obtained upon a prize ticket in a lottery drawn by mistake in a place not authorized by law.

This was a bill in equity [by Joseph Smith against the Chesapeake & Ohio Canal Company], claiming an annual dividend upon an unsubscribed claim against the old Potomac Company, according to the provisions of the second section of the charter of the Chesapeake and Ohio Canal Company, granted, by Virginia, on the 27th of January, 1824. The bill after stating the origin and surrender of the charter of the old Potomac Company, and the acts granting a charter to the Chesapeake and Ohio Canal Company, avers that the plaintiff is a creditor of the old Potomac Company upon a judgment of this court, obtained by the state of Maryland for the complainant's use at April term, 1820, for $12,750, with interest from the 20th of June, 1818, till paid, and $21.61 costs. That, by the second section of the charter of the Chesapeake and Ohio Canal Company, the subscriptions might be paid in the claims of the creditors of the Potomac Company certified by the acting president and directors to have been due for principal and interest, on the day on which the assent of the said company shall have been signified, by their corporate act, to the new charter of the Chesapeake and Ohio Canal Company as provided for in the first section of the charter of the 27th of January, 1824; provided that the amount of claims, thus to be subscribed, should not exceed $175,800; and provided that the new stock, thus paid for, should be entitled to dividend, only as thereinafter provided, (that is, after the cash-stockholders should have received ten per cent. upon the amount of cash paid upon their subscriptions. See section 11.) That by the twelfth section it is enacted, "that it shall be the duty of the president and directors of the Chesapeake and Ohio Canal Company, so long as there shall be and remain any creditor of the Potomac Company who shall not have vested his demand against the same in the stock of the Chesapeake and Ohio Canal Company, to pay to such creditor or creditors, annually, such dividend or proportion of the net amount of the revenues of the Potomac Company, on an average of the last five years preceding the organization of the said proposed company, as the demand of the said creditor or creditors, at this time, may bear to the whole debt of one hundred and seventy-five thousand eight hundred dollars."

The bill further states that the revenues of the Potomac Company, for the last five years preceding the organization of the Chesapeake and Ohio Canal Company, amounted to very large sums of money, but the precise amount, the plaintiff has been unable to ascertain. That the claim on which the judgment was rendered was assigned to the plaintiff for value received by one ——; and that before he purchased it he inquired of the president and many of the directors of the Potomac Company whether the claim was a fair and valid claim, and would be paid; to which inquiries he was answered by them in the affirmative; and that under the assurance, so given, he was induced to make the said purchase, and receive the said assignment. That on the 6th of December, 1824, he assigned to one George Luckley, for a full and valuable consideration, four thousand dollars, part of the said judgment, with interest thereon from the 24th of December, 1823, till paid. That on the 24th of December, 1827, the plaintiff presented a copy of the judgment to the secretary of the Potomac Company, to be certified to the Chesapeake and Ohio Canal Company, and were informed, by the secretary, that a copy of the judgment had already been filed and entered upon the proceedings of the said company with an assignment of part thereof, as aforesaid, to the said George Luckley. That on the 11th of August, 1828, the plaintiff made a written tender of the said judgment to the treasurer of the Potomac Company, with a request in writing that it should be certified to the said Chesapeake and Ohio Canal Company under the provisions of their charter; and that if such certificate should be refused, his application, and the refusal of the certificate should be entered on the minutes of the Potomac Company. That the certificate was refused and that the plaintiff does not know what proceedings were had, by the board of directors of that company, on his

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

[2] [Affirmed in 14 Pet. (39 U. S.) 45.]

said application. That he has been informed and believes that Luckley was permitted to subscribe his interest in the said judgment, under the plaintiff's assignment, to the stock of the Chesapeake and Ohio Canal Company. That the plaintiff had made frequent applications to the board of directors of that company for his dividend on that part of his said judgment which remained unassigned, and for which he has received no payment nor satisfaction according to the provisions of the twelfth section of the act of the 27th of January, 1824, and that the board have not only refused to pay him any dividend, but deny all liability for it. That the plaintiff has not the means of knowing the amount of the dividend to which he is entitled without access to the books and papers of the Potomac Company, now in the hands of the board of directors of the Chesapeake and Ohio Canal Company, and without an account to be taken of the average revenues of the Potomac Company for the last five years preceding the organization of the Chesapeake and Ohio Canal Company; that he has not the means of taking such an account, but they are in the power of that company, who refuse the plaintiff access thereto, &c., and he prays that that company may be made defendant, and may answer, &c.; and that an account may be taken to ascertain the dividend to which the plaintiff is entitled upon his judgment, and that the defendant may be decreed to pay the same; and for general relief.

The answer of the Chesapeake and Ohio Canal Company, admits all the acts of incorporation of the two companies, &c. Denies that, in making the estimate of the debts due by the Potomac Company, amounting to $175,800, the plaintiff's claim was included; and affirms that the claims against that company, certified by its president and directors according to the direction of the act, amounted to $175,325.76¾, in which no claim arising from the lottery was included. It states that the lottery "out of which the claim of the complainant arises," was unlawfully drawn in the District of Columbia instead of Maryland, although erroneously and in good faith. That this court decided, in an action brought for the price of tickets sold, that the lottery was void, and that no suit could be maintained for the price of the tickets, or for prizes. It denies that the judgment was assigned to the plaintiff "for value;" or that before he purchased it he inquired of the president and directors of the Potomac Company, or was by them informed, that the claim was a fair or valid claim, &c. It avers that the judgment was given under ignorance "on all sides" of the rights of the parties; that although Luckley was permitted, by the commissioners, to subscribe the amount of a claim, &c., the nature of the claim was not understood or investigated, &c. This answer was not upon oath, nor under the corporate seal, but no exception was taken to it; and the cause was set for hearing upon the bill, answer, general replication, and the affidavit of S. B. Harper, and the deeds from Smith to Harper, admitted in evidence by consent, and showing that the plaintiff purchased the ticket which had drawn a prize of $15,000 for $13,000, paid in land, houses, and goods, of that value: which prize was the cause of action upon which the judgment was rendered against the Potomac Company in favor of the state of Maryland, for the use of this complainant, upon which the present claim is founded. The case was then referred to a master commissioner to ascertain and report the average net annual revenue of the Potomac Company for the last five years, &c., which he found to be $5,984.06, and the amount of the plaintiff's claim upon the judgment, including the $4,000 assigned to Luckley, to be $17,-057.73; so that the plaintiff's annual dividend of the revenues of the Potomac Company would bear the same proportion to his claim as the whole revenues bear to the whole debts of that company, (namely, $175,-800,) if he is entitled to any thing.

Upon the coming in of the report, and on final hearing, THE COURT (CRANCH, Chief Judge, contra) dismissed the bill with costs, upon the ground, as it is understood, that the drawing of the lottery in Washington, D. C., was illegal, as being contrary to the Maryland act of November, 1792 (chapter 58), which was continued in force in this county by the act of congress of the 27th February, 1801 (2 Stat. 103), and which declares it to be unlawful, without the permission of the legislature of the state, to propose to the public any scheme of a lottery to be drawn within the state, under the penalty of £500 current money for every offence, to be recovered by indictment. This court, in the case of Hawkins v. Cox [Case No. 6,-243], at June term, 1819, decided that that act of Maryland was in force in this county, considering the county as standing in the place of the state; and intimated the same opinion in the case of Thompson v. Milligan [Id. 13,969], at June term, 1820, which was an action brought upon a note given for tickets in the second class of the Potomac and Shenandoah lottery, granted to the Potomac Company by the legislature of Maryland in the year 1809; upon which intimation, Mr. Key, for the plaintiff, became non-pros. See Holman v. Johnson, Cowp. 343, and 2 Comst. Cont. 239.

CRANCH, Chief Judge. 1st. The first question is, whether the illegality of the drawing of the lottery in the District of Columbia, instead of Maryland, is a defence in equity to the judgment at law, it being admitted that it was so done erroneously, but in good faith. 2d. Whether a claim against the Potomac Company, not included in the estimate of $175,800, mentioned in the second section of the act of the 27th of Jan-

uary, 1824, is entitled to a dividend under the twelfth section of that act, although the sum of $175,800 of claims should have been subscribed as stock in the new company. It is a rule in equity, that the court of equity will not aid a plaintiff in the recovery of a legal claim, contrary to conscience; that is, if the plaintiff ought not, in good conscience, to insist upon his legal right.

Whether the error, of drawing the lottery in the District of Columbia, instead of drawing it in Maryland, as stated in the answer, is sufficient to deprive the plaintiff of his equitable right to enforce his judgment. I doubt. (1) Because the answer admits that it was done by mistake, and in ignorance of the law against it, and in good faith by all the parties. There is nothing in it to affect the plaintiff's conscience. (2) Because the Potomac Company must be presumed to have sold the tickets and received the money before the lottery was drawn; and it would be against conscience in them, after receiving the fund out of which the prizes were to be paid, to refuse to pay them, upon the plea that they themselves, who had induced the ticket-holder to venture his money, had drawn the lottery in an unlawful place. It is presumed that the case alluded to in the answer was that of Thompson v. Milligan [supra], at June term, 1820; but the judgment under which the plaintiff claims, was rendered at the April term preceding. It does not appear that in the case of Thompson v. Milligan, this court decided any thing. Mr. Jones, for the defendant, in that case, took the ground that the note, which was for $2,422.50, the price of sundry tickets in the lottery, was given for an illegal consideration, as being contrary to the act of Maryland, 1792 (chapter 58), this court having, at June term, 1819, in the case of Hawkins v. Cox and Smith [supra], decided that that act of Maryland was adopted by the act of congress as the law in the county of Washington. Milligan's note having been given in that county, was supposed to have been given for an unlawful consideration, and Mr. Key, for the plaintiff, suffered a non-pros., but it has not yet been judicially decided that the Potomac Company was not liable for the prizes drawn in that lottery. (3) I do not think that the claims against the Potomac Company provided for by the twelfth section of the charter of the Chesapeake and Ohio Canal Company, are limited to $175,800. That is the limit of the stock of the new company, which should be paid for by claims of the creditors of the Potomac Company, certified by the president and directors of that company; but the twelfth section provides for all the creditors of that company who shall not have invested their demands against the same in stock of the new company, and does not require that those demands should be certified by the president and directors of the Potor Company.

If, therefore, the plaintiff had a valid claim against the Potomac Company on the 27th of January, 1824, he has a right annually to his proportion of the net amount of the revenues of that company, on an average of the last five years preceding the organization of the Chesapeake and Ohio Canal Company. For these reasons I do not concur in the decree of the court, dismissing the bill.

Decree affirmed by the supreme court, at January term, 1840. 14 Pet. [39 U. S.] 45.

Case No. 13,025.

SMITH v. CINCINNATI, H. & D. R. CO.

[2 Cin. Law Bul. 243.][1]

Circuit Court, S. D. Ohio. 1876.

EQUITY—ADEQUATE REMEDY AT LAW.

A bill in equity, filed in the United States court, must be dismissed where it appears that the plaintiff has a complete remedy at law.

In equity. Plaintiff [Thomas G. Smith] sued as assignee in bankruptcy of M. W. Stone, alleging that said Stone had been lessee of the grain elevator adjacent to the defendant's railroad depot in Cincinnati; that the elevator company and the railroad company had entered into a contract on the 11th day of June, 1862, whereby the railroad company agreed to deliver all grain in bulk "arriving here" over its railroad to the elevator company: that the railroad company violated the agreement by delivering bulk grain directly to consignees, at Brighton station, and in its depot yards. The case came on upon bill and answer. The defendant raised the point of jurisdiction, which is disposed of in the opinion.

Hoadly, Johnson & Colston, for plaintiff.

Matthews, Ramsey & Matthews, for defendant.

SWAYNE, Circuit Justice. My judgment in this case will be confined to a single point. The suit is brought to recover damages for the violation by the defendant of the contract set forth in the bill. No other relief is asked for. This is the sum total of the case as presented in the record. It is therefore in fact an action of assumpsit in the form of a bill in equity. The objection is taken that there is a remedy at law as complete and effectual as can be given by a court of equity. Where this objection is apparent in a court of the United States, such court is bound to recognize it and give it the same effect sua sponte, as if it had been presented by demurrer or otherwise, and insisted upon by counsel. In such cases the defendant has a constitutional right to a trial by jury. The principle is jurisdictional, and he cannot be denied the benefit of its application. Parker v. Woolen Co., 2 Black [67 U. S.] 551; Hipp v. Rabin, 19 How. [60 U. S.] 278; Lewes v. Cocks, 23 Wall. [90 U. S.] 469. That this is a proper case wherein to give effect to the objection.

is clear both upon reason and authority. Richmond v. Dubuque & S. C. R. Co., 33 Iowa, 423, 479.

That the complainant has prayed for a discovery and needs it, is no answer, for two reasons: 1. The corporation can only answer by its officers and servants. The same persons, in an action at law, can be served with a subpœna duces tecum and thus be compelled to be present and to have with them the books of the company. Their testimony can thus be readily and fully taken upon a trial at law as in a suit in equity. It would of course be the same in both cases. 2. The act of congress of June 1, 1871 (17 Stat. 197, § 5), requires that "the practice, pleadings, forms and modes of proceeding in civil causes, other than equity and admiralty causes, shall conform as near as may be" to the same things "in the courts of record in the state in which such circuit and district courts are held." The Ohio Code Civ. Proc. § 105 (Seeney's Ed., p. 193) authorizes the plaintiff to file interrogatories with his complaint or declaration, and provides that the defendant may be compelled to answer. Thus, a suit at law would give to the plaintiff all the advantages of a bill of discovery in equity, and at the same time conserve to the defendant the benefit of his constitutional right to a trial by jury. The frame of the bill is perhaps liable to some technical objections, but I do not deem it necessary to consider that subject. Whether well founded or not they are not material to the view which I have taken of the case.

In my judgment the bill must be dismissed. If an action at law shall be instituted, all the depositions taken in this case can probably be read in that proceeding. Greenl. Ev. §§ 553, 554.

Case No. 13,026.

SMITH v. CLAFLIN et al.

[19 N. B. R. 523.] [1]

District Court, S. D. New York. Dec. 4, 1879.

BANKRUPTCY—ILLEGAL SALE—CONSPIRACY TO DEFRAUD—BILL FOR ACCOUNT.

Under a provisional warrant in a bankrupt proceeding the marshal seized certain goods which were in the possession of the firm of D. & A. under a claim of title derived by purchase from persons in the employ of the bankrupt. The goods were delivered to the assignee by the marshal, and have been sold for the benefit of the estate. D. & A. sued the marshal for conversion, and have recovered a judgment on the ground that the warrant did not authorize the seizure of goods in the actual possession of a third party under claim of right, though the title thereto might be in the bankrupt. That suit is still pending, in the state court on appeal. The price paid by the parties who held the goods came to C. & Co., to whom the bankrupt was indebted under circumstances strongly tending to show that C. & Co. and one L., who was guarantor to C. & Co. for the bankrupt's indebtedness to them, had conspired with the purchasers to effect a fraudulent sale of the goods for the purpose of using the proceeds to pay the debt of the bankrupts to C. & Co.; *Held*, that although the transaction might be fraudulent as against the creditors and the assignee of the bankrupt, a bill in equity for an accounting and payment of the proceeds or value of the goods would not lie against C. & Co., L. and D. & A., because the assignee showed no legal injury to him by the fraud, his possession of the goods for the benefit of the estate being undisputed.

[1] [Reprinted by permission.]

In equity.

D. M. Porter, for complainant.

W. H. Arnoux, S. Tenney, and J. A. Koones, for defendants.

CHOATE, District Judge. I do not see any principle on which this bill can be sustained upon the evidence. It is a bill brought by the assignee in bankruptcy of the firm of Lagrave & Otis, praying for an accounting and payment to the complainant of the proceeds of certain goods of the bankrupt, alleged to have been fraudulently and unlawfully taken and disposed of by the defendants in pursuance of a combination between them to that end. It appears that after Lagrave & Otis failed and had absconded, the defendant Landers, who was a relative of Lagrave, and who was liable as guarantor for Lagrave & Otis to the defendants H. B. Claflin & Co. to the amount of five thousand dollars—the entire debt of Lagrave & Otis to H. B. Claflin & Co. being eight thousand three hundred dollars—obtained the goods from the defendants, George Wagner and George L. Wagner, employés of Lagrave & Otis, in whose possession they were, upon a promise to pay them some one thousand two hundred dollars due to them from Lagrave & Otis, with the avowed purpose of protecting himself against his guaranty by disposing of the goods and paying the proceeds to the defendants, H. B. Claflin & Co., upon the debt of Lagrave & Otis to them. The goods were worth about seven thousand dollars. The Wagners clearly had no right to sell them to Landers in this way, as he well knew, but the sale was made by a transfer of the bills of lading about one or two hours before the creditors' petition in bankruptcy was filed. Landers was himself a salesman in the employ of the defendants H. B. Claflin & Co. The goods were taken to H. B. Claflin's warehouse, and for the sake of secrecy the marks on the cases were altered; they were then removed to H. B. Claflin's store upon a consent obtained by Landers from one of their employés, and examined and repacked by Landers, and, with the aid of other persons in the employ of that firm, sent to another warehouse. The petition in bankruptcy was filed May 30, 1872. On the 10th of June, 1872, the goods being in warehouse, Landers sought an introduction to Mr. Doyle, of the firm of Doyle & Adolphi, who were also made defendants in this suit, and who were dealers in goods of the same kind as those thus taken by the defendant Landers. This introduction was made at H. B. Claflin & Co.'s store by one Wilkinson, a salesman of H. B.

Claflin & Co. And thereupon the defendant Landers offered the goods to Doyle for five thousand dollars, exhibiting the invoice of the goods, and Doyle thereupon agreed to purchase them upon a credit of four months, and he gave his firm's note for five thousand dollars at four months. This sale was made without an examination of the goods and with no previous acquaintance between Doyle and Landers, and upon Wilkinson's guaranty that it was all right. A few days after, the warehouse receipts were delivered to Doyle & Adolphi by Wilkinson, who held them at the request of Landers, so that Landers might not be found in the apparent possession of the goods. While the goods were still in the warehouse they were seized by the United States marshal, who held a provisional warrant in this bankruptcy proceeding. Landers sold the note immediately to the defendant Baishfield, the cashier of H. B. Claflin & Co., for four thousand eight hundred dollars. Baishfield drew the money out of his account with H. B. Claflin & Co., in which he had standing to his credit about twelve thousand dollars. Landers immediately paid the amount he received, four thousand eight hundred dollars, to H. B. Claflin & Co. on account of the debt of Lagrave & Otis. The note was paid at maturity. On the 28th of June, 1872, Doyle & Adolphi sued the United States marshal in a state court for the conversion of the goods, alleging that they were the lawful owners and in the lawful possession thereof. The marshal defended on the ground that Doyle & Adolphi had no title, and that he was justified under the provisional warrant in seizing the goods as the property of the bankrupts. The first trial took place in June, 1875, resulting in a verdict for the defendant by direction of the court. The verdict was set aside and a second trial took place in December, 1876, which resulted in a verdict for the plaintiffs, Doyle & Adolphi, for seven thousand four hundred and twenty-three dollars. The jury found as matter of fact that Doyle & Adolphi were in possession, claiming to hold the goods in their own right, and that the sale to them was not a sham sale—that is, that they were not acting in the matter merely for Landers or H. B. Claflin & Co.—and the court instructed the jury that the provisional warrant did not justify the marshal in seizing goods in possession, not of the bankrupts, but of a third party claiming them as owner for himself. That suit is still pending on appeal in the court of appeals. On the 10th of September, 1872, an order was entered by this court in the matter of Lagrave & Otis, bankrupts, upon the written consent of the attorneys who appeared for Doyle & Adolphi in their action against the marshal, directing that the assignee in bankruptcy sell at public auction the goods in question then being in his possession, and hold the proceeds according to the provisions of the bankrupt act [of 1867 (14 Stat. 517)]. The goods having been seized by the marshal, were by him delivered to the assignee.

I think it is a fatal objection to the maintenance of this action that the assignee in bankruptcy has sustained no damage whatever by the wrongful acts complained of. Without question the transfer by the Wagners to Landers was a fraud upon the creditors of the bankrupt, and was also without any authority derived by them from the instructions of Lagrave & Otis or from their power as agents of that firm. So far as these three defendants were concerned, the operation differed little, if at all, from robbery. Nor do I see how the defendants H. B. Claflin & Co. could hold on to the proceeds of the goods as against the assignee, if the payment to them operated to deprive him of the goods. Those proceeds are clearly traced into their hands. They gave no consideration for them, and they can hardly be held ignorant of the proceedings going on in their own place of business, transacted by their own employés for their own benefit, and of which they took and held the fruits. Nor, it seems, did Doyle & Adolphi take, as against the assignee, any better title than Landers, who, having purchased from agents having no authority to sell as this sale was made, took no title. And even if he took a technical title, which I think he did not, the very suspicious circumstances under which they bought, and not even relying on his apparent possession and ownership, but on Wilkinson's guaranty, would, it seems, have made their title void as against the assignee, so that he could, after demand, have recovered the goods from them in a proper form of action. If they came not unlawfully into possession of the goods, they could not have held them against the assignee after demand. But the state court has held—and there is no occasion here to question the correctness of the ruling—that the provisional warrant did not authorize the marshal to take the goods from them if they were in possession, claiming title in them for themselves. And on the ground that the title of Doyle & Adolphi, that is, their possession under a claim of title, was a good enough title against a trespasser, the suit was decided against the marshal. This decision appears to be in conformity with the construction given by the supreme court of the United States to those parts of the bankrupt law defining the summary jurisdiction of the district court as a court of bankruptcy, which has been held not to extend to the determination of questions of title between the bankrupt and third parties. In re Waitzfelder [Case No. 17,048]. But the fact that the marshal in this proceeding was a trespasser did not affect the right of the assignee to the possession of the goods. He did not instigate the seizure by the marshal, and is not prejudiced by it. As the court held the law, the marshal, in seizing the goods, was not acting under his warrant at all. When, therefore, the assignee received the goods from the marshal he did not adopt the act of the marshal by which the marshal obtained them. If a thief had stolen them from Doyle & Adolphi, and the assignee found them in the thief's

possession, I see no reason why he could not take them as the goods of the bankrupt if the thief gave them up to him, without being prejudiced in any way by the thief's acts. I know of no principle on which the marshal can call on the assignee, whatever may be the final result of the suit against the firm, for a return of the goods or their proceeds, or for reimbursement of his loss, if it proves such. Nor has this court any duty of protecting the marshal against the legal consequences of his unlawful act. If this is so, then the assignee, notwithstanding all the wrongs intended by the defendants, is still in undisturbed possession, for the benefit of creditors, of the goods in question, and therefore has sustained no loss or damage. If loss results to the marshal this suit is not brought to relieve him, if indeed he can be relieved at all. And if the marshal finally prevails in his defence, it is of no concern to this complainant how the defendants may adjust the matter among themselves.

Bill dismissed without costs.

Case No. 13,027.

SMITH et al. v. CLARK et al.

[Brunner, Col. Cas. 345;[1] 3 Am. Law J. (N. S.) 155.]

Circuit Court, D. Massachusetts. Oct. 17, 1850.

PATENTS—INFRINGEMENT—WHAT CONSTITUTES.

Where parts of a patented article have been in general use prior to the patent, such parts may be used in another invention, and such use will not be an infringement on the patent of the first article.

[This was a bill in equity by Francis O. J. Smith and others, against Joseph W. Clark and others for the infringement of letters patent No. 4,453, granted to S. F. B. Morse, April 11, 1846, reissued June 13, 1848 (No. 118).]

B. R. Curtis and F. O. J. Smith, for plaintiffs.

C. L. Woodbury, Geo. Gifford (of New York), and R. Choate, for defendants.

WOODBURY, Circuit Justice. His honor proceeded first to construe the patent of Mr. Morse, which he did in a manner to sustain its validity, viz.: that the claim of the principle, or the use of the motive power of electro-magnetism, must be understood as being in combination with the machinery by him invented. To give it a broader signification, his honor said would be to make void the patent of Mr. Morse. Having determined the construction of the patent his honor proceeded to consider and comment on the evidence contained in the record, and after briefly considering the numerous European telegraphs, electric and galvanic, which were invented during the last century and the present one (including Sœmering's, Ronald's, Schilling's, and one at Madrid and others), his honor proceeded to comment on the attempt of Coxe, in America, and after on the electric recording telegraph invented by a son of Massachusetts, at Long Island in 1828, Mr. Harrison Gray Dyar, which he characterized as of remarkable ingenuity, as in the application of the idea of time in regulating the space so as to compose an alphabet, and the first American who had succeeded in this purpose of recording, although the system he used differed some from both House and Morse. The experiments of Prof. Henry, at Albany, also anterior to Morse's attempt, in which he endowed the electro-magnet with power equal to raising the weight of a ton, and obviated the great difficulties which had lain in the way of using electro-magnetism. These all preceded the passage on board the ship Sulley, in 1832, when Mr. Morse and Dr. Jackson conversed on the subject, and when Mr. Morse commenced his labors. After following down the various inventions and labors of Sternheil, Gauss, Alexander, Weber, Cook, and Wheatstone, on the telegraph, to the date of Morse's application for a patent, in 1837, his honor remarked that something was wanted in all these to produce a result perfect for practical use; that among the sixty competitors who had labored for this end, Morse appeared to have got the most practical and perfect machine. The combination of the pen point and the machinery to move paper, with the telegraph, his honor thought to be that desideratum and the essential point in Morse's invention. His honor said that Mr. Morse and his assignees would be protected in the method of telegraphing claimed by Mr. Morse. The pen, a most happy thought; the rollers and paper, a most important thought; and the stenographic alphabet, the crowning thought; and any infringement on the things described, etc., would be punished. While Morse is thus secured, the same latitude is left open for his successors to invent as was accorded to Mr. Morse in improving on his many predecessors.

Now, has this patent been violated by the defendants? The defendants insist they have used nothing which was not open and public before the date of Morse's invention. While shielding the public in this right, we must not allow any one to use the invention of Morse without his assent. House's machine appears much unlike Morse's, and in its work differs in using two new powers. While Morse's is simple, that of House is so complicated as to require days of attention by mechanics to understand. While Morse's is speedy, House's gives lightning to Roman letters; his speed of breaking and closing is much greater than Morse's, and without this greater speed he could not accomplish his object. This is not the same system as Morse's, and is much more than that of Alexander. Morse's machine traces the signs intended;

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the type or the lever at one end do so, and the pen at the other also. House's machine does not do this. It acts at both ends by signals, and traces nothing. This new power of axial magnetism, the invention of which is claimed by Mr. House, aids in transferring this so as to have it printed, and the U magnet of Mr. Morse would be utterly inefficient for this purpose. House's is a signal and printing telegraph, and Morse's is a writing telegraph. The electro-magnetism between the two points had been used long before Mr. Morse, and is, therefore, no infringement of his invention. House produces in his machine new results, and cannot be considered as an equivalent for Morse's, as he uses neither the pen, the lever, nor the stenographic alphabet to translate the signs, as appears from the testimony of Prof. Henry, Dr. Jackson, Prof. Hare, Col. Borden, Hibbard, Channing, etc.

His honor then commented on the originality and novelty in House's machine of the axial magnetism and the use of the air tubes and condensers, and expressed himself astounded, in examining this case, to find that so much which he had supposed to have been near an original in telegraphing, was not of late origin nor derived from Mr. Morse's, as electro-magnetism, wires, etc., but that the invention of Mr. Morse lay in a different place from what he had formerly supposed. Morse's leading novelties, his honor thought, were: (1) The local circuits. (2) Writing at a distance by electro-magnetism. (3) The stenographic alphabet. Neither the electro-magnetism, nor the Roman letters, nor the printing apparatus were invented by Morse. The local circuits and the stenographic alphabet were not used by House, nor the writing, etc.

The opinion of the experts who testified in the case as to the principles of the two machines, stood thus: Mr. Morse, who was not regularly educated to mechanics, and whose profession was that of a portrait painter, and beside him Mr. Foss, his assistant, who until a few days past had been employed only as a grocer and baker, alone regarded this as an infringement. On the other hand, a numerous body of experts in mechanics, some twelve or fourteen, embracing some of the most talented men in the country in their profession, unite in opinion that this machine of House's is no infringement. Some of these gentlemen say the two machines are as unlike as a goose quill and a printing press. His honor said he thought the difference of Mr. Morse and Foss from the rest of the experts arose from their attaching a wrong meaning to the word "principle," as used in the patent law, and that, setting aside the battery and wires, etc., which were public long before Morse began to invent, there could be no question of infringement. The public had the same right to make and re-employ the old modes, the same privilege to make improvements as Morse had in 1832. His honor said, on considering the whole, I do not think the plaintiff entitled to an injunction. His honor expressed his sense of the weight due to the decision of Judge Monroe of Kentucky, against O'Reilly [Case No. 9,859], but thought it did not apply in this cause, and said that his examination of the evidence in this cause had impelled him to take the views of the subject he had stated, and which, if wrong, he felt gratified it was in the power of another and higher tribunal to reverse.

[NOTE. A final decree was rendered on the 17th day of October, 1850, for the respondents, and on the same day plaintiffs appealed to the supreme court, and on the 30th of October, 1850, filed his appeal bond with sureties, whereby execution on the decree was suspended. A motion to docket and dismiss the appeal was made and overruled. 12 How. (53 U. S.) 21.

[For other cases involving this patent, see Morse & Bain Tel. Case, Case No. 9,861; Smith v. Downing, Id. 13,036; Same v. Selden, Id. 13,104; Same v. Eli, Id. 13,043; O'Reilley v. Morse, 15 How. (56 U. S.) 109.]

Case No. 13,028.

SMITH et ux. v. CLARKE.

[4 Cranch, C. C. 293.] [1]

Circuit Court, District of Columbia. March Term, 1833.

PLEADING AT LAW—PROOF—VARIANCE—DUE-BILL MADE TO WIFE—BEFORE MARRIAGE—DURING COVERTURE.

A due-bill made to the wife during the coverture, and for a consideration accruing during the coverture, is not admissible evidence to support a declaration which avers that the due-bill was made dum sola.

The declaration stated that the due-bill, which was made to the wife, was made to her dum sola. The due-bill offered in evidence was given to her after the marriage, and during the coverture, for a consideration accruing during the coverture.

The defendant objected to the evidence for the variance, and the objection was sustained by THE COURT. (THRUSTON, Circuit Judge, absent.)

SMITH (CLASON v.). See Case No. 2,868.

SMITH (CLEAVELAND v.). See Case No. 2,874.

Case No. 13,029.

SMITH et al. v. COLEMAN et al.

[2 Cranch, C. C. 237.] [1]

Circuit Court, District of Columbia. April Term, 1821.

DEPOSITION—NAME IN CAPTION—NOTICE—PRACTICE.

1. If the name of one of the defendants be omitted in the caption of a deposition, it cannot be read in evidence in the cause.

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

2. It is not necessary that the magistrate who takes a deposition under the act of congress [3 Stat. 350], should certify that the opposite party had no attorney within one hundred miles of the place of caption, in order to excuse the want of notice.

3. If the defendant call upon the plaintiff to produce a certain account at the trial, and, when produced, refuses to read it, in evidence, the plaintiff cannot read it to the jury, in evidence, because called for by the defendant.

[Cited in Griffin v. Jeffers, Case No. 5,817.]

[This was an action by Joseph Smith & Son against George Coleman and others.]

This was a cause transmitted from Alexandria county, for trial in this county.

Mr. Key, for defendants, objected to the deposition of Charles H. Hall, because it does not appear to be taken in this cause,—the name of James Anderson, one of the defendants, having been omitted in the caption.

Mr. Jones, contrà. On an indictment for perjury, it might be averred that the deposition was made in this cause, notwithstanding the omission of the name. So, in special pleading, it might be averred to be taken in this suit, and proved by parol.

THE COURT (nem. con.) rejected the deposition, because it did not appear to be taken in a cause in which James Anderson is a defendant.

Mr. Key also objected to the deposition of David Seldon, because the judge had not certified that the defendants had no attorney within one hundred miles of the place of caption. He had certified that no notice was given to the adverse parties, because they were within one hundred miles, but said nothing of their attorney.

THE COURT (nem. con.) overruled the objection, because the judge was not required, by the act of congress, to give any reason for not giving notice; and, if he had, his certificate would not be conclusive evidence of the fact that neither the party nor his attorney was within one hundred miles of the place of caption. The defendants, not having had notice, may object, on that ground, and the plaintiffs may show, in fact, that neither the defendants nor their attorney were within the one hundred miles, &c.

The defendants having given notice to the plaintiffs to produce a certain account at the trial, and the plaintiffs having produced it accordingly, the defendants declined to use it; whereupon the plaintiffs offered to read it, in evidence, to the jury. To this the defendants objected, and

THE COURT (nem. con.) sustained the objection, and refused to permit the plaintiffs to read it to the jury. The plaintiffs became nonsuit, but the court permitted the cause to be reinstated, upon payment of the costs of the term.

The cause, at a subsequent term, was, by consent, returned to the Alexandria docket.

SMITH (CRAIG v.). See Cases Nos. 3,338 and 3,339.

Case No. 13,030.

SMITH v. CRAWFORD.

[6 Ben. 497;[1] 9 N. B. R. 38.]

District Court, S. D. New York. May, 1873.

BANKRUPTCY — LIMITATION OF SUITS — ADVERSE INTEREST—CASES CRITICISED.

1. An action at law was brought by an assignee in bankruptcy, to recover a debt due to the bankrupt before the adjudication. The petition in bankruptcy was filed December 31st, 1868, and the plaintiff was appointed assignee April 1st, 1869. The debt accrued February 5th, 1867. The defendant pleaded specially, "that the cause of action did not become vested in or accrue to the plaintiff at any time within two years next before the commencement of the suit." The plaintiff demurred to the plea: *Held*, that the limitation of two years, prescribed in the second section of the bankruptcy act [of 1867 (14 Stat. 517)] did not apply to such actions as the present, and that there must be judgment for the plaintiff on the demurrer.

[Cited in Brooke v. McCraken, Case No. 1,932; Pickett v. McGavick, Id. 11,126. Cited, contra, in Walker v. Towner, Id. 17,089.]

[Cited in Beeson v. Shiveley, 28 Kan. 580.]

2. The cases of Mitchell v. Great Works Milling, etc., Co. [Case No. 9,662], and Pritchard v. Chandler [Id. 11,436], criticised. Sedgwick v. Casey [Id. 12,610], maintained.

[This was an action by Albert Smith, assignee of Merrick G. Reade and Charles D. Chase, bankrupts, against David Crawford, Jr., to recover a debt alleged to be due by the defendant to said bankrupts.]

F. R. Coudert, for plaintiff.

F. F. Marbury and C. M. Da Costa, for defendant.

BLATCHFORD, District Judge. This is an action at law to recover an alleged debt due to the bankrupts before their adjudication. The petition was a voluntary one, filed in this court, December 31st, 1868. The plaintiff was appointed assignee April 1st, 1869. The indebtedness set forth in the declaration is alleged therein to have accrued on the 5th of February, 1867. The declaration is on the money counts, and an account stated. The defendant pleads the general issue, and also a special plea, that the "supposed causes of action in the said declaration mentioned, touching the rights of property of Merrick G. Reade and Charles D. Chase, the bankrupts aforesaid," did not "become vested in, or accrue, to the said plaintiff at any time within two years next before the commencement of this suit." The plaintiff demurs generally to the special plea, and the defendant joins in demurrer.

The only question presented on this demurrer is the same one adjudged by this court in Sedgwick v. Casey [Case No. 12,610]. But this court is pressed to review and reverse the decision then made.

The plea demurred to is sought to be maintained under the 2d section of the bankrupt-

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

cy act, which provides, that the several circuit courts of the United States, within and for the districts where the proceedings in bankruptcy are pending, shall "have concurrent jurisdiction with the district courts of the same district, of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to, or vested in, such assignee; but no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee." It is contended that this suit is a suit at law against a person claiming an adverse interest touching a right of property of the bankrupts, which is vested in the plaintiff, as their assignee. The right of property is said to be the debt or claim which is sought to be enforced in this suit. It is said that the suit is one touching, and to enforce, that right of property, and that the defendant claims an adverse interest, because the plaintiff seeks to recover the debt out of some property which the defendant has and claims, and to which, by defending the suit, the defendant asserts an adverse interest, which interest will be divested, if such property shall be taken, as a result of the suit, to pay the plaintiff's claim.

In Sedgwick v. Casey [supra], the view held was, that the 2d section does not apply to a suit merely to collect a debt or enforce payment of money due on a contract; that, to bring any suit by an assignee in bankruptcy within the section, it must be a suit wherein the plaintiff claims an interest adverse to the defendant in or touching some property, or right of property, of the bankrupt, transferable to or vested in, the plaintiff, as assignee, or one wherein the defendant claims an interest adverse to the plaintiff, as assignee, in or touching some such property, or right of property; that, in the case then before the court, the defendant claimed no ownership of, or title to, the debt or contract which the plaintiff was seeking to enforce against the defendant, nor did the plaintiff claim any ownership of, or title to, any specific property, or right of property, as having passed to him by virtue of his appointment, which the defendant also claimed to own, nor did the defendant claim any ownership of, or title to, any specific property which belonged to the bankrupts; that the limitation of two years applies only to such controversies; that, besides, it applies to controversies of which, by the same 2d section, the circuit court of the district has concurrent jurisdiction with the district court of the same district; and that the circuit court of this district would have no jurisdiction of the suit then before the court.

The construction I so placed upon the language of the 2d section was, that one of the two adversary parties to the suit must claim an adverse interest, tnat is, an interest adverse to the other party, respecting some property, or right of property, of the bankrupt, transferable to, or vested in, the assignee, and that the suit must be one involving such claim of adverse interest. I could not and cannot regard a mere debtor to the bankrupt as a claimant of an adverse interest, within the section, if sued by the assignee, to recover such debt. True, the suit is, in one sense, a suit touching a right of property of the bankrupt, vested in the assignee; because, the debt was a right of property of the bankrupt, and it is vested in the assignee, and the suit is founded on it. True, also, the defendant is an adverse party in the suit. But he does not claim an adverse interest touching, that is, in or respecting, the debt claimed, in the sense of the section. He does not claim an adverse interest in anything which, by the suit, the assignee claims and seeks to enforce an interest in. The assignee cannot claim to be vested, by the bankruptcy proceedings, with any interest in such property of the debtor as may be taken to pay the debt. Any interest which he could possibly acquire in such property would not be an interest passing, or transferable, or vested, by the assignment in bankruptcy, but would be an interest resulting solely from a judgment in his favor as plaintiff in the suit. Nor does the defendant claim to own, or have any interest in, or title to, the debt sued on.

If the construction contended for by the defendant were to prevail, the language of the 2d section would cover all suits that an assignee, as such, could bring or that could be brought against him, as such assignee. For, as the assignee has, as such, no property or right of property that does not come from the bankrupt, and as the party opposed to the assignee, in the suit, and the assignee, are adverse parties to each other, in the suit, the description would cover all such suits. Of all such suits the circuit court would, by the section, have concurrent jurisdiction with the district court. On such view, all that is said, in the section, about adverse interest touching the property and rights of property mentioned, might as well have been omitted, and the jurisdiction have been given, concisely, of all suits by or against the assignee, touching the property and rights of property mentioned.

Jurisdiction is expressly given to the district court, by the 1st section of the act, to collect all the assets of the bankrupt. This suit is simply a suit to collect an asset of the bankrupts, without being a suit to recover anything as transferred in violation of the 35th or 39th section of the act, under the

right of action given by those sections, and in which the transferee claims an adverse interest, and without being a suit to recover anything else in which an adverse interest is claimed. Therefore, the jurisdiction of this court over the subject-matter of this suit needs no support, and can receive none, from any section of the act except the 1st section. A suit brought under the jurisdiction conferred on the circuit courts by the 2d section, may be a suit to collect an asset of the bankrupt. A suit brought under the right of action given by the 35th and 39th sections may result in collecting an asset of the bankrupt. But, it has been held by the supreme court (Smith v. Mason, 14 Wall. [81 U. S.] 419) that the enumeration, in the 1st section, of the controversies to which the general jurisdiction of the district court extends, and which enumeration includes "the collection of all the assets of the bankrupt," does not include the suits mentioned in the 2d section; and that a suit by an assignee in bankruptcy, to divest a person of an interest claimed by such person in a fund transferred by the bankrupt before the adjudication of bankruptcy, must be brought under the 2d section, in a plenary way, and not under the 1st section, as a summary proceeding, although the thing sued on is, necessarily, an asset of the bankrupt.

It is contended, for the defendant, that, whatever view may be taken of the clause, in the 2d section, conferring jurisdiction on the circuit courts over the suits specified therein, the clause in regard to the limitation is so broad as to cover the present suit. The provision is, that "no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee." It is contended, that this is a plain provision, that no suit shall be maintainable by or against the assignee, touching the property and rights of property of the bankrupt, transferable to, or vested in, the assignee, unless it is brought within two years from the time the cause of action accrued for or against the assignee; and that this suit is one touching, and founded on, such a right of property. But this view allows no meaning to the words, "or by or against any person claiming an adverse interest." In order to give any meaning to those words, it must be held that the limitation prescribed refers only to the kind of suits mentioned in the previous part of the same section. The two parts of the sentence are separated by a semicolon. The granting of jurisdiction to certain circuit courts, in such suits, precedes, in the sentence. Then follows the semicolon. Then follows the word "but," as introducing a restriction on the exercise of jurisdiction, in such description of suits, by any courts, by a limitation thereof, as to time. The limitation must, it seems to me, to give effect to all its language, be held to mean the same as if it read, that "no suit at law or in equity shall, in any case, be maintainable by such assignee, against any person claiming an adverse interest, touching the property and rights of property aforesaid, or by any person claiming an adverse interest, touching the property and rights of property aforesaid, against such assignee, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee."

The case principally relied on to sustain the view urged on the part of the defendant, as to the construction of the clause of the 2d section in regard to the jurisdiction of suits, is that of Mitchell v. Great Works Milling & Manuf'g Co. [Case No. 9,662], which arose under the bankruptcy act of August 19, 1841 (5 Stat. 440). The 8th section of that act contained this provision: "The circuit court within and for the district where the decree of bankruptcy is passed, shall have concurrent jurisdiction with the district court of the same district, of all suits at law and in equity which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt, transferable to, or vested in, such assignee; and no suit at law or in equity shall, in any case, be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued." The language of this section is, to all intents, the same as that found, as before quoted, in the 2d section of the present act. There is some difference in punctuation, as seen in the two citations, but none to affect the question involved. The suit, in the case cited, was a bill in equity, brought in the circuit court for the district of Maine, by an assignee in bankruptcy, to obtain an accounting by the defendants in respect of an agency of the bankrupts for them, and the payment of a sum which, it was alleged, would be found due on such accounting. The bill was demurred to. One of the objections taken was, that the circuit court had no jurisdiction of the case. The court (Mr. Justice Story) proceeds, first, to consider the question of the jurisdiction of the district court over such a case, and holds that it finds such jurisdiction conferred on the district court by the 6th section of the bankruptcy act of 1841, in its provision, that the "jurisdiction in all matters and proceedings in bankruptcy," arising under the act, "to be exercised sum-

marily, in the nature of summary proceedings in equity," conferred on the district court, "shall extend to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy." This clause it holds "to include the jurisdiction to entertain suits to adjust all adverse claims, and to collect all outstanding debts." It further holds, that the circuit court, under the 8th section of the act, was given jurisdiction of the case. The view taken is, that "a debt claimed by, and due to, the bankrupt, from any person, is a right of property in the bankrupt," assignable under the act, and suable by the assignee; that the debtor, in every such case, is, necessarily, in the sense of the act, an adverse party, because he does not pay the debt, and resists its payment, on suit brought, and that the statement in the 8th section, that the jurisdiction therein given to the circuit court is a concurrent jurisdiction with the district court, shows that the district court has, by the 6th section, jurisdiction of such a suit. This reasoning is, to my mind, entirely unsatisfactory, and on the grounds before stated. The statute does not say that the circuit court shall have jurisdiction of every suit to which the assignee is a party, and wherein he is an adverse party to the other party, touching the property or rights of property mentioned. The fact of bringing the suit, makes the party bringing the suit against the assignee, and the party against whom the assignee brings the suit, a party adverse to the assignee, in the suit. The statute does not speak of "an adverse party." It speaks of a person claiming an interest adverse to the assignee, touching the property or rights of property referred to.

In Pritchard v. Chandler [Case No. 11,436], Mr. Justice Curtis follows such decision of Judge Story, and holds that, "a suit by an assignee, to recover a debt due to the bankrupt, is," under the 8th section of the act of 1841, "a suit against a person claiming an adverse interest touching a right of property of the bankrupt, within the meaning of that section of the act, and that such a suit is, therefore, within the jurisdiction" of the circuit court.

The case of McLean v. Lafayette Bank [Case No. 8,885], did not involve the question, for that was a suit to set aside certain alleged liens on the property of the bankrupts, as created in fraud of the bankruptcy act.

Opposed to the construction put by Mr. Justice Story and Mr. Justice Curtis, on the 8th section of the act of 1841, is the language of Mr. Justice Nelson, in Re Conant [Case No. 3,086], where he says, that the limitation in that section "applies only to suits growing out of disputes in respect to property and rights of property of the bankrupt which come to the hands of the assignee, and to which adverse claims existed while in the hands of the bankrupt, and before the assignment."

Under the present bankruptcy act, the uniform current of decisions has been in accordance with the views of this court in Sedgwick v. Casey, no case being cited which holds a different view.

In Woods v. Forsyth [Case No. 17,992], the circuit court for the district of Missouri (Judges Treat and Krekel) held that it had not "concurrent original jurisdiction given it by the bankrupt act, for the collection of the debts due the bankrupt and the settlement of his estate;" that the concurrent jurisdiction conferred by the 2d section of the act "is confined to cases in which there is a disputed title or claim to property, to suits in which some title or claim to the property or assets, adverse to that of the assignee, is set up;" and that the court had no jurisdiction of the suit before it, which was a suit by an assignee in bankruptcy to collect a debt due by the defendant to the bankrupt prior to the bankruptcy.

In Re Krogman [Case No. 7,936], the district court for the Eastern district of Michigan (Judge Longyear) concurred with the views of this court in Sedgwick v. Casey.

In Davis v. Anderson [Case No. 3,623], in the district court for the Eastern district of Missouri, Judge Treat states his view to be, that the limitation in the 2d section of the act "is to be confined to controversies about property rights, or legal and equitable titles to property."

In Goodall v. Tuttle [Case No. 5,533], which was a suit in the district court for the Western district of Wisconsin, brought by an assignee in bankruptcy to collect a debt claimed to be owing by the defendant to the bankrupt at the time of the commencement of the bankruptcy proceedings, Judge Hopkins says, that the 2d section of the act does not clothe the circuit court with jurisdiction of such a case.

The case of Bachman v. Packard [Case No. 709], is a case precisely like the one at bar. The plaintiff, as assignee in bankruptcy, brought suit in the circuit court for Oregon, to recover the amount due on a promissory note made by the defendant to the bankrupt before the bankruptcy. There was a demurrer to the complaint, assigning for cause that the court had not jurisdiction of the subject of the action. The opinion of the court (Deady, J.) is very full, on the question, and holds the same views which I have maintained in the present case. It cites the decision of Judge Story under the act of 1841, and examines it, and dissents from it, and sustains the demurrer.

There must, therefore, be judgment for the plaintiff, on his demurrer to the special plea.

Case No. 13,031.

SMITH v. CREASE.

[2 Cranch, C. C. 481.] [1]

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

PRINCIPAL AND SURETY—EXTENSION OF TIME—RELEASE OF SURETY.

If a creditor having the bond of his debtor with a surety, takes a new security payable at a day beyond the time of payment of the bond, without the consent of the surety, with the understanding that he was not to trouble the principal for the money, unless the new security should prove to be good for nothing, the surety is discharged, and his remedy is in equity.

This was a suit in equity, in which the plaintiff [Joseph Smith] stated that he was surety for Thomas Mount, in two single bills for $1000 each, dated in July, 1815; one payable with interest on the 1st of July, 1817, and the other on the 1st of July, 1818, to Anthony Crease, the defendant's testator; and when he thus became surety, he took a deed of trust upon the property of Mount for his indemnification. That the first of the bills having become payable, and remaining unpaid; and before the second had become payable, the creditor, Anthony Crease, without consulting the plaintiff, took from Mount an assignment of one J. W. Bronaugh's bond for $2000, to one Richard Weedon, who had assigned it to one John Mount, who had assigned it to the said Thomas Mount; which bond was payable on the 1st of March, 1819, eight months after the last of the bills in which the plaintiff was a surety, and was to be held by Crease as a collateral security for Mount's debt; that is to say, the said Anthony Crease was "to use due diligence to collect the said debt of the said J. W. Bronaugh, and if the same was not collected, your orator did suppose that resort was to be had to the said Thomas Mount, and the other assignors of the said bond." That when the plaintiff was informed of this arrangement, he considered himself released from his responsibility, and gave up to the said Thomas Mount the lien which he held for his indemnification. That Crease obtained judgment against Bronaugh upon the bond, but he never paid it, and was discharged under the insolvent act. That Crease did not bring suit against the assignors. That after this arrangement. Crease never set up any claim against the plaintiff for Mount's debt, and died in September, 1820, leaving the plaintiff under a belief that he was no longer liable for the debt; but that his executors have obtained judgment at law against him upon the bills, and will enforce the same unless restrained, &c.

The defendants, in their answer, deny that Bronaugh's bond was received in payment of the debt of Mount, or on any other terms than as a collateral security. They deny that their testator agreed, or bound himself to wait the result of the collection of Bronaugh's bond; or in any manner precluded himself from proceeding against Mount and his surety whenever he pleased, on their original obligations. They deny that the plaintiff took the deed of trust for his indemnity when he became surety for Mount, and that his supposed exoneration was the motive for his release of his lien upon Mount's property. In order to account for not having brought suit against the assignors of Bronaugh's bond, they say they have been informed that John Mount and Richard Weedon are insolvent. They also say that they have returned Bronaugh's bond to Thomas Mount.

The deposition of Thomas Mount was taken, in which he says, that, "as he" (Mr. Crease) "appeared uneasy, I told him I would give him this bond," (that is, Bronaugh's bond,) "with the understanding that he was not to trouble me for the money without this bond should prove good for nothing, to which he agreed, and took the bond, and accordingly never did ask me for any part of the principal afterwards." The receipt given by Mr. Crease for Bronaugh's bond was as follows: "Memorandum. Received, Alexandria, 3 April, 1818, of Mr. Thomas Mount, J. W. Bronaugh's bond, assigned by Richard Weedon to John Mount, and by John Mount to Thomas Mount, for $2000, which I hold as collateral security for moneys due me. Anthony Crease. Said bond becomes due, 1 March, 1819."

The cause having been set for decree by consent, and submitted to the consideration of the court (in the absence of THRUSTON, Circuit Judge) during the vacation,

MORSELL, Circuit Judge, at November term, 1824, after stating the case, delivered the opinion of the court, as follows:

Although the testimony of Mount is thus let in, it would be still insufficient, unless fortified by strong and pregnant circumstances. being contradicted by the oath of the defendants. Let us, then, examine what the circumstances are. Was there any previous engagement on the part of Mount to give this additional security, at the time it was given, for any other and different consideration? None such appears in the proof in the case. In the absence of all proof on the subject, what is the common and ordinary understanding in a case where the bond of another man is assigned as such collateral security? Is it not universally and invariably implied that he shall use all necessary and legal steps to obtain payment from the obligor, (unless insolvent) first, and before he proceeds against the assignor? And does not the law raise such an implied condition? But this is a stronger case than the ordinary; for the bond of Bronaugh thus received, had actually a considerable time to run, beyond the time when both the notes would fall due, before it could even be demanded. Can it be supposed for a moment, that it was not understood between the parties, that Crease should at least in-

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

dulge Mount on the bills until Bronaugh's bond should become due, so that it might be ascertained whether that obligation would be paid or not? And what has been the conduct of Crease and his executors? Have they not actually waited, and indulged Mount for years after the bills became due, and until after the suit against Bronaugh had been prosecuted to a stage conclusively to show that no fruits were to be had from the judgment; that Bronaugh was a bankrupt; their own actions thus strictly corresponding with what Mount states to have been the agreement.

It does seem to me, therefore, that these circumstances are strong and pregnant, and completely fortify and establish Mount's testimony. Before, however, the legal effect is considered, I will notice some other parts of the case.

1. As to the time which was suffered to elapse between the time when the bills became due, and that of suits being brought against Mount and Smith; I should say that mere delay to call on the principal debtor, or mere forbearance to sue him would not amount to a discharge of the surety, unless gross laches were proved. I am not prepared to say that the negligence in this case did amount to such gross laches.

2. As to what is stated in the answer to have taken place between one of the defendants and the complainant, Smith, shortly before the bringing of the suit against him, the negotiation and the offer appear to have taken place with a view to prevent suit being brought, and in a spirit of compromise; and there does not appear to have been any such clear binding promise or engagement on the part of Smith, as to revive and set up the claim, if the same was, at the time, extinguished as to him, and which will now be considered by applying the law to what appears to be the proof in the case.

The law, as clearly laid down and settled, will, I think, be found to be this: The surety being importantly interested in the contract, or agreement, there should be no transaction with the principal without acquainting him therewith. The original implied contract is, that as far as the nature of the original security will admit, the surety, paying the debt, shall stand in the place of the creditor; so also the surety has a right, the day after the bond is due, to come into a court of chancery and insist on its being put in suit against the principal debtor; and finally the law seems to be clear, that if a creditor agree with his debtor to postpone the day of payment, or in any other way to change the terms of the contract, without the consent of the surety, the latter is discharged, even although the change should be for his advantage.

The last consideration will be, that admitting the arrangement thus to have operated a discharge, is the complainant in time, and before a proper court, with his defence? Should not such a defence have been set up to the action at law, especially as to the single bill which had not fallen due at the time of the agreement? On this point, I confess I have felt considerable difficulty in the course of my examination into the subject. I have found the American authorities differing, some being on one side, and some on the other. The English authorities are pretty clear that the chancery forum is the proper one; and I incline to think so also.

Let the decree, therefore, in this case, be for the complainant, making the injunction perpetual. The authorities relied on are: 7 Bac. Abr. 506; 10 Johns. 180, 587; 6 Ves. 734; 18 Ves. 21; 2 Ves. 540.

Case No. 13,032.

SMITH v. The CREOLE et al.

[4 Am. Law J. (N. S.) 558; 5 Pa. Law J. Rep. 186; 9 Leg. Int. 74.]

District Court, E. D. Pennsylvania. April 5, 1852.[1]

COLLISION IN HARBOR—PRESENCE OF PILOT—EFFECT OF COMPULSORY PILOT LAWS.

[1. A vessel having on board a licensed pilot, in compliance with a compulsory pilot law, such as the act of Pennsylvania of March 29, 1803, is not liable for a collision which happens through her fault while being navigated under his command. Not being selected by the voluntary act of the owners or master, his wrongful acts are not imputable to them, or to the vessel, on the ground of agency.]

[2. The Pennsylvania compulsory pilotage law of 1803 applies to foreign as well as American vessels.]

[3. Quære, whether a vessel may be liable in rem for a tort under circumstances which exclude any personal liability on the part of her owners.]

[This was a libel in rem against the ship Creole to recover damages alleged to have resulted from a collision.]

G. M. Wharton and R. R. Smith, for libellant.

Mr. Kane, for the Creole.

Mr. Sanderson, for the Sampson.

KANE, District Judge. The Creole, a British ship, outward bound, and in charge of a licensed pilot, left her moorings at one of the Delaware wharves, under tow of the steam tug Sampson, and immediately afterward ran afoul of the John Smith, a small steamer lying at the island opposite the city. The present libel is against both the Creole and the Sampson, for the damage which was occasioned by the collison. There was unquestionably fault on the part of one or both the respondent vessels, and there was none on the part of the libellant. The ship was drawn out from the dock while the tide was too strong for the steam tug to counteract it; besides which, as it seems to me, the operation of removing her was performed unskill-

[1] [Reversed in Case No. 13,033.]

fully; the ship being made to describe three-quarters of a circle, while under full tideway, instead of a single quadrant, before her head could get round to her course down the river. She had not completed this gyration when the collision took place. Regarding these, then, as the immediate causes of the accident, I should have no difficulty in decreeing for the libellant, as the party wronged, but for the fact that the real blame seems to me to rest upon the pilot alone. The ship and the steam tug were both of them under his orders, and there is no pretence that he was interfered with or disobeyed.

By an act of assembly of Pennsylvania, passed March 29, 1803 [4 Smith's Laws Pa. 73] provision is made (section 17) for the selection of pilots by the wardens of the port, and (section 18) for licensing the pilots so selected, after they shall have given bond with surety in a sum not exceeding five hundred dollars, nor less than three hundred, for the faithful performance of their duties. The 29th section of the same act makes it the duty of all sea-going vessels to employ one of the pilots so licensed. The language of the section, so far as it bears on the case before me, is as follows: "Every vessel, bound to a foreign port shall be obliged to receive a pilot; and the master shall make known to the wardens the name of the pilot who is to conduct her; and if he neglect to make such report, he shall forfeit and pay the sum of sixty dollars; and if the master shall refuse or neglect to take a pilot, the master, owner, or consignee of such vessel shall forfeit and pay to the wardens a sum equal to the half-pilotage of such vessel, to the use etc." By a supplement to this act, passed Feb. 24, 1820, the penalties I have recited are declared to be liens upon the vessel, and process in the nature of admiralty process is directed to issue from the state courts to enforce their payments. Though claims for half pilotage are thus put upon the same footing as the claims of material men against domestic ships in regard to which the United States courts have always felt themselves authorized to take jurisdiction of the statutory lien, I have not heretofore sanctioned the use of our admiralty process to collect them. So far as I know, the admiralty courts, like those of more general equity, have refused their aid to the enforcement of penalties, even such as were imposed by law for a breach of contract strictly within our cognizance. I have done so myself, under the passenger law, more than once, when this very ship, the Creole, or one of the same name, was the delinquent, and, if my memory serves me, in cases also under other acts of congress. And I have felt the less inclined to admit a departure from this principle in cases arising under the Pennsylvania pilot act, because I knew not only that the act itself was the subject of constant and grave controversy with reference to its effect on the navigating interests of our port, but also that its constitutional validity had not been fully conceded among the members of the profession. I do not remember that, in any one of the numerous cases of collision that have been so ably discussed before me, there has ever been an inquiry whether there was or was not a pilot on board the offending ship.

Whether I shall be required hereafter to recognize the half pilotage lien as one to be enforced in the admiralty of this district, is a question not necessary to be considered now. But a recent decision of the supreme court of the United States (Jan. T., 1852), by declaring that the pilot acts are within the constitutional sphere of state legislation, has given great interest to the other question, whether the presence of a pilot on board and in command exonerates the vessel and cargo from liability for a collision. I cannot disguise from myself that this may be a momentous question, in its bearings on the safety of our bay and river navigation, and not remotely on the prosperity of our city. I fear that our whole system of pilot laws; the humble grade of qualification which it exacts of the candidates for pilot's license; the imperfect manner in which their qualifications are tested; the tenure of the pilot's office, independent of everything outside the board of wardens; the very limited security which he is required to give; and the compulsion which rests on the master of an inward-bound vessel to accept the first pilot that boards him,—all these, taken together, do not promise such a safeguard against collisions on our long and intricate river, or such an assured indemnity for the consequences of them, as to make us willing to forego, if we can help it, all recourse for a party aggrieved against the vessel that has run him down. I think, too, I can see that one class of vessels, which the policy of the admiralty has heretofore held to a most rigorous accountability, and which has been able, as a class, to respond more amply than any other for the damage it may have done, will hereafter find it politic, if it be practicable, to devolve its liabilities for collisions upon some licensed pilot and his three or five hundred dollar surety, to be sued at common law. The question, however, is not I apprehend, a new one, either in its principle or its terms. There can be no liability for collision where there has been no wrong. The foundation of the demand against the owner, in personam, or his vessel, in rem, is that he or his representative had the power to prevent the wrong. The master is the owner's representative, for the owner selects him, and substitutes him for himself, or does without him, if he pleases, and takes the command in person. "Qui facit per alium," etc., explains this liability very perfectly. But it has never been held that the ship owner should answer for the conduct of a prize master, or the piracies of a revolted crew—nay, not even for their contracts, though made for the benefit of the ship,—

The Anne [Case No. 412],—and for the simple reason that there is no such thing as a representative in invitum, and no such thing as a liability for the acts of a stranger. The pilot, if it is the law that places him in the charge of a vessel, is as little the owner's representative, as the marshal is who holds her in possession under a writ of attachment.

Our only inquiry then is whether it is the law or the ship owner that puts the pilot on board? Is it a case of compulsion? or is it not? I confess I cannot see what discretion is left to the owner or his representative, save that which belongs to every man, of violating a law and taking the consequences. If the Creole had not received a pilot, she would have incurred a penalty of sixty dollars, to begin with, for not reporting her pilot's name to the wardens, and a further penalty, to the use of the Pilot's Society, equal to half the charge for pilotage; and for these penalties she might have been arrested, brought back to the wharf, libelled, and sold. Besides, the words of the act are strong ones: "She shall be obliged to receive a pilot;" and a state court, having full criminal jurisdiction according to the common law, might, peradventure, hold that to violate an injunction like this, was to commit a misdemeanor. This looks very like compulsion.

If we pass from principles to authority, the question at the present day seems equally clear. The reports of some of the early cases do not distinguish as carefully as they might between the compulsory and the voluntary employment of a pilot, and the reasons which have sometimes been given in the common law courts might apply equally well to one or the other. Milligan v. Wedge, 12 Adol. & E. 742, and cases there cited. But I believe no judge, except Sir John Nicholl, in The Girolamo [3 Hagg. Adm. 169] and other cases in 3 Hagg. Adm., has ever held a party liable for the conduct of third persons whom the law compelled him to employ. The fully reasoned decisions of Dr. Lushington, in The Protector [1 W. Rob. Adm. 57], The Maria [Id. 95], The Diana [Id. 131], and The Duke of Sussex [Id. 275], explained by himself in The Agricola [2 W. Rob. Adm. 10], The Batavia [Id. 407], The Eden [Id. 442], and other cases, in 2 W. Rob. Adm., must be regarded as fixing the law of the English admiralty on the subject. Where a pilot has been received on board in obedience to a statutory injunction, and the blame of a collision, occurring while he is in charge, is not shared by the officers or crew, and is not referable to the defective character of the vessel itself, the vessel and her owners are not responsible. Smith v. Condry, 1 How. 34. I thought at first, on reading over the adjudications of Sir John Nicholl, that there might be a reason for not applying the general rule to the particular case before me; and I invited, therefore, an argument upon the two questions: 1st. Whether the compulsory provisions of our pilot acts apply to foreign ships. 2nd. And whether there might not remain a recourse in rem, though the owners were discharged from personal liability. But I now see no reason for either of these exceptions. Whatever may have been the case under some of the British pilot laws, the words of which might, by reference to other statutes, be construed without too much effort, so as to exclude foreign vessels, the general English law makes no distinction; and in the Pennsylvania act, which makes part of our question, the phraseology is too clearly general to be misapprehended. Indeed the Pennsylvania act, so far from relieving foreign vessels from its operation, mulcts them in special liabilities. Acts Pa. 1803, p. 76, § 27. Obviously there is no reason of policy to found a distinction on between the two. When the act is considered as a police regulation to guard against accidents from collision, or as the means of providing vessels with guides to the navigation of the bay and river, familiar with its tides and channels and with the regulations and usages of the port, it should bear on all alike, for all alike derive benefit from it, and alike require to be controlled.

The other question also, though expressed in general terms, was in fact suggested by the proviso of British statute, which reserved to the admiralty its jurisdiction in cases of damage under the pilot system, while taking away in certain cases that of the courts of common law. It is enough to say that the question cannot arise on the language of the Pennsylvania act.

This last question might perhaps invite a discussion on the broader ground which was taken by the advocate for the Creole. What is the admiralty import of a proceeding in rem? And does it so connect itself with the question of a personal liability, as that the thing may be liable, although the owner is not, and never has been? I do not refer to the case of a hypothecation, actual or constructive, as there is a bottomry, or where the question is of affreightment, or supplies, or seamen's wages. All these belong to the category of contract. But how is it with the recourse in rem in a cause of damage by collision? The English books do not help us to answer. The standard treatise of old Clerke has not a word about collisions, or the redress for them, and not a word about proceedings in rem, except where the dispute concerns the title or right of possession in a ship. What we recognize as the process in rem would seem to have been introduced into the courts of admiralty after the time of Queen Elizabeth, and was probably resorted to at first as a means of saving some part of their ancient jurisdiction from the innovating grasp of the common law judges. It must have been known as early as 1648, when the ordinance of the commonwealth declared the admiralty jurisdiction to be against the vessel and her apparel in cases of damage among

others; but this ordinance having expired at the Restoration, in 1660, Godolphin, whose work was published the year afterwards, makes no allusion to this as a form of process. Godol. c. 4, p. 41. There is, properly speaking, no lien in a case of collision, and cannot be, for the subject is tort. Yet the remedy, according to the ancient and practically approved opinion in this district, is not affected by a change of property in the thing; no one has contended in this court that his vessel was free of liabilities for a collision because he had purchased her after it took place. Doctor Lushington almost asserted a doctrine like our own when he decided in The Aline, 1 W. Rob. Adm. 117, 119, that the decree in favor of the party damaged took precedence of a bottomry bond. But in The Druid, Id. 399, where the immediate question was brought to his notice more directly, he passed it by with the remark that an innocent purchaser may possibly have his ship arrested and sold for damages done by her before his purchase; and, generally speaking, the judicial opinions in the English admiralty, and the treatises which follow them, Lord Tenterden's among the rest, seem to regard the vessel and her owner as legally convertible terms. Still I cannot help thinking that there is a difference between them, and that the remedy in rem is not merely another mode of giving effect to a personal liability. I have myself endeavored to trace the analogies and history of this form and measure of redress through the Roman law and the maritime codes of a later period But the libraries to which I have access are so imperfect as to leave me uncertain of the correctness of my conclusions. For the present case it is enough to say, the vis major of the law must be esteemed as effective as any other in absolving both the ship and her owner; and that, therefore, whether the vessel can or cannot be regarded in any case as the subject of an independent liability, she can never be regarded as liable for the consequences of an act done under legal compulsion. I shall therefore dismiss the libel; but without costs. Decree accordingly.

[The cause was taken to the circuit court on an appeal, where the decree of this court was reversed. Case No. 13,033.]

Case No. 13,033.

SMITH v. The CREOLE et al.

[2 Wall. Jr. 485.] [1]

Circuit Court, E. D. Pennsylvania. April. 1853. [2]

TOWING TUGS—STATUTES WITH PENALTY—PUBLIC PILOT—LIABILITY OF SHIP FOR HIS NEGLIGENCE.

1. Where a larger vessel—a ship—is in tow of a small one—a steam tug—the latter is in law regarded as the servant of the former; and being thus its agent, and so bound to obey its orders, is not responsible for damage in the proper course of the employment.

[Followed in The Sampson, Case No. 12,280. Cited in The Belknap, Id. 1,244; The Frank Moffat, Id. 5,060; Albina Ferry Co. v. The Imperial, 38 Fed. 617; The Express, 46 Fed. 863; Homer Ramsdell Transp. Co. v. Compagnie Generale Transatlantique, 63 Fed. 853.]

[Cited in Saulter v. New York & W. S. Co., 88 N. C. 123.]

2. The Pennsylvania pilot act of 29th March, 1803 [4 Smith's Laws (Pa.) p. 67], which "obliges" vessels going out of or coming into the port of Philadelphia to receive a pilot, under a "penalty," and "forfeiture" of half-pilotage, which the act makes a lien upon the ship, and recoverable in the admiralty, is not compulsory, but is optional. The ship need not take a pilot, if it prefers to pay the penalty or forfeiture. Hence, there being a direct privity between the pilot and the ship, the latter is liable in admiralty for damage caused by his acts.

[Followed in Chase v. Crary, Case No. 2,626. Cited in Camp v. The Marcellus, Id. 2,347; The China, 7 Wall. (74 U. S.) 66; Sherlock v. Alling, 93 U. S. 107.]

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

An act of assembly of Pennsylvania, passed in 1803, provides for the selection of pilots by the wardens of the port, and for licensing the pilots so selected, after they shall have given bond with surety in a sum not exceeding five hundred dollars, nor less than three hundred, for the faithful performance of their duties. And one section declares that "every vessel (including, of course, foreign vessels), &c., shall be obliged to receive a pilot—in the case of an inward bound vessel, the pilot who shall first offer himself; and in the case of one outward bound, it is enacted, that the master shall make known to the wardens the name of the pilot who is to conduct her (who, by understanding among the pilots, is always the same person who brings her up); and if he neglects to make such report, he shall forfeit and pay the sum of sixty dollars; and if the master shall refuse or neglect to take a pilot, the master, owner, or consignee of such vessel shall forfeit and pay to the wardens a sum equal to the half-pilotage of such vessel, to the use of the society for the relief of distressed and decayed pilots, their widows and children." By a supplement to this act, the "penalties" above recited are declared to be liens upon the vessel, and process, in the nature of admiralty process, is directed to issue from the state courts to enforce their payment. See Act March 29, 1803, §§ 17, 18, 29, and Act Feb. 24, 1820 [7 Laws Pa. 40]. The act is a long and circumstantial one of thirty-seven sections, and under its provisions the port of Philadelphia has long been almost exclusively governed. It makes in short a complete and authoratative code of port warden law. Its title is "To establish a board of wardens for the port of Philadelphia, and for the regula-

[1] [Reported by John William Wallace, Esq., and here reprinted by permission.]

[2] [Reversing Case No. 13,032.]

tion of pilots and pilotage, and for other purposes therein mentioned." It directs certain penalties, which it prescribes to be paid to the "Society for the Relief of Distressed and Decayed Pilots, their Widows and Children." But it does not establish or regulate or in any other way refer to that society, which was one previously in existence. The Pennsylvania act, unlike one or more of the English pilot acts hereafter mentioned, which, in effect, though not in terms, oblige or require masters to take pilots aboard, does not contain a clause exempting masters or owners for damage done through the neglect, default, incompetency, or incapacity of the pilot. With this act in force, the Creole, a British ship, bound out and in charge of a licensed pilot, left one of the Philadelphia wharves, under tow of the steam tug Sampson, a small steamer of sixty horse power; and in a very culpable manner, owing solely to the negligence of this pilot, ran foul of the John Smith, which was quietly moored in a proper place on the opposite shore. The ship and tug were, of course, both under the pilot's command, and there was no pretence that he was interfered with or disobeyed. On a libel filed against both the steam tug and the ship, the district court, from which the case came here by appeal, was of opinion that they were both exempted, from the fact that both were in charge of a licensed pilot, whom the court considered had been compulsorily taken aboard. [Case No. 13,032.]

In order to understand fully the arguments of court and counsel, and the cases which they cited on appeal, it is necessary to refer to certain other pilot laws, both American and English. The Pennsylvania act, on which this question arose, was passed, as has been said, in 1803. Congress, as early as August 7, 1789, had enacted (section 4, Act Aug. 7, 1789 [1 Stat. 54]) "that all pilots &c., shall continue to be regulated in conformity with the existing laws of the states respectively wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by congress." New Jersey, on February 8, 1837 (Acts 1837, p. 110), passed an act, which, though intended to establish and regulate pilots for certain ports not on the Delaware, provides for the case of a master of any vessel coming into any of the waters of New Jersey, who shall refuse to take on board a pilot, &c. And the state of Delaware has also a pilot law and system. These three states, it is known, are all bounded by Delaware river and bay. And an act of congress, passed March 2, 1837 [5 Stat. 153], enacts, that it shall be lawful for the master of any vessel "coming into or going out of any port situate upon waters which are the boundary between two states, to employ any pilot duly licensed or authorized by the laws of either of the states," &c.

The first English pilot act of importance appears to have been passed in 1716. 3 Geo. I. c. 13 (5 Ruffh. St. 88; Id. 679; 6 Ruffh. St. 481). It recites the antiquity, usefulness, and skill of the fellowship known as the "Pilots of Trinity House," and that persons not belonging to that fellowship, and incompetent, had lately interfered with their business, and lost or endangered many ships. It therefore forbids any person not belonging to that house to pilot ships under penalty of £10; saving, however, to all masters, &c., residing at Dover, Deal, or in the Isle of Thanet, the right to pilot their own vessels from any of those places; and it gives, always, to every master, "the liberty to make choice of such pilot of the said society or fellowship as he shall think fit." The act declares that the number of pilots in the fellowship shall never be less than 120. It nowhere, in terms, "requires" or "obliges" the master to take a pilot; nor does it affix any forfeiture or "penalty" for his not doing so, except so far as he may come within the designation of any person not belonging to that house, and may not come within the exception of a master residing at Dover, Deal, or in the Isle of Thanet. And it nowhere, in terms, exempts an owner or master for damage done through the neglect, default, incompetency, or incapacity of a pilot.

Passing by a subsequent act, that of 48 Geo. III. (A. D. 1808; 21 Ruffh. St. 479, c. 104), an important act in the history of English pilotage, but one not important in the statement of the case before us, we come to the act of 52 Geo. III., passed in 1812 (22 Ruffh. St. 714, c. 39). It recites (section 1), among other things, the wrecking of vessels and the loss of lives and property, from the ignorance and misconduct of incompetent persons attempting to pilot; and recites further the antiquity and usefulness of the pilot societies of Trinity House; and then provides (section 2) for the appointment of a body of fit pilots, in connection with the Trinity House, their rates of pilotage and contributions to be made by themselves, to support their house. It enacts (section 6) that no person but a regular pilot shall take charge of vessels, under a money "penalty," which the act prescribes; that (section 10) not less than eighteen pilots, in succession, without intermission or any unnecessary delay, shall by day and night constantly ply at sea, or be afloat to take charge of vessels, &c., whose approach is to be made known to them by signals, for the establishment of which the act provides; upon the making of which signals the pilots are forthwith to go off in time to fall in with such ships and vessels, "on pain of forfeiting, for the first offence, £20, for the second," &c. And the masters of ships (section 11) coming towards land "shall display and keep flying the usual signal for a pilot to come on board;" and if a pilot is within hail or approaching, and the master does not facilitate his getting on

board, and give the charge of piloting his ship or vessel to such pilot, he "shall forfeit and pay double the amount" of the pilotage charge. It then enacts (section 30) that no owner or master of any ship shall be answerable for any loss or damage, nor be prevented from recovering upon his insurance, for a loss occasioned by the neglect, default, incompetency, or incapacity of any regular pilot. It saves (section 31) the right of any person to proceed by civil action against pilots or other persons; and provides (section 73) that nothing in the act shall "affect or impair the jurisdiction of the court of admiralty."

Finally came a pilot act, passed in 1825, 6 Geo. IV., quite a long and particular act, but containing, so far as we need refer to it, the same provisions as the act of 52 Geo. III., already quoted. No one of these last acts, in terms, either "requires" or "obliges" the master to take a pilot. The three last acts are sometimes severally called the "General Pilot Act." Relating, however, chiefly to vessels sailing on certain waters in the south of England, and not so obviously including vessels sailing on other rivers, the term is not clearly proper; and the extent of their application has been a matter of some diversity of opinion. These acts do not, in their terms, either embrace or exclude foreign vessels, but have generally been considered as not applying to them. Independently of these so called general pilot acts, are certain local pilot acts, proper to be mentioned.

The Liverpool pilot act, 37 Geo. III. See 3 Price, 318. That act places in the hands of a committee the power over pilots for the port of Liverpool; and after providing for their rates of remuneration for piloting ships into and out of that port, enacts, in one clause, "that the master of any vessel outward bound, who shall proceed to sea and shall refuse to take on board and employ a pilot, shall pay the full pilotage. A subsequent clause of the same act provides, "that if the owner, master, or commander shall require the attendance of a licensed pilot on board any ship or vessel, during her riding at anchor, such pilot shall attend such ship or vessel, and be paid for every day he shall attend, five shillings and no more." No clause of compulsion of any kind to have a pilot, nor any imposition of "penalty," is contained in this act. This act, like the Pennsylvania act, and unlike the "general pilot act," contains no clause of exemption to master and owners for damage occasioned by the negligence, &c., of the pilot on board; nor exemption from defence by insurers, from the mere want of a pilot. The Newcastle Pilot Act, section 41 (Geo. III. c. 86, § 6; 1 W. Rob. Adm. 108), very much in this respect, resembling the Pennsylvania statute, and enacting that the owners or masters of any foreign ships, &c., coming into or departing from the said port of Newcastle, &c., "shall and they are hereby obliged and required" to receive and employ a pilot licensed under the act; "and in case of their neglect or refusal to receive and employ such pilots as aforesaid, they shall severally, nevertheless, answer and pay to the said master, pilots and seamen, the aforesaid pilotage duties." This act, like the Pennsylvania and Liverpool acts in this respect, and unlike the general pilot acts of 52 Geo. III., and 6 Geo. IV., contains in terms no clause of exemption of liability to the master and owners, for damage occasioned by the negligence, &c., of the pilot on board.

G. M. Wharton and R. R. Smith, for libellant, Smith.

R. P. Kane, for the Creole.

Mr. Sanderson, for the Sampson.

The two questions in the case being: (1) Whether, under any view, the steam tug being so small a vessel, was liable? (2) Whether, having taken a regularly licensed pilot aboard, excused the ship; the fault, confessedly, having been the pilot's alone.

For the towing-tug, the Sampson:

It was said, that being so small a vessel—only about sixty-five horse power—and towing a large foreign ship, she was a mere servant of the ship, and that the case was quite different from the case of a large steamer towing small boats; in which last case, the smaller boat, which was often hitched on with several others, was necessarily in the custody and under the control of the large boat, who, with few or no orders to any of them, dragged them just where she pleased.

And this view, though not admitted by the libellant, or by the owners of the ship, was not so strongly contested. The argument was principally on the second point: on which it was argued,

For the libellant:

I. The language of this act we concede is strong. But the act itself has never been considered as obligatory. The reason probably is, that the right of state legislatures to act at all on this subject, may be questioned. The subject is intimately connected with the duty "to regulate commerce with foreign nations and among the several states." And this duty the constitution of the United States gives to congress. Whether to congress exclusively, or not, is a matter which was long a subject of dispute, and is but just now settled. Cooley v. Board of Wardens, 12 How. [53 U. S.] 299. New Jersey, which bounds the Delaware bay and river on the east, has a pilot law; so has the state of Delaware. Since 1837 the United States have a pilot law. "That the subject of pilotage in bays and rivers bounded by two states, is within the constitutional power of the federal government, cannot," says Judge Rogers (7 Pa. St. 311), "I think, admit of doubt." Undoubtedly the act of congress will excuse a violation, in its favour, of any state act.

II. On general principles of law, the employment of a pilot under the Pennsylvania

act, was not obligatory. "In relation to those laws," says Blackstone (1 Comm. Introduction, p. 58, § 2), "which enjoin only positive duties, and forbid such things as are not mala in se, but mala prohibita, merely without any intermixture of moral guilt, annexing a penalty to non-compliance, here, I apprehend, conscience is no further concerned than by directing a submission to the penalty, in case of our breach of those laws. * * * In these cases the alternative is offered to every man; 'Either abstain from this, or submit to such a penalty;' and his conscience is clear, whichever side of the alternative he thinks proper to adopt. * * * These prohibitory laws do not make the transgression a moral offence or sin: the only obligation, in conscience, is to submit to the penalty, if levied." He quotes Bishop Sanderson, whose language (De Consientiæ Obligatione, Præl, viii., §§ 17, 24) is "Lex pure pœnalis obligat tantum ad pœnam, non item ad culpam."

III. This question is hardly open; for it is a question on a state enactment, judicially explained by the highest court of the state itself. Bussy v. Donaldson, 4 Dall. [4 U. S.] 206, was decided by the supreme court of Pennsylvania in 1800, upon a pilot act similar in terms to the present one. Chief Justice Shippen then said: "The legislative regulations were not intended to alter, or obliterate the principles of law, by which the owner of a vessel was previously responsible for the conduct of a pilot; but to secure, in favour of every person (strangers as well as residents) trading to our port, a class of experienced, skilful and honest mariners, to navigate their vessels safe up the bay and river Delaware. The mere right of choice, indeed, is one, but not the only, reason, why the law, in general, makes the master liable for the acts of his servant; and, in many cases, where the responsibility is allowed to exist, the servant may not, in fact, be the choice of the master. For instance, if the captain of a merchant vessel dies on the voyage, the mate becomes captain; and the owner is liable for his acts, though the owner did not hire him, originally, nor expressly choose him to succeed the captain. The reason is plain: he is in the actual service of the owner, placed there, as it were, by the act of God. And so, in the case under consideration, the pilot was in the actual service of the owner of the ship, though placed in that service by the provident act of the legislature. The general rule of law, then, entitles the plaintiff to recover; and we have heard of no authority, we can recollect none, that distinguishes the case of a pilot, from those numerous cases on which the general rule is founded." This construction of the pilot law, after an acquiescence in it for forty-seven years, was again judicially established by the same court in Flanigen v. Washington Ins. Co., 7 Pa. St. 306. "The act, it is true," say the court, "in its terms seems to justify the position assumed; * * * but in the construction of this act, we must avoid laying too much stress on particular expressions. * * * It is very evident from a glance at the act, connected with the knowledge we have of its history and subsequent legislation, there has been a conflict of interests between the owners of ships and vessels employed in the foreign and coasting trade, and particularly the latter, on this subject; one contending for. and the other against, the compulsory employment of pilots in the navigation of these waters. This difference has resulted in a compromise. The legislature have wisely decided not to compel the owners to employ one, but have permitted them, if they please. to compound, by paying half pilotage, for the benevolent and beneficial purpose of relieving distressed and decayed pilots, their widows and children. The act sets out an inducement to avail themselves of their services. but does not compel them to do so. This construction of the act is reasonable and just. The legislature had two objects in view; the encouragement of that meritorious and patriotic class of men, by employment in their profession, and when that cannot be accomplished, by providing a fund, at the expense of the owners, for the support of themselves, their widows and families, when, either from age or disease, they may need assistance. It is just, as to the owners, whose interest it is to encourage a race of men surrounded by peril and hardship, and who contribute so much to the security of life and property, in the intricate navigation of our waters. But while this object is kept steadily in view, care has been taken not to throw too great a burden on the owners, which would certainly be the result of compelling them to employ a pilot, and of course pay full pilotage, even when the master of the vessel may have equal, if not greater skill, than those whom they may be obliged to employ; many of them being selected because of their intimate knowledge of the navigation."

IV. It is hardly necessary to refer to English decisions on this point, but that of The Neptune the Second, in the English admiralty (1 Dod. 467), is very strong. It was in November, 1814, two years and more after the act of 52 Geo. III., containing the clause of exemption, but saving the rights of the admiralty, had passed. Sir William Scott says, "If the position could be maintained, that the mere fact of having a pilot on board, and acting in obedience to his directions, would discharge the owners from responsibility, I am of opinion that they would stand excused in the present case; for I think it is sufficiently established in proof, that the master acted throughout in conformity to the directions of the pilot. But this, I conceive, is not the true rule of law. The parties who suffer are entitled to have their remedy against the vessel that occasioned the damage, and are not under the necessity of looking to the pilot, from whom redress is not always to be had, for

compensation. The owners are responsible to the injured party for the acts of the pilot, and they must be left to recover the amount, as well as they can, against him. It cannot be maintained that the circumstances of having a pilot on board, and acting in conformity to his direction, can operate as a discharge of the responsibility of the owners." The case of The Transit, not reported, but referred to as decided by Sir John Nicholl (1 W. Rob. Adm. 50), seems to have been decided in the same way. And while Dr. Lushington, in cases which will be cited on the other side, has said that Sir William Scott did not know of the passage of the act of 52 Geo. III., this would seem to be less probable than that, considering the jurisdiction of the admiralty undisturbed by the act, he meant to decide that, notwithstanding the master was obliged, so far as penalty obliged him, to take a pilot; and admitting that the clause of exemption would release him and the owners in a common law court, yet, as the act declared that nothing in it should affect or impair the jurisdiction of his court, the ship was still liable in his court. In other words, he meant to decide that it was the clause of express exemption, and not the mere penalty on such compulsory taking of a pilot, as a penalty made, which exonerated the vessel. This view of the act, in its effect on proceedings against the ship, is also taken by Sir J. Nicholl, in The Girolamo, 3 Hagg. Adm. 180. "The next clause indeed enacts," says this learned judge, "that nothing in this act is to deprive persons of any remedy or remedies upon any contract of insurance, or of any other remedy whatsoever, which they might have had if this act had not been passed, by reason or on account of the neglect, default, incompetency or incapacity of any pilot duly acting in charge of any ship:" and then comes the section, expressly saving the jurisdiction of the court of admiralty. If, then, all the former remedies are to remain, and if the jurisdiction of the court of admiralty is to be unimpaired, the remedy against the ship still exists, and masters and owners are only exonerated from personal responsibility. Before any of these acts passed, there can be no doubt that a pilot being on board, would not have exempted the owner from responsibility; what is then meant by "any other remedy or remedies whatsoever?" The remedy reserved, and the jurisdiction reserved, appear to me to mean, by the most just and fair construction, the remedy, in rem, in this court, according to the existing rule of the maritime law of nations. Now our act contains no clause of exemption; while its obligations to take a pilot on board, are really not so compulsory as those of the act of 52 Geo. III., for this last contains a penalty of double pilotage, whereas ours contains a penalty of but half pilotage. And without considering what might be, or what have been the decisions of our state common law courts, we have the decisions of Sir William Scott and Sir John Nicholl, in The Neptune the Second and in the Girolamo, sustaining the liability by remedy, so far as the vessel itself extends, in this, a court of admiralty. Fletcher v. Braddick, 2 Bos. & P. (N. R.) 182, though not a case arising on the pilot acts, seems to declare a principle such as we seek to establish. There the defendants being owners of a ship, had chartered her—ship, master, mates and men—to the government, who put on board a commander in the navy and a king's pilot; and while under the orders of these, damage was done by a careless collision. But notwithstanding that charter party gave complete control of the ship to the government for the time being, and both master, mates and men were stipulated to be under the control of government, the court held that with regard to third persons, the ship was to be considered as the ship of the owners; and that they were liable for the damage.

For the ship, the Creole:

The question is, whether it is the law or the ship owner which put the pilot on board?

I. The case is to be decided on the language of the act; and that language is to be construed by the rules of law—not by the understanding of ship owners. The state of Pennsylvania, governing by a system meant to comprehend the entire subject of navigation in the Delaware river and bay, "obliges" every vessel to receive a pilot; and affixes "a penalty," which it makes a lien, for the omission to do so, and gives to pilots specific liens and remedies to enforce them. The right of the state to pass this law, is settled conclusively. Cooley v. Board of Wardens, 12 How. [53 U. S.] 300. It was never a matter of any practical doubt; for congress, as early as August 7th, 1789, acknowledged and assisted the states in regulating this matter.

II. The subjection of the navigation to a public control, is a most important matter of state. The law meant—as public policy and necessity requires that it should mean—to prevent accidents from collision, in our long and intricate river and bay, by a general preventive police. The law commands. The party "shall be obliged." A penalty is annexed, to be sure, and the argument is that the act thus provides an alternative. A statute may, indeed, be so worded, as to allow the party an option to do what it aims at, or to pay a penalty; to pay a tax, e. g., at a certain day, or the tax and 10 per cent. at a day after. But this act is not so worded. It creates a duty, and punishes for the violation of it. Penalty is that which is rendered for wrong, and is not commutation or forced equivalent for acknowledged right. It implies, at least, in its general interpretation, the commission of some illegal act. The argument of the other side, "would prove every trespass to be matter of right, subject only to just responsibility." See the argument put

with great force by Mr. Webster in reply to Lord Ashburton (Works, vol. 6, p. 337). A man might legally forge, rob or murder, if he would only surrender himself to be imprisoned or hanged. The doctrine mooted by Blackstone (1 Comm. Introduction, p. 58, § 2) is not supported by the ethical writer, Bishop Sanderson, whom he quotes only in part. It is strongly and rightly dissented from by his able commentator, the present Mr. Justice Coleridge, of the C. B. He never, himself, meant to apply it, except to cases where the law is "simply and purely penal; where the thing forbidden or enjoined is wholly a matter of indifference," and where it can involve in it no degree of "public mischief or private injury." Id. "Perhaps," says Mr. Coleridge, "we shall find presently, when we consider the principle of obedience to the laws, that no matter can be purely indifferent, upon which the law acts by way of prohibition or command. But in the mean time the opinion seems a little inconsistent with other parts of the text, because it admits that a part of the law at least, (the penal part,) has a binding force on the conscience. To escape this, it is said that the law is to be understood as offering an alternative, and that the lawgiver did not intend the penalty as a punishment, but as a compensation. This is not very intelligible, when reduced to practice; compensation for what, and to whom?—some injury to some person or body is assumed in the very notion of compensation; and, in the case before us, that injury must flow from the breach of the law; so that the hypothesis is, that the legislature, seeing that a certain thing cannot be done without injury, deliberately agrees that it shall be done by any one, who will pay so much money for doing it; and it clothes this agreement and permission in the form of a direct prohibition. But even this explanation will not serve in the common case, in which, on default or inability of payment, the punishment is whipping or imprisonment; a fine paid to the king, the representative of the injured community, may be conceived to be compensation. But in the case now supposed, it must be said, that the legislature allows any man to do a given act, by the hypothesis injurious to the community, who will compensate it for that injury, by submitting quietly to be whipped. Penalty, of whatever kind, is only another name for punishment; and punishment, as the author himself tells us (in volume 4, p. 11), is not imposed for the sake of atonement or expiation, but as a precaution against future offences. The amount of the penalty may indicate the importance which the legislature attaches to the crime, and so indirectly the public inconvenience of the breach of the law; but it never can be looked upon as calculated to heal the wound occasioned by the breach. Nor have the wisdom or importance of the law any thing to do with the principle of our obedience to it; the true principle of that is the authority of the lawgiver, which must be the same, whatever be the law. If we are convinced that the authority is sufficient, we ought to obey equally in great and small; nothing will discharge us but the opposition of a superior authority, which, in truth, renders the inferior insufficient. The same principle, upon which a breach of one commandment is declared to make a man guilty of the whole ten, applies to this case, and the more closely, the more trivial the matter may seem; for the smaller the inducement is upon which we break the commandment, the greater is the contempt of the authority. Common sense and experience approve this reasoning, by showing that nothing is in fact indifferent when the law has once prohibited it. The breach of any one law must be inconvenient, either by way of example to other persons, or as diminishing the habit of respect for other laws, in ourselves. The laws of a country form an entire connected body, and though "he that takes a little piece of iron from an iron forge, may do no great harm; yet if he takes it from a lock or a chain, he disorders the whole contexture." The amount or character of the penalty can make no difference in the legal or moral obligation to obey the law. If the penalty had been imprisonment for a twelve month, would it be argued that the party might rightly disobey the law, if, on landing, he would go, without compulsion, to gaol?

III. The two cases cited in the state courts, are not obligatory here. Admitting that on a statute strictly local—a statute, e. g., relating to real estate, the decisions of the state courts settle the construction for this court—the case of such a state statute as this is very different. The act is essentially extra-territorial in its sphere of action. It is intimately connected with foreign subjects: so much connected with the "regulation of commerce" between foreign nations, as to have caused great doubt whether the state had a right to pass such acts at all. It has been decided that they have. But it is indispensable that the construction of them remain to be settled by the federal courts, in those cases where questions arise in those courts upon them. Independent of this, Bussy v. Donaldson hardly has the weight of a well-considered judgment. Chief Justice Shippen expressly states, that it was a point of law "equally interesting for its novelty and its importance, suddenly started;" and one of a sort on which it was not "agreeable to deliver an opinion," as he did. Flanigen v. Washington Ins. Co. was a sharp attempt by demurrer, to deny a statutory sea-worthiness: no proof being given, of course, of the want of any sea-worthiness, in fact.

IV. In reviewing the English cases, it is necessary to advert to the dates of their decision, and to observe upon what acts they were decided. Bowcher v. Noidstrom, 1 Taunt. 568, was in 1812, and under the act of 3 Geo. I. That was a suit in trespass against the master of a Swedish ship, for damage done to another vessel, while the

Swedish ship was in charge of a pilot, who "gave directions to one of the crew" to do an act which the court considered improper to have been done, and which was the cause of the damage. The master now sued was on board at the time; but he was asleep in his bed and gave no orders throughout the whole transaction. Mansfield, C. J., who tried the case at nisi prius, being "of opinion that, although there was a pilot on board, the pilot does not represent the ship, and that the master was still answerable for every trespass," the jury found for the plaintiff. But on a rule nisi, in banc, to set aside the verdict, and have a new trial, "the court held that, as it did not appear that the captain had done any act in this case, the rule to enter a nonsuit must be made absolute." Here then under a statute much less positive than our Pennsylvania statute, in requiring the master to take a pilot—a statute where the master had the liberty to make choice among 125 different pilots, which one he would have, and where there was no clause exempting owners—the master was held not liable. Certainly, the ground of this decision must have been that the vessel was properly in the hands of a legally appointed pilot, who, while on board, was the proper and exclusive person to give orders. The principle of the decision relieves the owner just as much as it can the master. In the well considered case of Attorney General v. Case, 3 Price, 302, in the exchequer, in 1816, the owners of a vessel which damaged another ship lying at anchor in the river Mersey, and not proceeding on her voyage, by mismanagement of the helm while a pilot was aboard, was held liable. But why? "Because," says the syllabus, "the Liverpool local pilot act is not compulsory or penal on the captain to take a pilot on board whilst lying at anchor, but merely subjects him to the pilot's regulated allowance on refusal." It will be seen by reference to the peculiar terms of that act, how very different it is from ours. The counsel in the case just cited, who sought to charge the vessel, expressly distinguish the Liverpool act from the acts of Geo. III., &c. "The Liverpool act," they say, "is not imperative; * * * there is no penalty in that act * * * as there is in the 52 Geo. III. So that, if the master pleases, he may decline the services of a pilot on paying him his regular allowance; and the true reason of the indemnifying clause in the 52 Geo. III., is that the taking a pilot on board is compulsory." Chief Baron Thomson, in giving the judgment of the court, which adopting this view, held the vessel liable for the damage, distinguishes the Liverpool pilot act from the other, sometimes though improperly called the general pilot act; distinguishing them, not by adverting to the express clause of exemption in these latter, but by the fact that "a penalty" is annexed to the omission to take a pilot. His language is (3 Price, 321), "There is therefore no obligation imposed by the 37 Geo. III. (i. e. the Liverpool act), upon the master, to take any pilot whatever on board his vessel before she proceeds on her voyage; for the consequence of his refusing to take a pilot on board, on other occasions, is only a liability to pay the same wages as if he had taken such pilot on board. Now, if he was proceeding to sea, having taken such pilot on board, and if while the ship was duly and properly under the management of that pilot, an accident had happened, it might have been a fair question, whether the owner would then have been answerable; though there have been cases which show that, though a pilot may be on board, the master is in some instances deemed responsible, notwithstanding. But, I repeat, there is no such penal provision in this act of the Liverpool pilotage. By the thirty-fourth section of that act, indeed, it is provided, 'that if the owner, master, or commander shall require the attendance of a licensed pilot on board any ship or vessel during her riding at anchor, &c., such pilot shall attend such ship or vessel, and be paid for every day he shall so attend, five shillings and no more.' So that there is nothing here compulsory upon the master or owner to take on board a pilot while he is riding at anchor in this river Mersey. It is optional in him whether he will do it or not; but if he chooses to do so, he is to pay the pilot at the rate of five shillings for every day he shall attend, and no more. His obligation to take a pilot is only on his proceeding to sea, and refusing to take on board a pilot so licensed. There is no penalty for not taking on board a pilot while lying in the river Mersey; but he is enabled, if he thinks fit (and not otherwise), to command the services of a pilot while so lying at anchor, paying for him at the rate here specified; and it is for that accommodation that he is to pay the five shillings, if he refuses to take the pilot on board. * * * He was not compellable, at that time, in any way, either under the penalty of double the wages, or of paying even the single wages, to have any pilot on board. It was his own act to have him; and it can be only in the case of such an officer having been forced upon them and without his own election, that the responsibility of the owner can possibly be discharged." But the case of The Maria, 1 W. Rob. Adm. 95, which arose on the Newcastle pilot act, and was most carefully considered by Dr. Lushington, is in point. There can be no doubt that if the Pennsylvania statute is compulsory, the owners are discharged. And the case of The Maria settles what language creates compulsion. The Newcastle act, unlike the general pilot act of 52 Geo. III., &c., contained no clause of express exemption; but it "obliged and required" masters to receive, take on board, and employ a pilot. Neither did it prescribe any "penalty" eo nomine, but enacted simply that, "in case of their neglect or refusal to receive and employ such pilots as aforesaid, they shall severally neverthe-

less answer and pay to the said master pilots the pilotage duties." It was in truth an act less strong than our state act. A collision having occurred while a pilot was aboard, the question in admiralty was, whether that fact discharged the owners. And what says the court? "Does the section in question impose any compulsory duty and necessity upon the owner or master to take a pilot on board? I am not clearly of opinion that the section referred to is compulsory. If it had been enacted simply that a pilot should be taken, without providing that, in case a pilot was not taken, the pilotage should be paid, the master would clearly have been liable to be indicted for a misdemeanor. * * * Look at the words of the act, 'obliged' and 'required,' they are compulsory per se. But is not the making the neglect to take a pilot punishable with payment of the pilotage also, a compulsion upon the owners. Suppose the statute had mentioned ten times the amount of pilotage. It would only be in the degree of compulsion, but not in the compulsion itself. * * * The opinion I have thus formed in this case is founded on the general principles of reason and justice; that no one should be chargeable with the acts of another who is not an agent of his own election and choice. And I further think, that it would be contrary to all sense of equity, to say to the owners of a foreign vessel, 'You shall take a pilot of our selection, of our appointment; be he drunk or sober, negligent or careful, skilful or ignorant, you shall be responsible for his conduct unless you choose to submit to the penalty, and penalty it is, of paying the pilotage for nothing.' " So, too, in Carruthers v. Sydebotham, 4 Maule & S. 77, a suit on an insurance, though the court of king's bench (differing herein from the court of exchequer, in Attorney General v. Case, 3 Price, 302), held that the general pilot act did apply to the port of Liverpool, and therefore in the decision which they gave against the underwriter could have invoked the clause of express prohibition of a defence by the underwriter, when the loss arose from the pilot's act, yet the court does not do so; but puts it on the fact that the terms of the general pilot act—terms less strong than in ours—are compulsory. Lord Ellenborough says: "If the master cannot navigate without a pilot, except under a penalty, is he not under the compulsion of the law to take a pilot? And if so, is it just that he should be answerable for the misconduct of a person whose appointment the provisions of the law have taken out of his hands? . . . . . The consequence is, that there is no privity between them." Le Blanc, J., says: "It appears that the master was compellable by law to take on board a pilot;" and he afterwards refers to and relies on the express clause, "independently of the general principle." Bayley, J., says: "This being a case where the master of the ship was bound at his peril to take a pilot on board, he cannot be identified with the pilot," &c. And see McIntosh v. Slade, 6 Barn. & C. 657, 665. The position we contend for is embraced in a principle of law stronger than it is necessary for us to contend for—a principle of law generally. Thus in Milligan v. Wedge, 12 Adol. & E. 737, a butcher who had bought a bullock, employed a licensed drover to drive it home; none but licensed drovers being allowed to drive bullocks. The drover employed a boy to drive the animal, which did damage through the boy's careless driving. Denman, C. J., says: "The party sued has not done the act complained of, but has employed another, who is recognized by the law as exercising a distinct calling. The butcher was not bound to drive the beast; he might not know how to drive it. He employs a drover, who employs a servant, who does the mischief. The drover therefore is liable, and not the owner of the beast. * * * So as to decisions upon the pilot acts: when it is not necessary to employ a pilot, the master who has voluntarily employed one, is liable for his act." So Williams, J., "Where the person who does the injury exercises an independent employment, the party employing him is clearly not liable." And Coleridge, J., "I make no distinction between the drover and the boy. Suppose the drover to have committed the injury himself. The thing done is the driving. The owner makes a contract with the drover that he shall drive the beast, and leaves it under his charge, and then the drover does the act. The relation, therefore, of master and servant does not exist between them." Now there is no English case which establishes a doctrine contrary to the one we seek to establish. That of The Neptune the Second, 1 Dod. 467, cited on the other side, in which Sir W. Scott uses language broad enough to comprehend contrary doctrine, was the case of a foreign ship, to which none of the English pilot laws apply, as was decided by Sir J. Nicholl in The Girolamo, 3 Hagg. Adm. 169. The report contains no statement of the case nor any argument of counsel, while Sir W. Scott's opinion proceeds on the supposition that the reporter had done his duty, and given both. The grounds of his opinion—the antecedents upon which it was given—not appearing, an eminent judge (Dr. Lushington) has been forced to suppose that Sir W. Scott did not know of the act of 53 Geo. III., passed a year before. Certainly it is impossible to believe that with an express exemption clause, he still held parties subject to that act, liable. But it is almost as impossible to believe that he did not know every thing important to any decision of his. The decision is perfectly explained by supposing that he was speaking only as to the case before him, the case of a foreign vessel: and that he gives results only of his argument without any exhibition of the process of mind, which in the case of The Girolamo a foreign ship also, brought his successor, Sir J. Nicholl, to a similar conclusion.

3 Hagg. Adm. 169. After the case of The Neptune the Second, comes, in 1834, that of The Girolamo, just mentioned, and also cited on the other side, in which the presence of a pilot was also held no discharge. This case, in truth, required no decision upon law. The Girolamo left the London docks with a pilot aboard, and went down the Thames as far as Blackwall, about which place a thick fog came on. The master, instead of interposing, as supreme over pilot and all on board, and stopping the vessel, "did not in the least interfere." The vessel went on, and when she got so much further down the river as to be below Woolwich, she ran afoul of another vessel and injured her. Sir J. Nicholl says in this part of the case (page 176): "But again, did the accident arise from the 'neglect, default, incompetency, or incapacity' of the pilot? or was the master in pari delicto? It occurred from the vessel going on in the fog, not from any act of bad steerage, want of knowledge of shoals, or any incapacity as pilot; but from proceeding at all. * * * Had he (the master) not a right to resume his authority? Did he not owe it to his owners and to other persons, whose property might be damaged by a collision, to insist on bringing the vessel up? If he was in as much haste to get out of port, as the pilot was to finish his job, are they not in pari delicto? Was not the master in duty bound, at least, to remonstrate with the pilot, and to represent the danger of proceeding? * * * Is the master, or are the owners relieved from all sorts of responsibility, however gross and manifest the misconduct of the pilot may be, whilst the master remains a passive looker-on, without taking any step to guard against damage?" The court, however, put the case on other ground, st., that of the foreign character of the ship, which, as a foreign ship, was not meant to be included in the British act: and declares, that as by the laws of Austria, a British vessel would be held liable in similar circumstances, no law of national reciprocity could control the court in applying the general rule of law that the owners are responsible. Fletcher v. Braddick, 2 Bos. & P. (N. R.) 182, cited on the other side, has confessedly nothing to do with the pilot acts; nor with the principle of exemption which they give. There the defendants had chartered their ship to the government. The commander of the navy, by whom the bad orders were given, was placed in the situation and power to give them, by the voluntary act of the defendants: and so having voluntarily enabled others to do the injury, they could not themselves plead exemption.

GRIER, Circuit Justice. When canal boats, or other like vessels, are towed by steamboats, it is usually under a contract, which puts the towed vessel wholly under the direction and control of the officers of the steamboat. In such cases the steamboat would be liable for any collision occasioned by the negligence or want of skill of her officers. But when the steam power has been hired to tow larger vessels in or out of port, the contract is different, and creates a different state of responsibility. The tow-boat in such cases is the servant of the ship, and in the exercise of its physical power is bound to obey the orders of the master or pilot who has command or control of the ship. If the tow-boat obeys the directions of the pilot or master of the vessel, he is responsible for the consequences. If the ship is brought into collision with another vessel, by the unskilfulness or disobedience of orders of the officers or hands on the tow-boat, its owners are liable to the owners of the vessel or person who employed them, but not to third parties. Their recourse is to the master and not the servant, unless in case of malicious or wilful injury. It is only necessary to refer to The Duke of Sussex, 1 W. Rob. Adm. 270, The Duke of Manchester, 2 W. Rob. Adm. 478, and The Gypsey King, Id. 537.

Second. The position assumed in behalf of the ship, and by which it is sought to cast the responsibility on the immediate cause of it—the pilot—raises a question of vast importance in its bearing on our bay and river navigation. In most, if not all the ports of the United States, the laws for licensing and regulating pilots, are enacted by the different states in which the ports are situated. And however variant they may be in their details, they generally require a vessel entering or leaving a port, to employ a licensed pilot. The persons licensed are seldom of sufficient property to respond in damages for their acts of negligence, nor are they required to give security to a sufficient amount to meet such responsibility. If the colliding vessel be discharged from liability, while under the direction of a licensed pilot, and recourse for the injury can be had against the pilot alone, the injured party will, in most cases, be wholly without remedy.

It is a violent presumption against the validity of this defence, that in the numerous cases of collision daily occurring in the United States, in many or most of which, no doubt, the vessels have been under the control of licensed pilots, the owners have not endeavoured to avail themselves of it. Nor has the learned counsel for the respondent, with all his research, brought to my notice a single case in the common law or admiralty courts of the United States, where this defence has been held available. On the contrary, in the case of Bussy v. Donaldson, 4 Dall. [4 U. S.] 206, in the supreme court of Pennsylvania, when this defence was set up, it was not sustained, and Chief Justice Shippen, speaking in 1800, of the pilot law of Pennsylvania—an earlier law than the one now in force, but in this particular section the same as the present one—says, "The legislative regulations were not intended to alter or obliterate the principles of law, by

which the owner of a vessel was previously responsible for the conduct of a pilot; but to secure, in favour of every person (strangers as well as residents) trading to our ports, a class of experienced, skilful and honest mariners. to navigate their vessels safe up the bay and river Delaware. The mere right of choice. indeed, is one, but not the only, reason why the law in general makes the master liable for the acts of his servant: and in many cases, where the responsibility is allowed to exist, the servant may not in fact be the choice of the master. For instance, if the captain of a merchant vessel dies on the voyage, the mate becomes captain, and the owner is liable for his acts, though the owner did not hire him originally, or choose him to succeed the captain. The reason is plain: he is in the actual service of the owner. placed there, as it were, by the act of God. And so in the case under consideration, the pilot was in the actual service of the owner of the ship, though placed in that service by the provident act of the legislature."

The doctrine that the owners are not liable for a collision by their vessel when under the control of a licensed pilot, was first introduced in England by the pilot act of 52 Geo. III. c. 39. passed in 1812. Previous pilot laws, although they required every vessel to take on board such a pilot under penalties, did not discharge the owners from liability for their negligence. It appears by the case of Bowcher v. Noidstrom, 1 Taunt. 568, which was decided before Chief Justice Mansfield in 1809, that this notion that a licensed pilot was not considered a servant or agent of the owner, had obtained no place in courts of justice; for the chief justice held the master liable, on the assumption that he represented the ship or owners; and the case was reversed, not because his legal position was incorrect—to wit, that the ship or owners would have been liable for the act of either master or pilot, as their servant; but because one servant was not liable for the act of another, who was not his subordinate. The case of Fletcher v. Braddick, 2 Bos. & P. (N. R.) 182, though not directly in point, seems not to recognise the same principle. In cases of collision, the injured party has a remedy by action at common law, not only against the owners, but the master. And although the master of the vessel is the servant of the owners, and they are liable for his acts in the course of his employment, he is an exception to the general rule, that the remedy of third persons for the servant's acts of negligence is only against the master. As the pilot, when on board, has the absolute and exclusive control of the ship, the master might well defend himself against liability for the acts of one over whom he has no control or authority. Therefore by the maritime law the master is not held liable for the acts of mariners, who are not of his own choosing, and who are not acting under his orders. Moll. de J. Mar. bk. 2, c. 3, § 12. The pilot is for the time master of the vessel, and substituted in the place of the captain, with the same duties and responsibilities. But it is far from being so clear as a principle, either of maritime or common law, that the vessel or the owners are discharged from responsibility for the same reason.

Pilot laws are intended not to burthen commerce, but for its benefit and safety. As a general rule, masters of vessels are not expected to be, and cannot be, acquainted with the rocks and shoals on every coast, nor able to conduct a vessel safely into every port. Nor can the absent owners, or their agent, the master, be supposed capable of judging of the capacity of persons offering to serve as pilots. They need a servant, but are not in a situation to test or judge of his qualifications, and have not therefore the information necessary to choice. The pilot laws kindly interfere, and do that for the owners which they could not do for themselves. It selects persons of skill and experience, and requires them to give bonds for the faithful performance of their duties; and if it should happen in some particular cases, that owners may not need the services of such pilot selected by law, it is but just that they should contribute to the support of a system instituted for their benefit. This compulsion which is supposed to annul the relation of master and servant between pilot and owners, is more imaginary than real. It has its origin rather in minute verbal criticism of the language of the pilot laws, than on fact. The Pennsylvania pilot law, it is true, "obliges" a pilot to be taken on board, under the penalty of paying half pilotage. But, as has often been said, there is no magic in words. For after all, it amounts only to this: That vessels which do not find it necessary to avail themselves of the services of pilots provided for them by the law, may be piloted by the master or other person, if they prefer it; but in such case they will be required to pay a small tax, equal to half pilotage, for the benefit of the wives and children of those whose lives are daily exposed to peril and hardship, for the purpose of tendering their services, if needed. The assessment of a tax for the support of a system so beneficial to ship owners, where the services are declined is no compulsion, and calling it a penalty, will not alter the case. The vessel when under the control of a pilot, is in the legal possession of the owners. The pilot is their servant, acting in their employ, and receiving wages for services rendered to them. The fact that he was selected for them by persons more capable of judging of his qualifications, cannot alter the relation which he bears to the owners. He is still their servant.

The court of exchequer in the case of Attorney General v. Case, 3 Price, 302, confirm what I have said, that before the pilot act of 52 Geo. III. (1812), the owner was held liable

for the act of the pilot as his servant. They decided also, that the Liverpool pilot act was not compulsory or penal, though it required the vessel to pay the pilot's wages, whether it employed him or not. In the case before us the master may decline the services of the pilot, by paying half his wages. I am well aware that Dr. Lushington, in the case of The Maria, 1 W. Rob. Adm. 95, which arose on the Newcastle pilot act, has given a different construction to the Liverpool pilot act, because it uses the words "oblige and require."

The English cases on this subject, since 1812, cannot be reconciled with one another, and have not been adopted, as precedents here. On the contrary, the case of Bussy v. Donaldson, in which I have quoted the opinion given by Chief Justice Shippen, has been adopted as founded on the sounder reasoning. See Yates v. Brown, 8 Pick. 23; Williamson v. Price, 4 Mart. (N. S.) 399; 3 Kent Comm. 175, 6. And in 1847, quite independently of that precedent, and without the least reference to it, the supreme court of Pennsylvania again interprets the statute before us in the same way as he did the one before him, in this respect, exactly like it. Flanigen v. Washington Ins. Co., 7 Pa. St. 312.

They say: "The legislature have wisely decided not to compel the owners to employ a licensed pilot, but have permitted them, if they please, to compound by paying half pilotage, for the benevolent and beneficial purpose of relieving distressed and decayed pilots, their widows and children. This act sets out an inducement to avail themselves of their services, but does not compel them to do so. This construction of the act is reasonable and just."

Thus far I have considered the question on the principles peculiar to the common or civil law relating to master and servant, rather than those of the maritime law. The proceeding in this case is in rem, for a maritime tort. The rights and remedies of the libelants are to be tested by the principles of that law, unaffected by any statutory provisions. A proceeding in rem, in admiralty, is not a mere attachment to compel the appearance of the owners, as in civil law proceedings, and attachments under the custom of London, which are not proceedings in rem in the admiralty sense of the phrase. The court of admiralty proceeds on the principle that the vessel itself is hypothecated by the contracts, as well as the obligations arising ex delicto of the master, and is herself liable for all maritime liens. The owners and others interested, are allowed to intervene pro interesse suo; and for convenience of trade and commerce, are permitted to release the vessel, by substituting their stipulation and security in its place. But the property attached is, in all cases, treated as the debtor, and primarily liable.

By the maritime law, the power of the master to bind the owners by his obligations ex delicto, did not extend beyond the tacit hypothecation of the property in his possession. By surrendering the hypothecated vessel, the owners escape further liability, or if they intervene, cannot be made liable beyond her value.

These principles which prescribe the powers of the master of a vessel, are not drawn from the doctrine of the civil law concerning the relation of master and servant, but had their origin in the maritime usages of the middle ages. By these the ship was bound to the merchandise and the merchandise to the ship; and both are bound for the mariners' wages, "even to the last nail of the ship." By these the master was authorized to bind the vessel by bottomry. And by these the vessel becomes hypothecated for the obligations of the master arising ex delicto, and is herself treated as the debtor or offender. Hence, also, the vessel became bound to those who dealt with the master, whether he was appointed to act as their agent, or the ship was let to him on charter-party. It is unnecessary to make an array of the various European writers on this subject, as authority for these statements. I refer for them to the opinions of Judge Ware, in the cases of Poland v. The Spartan [Case No. 11,246]; The Rebecca [Id. 11,619], and The Phebe [Id. 11,-064], in which the origin and principles of maritime law affecting the liability of vessels for the contracts of the master, are treated with the ability and research which distinguished that judge.

It would seem to follow from these principles, that third persons, who may be supposed to be ignorant of the owners, have a right to treat the vessel as primarily liable, ex delicto, for the acts of the owner, who has the legal possession and control of her movements. The pilot is the master for the time being—as such, also, he is legally in possession, acting for the owners and in their services. The law which hypothecates the vessel for negligent or wrongful acts of her commander, does not stop to inquire as to the mode of his appointment, or the motives or degree of consent which accompanied it.

It is in accordance with these principles that the case of The Neptune the Second, 1 Dod. 467, was decided by Sir W. Scott, in 1814, two years after the passage of the pilot act of 52 Geo. III., already referred to. It is supposed by Dr. Lushington (1 W. Rob. Adm. 49), that the learned judge overlooked the provisions of that statute; but as a true statement of the maritime law unaffected by statute regulations, it has never been impugned. In that case the pilot was wholly in fault, and it was objected that the vessel and the owners were not liable for the damages occasioned by the collision. But Sir W. Scott asserted the law to be, "That the parties who suffer are entitled to have their remedy against the vessel that occasioned the damage, and are not under the necessity of looking to the pilot for compensation. It cannot

be maintained that the circumstance of having a pilot on board, and acting in conformity with his directions, can operate as a discharge of the responsibility of the owners."

I am authorised to say that the point of law now before us, has been decided by my Brother Wayne, in the district of South Carolina, in the same way as I now determine it. Judgment reversed.

Case No. 13,034.

SMITH v. CUMMINGS et al.

[1 Fish. Pat Cas. 152; [1] 9 Leg. Int. 82.]

Circuit Court, E. D. Pennsylvania. May 11, 1852.

INJUNCTION — PERFORMANCE OF CONTRACT — CONTROVERSY AS TO EQUITIES OF THE PARTIES.

1. It has been matter of grave question whether the writ of an injunction should ever be employed, to compel a defendant to perform his contract.

2. To issue an injunction while there is a substantial controversy as to the equities of the parties, and upon a simple motion which does not permit those equities to be inquired of and defined according to the approved usages of chancery, would be carrying the remedy by injunction too far.

In equity. This was a motion for a provisional injunction. Complainant [Francis O. J. Smith] was an assignee of S. F. B. Morse, under his patent for electric telegraphs. Defendants [A. B. Cummings, J. K. Moorehead, Joshua Hanna, and others] were operating under a license from parties also claiming under Morse. The bill charged the defendants with such a violation of the terms of their license, as rendered them infringers. The defendants denied that they had violated their agreement, except by the fault of the complainant. Affidavits were filed on both sides.

George Harding, for complainant.
Henry M. Watts, for defendants.

KANE, District Judge. The motion for an interlocutory injunction in this case has for its object to restrain the defendants from using the Morse telegraph on the line under their charge, between Harrisburg and Philadelphia. The bill and accompanying affidavits set forth an agreement, or license, from the patentees, to those under whom the defendants claim, but asserts that the defendants have altogether failed to comply with their engagements, which were the conditions on which the license was granted.

The counter-affidavit of one of the defendants, the only one that has been read in opposition to the motion, denies all purpose to violate either the patent or the contract for using it; but it avers that, on the contrary, they have sought to keep their engagements with the patentees, and have proffered, at different times, to perform them fully, provided the patentees, or the complainant, as their representative, would perform their engagements toward the defendants; and it charges, that the contract has been and now remains broken, by the complainant, and those under whom he derives title, to the great damage of the defendants; and that the complainant and patentees have, by their own acts, incapacitated themselves for now performing their part of it; for which injuries sustained by the defendants, they say they are without adequate recourse otherwise than by the action of this court, on a full view of the matters embraced in this cause. They further assert that their means are ample to satisfy any decree that may be made against them, and that they would necessarily sustain very grievous harm if the injunction were granted.

There are other asserted grounds of opposition to the motion, which I need not now advert to. The points of fact presented and controverted by the affidavits, and to be passed on by the court, are numerous—involving questions of feeling, and seemingly of good faith. I have, of course, formed no opinion whatever in regard to any of them. But on the case being opened, I was strongly impressed with the opinion that it was not one to be safely dealt with on an interlocutory proceeding, and to that opinion I adhere.

It has been matter of grave question whether the writ of injunction should ever be employed to compel a defendant to perform his contract, and there is certainly no case in which such a writ has been awarded, without exacting, as preliminary, the full performance of equity by the complainant. To issue it while there is a substantial controversy as to the equities of the parties, and upon a simple motion which does not permit those equities to be inquired of and defined, according to the approved usages of chancery, would be to go further than I believe it has ever been contended that a chancellor ought to go. See 3 Daniell, Ch. Prac. pp. 1881, 1882.

Such seems to me the case here. It is impossible to read over the affidavits of the parties, as I have done since the adjournment, without seeing that there are facts in controversy between them, on which it would be most unsafe for me to pass without full and orderly proofs. Were I to arrest the operations of the defendants by an unconditional order, in anticipation of such proofs, I might find, hereafter, that I had inflicted irreparable injury upon a party already aggrieved, or that I had coerced the defendants to a surrender of rights which it was my duty to have protected. To frame a conditional order would be to assume a knowledge of the merits, much more accurate than I am willing, in a case like this, to infer from ex parte affidavits.

On the other hand, to refuse the writ at the present time, is not, I apprehend, to

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peril the rights of the complainant, or seriously to delay his vindication of them. It is to save both parties the expense and labor of a preliminary hearing, repeatedly adjourned to allow the preparation of counter-affidavits, on the one side or the other, and unsatisfying at last, and to leave the judicial mind unbiassed till the cause is ripe for a final adjudication. Motion dismissed.

[For other cases involving this patent, see note to Smith v. Ely, Case No. 13,043.]

SMITH (CURTIS v.). See Case No. 3,505.

SMITH (CUSHING v.). See Case No. 3,511.

SMITH (DAVIDSON v.). See Case No. 3,608.

Case No. 13,035.

SMITH et al. v. DELAWARE INS. CO.

[3 Wash. C. C. 127.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1811.[2]

MARINE INSURANCE—ILLICIT OR PROHIBITED TRADE—NEUTRALITY—ABANDONMENT—DELAY.

1. Action on a policy, on goods on board the Julius Henry, at and from Baltimore to Hamburgh, with leave to touch at Tonningen, warranted free from loss, charge, or damage, in consequence of seizure or detention for, or on account of, illicit or prohibited trade. What will be considered a delay of an abandonment, so as to affect the right to recover from the assurers.

2. Where a seizure is made within the territories of a foreign government, on account of illicit trade, it cannot be said the warranty is not broken, because the seizure was not made before the vessel arrived at her port of destination, or before she had an opportunity to do some act amounting to an actual trading.

3. In a case of a warranty of neutrality only, the parties have a view to the laws of nations, and subsisting treaties; and the insured only engages that the property is neutral, for the purpose of being protected; and in fulfilling this engagement, the insured can never be surprised by the want of all proper documents, except by his own neglect or fault.

4. A warrant against illicit or prohibited trade, has a view to the municipal laws and ordinances of the country, where the trade is to be carried on; and foreigners going there, are bound to know and to observe those laws.

5. The warranty amounts to a stipulation, that the trade in which the insured shall engage, shall be lawful to the purpose of protecting the property insured, and that it shall not become unlawful by the misconduct or neglect of the insured.

Action on a policy, dated 22d of August, 1807, on goods on board the Julius Henry, at and from Baltimore to Hamburgh, with leave to touch at Tonningen; valued at 10,000 dollars; warranted free from any charge, damage, or loss, which may arise in consequence of seizure or detention for, or on account of, illicit or prohibited trade.

The facts of the case are substantially as follows: This vessel, belonging to the plaintiffs [Smith & Buchanan], sailed with a cargo, also the property of the plaintiffs, from Baltimore, about the 22d of August, 1807, with a letter of instructions to the master, to go to Tonningen, or to Hamburgh, if the Elbe should not be blockaded; and upon his arrival at Tonningen, to write to Van Hollen, the agent of the plaintiffs, and consignee of the cargo, at Hamburgh, (whose orders the captain was to follow,) informing him of his arrival. The bill of lading, invoice, and outward manifest, all speak of Tonningen as the port of destination. The vessel having proceeded as far as Heligoland, was there warned by a British vessel of war not to go to Tonningen, as the Eider was blockaded; in consequence of which, he sailed for Hamburgh, and arrived at Cuxhaven about the 22d of October, where the vessel was seized, the papers examined by the custom-house officers at that place; and a French officer and other persons were put on board, who proceeded with her to Hamburgh, where her cargo was landed, under the orders of the principal officer of the customs at that place; and a part of it was then sent off to France, in wagons, and the residue was sold at Hamburgh. Hamburgh, as well as Cuxhaven, was then in the possession of the French government, and all the transactions in relation to this vessel and her cargo, were conducted by persons representing the emperor. The cause alleged for the seizure, and also for the condemnation of the vessel and cargo, (which soon followed, and which was afterwards confirmed by the emperor,) was the not having on board a certificate of the origin of the cargo, as required by the French decree of the 6th of August, 1807. The third article of this decree declares, "that colonial goods shall not be admitted, but when accompanied with certificates of origin, by our commissary of commercial relations residing at the ports of embarkation, although they did not proceed from England or her colonies." It appears, by the correspondence between Van Hollen and the plaintiffs, that notice was given by the former to the latter, so early as the 11th of September, 1807, of the seizure, and the cause of it; and by other letters dated early in November, it was stated, by the agent, that he should put in a claim at Paris. In December, the agent's letters informed the plaintiffs, that the American minister at Paris could no nothing for the relief of the property, and he expresses himself very despairingly as to the release of it. But by a letter dated the 15th of January, 1808, the agent expresses some hope of success, from a petition which he had presented, in which case, he adds, that the adventure may turn out very advantageous to the plaintiffs, in consequence of the high price of the articles composing this cargo.

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

[2] [Reversed in 7 Cranch (11 U. S.) 434.]

These letters, and many others, were received by the plaintiffs, from the 21st of December, 1807, to the 2d of May, 1808; and on the 9th of June following, the offer to abandon was made, and after some time refused. The plaintiffs, in one of their letters to Van Hollen, dated the 17th of April, 1807, expressed their hope that the cargo would be released, and that the seizure might ultimately turn out to their advantage.

Upon this evidence, the court left it to the jury to say, whether the abandonment was made in due time; expressing, at the same time, a strong opinion that it was not, and that it was delayed, with a view to take the chance of an acquittal, and to speculate upon the high market for these goods. The jury were directed, in case they should be of opinion that the abandonment was not made in time, to find for the defendants, subject to the opinion of the court upon the points of law arising in the cause; the defendants agreeing, that judgment should be entered for the plaintiffs, for the sum ascertained by the parties, in case the law should be decided against them. The jury having found for the defendants, under the charge of the court, and consequently, that the abandonment was not made in due time; the questions of law arising in the cause, and reserved for the opinion of the court, are—1. Whether the plaintiffs are entitled to recover any thing in this action, the loss having become total?—and secondly, Whether the warranty against loss, on account of seizure or detention for illicit or prohibited trade, has been complied with?

WASHINGTON, Circuit Justice. The opinion of the court will be confined to the second question. It is contended by the counsel for the plaintiffs, that this warranty extends only to illicit trading, by sale, barter, or otherwise, which did not take place in this case, inasmuch as the vessel entered the Elbe, not with a view to trade, but from necessity, in consequence of the blockade, which prevented her from going to Tonningen; and that she was seized before she had broke bulk, or done any act which amounted to a trading. That in fact, the trade she contemplated was not illicit or prohibited, because the cargo had not come from a British colony, and consequently, did not come within any of the French decrees, in force at the time of the seizure. That the decree of the 6th of August, merely required a certain document to accompany the cargo, which it was impossible the plaintiffs could have complied with, the decree not having been known, nor could it have been known in the United States, at the time the vessel sailed; and finally, that the law can never be so unjust, as to punish any person for omitting to perform an impossibility.

First, it is said, that this vessel went to Cuxhaven from necessity, and that she did not trade previous to the seizure. If the first branch of this argument were true, it would be at once destructive to the plaintiffs' right of recovery. For, if the destination of this vessel was to Tonningen, and not to Hamburgh, there never was an inception of the voyage insured, which was to Hamburgh, with leave to touch at Tonningen; and consequently, the policy never attached. It is true, that the bill of lading, and outward manifest, are for Tonningen, and even the letter of instructions, seemed to warrant the ending of the voyage at that place. But, as no objection on this ground was made at the trial by the counsel for the defendants, it is fair to suppose, that the defendants were satisfied that the termini of the voyage were, in reality, such as are mentioned in the policy. If so, it will be difficult to maintain the ground taken by the plaintiffs' counsel, that where a seizure is made within the territories of a foreign government, on account of illicit trade, the warranty is not broken, because it was made before the vessel had arrived at the port of her destination, or had an opportunity to do some act amounting to an actual trading. Where the policy is on the outward cargo, as in this case, it can seldom, if ever, fairly happen, that the seizure should not precede such a trading; since the illegality of the contemplated trade must be discovered, before the unlading or breaking bulk would be permitted. It is true, that in such a case, if it appear that there has been no mala fides, but that the neutral has acted under an entire ignorance of the municipal law of the country, where he intended to trade, humanity would seem to forbid a just nation, from proceeding further than to turn him away; yet, if a more rigid conduct is adopted, or if an intended breach of the law be proved or suspected, and the property is seized and condemned, justly or unjustly, but avowedly for a breach of such law, it is impossible for a reasonable doubt to exist, that the loss has not happened on account of a prohibited trade. A different construction would render this warranty, so hazardous to the insured, of very little consequence to him, and a mere nullity in respect to the insurers.

Secondly. It is said, that this trade was not prohibited, and that the condemnation proceeded upon the ground of the want of a document to prove the origin of the cargo. In order to test the strength of this argument, let it be supposed, that the decree of the 6th of August had been known in the United States, before this vessel sailed. Would it, in that case, be contended, that the want of the document required by this decree, would not have amounted to a breach of the warranty? And if it would, it proves, that without the document, the trade was illicit and prohibited. But we understand the decree to amount to this—that articles, the produce of the colonies of Great Britain, are prohibited from being brought, upon any

terms, into any place possessed by the French; and the produce of any other country is prohibited, which is not accompanied by a certificate of origin, no matter how conclusive the proof may be, that it was not the growth of a British colony. In either case, the trade is prohibited altogether, whether the decree, containing the prohibition, were known to the neutral or not. If, then, the knowledge or ignorance of the neutral, in respect to the decree, makes no difference in regard to the illegality of the trade, the whole question comes to the hardship and injustice to which the merchant is made the victim, as to which, there can be but one opinion. But who is to be the sufferer in such a case? The insured, who consented to exempt the insurer from all loss which might happen on account of illicit trade; or the insurer, who, in estimating the premium for the risk he undertakes, has allowed to the insured, what both parties supposed to be the value of this exemption? Most undoubtedly the former. In the case of a warranty of neutrality, the parties have a view to the law of nations and subsisting treaties; and the engagement of the insured is, that the property is neutral to the purpose of being protected. It must of course be neutral, in fact, in appearance, and in conduct. In fulfilling this engagement, the insured can never be surprised by the want of all necessary documents, unless by his own neglect. But, the warranty in this policy has a view to the municipal laws and ordinances of the country, with which the trade is intended to be carried on, which the subjects or citizens of foreign countries are bound to observe, whether previously made known to them or not. Ignorance of such laws, will be no excuse for a breach of them; and an engagement with a third person not to violate such laws, cannot be satisfied by a plea, which would be ineffectual in the country where the law was broken, and the penalty incurred. The warranty against illicit trade, amounts, in short, to a stipulation that the trade in which the insured engages, shall be lawful to the purpose of being protected:—that is, that it shall not only be lawful in fact, but that it shall not become otherwise by the misconduct of the insured, or from the want of all necessary documents required by the laws of the country to legitimate it. For, what would it signify to the insurer, whether the loss arose from the circumstance that the trade was prohibited altogether, or was prohibited unless accompanied by certain documents?

That the seizure and condemnation of property, because it was unaccompanied by papers which the insured could not possibly know were required, is to the highest degree unjust, has already been admitted. But is this more unjust, or does it impose a greater hardship on the insured, than if a trade known to be lawful when the voyage was commenced, should be prohibited but the day before the arrival of the vessel, and on this recent order or law, she should be seized and condemned? And yet it can scarcely be doubted by any one, but that in such a case, the warranty would protect the insurer. The truth is, that the insured, by such a warranty, takes upon himself every risk which can occur in consequence of the trade being prohibited, whether absolutely, or under any qualification, and whether known or unknown to him; and for an engagement attended with so much danger, especially during the present European war, he is entitled, and no doubt takes care, to indemnify himself, by a proper diminution of the premium.

[The judgment of this court was reversed by the supreme court, where it was carried on writ of error. 7 Cranch (11 U. S.) 434.]

SMITH (DEXTER v.). See Case No. 3,866.

Case No. 13,036.

SMITH v. DOWNING et al.

[1 Fish. Pat. Cas. 64.] [1]

Circuit Court, D. Massachusetts. June, 1850.

PATENTS—PATENTABILITY—ABSTRACT PRINCIPLE—"ART"—"MECHANICAL EQUIVALENTS"—SIMILARITY IN MODE OF OPERATION.

1. What is to be protected is not an abstract or isolated principle, but the embodiment of a principle into a machine or manufacture, as described in the specification.

2. What the patentee does not, or certainly what in the misty future he can not describe, he must be presumed not to have invented.

3. The word "art," in the patent acts, means a useful art or manufacture which is beneficial, and which is described with exactness in its mode of operation. Such an art can be protected only in the mode and to the extent thus described.

4. One machine or manufacture is not a violation of another, within the purview of the patent system, unless it is substantially the same. It need not be identical, but it must be similar in the principle or mode of operation.

5. By equivalents in machinery is usually meant the mere substitution of one mechanical power for another, or one obvious and customary mode for another, to effect a like result.

This was a bill in equity filed by the complainant [Francis O. J. Smith], as assignee of S. F. B. Morse, to restrain the defendants [Hugh Downing and others] from infringing upon letters patent, granted to said Morse, June 20, 1840, reissued January 25, 1846, and again June 13, 1848, and letters patent granted to him April 11, 1846, and reissued June 13, 1848, both for "electro-magnetic telegraphs." The defendants were assignees of R. E. House, under letters patent granted to him April 18, 1846, for a "magnetic letter-printing telegraph." The issues of law and fact, and so

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much of the evidence as is material, are stated in the opinion of the court.

C. S. Davis, C. M. Keller, and B. R. Curtis, for complainant.

C. L. Woodbury, George Gifford, and Rufus Choate, for defendants.

WOODBURY, Circuit Justice. This case is full of difficulty, in respect both to the facts and the law. The operations of the conflicting machines depend much on the principles of electricity and galvanism—two sciences not very well understood, except by those who have made them a special study; and the trouble in comprehending with clearness and fullness their operations here, is increased by the intricate and novel mechanism employed.

More especially is this last the case with the machine worked by the defendants, and alleged to have been invented by Mr. House, and which is made still more complicated by the use of the new species of magnetism called axial-magnetism, and by the use of air as an additional power to move parts of the machine. As these two inventions are both conceded to be remarkable in their character—relating to an improvement in telegraphic communication by electro-magnetism at great distances, with almost lightning speed, and thus forming one of the wonders of the age; and, as their value is estimated to be very large, both to their owners and the public, I have hastened to examine the rights of each party as early and as fully as other pressing avocations would permit.

The prayer of the bill, by Smith, the assignee of Morse, is for a permanent and final injunction in equity against those who are operating under House. And this remedy should be granted, if it appears on the whole evidence that Morse was the original and first inventor of what he really claims in his patent, and that the machine by House is not different in principle, but the same in substance as Morse's.

These two questions, with some incidental considerations under each, will be found to cover the whole case. In order to ascertain whether Morse was the original inventor of all which he claims, it will be necessary first to examine and settle how much he does claim—that is, how much is embraced in his specification.

This inquiry is made somewhat complicated by his having taken out two different patents on the subject of electro-magnetism and its use in telegraphs, and having renewed one of them twice and the other once, and having preceded the first patent by a caveat, describing its character and extent.

But what he claims does not seem material in this case, except as set forth in the first patent and its various renewals.

I shall, therefore, confine my inquiry to that, though the others must be at times adverted to, the better to understand what was meant in that. As represented in his letter to the treasury department in 1837, Morse says he had been attempting, since 1832, to make electricity visible at a distance by signs, intelligible and certain, so as to communicate information. And in his caveat of October 6, 1837, he claims to have "invented a new method of transmitting and receiving intelligence by means of electro-magnetism." Or, in other words, in the same instrument, "a method of recording permanently electrical signs" at a distance. His specification, filed in 1838, April 7, is much the same in substance.

Following up a like idea in 1840, in his first patent he claims in that to have invented only a "new and useful improvement in the mode of communicating information by signals," and by the power of electro-magnetism.

Such is, in substance, the title of this patent in its original form and under all its renewals. In his last specifications in 1848, he claims to have invented merely "a new method," or "a new and useful apparatus for a system of transmitting" intelligence, which puts in motion machinery for producing signs, and at a distance recording said signs.

From all these, standing by themselves, it would seem manifest that he makes no pretension to have invented or discovered any new principles in physics, or to have discovered the old principles of electricity or galvanism. Nor does he claim to have invented or discovered any new principle in mechanics—like a new power, resembling the lever or screw. As little would any one have supposed, that he meant to claim as his invention and as new—the application at all, of electro-magnetism to the purposes of telegraphing at a distance, whether by making intelligible marks or signs there, or in some other mode—if it had not been for some remarks in one of his letters in 1837, and some words in the eighth clause of his last specification, and the ground taken in the argument, recently, by his counsel.

Thus, in his letter in September, 1837, to Jackson, he seems to have believed he had some claim to this discovery, viz: as he describes it, "The original suggestion of conveying intelligence by electricity"—as well as to the invention, which he calls "the devised mode of doing it."

Yet nothing of this is believed to be inserted in any of his official documents, till 1848. In his last renewal, in 1848, there are introduced for the first time, some changes of language and some tendencies in a part of them, as well as in some of the arguments, to make the claim broader, and, as in the letter just quoted —to cover all application of electro-magnetism, if not of electricity—to convey intelligence, or to telegraph to a distance.

But as late as 1846, so far from claiming the discovery or invention of any new general principle, or art, and asking a patent to protect himself in the exclusive use, as inventor of all telegraphs by electro-magnetism—he asks for protection of only his own improvement—his own method—his own apparatus. And he seems in his last specification, in 1848, to regard as the great excellence and

novelty of his invention, that it imprints the signals at one end, which were sent at the other, and in such characters as to be intelligible, without an observer to note them, and easily translated into English by means of his stenographic alphabet—and hence he there styles it a "recording or printing telegraph."

When there, for the first time, he also speaks of "the essence of my invention being the use of the electric or galvanic current," "however developed," "for marking or printing intelligible characters," "at any distance," being "a new application of that power of which I claim to be the first inventor or discoverer," he must, by all before said and done, be considered as claiming it in the form of his application—according to his machinery—and in the modes he had described in 1837, 1838, 1840, and 1846—rather than in this succeeding clause of 1848, and by it intending to cover the application itself of electro-magnetism to telegraphic purposes, in every possible form. Otherwise, his renewed patent of 1848 must be regarded as void for claiming too much, and for wishing to protect a mere principle, or effect, "however developed," and without reference to any method described by him, and to cover a principle, also before known.

But, limiting the patent to what is described as his method, or mode, and considering that in his "first claim" in 1848, he disclaims such broad views as appear in the "eighth claim," of that date, and expressly says: "I wish to be understood that I do not claim the use of the galvanic current, or current of electricity, for the purpose of telegraphic communications generally, but a new mode of using it, to move machinery, to print signs, etc., as described." All is consistent, and confined substantially to the mode he sets out in his specifications and in his own testimony in the record.

What he thus sets out is the subject invented. What is to be protected is not an abstract or isolated principle, but the embodiment of a principle into a machine or manufacture, as described in the specification; and it is the invention, in conformity to that embodiment, or representation of its working, which the act of congress will protect. Boulton v. Bull, 2 H. Bl. 463, 468, 483, 8 Term R. 95; Webst. Pat. Cas. 208; Webst. Pat. 4, 58, 126–128; Bean v. Smallwood [Case No. 1,173]; Winans v. Boston & P. R. Co. [Id. 17,858]; Curt. Pat. pp. 96, 145, § 4; Stone v. Sprague [Case No. 13,487]; Gods. Pat. 72; Phil. Pat. 90; Whittemore v. Cutter [Case No. 17,601]; Hind. Pat. 157. Because by those laws, the inventor is not to be protected, unless he describes plainly and fully what he has done, so that the public may copy or imitate, and use it after his term expires.

That is the consideration for the exclusive use during the period of the patent, and having this, prevents the patentee from claiming afterward more than he had invented when his patent issued. Webst. Pat. Cas. 719, notes 1, 2; 8 Term R. 100, 102; Curt. Pat. p. 205, § 128. And what he does not, or certainly what in the misty future he can not describe, he must be presumed not to have invented. 2 H. Bl. 483.

As this broader claim goes far beyond what we have already seen was that made in the caveat, and in the first specification, and in the original patent, as well as in all the subsequent renewals—as it conflicts with much of the language in this very last renewal—looking only to a new method and a mere improvement of what existed before, and as he seems to disavow it in his own evidence; and as, on every thing in the case it is questionable whether he could have intended to patent any thing except an improvement on what before existed, I do not think it just to place a broader construction on his language, than the whole subject-matter, and description, and nature of the case seem to indicate as designed.

These are all to be looked to; and no fancied construction, traveling too far, on a new and doubtful ground, is to be adopted; rather what is natural and clear, considering what already exists on the same subject. Haworth v. Hardcastle, 1 Webst. Pat. Cas. 485; Davoll v. Brown [Case No. 3,662]; [Grant v. Raymond] 6 Pet. [31 U. S.] 218; Wyeth v. Stone [Case No. 18,107]; Blanchard v. Sprague [Id. 1,518]; 1 Leeman, 482.

And I the more readily adopt this course for his own protection, as such a broader view might subject his patent to be considered void, both for claiming too much, and for claiming also the invention of a mere principle. It would be claiming too much, as it would cover the application, in every way, of electro-magnetism to telegraphs, when this, as will be seen hereafter, by the history of this subject, and as is sworn to by a large number of highly intelligent experts, had been known publicly and for years before Morse's first attention to the subject, in 1832. Indeed, he himself virtually admits the truth of this in his testimony.

Others, no less than the persons cited, as well as the history soon to be given of the progress on this subject, show that several had, before Morse, not only made this discovery, but applied both electricity and electro-magnetism to the purpose of telegraphing. But if, by his alphabet and record, he had been successful in making an improvement in the use of electricity for that purpose, and wished to secure the new method of doing it, he was at liberty, in point of law, to take out a patent for that new mode, but for nothing more.

He came into the world too late for truly claiming much as new. A large galaxy of discoverers on this subject had preceded him. The avoidance of patents for claiming too much is of frequent occurrence, and needs no explanation as to the reasons for it, when an applicant is so improvident or unjust to others as to claim for himself more

than he invented, and the credit or profit of which belongs to others rather than himself. See Wyeth v. Stone [supra]; Blanchard v. Sprague [supra]; Ames v. Howard [Case No. 326]; 1 Webst. Pat. Cas. 485; [Grant v. Raymond] 6 Pet. [31 U. S.] 218; Davoll v. Brown [supra].

As to the second objection, that this would be seeking to cover, by a patent, a new principle, without reference to any mode or method of enforcing it, the patent laws are well settled never to permit it.

The impropriety of claiming a patent for the invention or discovery of a new principle, however important it may be per se, rests on the idea that the exclusive use of the invention, for a term of years, is given to the patentee, to reward his genius and expense in making his invention, and pointing out, in his specification, how it can be used beneficially; and the machine, if it be a machine, easily made by any mechanic for general employment.

The patent is, in such cases, and must be in order to possess validity, not for the principle, but for the mode, machine or manufacture, to carry out the principle and to reduce it to practice. Webst. Pat. 45, 48. In short, the principle thus becomes the modus operandi, and rests in the new mode adopted to accomplish certain results. And though some expressions may have been used by one or two judges, which look like a sanction to patenting a principle, yet they are used in the above sense, of a principle in operation, in the manner set out in the specification, or, are used too loosely from haste and inadvertence. Except for this view as to the method, what use would there be in a specification describing the machine or method? So, where any judge speaks of patenting an art, it is not an art in the abstract, without a specification of the manner in which it is to operate, as a manufacture or otherwise. But it is the art thus explained in the specification, and illustrated by a machine, or model, or drawings, when of a character to be. It is the art so represented or exemplified, like the principle thus embodied, which alone the patent laws ever are designed to protect. In the English patent acts, the word "art" is not used at all.

And in ours, as well as in our constitution, the word art means a useful art, or a manufacture which is beneficial, and which, by the same law, is required to be described with exactness, in its mode of operation; and which, of course, for the reasons already laid down, can be protected only in the mode, and to the extent thus described. Wyeth v. Stone [supra]; Kneass v. Schuylkill Bank [Case No. 7,875]; [McClurg v. Kingsland] 1 How. [42 U. S.] 204; Webst. Pat. 8, 9; Phil. Pat. 74–76; Hind. Pat. 49; Curt. Pat. 38, § 9.

No lawyer conversant with the patent system, could for a moment suppose, that because Arkwright first invented and perfected the art of spinning by machinery, he could have taken out a patent for this art generally, and covered and monopolized all kinds of future and different improvements in that art. On the contrary, he could shield no mode of the art but that which he devised, used, and described. So it has been held that a patent for cutting ice by human power does not cover any mode but that described. Wyeth v. Stone [Case No. 18,107].

So, though Woodworth first invented planing boards by machinery—he could not take out a patent for that art, principle, or system generally, and thus either monopolize or prevent future improvements, when differing substantially from his machine. But the whole effort of Woodworth's assignees has been to describe his particular mode of planing, so as not to omit any thing material, or to cover too much—and no attempt is made to protect any thing connected with planing by machinery, except the mode thus described—or what is substantially the same.

Considering the opinions I have thus formed on this, and as will soon be explained, on other points of the case, it does not seem necessary to decide, on this occasion, whether the severe criticism, which has been made by the counsel for the respondents on several other portions of Morse's claims, are well founded or not; and more especially, whether his chief patent is not invalid, because covering too long a period—the time included by a previous foreign patent not having been deducted. It suffices now to add that the general conclusion as to the extent of Mr. Morse's claim in his specification, as amended or renewed, is, that he intended, in the words of the patent, to embrace only "a new and useful improvement." Or, as repeated in the specification itself, only "a new method," of communicating and recording signs by "electro-magnetism;" and he does not seem to have meant to cover merely a new object or purpose, to which an old principle or machine was to be applied, and which is not patentable,—Hind. Pat. 96; Webst. Pat. Cas. 208; Curt. Pat. § 42; Bean v. Smallwood [Case No. 1,173]; nor a new abstract principle to produce new results in telegraphing by means of electro-magnetism.

The essence of his method beyond what had before existed or been practiced, was to make the electro-magnetism, when excited and moving in a particular form, and marking at one end of the wires—not merely exhibit some evanescent sign at the other end, but a sign which the machine is made to trace, and thus record there permanently. This sign is excited by the closing and opening of the circuit by a stroke, or by lifting the wire from the cups, or by a knob pressed down and acting by a spring, and the mark by machinery is made to assume several forms; but the one generally practiced, is that of dots and straight lines. These, traced in succession on the rolling paper, and by being different in number and com-

bination, are, by the stenographic alphabet, invented by Mr. Morse and embraced as a part of the system, made to represent all the letters, and when you please, certain words in most common use.

The great result of the improvement is, by this machinery and the alphabet of signs for letters, to trace at one end the dots and lines, which represent what it is wished to communicate, and thus to have the same traced at the other end or paper, by like dots and lines.

The great beauty of the system is the identity of the tracing at both ends by the new machine (whether through the type rule at the beginning or the breaking and closing the circuits through the type rule or thumb spring), and also the rapidity as well as the exactness with which this tracing or recording is accomplished.

Indeed, so impressed was the inventor with this striking peculiarity in his system, that in his last specification he proposes to characterize it as "the first recording and printing telegraph by electro-magnetism." Describing his invention as including these improvements, and limiting it to them, he escapes the imputation or fatal error of claiming too much, or claiming to have discovered only a new or a mere art.

The next question in connection with the first head of inquiry, is, if this improvement or method was original with Mr. Morse. He states that the first idea he formed in relation to the subject of communicating information by electricity to a distance, was on board the Sully, on his return from Europe, in the autumn of 1832. But from various obstacles and imperfections in existing batteries, and a want of pecuniary means, and the novelty and complicated nature of the proposed improvements, he was not able nearly to complete it till October, 1837, when he filed a caveat on the subject, and in April, 1838, put his specifications and drawings on the records of the patent office, and in June, 1840, took out his first patent.

When his attention was first turned to the subject in 1832, not having before been particularly engaged in scientific pursuits, though possessed of good general information and much ingenuity, he did not appear to know with exactness what discoveries had before been made in the matter, and how far others, by vast ingenuity and science in the same path, had already carried into effect what then struck him as practical and likely to prove highly useful.

Whether he or Dr. Jackson spoke first, on that occasion, of what might probably be done to convert the power of electricity to use in recording ideas, as well as in communicating them to a distance, is disputed. It does not seem necessary to settle this point on this occasion; and it is a controversy very unpleasant to discuss, if avoidable, between two gentlemen of such high reputation and public usefulness.

It would seem probable, that, after the matter was broached by some one, Dr. Jackson, from the nature of his scientific studies, fresh from lectures in Paris, with an electro-magnet in his baggage on board, and some recent books treating of some of the operations which had been performed with this power, could impart more information in respect to it, and to any probable movement in the use of it. While, on the other hand, it is certain, from what has taken place since, that Mr. Morse possessed the perseverance, industry, and skill to go on with inquiries concerning the subject, when once started, till he perfected an instrument or machine to accomplish what was then agitated; and that he is, therefore, under the patent system, alone entitled to be protected as the inventor of what is claimed and described in his specification—so far as it had not been completed before—by others. Bedford v. Hunt [Case No. 1,217]; Washburn v. Gould [Id. 17,214]; Allen v. Blunt [Id. 217].

Undoubtedly much, which, in his first reflections on the matter, seemed to him novel, had been matter of deep inquiry and frequent experiments in the universities as well as private laboratories of Europe, and even of America.

It appears, on examination, that as early as 1746, Winkler at Leipsic, had used common electricity for telegraphic communications by the discharge of Leyden jars in connection with a long wire. In 1748, the same was done by Watson with two wires on an extended circuit of four miles. And in 1784 or 1787, Loneard, by frictional electricity and a wire extending thence into another room, transmitted telegraphic signals. In 1794, Reizer, by an electric spark and wires, illuminated letters of tinfoil at a distance on a glass plate. And in 1798, Betancourt, in Spain, sent this spark by Leyden jars and a wire, twenty-six miles; and in the same year, Salva, at Madrid, worked for many miles what was called "an electric spark telegraph."

If nothing more had occurred than these cases, it would be a little surprising that any one acquainted with the subject, should in 1832, near thirty-eight years after, anxiously inquire, as if a novelty and wonder, whether electricity could not be used for telegraphic communications.

But galvanism having been discovered in 1790, it is not strange, after the experiments with it for seventeen to nineteen years, that Soemering should, at Munich, in 1807, be able to erect a galvanic telegraph, and to make the voltaic pile decompose water, and show, as signals, air bubbles over the proper letters, and connect a wire to a trough, in which were thirty-five gold pins, with letters or numbers on each, and so arranged as to complete a communication of information.

Common electricity had been found too intense and erratic, and difficult to be confined, whereas, that generated by galvanism has

proved more quiet and manageable, and not costly. Inquiries, therefore, did not stop here, but under that were much multiplied and advanced, long before the year 1832. In 1813, Oersted, the Danish philosopher, commenced his experiments on the subject, and by 1819 or 1820, discovered that a magnetic needle at a distance might be deflected by a galvanic current, and thus mark information, and he is generally considered the discoverer of the magnetic properties of electro currents.

In the interim of 1816, Doctor John Redmond Cox, of Philadelphia, describes the use of galvanism as a telegraph by decomposing water. How its decomposition and the air bubbles enable the machine to act, is fully explained by Channing.

In the same year, Ronalds constructed a telegraph at Hammersmith, which operated for eight miles, and used the disc of clocks for his signals at both ends, keeping exact time, and one, when touched, indicating the same at the other end. But it worked very slowly, the interval between each being so great.

In 1820, Arago, Ampere, and Sir Humphry Davy, all experimented and discovered as much as Oersted had, and Ampere expressly stated, that the deflective needle would, in his opinion, be used for telegraphing by the magnetic fluid.

The use of magnetism in connection with electricity to make communications by telegraphs, thus became known and practiced to some extent, twelve years before Mr. Morse proposed to commence any improvements on the subject.

This last period was a new era in the science and the mode of operating by deflecting the needle or lever by magnetism. The preceding era, from 1790 to 1820, had been distinguished by decomposing water, ringing a bell, exploding a pistol, and other great changes and improvements, introduced by galvanism, in a manner superior to common frictional electricity. All before that had been the circuit by wires, and the use, so far as practicable, of the spark and other signals connected with it, through ordinary electric power.

It is not a little remarkable, looking to both Morse and House as inventors, that Ampere's plan was to have as many wires as letters, and press down a key on each as wanted. And that the same year. Cavallo proposed the communication to be made by a spark as a signal.

The public mind, among the scientific and machinists, had got so excited on the topic four years previous to 1832, the period of the voyage in the Sully, that numerous attempts were made in 1828 to carry out into more practical use, and to perfect what had before been indicated so often and so distinctly, the use of electricity and electro-magnetism for the purpose of telegraphing. Jacob Green wrote on it. Travoilot proposed to act by a wire from Paris to Brussels, and Sturgeon actually constructed at Woolwich an apparatus with a horse-shoe magnet, and the end of a wire coiled around it, communicating with the opposite poles of a galvanic machine, and thus supporting a weight or bar of nine pounds.

It is believed that Prof. Henry had discovered and described as early as this, and shown at Albany in 1829, how to increase the power at little expense. And Feckner suggested that galvanism could thus be applied to telegraph from Leipsic to Dresden.

But the most surprising discovery on this subject, about this period, was by Harrison Grey Dyer, another enterprising American. In 1827 or 1828, he is proved by Cornwell to have constructed a telegraph on Long Island, at the race-course, by wires on poles, and using glass insulators. Doctor Bell fortifies this statement, having seen some of his wires, and understood its operation to be by a spark sent from one end to the other, which made a mark on paper, prepared by some chemical salts.

Dyer's own deposition, taken since this cause was argued, and to be substituted for a letter from him to Doctor Bell, which was then objected to by the plaintiff, and ruled out, now verifies the truth of the letter, and goes into several details as to the condition of his invention, when abandoned in 1830, from fears of prosecution by some of his agents.

He used common electricity, and not electro-magnetism, and but one wire, which operated by a spark, which, after going through paper chemically prepared so as to leave a red mark on it, passed into the ground, without a return circuit. The difference of time between the sparks was, by an arbitrary alphabet, to signify different letters, and the paper was to be moved by the hand, while the telegraph operated, though machinery was contemplated to be introduced for that purpose. This device of an alphabet by spaces of time between sparks, evinced remarkable ingenuity, and differs, in some degree, from either Morse's, or House's, though much nearer in principle to the former.

It seems that in 1830, Booth, in Dublin, explained fully how electro-magnetism could be used to telegraph at a distance, and cause marks to be made by the fall of the armature from the horse-shoe magnet, when the circuit was broken.

But Barlow had failed of success in England from want of more power; and following out the new idea to increase the power of the magnet by closer coils of wire and otherwise, and when the want of greater power to operate further and quicker, and at less expense, seemed the chief desideratum, Mull, in 1830, succeeded in making a magnet which would sustain seventy-five pounds, and soon after one hundred and fifty pounds; and Prof. Henry, in 1831, completed one that could sustain a ton. During

this last year, also, Farraday had matured fully the horse-shoe magnet, and caused, under Saxton, at a distance, a strong circular motion, and brought magnetic electricity almost to maturity.

While all these clearly preceded what took place on the Sully, and removed very much all novelty in some of the ideas then suggested, yet it is certain that there yet remained to be constructed, on these or other principles, some practical machine for practical, popular, and commercial use, which would communicate to a distance, by electro-magnetism, and record quickly and cheaply what was thus communicated.

From that time forward, Morse is entitled to the high credit of making attempts to do this, however imperfectly informed he may then have been of what had already been accomplished toward it; and he has the still higher credit, among the experimenters from that time to 1837, of having then succeeded in perfecting what he describes at that time in his caveat and specification. Laboring on the same subject, and before 1838, Sturgeon, in 1832, had formed a rotary "electro-magnetic machine," which gave motion to working models of machinery, so as to pump water, saw wood, and draw weights. He had batteries of zinc, and electro-currents from them, and magnets with attraction and repulsion. And Baron de Schilling, the same year, or the next, constructed an electric telegraph, at St. Petersburg, which had thirty-six magnetic needles, and sounded alarms, and made signals by the deflection of the needle, which indicated letters by numbers. In 1833, Dr. Soulther, at Zurich, caused a pendulum motion between two horse-shoe magnets, and Ritchie, with various others, showed how increased power could be cheaply created, and used at a distance.

And Professor Henry made experiments for this object, with success, and explained that the fall of the weights, or armature, would ring bells, etc. Gaus and Weber constructed the first magnetic telegraph, at Gottingen, the same year, carrying the wire above ground, and over houses, and making signs for letters. Some of their wires are still standing. And in 1834, Jacobi made one similar in some respects. And Mr. Gurley, at Dublin, made another; and in 1836, Taquin and Eutychausen carried another over the streets of Vienna. All which remained to complete what was desirable in a tracing or writing telegraph at a distance was to make dots or marks—intelligible or significant of letters and words—so as to be read or translated with ease, and to perform the operation with useful speed.

To make dots, and color them by the paper being chemical, had already been discovered, but not an alphabet in connection, unless by Dyer, in 1828; nor a movement of the paper on a roller, so as to make the dots and marks successive, unless by him with the hand. The struggle was such, in 1837, to finish what was wanted, that Morse became alarmed lest others might first complete and obtain patents, for the invention, and hence proceeded more actively with his, and in 1837, filed his caveat in the month of October.

In the same year, whether earlier or later is not known, Alexander formed an electric telegraph, by which, through signals somewhat like House's, he communicated and spelt out at a distance, the word Victoria. See evidence that this was done earlier, using a key-board, and letters on each key, like House's. Davenport, too, in Vermont, announced another, and obtained a patent, in 1838. And M. Cook, Whetstone, and Steinheil, some using the needle, deflected; some making dots and lines; and some using the ground and water for a part of the circuit. Cook and Whetstone took out a patent for theirs in June, 1837, making the deflection of the needle point to letters on a board.

Steinheil that year had, at the Royal Observatory, an electro-magnetic telegraph, half a mile long, on poles. This made dots and short marks on paper, and preceded Morse's caveat, being before July 19, 1837. It used the ground as part of the circuit, which had been before discovered, but which Morse does not appear to describe or claim, till his first renewal in 1848.

Nor did Morse use poles or posts at first, in 1844, when constructing a telegraph between Baltimore, and Washington. Though they were used by Steinheil before 1839, and by Dyer, even in 1828, and were suggested to Morse early in 1840 by Prof. Henry, yet Morse thinks he himself invented them. After all this, there still was wanting a more perfect succession of marks to be made or recorded, which were letters themselves, or signs of letters, intelligible by an alphabet and power obtained and applied so as to do it quick enough for purposes of business. This deficiency was at length supplied.

Among about sixty-two competitors to the discovery of the electric telegraph by 1838, Morse alone, in 1837, seems to have reached the most perfect result desirable for public and practical use. This may not have been accomplished so wholly by the invention of much that was entirely new, as by "improvements," to use the language of his patent, on what had already been done on the same subject — improvements, ingenious, useful, and valuable. By the needle, or lever instead, not only deflected by the magnet, but provided with a pen to write, or, in other words, a pin at the end to make a dot or stroke, when thus deflected, as the circuit was held longer closed or broken, with machinery to keep the paper moving in the mean time, and so as to describe the dots and lines separately, and more especially with an alphabet, invented and matured, assigning letters and figures to these dots and lines according to their number and combination, he accomplished the great desideratum. Thus the fortunate idea was at last formed

and announced, which enabled the dead machine to move and speak intelligibly at any distance, with lightning speed.

It will be seen, that amid all these efforts at telegraphic communication by electricity and electro-magnetism, more or less successful from 1745 to 1838, none had attained fully to what Morse accomplished. Some had succeeded in sending information by signals, even beyond the decomposition of water and the declivity of the needle. They had made persons at a distance recognize the sign used, and thus obtain intelligence. They had also made marks at a distance. But in no way does it appear that they had sent information to a distance, and at the same moment, by the same machine, traced it down and recorded it permanently, intelligibly, and quickly.

This triumph was reserved to Morse's inflexible perseverance in experiments and observation; and chiefly after arming the end of the needle or lever with a pin, by use of a roller, with appropriate machinery to move his paper, so as to trace successive dots and marks, and by a stenographic alphabet to explain the marks made on the paper, and by more power through his combined circuits, to effect all at a greater distance, and with greater dispatch.

Afterward by the improvements in batteries made by Daniel and Groves, in 1843, he was enabled, without these local circuits, to increase the power of the electro-magnet so as to accomplish this at any distance, and with a speed and economy which rendered the invention applicable to general use. Before 1843, Harse's battery was used, and was too feeble, and before that, Cruikshank's. The want of this increased power has rendered former attempts at times abortive for practicable purposes; and its being recently supplied by the science of Farraday and Henry, tended more speedily (by Daniel and Grove's battery, founded on them) to remove the greatest obstacle to success.

Others had before, and about the same time, as has been noticed already, made marks on paper at a distance by the deflection of the needle, and by sparks, and attached special meanings to them, and the spaces between them. But the evidence is strong that Morse's, if not the very first, in these respects, was the most perfect and available for practical use, and the improvements by others in batteries came very opportunely to aid in its power for distant operations, beyond what even the local circuits had done. His special advance beyond others, except some new combinations, looks as if chiefly mechanical, but still it sufficed to promote the desired object.

By them and his new combinations, he was going a step further than any of his predecessors, for practical use, had accomplished, and this entitles him to protection and the fame he has achieved. This he and his assignees can therefore protect, but not particulars known long before him, or which he neither claimed, nor described, nor invented. As before explained, he must not be considered to have claimed the invention of the general principle or art of telegraphing by electro-magnetism, nor could he, as already shown, have protected it if he had. But all he clearly claimed was "a method" of doing it—"an improvement" in doing it, and these he has a right to protect, and these only. They were a pin to mark or trace in the end of his lever or needle—a happy thought, but the movement of the paper on a roller was almost as necessary to receive marks in succession—and his alphabet to be thus applied and used, was the crowning art of his invention.

Much more might be offered as to the details of Morse's machinery, and as to those inventions existing before and since—and how far the latter may have been imitative or independent. But it is not necessary to explain or discuss them, for the purpose of settling the present case.

It is certain that in 1837, he had so far completed his invention as to announce it in his caveat, and have it described also, by a brother, in a public paper called the Observer, and in Silliman's Journal. And that though a specification followed in 1838, and a patent in 1840, without putting it in operation for practical purposes, yet, by the aid of congress in 1844, it was successfully used from Baltimore to Washington. It thus became perfected and turned to practical account; and is to be protected to its legitimate extent against every real violation.

However ingenious, then, have been some of the attacks on the originality of Morse's invention, and however cogent may be some of the objections to its validity, on other grounds urged in argument by the defendants, I do not find it necessary, as before remarked, to give an opinion on them in this case. Because, considering Morse's patent as good, if limited to the extent claimed in his specifications, as we have construed it on this occasion, and as we feel bound to construe it on the law of the case and the evidence before us, and considering it as original to the extent we have already explained—the situation of the House machine, as used by the defendants, is such as to render no further examination useful concerning the first two points.

The character of House's machine, and more especially as compared with Morse's, does not seem, to a very wide extent, to have been fully examined and understood.

Having ascertained, with some care, what must be considered the real claim of Morse in his patent, and how much of it is new, we are prepared better to decide the chief and final inquiry, what there is in the machine used by defendants, and alleged in their answer, to have been invented by House, which violates what is novel in Morse's.

Firstly. What is meant, in law, by a violation or infringement of a patent? It would amount to an infringement of such an invention as Morse's, or the patent for it, to adopt his mode of acting, operating, etc., or merely to change it by substituting some mechanical equivalent in a part of it, or altering only the form and proportion, so as not materially to affect results, or making any change merely evasive, colorable, and not "substantial," or "considerable" in its character. Jupe v. Pratt, 1 Webst. Pat. Cas. 146-149; Neilson's Case, Id. 342; Barrett v. Hall [Case No. 1,047]; Whittemore v. Cutter [Case No. 17,601]. But one machine or manufacture is not a violation of another, within the purview of the patent system, unless it is substantially the same. It need not be identical, but it must be similar in the principle or mode of operation.

When its results differ favorably and considerably, it is considered that there must be an improvement involved in it over and beyond the other, or this could not happen. So, when its mode of operation is unlike the other in material respects, the author of it is not culpable, and is of course not guilty of any mechanical piracy.

The same latitude for further inventions and improvements is open to others as was open to Mr. Morse himself. He was allowed to make any improvement on his predecessors; and others are equally allowed to make any improvement on him. To be sure, if his improvement was engrafted on a machine or manufacture before made and patented, he could use or patent only his improvement, and not what had been previously patented, without obtaining first a license or purchase from the patentee. So of others in relation to him. But if his machine did not amount merely to an improvement on others, but to more—and did constitute a new and useful combination, he had a right to use it without license from others. Eden v. De Costa, 37 Lond. Jour. Arts, 130.

So as to others, in respect to their improvements after his.

But the new combination, when the patent is for that, is not violated when only parts of it are used by others, and not all of them, which are material. Prouty v. Ruggles, 16 Pet. [41 U. S.] 336. Scrutinizing the two machines together, the defendants insist that House's operates on a principle radically different from Morse's; that its results are greatly superior, and that it resembles Morse's in nothing which did not exist before Morse's invention, and which was not produced before by others rather than by him.

In answer to this, it is true that the general object of the two is the same, and so it is with all rival inventions. But this, of course, does not necessarily make all new inventions or patents for a like object an encroachment on all previous ones. Such a doctrine would discourage progress, rather than encourage useful arts, as the constitution wishes to be done by granting patents.

It would, after one invention as to the same subject, principle, or art, halt and bar all further advances on the same subject. It would petrify everything as it stood, to the great loss of mankind, and in derogation of both private and public rights to advance human improvement and human power. It would also render the first improver a monopolist, and exclude the exercise or reward of further genius, science and labor in the same line, however useful, and however much needed, beyond what has already been accomplished.

But limit the doctrine, as we have done already, to the particular improvement made, and the patentee of it is allowed to protect that improvement, as he ought to be—it being his own invention, his own property, and the fruit of his own exertion, though, of course, it does not protect, and should not, a monopoly of what else may have been invented by others before, or may be invented by them afterward, on the same subject—the chief care must be, while allowing others their rights, to shield his, and not let others claim or use his method of improvement colorably or fraudulently, but only use what is substantially different. Elec. Tel. Co. v. Little, 34 Lond. Jour. Arts, 130.

Analyzing and comparing these inventions together in particulars, it will be difficult to designate anything in House's, which, in point of law or fact, amounts to a violation of the other—under the principles of well-settled law, applicable to the subject which we have laid down.

It is certain, on examination of the two machines, that they appear to the eye entirely unlike, except in some particulars as to wires, magnets and batteries, which were in existence and use before Morse's invention, or have been since improved by others.

It is certain, too, that Morse's is less complicated, and more easily intelligible, while House's is very difficult to be comprehended in its operations in detail, and works with the addition of two more powers—one, air, and the other called axial-magnetism.

Indeed, the difference is, in these respects, so strongly marked to the eye and to the mind, that while Morse's can readily be understood by most mechanics and men of science, it requires days, if not weeks, with some, thoroughly to comprehend all the parts and movements of House's. And House's, without any patent, has been sufficiently protected thus far from piracy, by the apparent inability of others to imitate it with success.

It is manifest, still further, that while Morse's operates rapidly, and records in a species of hieroglyphics or stenography, which has to be translated into English, House's moves much faster, at the astonishing rate of sixty or seventy strokes or breaks in a second, and at once records the information, by its own machinery, in Roman letters.

It literally gives "letters to lightning," as

well as "lightning to letters." In short, the system of Morse, in one respect, viz: in its tracing or writing, is essentially different as to its mode of recording from that of House's, and depends on machinery and devices original in Morse; whereas House's does not copy this, either in form or substance, but records in a different manner, and by new machinery, and by aid of one new power in axial-magnetism, and of another old, but different power in air, applied in a new way. And it does this in letters, not signs, and with wonderful speed and accuracy. This was a thing attempted before Morse or House, and, to a certain extent, realized, though not then, by the same powers, nor then so perfect as to be useful.

To be more minute, as before indicated, the chief principle or characteristic of Morse's, is, that by its type-rule or knob-spring at the starting place, it is able to make dots and lines, by breaking the circuit, for a longer or shorter time, and then being felt along the wires to the other end, trace there on paper, passing over or under the needle or pin, at the end of the lever, like dots or lines, which remain on it permanently written, to be afterward, by the stenographic alphabet, translated into Roman letters and words.

But this does not appear ever to have been accomplished before, so as to be turned to practical account, though developed in part and approximated as before described. But House's makes no such tracing at either end of the circuit. It acts at both ends by means of signals, and traces nothing, and at the closing end, by the power of air, operating on the type-wheel, it literally prints the letter signalized on the rim of the wheel. Such signals were known, and some used, long before Morse's patent, and they are here perfected and printed by House, in a manner exceedingly ingenious, rapid, and interesting.

Without going into fuller details in explanation of the principle in House's machine, operating so unlike Morse's, it may suffice to add, that the machine of the former, at the starting point, does not trace any marks or dots, and lines, but has signal letters stamped on twenty-four keys, like those of a piano. The operator touches one of these, so as to hold the circuit closed till, by means of the machinery, the same signal letter is presented at the other end of the rim of the type-wheel, where twenty-four letters are separately attached. There the signal letter is not then traced on the paper like Morse's, by the movement and tracing which have taken place at the other end, but this real letter on the type-wheel is itself printed on the paper, and others in rapid succession follow, till the words and sentences appear, as the paper rolls onward, printed in perfect form.

It will, therefore, be manifest that one machine—Morse's—traces at the distant end what is traced at the other; while House's does not trace at either end, but makes a signal of a letter at the distant end which has been made at the other, and thus, by new machinery, and a new power of air and axial-magnetism, is enabled to print the single letter at the last end; and this with a rapidity marvelous, and at the same time novel, and practicable for commercial use. In short, one is a tracing or writing telegraph, the other a signal and printing telegraph.

This distinction between writing and printing may not be very material for some purposes when a name or assent is wanting on paper, as under the Statute of Frauds, or in voting (4 Pick. 313).

Yet the art of writing is a different one from the art of printing; the latter being a modern invention, and the former a very ancient one, and every one knows that the process to form each rests on principles wholly different. Again, it must be conceded that House uses a moving power, such as the other does, for some purposes, when employing electro-magnetism between two stations. But this had long been employed by others for a like purpose before Morse or House used it; and hence the conduct of the latter in this respect is no infringement on any thing original and duly patented by the former.

There are other material differences; the rest of the machinery in one, that is in Morse's, is simple, and in some respects new; while the rest in the other, that is in House's, is complicated, is aided by new forces, and causes new results, though founded on a theory of signalizing older than either of these inventions.

In the next place, an objection urged against House's is, that if not like Morse's in most material respects, it is in all of them a mere equivalent. By equivalents in machinery is usually meant the substitution of merely one mechanical power for another, or one obvious and customary mode for another of effecting a like result.

That these two machines are not equivalents seems manifest from a fact, admitted in the argument, and testified to by Foss, a witness for the plaintiff, that though by some changes House's could do all which Morse's does, yet Morse's could not be made to do all which House's does.

Looking, also, into details, it is manifest, that differences exist between Morse's and House's, which consist of nothing resembling equivalents, such as the different results produced by each on the recording paper, and this by a different mode of operation, and by the assistance of two different powers.

Another difference, which prevents the two from being equivalents, is not only the want in Morse's of much that is in House's, but vice versa. Besides what the latter omits, before enumerated, he throws away entirely the "U" magnet, as well as other parts of Morse's as a combination.

Among other material things not used by House, which are used by Morse, and show the machines neither identical nor equivalent, are a local circuit—one of the two galvanic

batteries and one of the circuits of conductors —the mode of closing and opening the circuits—the pen and lever, etc.

Again, most if not all which House uses, that is in Morse's, was known before Morse's patent. Where House uses powers and machinery known before Morse, he does not use the same or an equivalent, which Morse invented or can protect. He has the same right to use all known and not patented before, as Morse had. Among them, we have already seen where the wires and the circuit—the galvanic battery—the use of the posts, and the ground for a part of the circuit—the breaks in it by various devices, as by lifting the wire out, or a blow—the making of signals and marks—the paper and the clock-work, and the needle deflected, if not the lever. There has been, too, in use in other business, numerous arrangements and machines for self-recording, such as gasometers for measuring the gas used, registers of tides and the quantity of rain falling, or work of certain kinds performed, direction of winds, distances traveled by men or carriages, etc. Some of these resembled much Morse's system of marks on paper. And to imitate those by like means would be permissible, though not by new means or machinery obtained from Morse.

It would likewise be difficult to consider House's as identical or equivalent with Morse's, when he uses neither of the new and distinguishing parts in Morse's, viz: the pin in the lever or needle to trace or record characters, nor the stenographic alphabet to make them intelligible.

House also uses some things, which seem new and peculiar to his machine, and prevent it from being a mere equivalent. The supposed new discovery and use by House of axial-magnetism, operating perpendicularly within a cylinder, covered by coils of wire, and helping to produce the astonishing number of fifty-four or eighty-four vibrations in a second, are claimed to be important, and to aid materially in the operations of his machine. How that may be, must be decided by experts, where necessary, as also the importance of the air and air apparatus which he employs. It is true that air is as old as creation, and its use as a moving power, almost coeval with navigation; but the employment of this all-pervading and nearly spiritual element in telegraphic machinery, to move by its vacuums, with superhuman strength and speed, and contribute to print rather than speak ideas, may be new and original.

But it does not seem useful, on this occasion, to go into details concerning either of them—considering how the machines stand on other grounds, and their external appearance in connection with it.

Indeed, we are compelled by the history of this subject, and the most decisive weight of evidence on the stand, to believe what is certainly not in accordance with our own previous general impressions, that much we supposed new in connection with both of these machines, is not new, nor to be protected against use by others. For instance: The use of the electro-magnetism generally, for communicating intelligence at a distance, and there recording it, is, as heretofore shown, not new to either Morse or House. The idea had, as already explained, been long conceived prior to the experiments of either. But the want of a sufficient power to operate at a great distance, till after the discovery of galvanism and the horseshoe magnet, prevented its complete success for practical objects, leaving it rather, as then called, a "philosophical toy," in most places. After this discovery and improvement, the want of mechanism to repeat the breaks rapidly enough for general use, and mark down the results, presented difficulties. To be sure, the marking down a dot at the distant end, made at the starting place, was known by the deflection of a needle and other devices, such as the spark, though not with the pin and the kind of machinery throughout used by Morse, or with the stenographic alphabet invented by Morse. So the signal of a letter at one end plainly understood at the other, was known before House's invention, but never made to work with the speed of his, and to print that letter as well as know it, at the distant place where it was signalized.

The lever, of which so much is said, seems only the old needle depressed at one end by the magnet, and of course elevated at the other till the circuit is broken; and by putting a pin or a pen in the last end, a dot or stroke is made on the paper rolling above or below, and the stenographic signs are then recorded. One other view to illustrate, whether House has or has not encroached on what Morse invented, and we shall be done with this mode of investigating this branch of the subject. From the examination made, it appears that the novelties in Morse's patents are—first, local circuits—and for these his last patent seems chiefly to have been taken out; secondly, recording or writing at a distance by electric magnetism; and, thirdly, doing it by a regular stenographic alphabet on rolling paper. Now, as to the local circuits, they are not used at all by House.

As to the tracing or writing at a distance in any way and by the aid of electro-magnetism alone, it is not the mode in which House's machine operates. But, on the contrary, it records by a distinct art, viz: the art of printing, and by means of two additional powers in axial-magnetism and in air, and by new and different machinery. To be sure, he uses, also, the power of electro-magnetism, but Morse did not invent that power or its employment in telegraphing.

Lastly, as to a stenographic alphabet, as invented and used by Morse—it is manifest that it is not employed by House at either end of his line, but the ancient Roman letters, unchanged and unmodified in any respect whatever. It seems thus demonstra-

ble, that all which Morse appears entitled to protect as new, is untouched by House.

If we proceed next to the opinion of experts, whether House infringes on Morse, or, in other words, whether the principle of the two machines be unlike or not, there seems to be a remarkable preponderance in favor of House's machine. Mr. Morse, himself, is the other way a gentlemen---not educated specially to any branch of science, but having the general information of a man liberally taught, and a highly ingenious mind. He was a painter by profession, according to his evidence, and beside him regarding House as infringing, is only Mr. Foss, an assistant in working one of his machines, but a baker and grocer till 1845. These are all against House's machine; and neither of them seem to be experts, such as usually are relied on to give scientific opinion rather than mere facts. On the other hand, [to show] that the principles of the two machines are clearly unlike, [there] are numerous experts, including some of the most experienced and talented men in this line of science in the country, and some of them also very practical men. They all, twelve or fourteen in number, unite in the conclusion, that the principle of the two is wholly different.

Some consider the two as unlike as "a goose-quill is to a printing-press." And several of them express a decided opinion that House's is superior---some think as a work of science, some as a piece of mechanism, and some as to its practical utility.

Though more complicated, its results are in Roman letters, and require no translation; its speed in action is greater; and is not so liable to mistakes in transmitting or construing and copying. Many of the patents or inventions which have been upheld, are such slight changes from former modes or machines as to be tested in their material diversity chiefly by their better results, such as the flame of gas rather than oil, the hot blast rather than the cold, charcoal used in making sugar, hot water in place of cold in making cloth, etc.

The meaning attached to the word "principle," may lead to a part of the difference expressed by Messrs. Morse and Foss. But the larger number concurring in a different view—and the definition which the law, as heretofore explained, requires us to place on the favored principle, in the patent system, leave no doubt that, setting aside the use of wires, batteries, and electro-magnets ---which neither Morse nor House invented—their machines or improvements rest on principles, in some respects, totally and clearly unlike.

Again, regarding Morse's as a new combination of old parts, or improvements with one new part, invented by him, which is perhaps nearest the truth, it is then manifest that if House's does not adopt the new part, or all the different elements of the new combination, it is not an infringement. Curt. Pat. 93; Barrett v. Hall [Case No. 1,047].

In order to violate a new combination, all the material parts of it must be used, or that is not used which the patentee claimed as necessary to constitute his new improvement. As before shown, on the evidence, it can not be pretended that House uses at all many things material in Morse's, such as the "U magnet," the "clock-work," the lever, the pin, or pen, or type-rule, or local circuits. The last machine, there, in such a case, being in parts, in principle and combination, so unlike the first, except the general use of electro-magnetism, invented by neither, can not be regarded as an infringement on the first, but its author has the same right to invent and employ it, as the author of the first had to invent that. The public, too, as well as men of genius, have the same right to make and employ still further improvements, in telegraphing by electro-magnetism, and in recording the results, as Morse had in 1832, or in 1838, or 1840.

All, however, must take care not to use anything which Morse, himself, invented, but only, like him, use the fruits of their own perseverance and ingenuity. While they do not go beyond this, as the defendants under House do not appear to have done in this case, the plaintiff as assignee of Morse, is not entitled in equity to the extraordinary remedy of an injunction to stop forever the operations under House's machine.

On the evidence presented to me on both sides, and after a careful examination of that and the legal principles which should govern my decisions, I have been forced to the conclusion, contrary to my previous impressions, that the defendants have not been proved guilty of any such wrong.

If I have fallen into an error in this conclusion, I deeply regret it; but it is some satisfaction to reflect that it can easily be corrected. For any views expressed by me, in this case in equity, can not only be revised by another tribunal, the supreme court, and, if erroneous, corrected, but another remedy exists at law, if the plaintiff supposes he will be able to prove there, with clearness, that the House patent is a violation of the principles involved in Morse's.

A decision by the district judge of Kentucky has been cited for the plaintiff on some of the points of this case. But as the defendants were not parties to it, and as it related to another telegraph than House's, it can not bind the defendants, and can not on any legal question, be an authority to govern this court, though its reasoning has received and is entitled to respectful consideration, where it refers to any legal principle. Injunction refused.

[For other cases involving these patents, see notes to Smith v. Clark, Case No. 13,027; Same v. Ely, Id. 13,043.]

Case No. 13,037.

SMITH et al. v. DRAPER.

[5 Blatchf. 238;[1] 2 Int. Rev. Rec. 6.]

Circuit Court, E. D. New York. June 30, 1865.

CUSTOMS DUTIES—TEA—ACT JUNE 30, 1864—RETROACTIVE EFFECT.

1. Under the joint resolution of April 29, 1864 (13 Stat. 405), and the 20th section of the act of June 30, 1864 (Id. 216), the legal duty payable upon a consumption entry of imported teas, made April 29, 1864, was 30 cents per pound.

2. The 20th section of the act of June 30, 1864, did not have a retroactive effect. Its intention was to equalize the operation of the joint resolution of April 29, 1864, as between two classes of persons—those whose goods, owing to a failure to enforce the resolution until a late hour on the 30th of April, had gone into consumption upon payment of the former rates of duty, and those who, on later hours of the same day, had been compelled to pay the extra duty of 50 per cent. upon similar entries; but it made no provision for those who, although their goods arrived on the 29th or 30th of April, did not on those days enter them for consumption.

3. Under the act of June 30, 1864, all teas in warehouse on the 1st of July, 1864, were subject to a duty of 25 cents per pound, when afterwards withdrawn for consumption.

This was an action [by William H. Smith and others] against [Simeon Draper] the collector of the port of New York, to recover the sum of $9,000, as an alleged excess of duties exacted by him from the plaintiffs, on a quantity of teas imported by them into that port. The teas arrived in port at about 9 o'clock p. m. of the 29th of April, 1864. On the next day, at about 2 o'clock p. m., the plaintiffs, prepared with their entry, invoice, and bill of lading, and with gold sufficient to pay the duties, applied to be allowed to enter the teas for consumption, on paying a duty of 20 cents per pound. The entry was refused by Mr. Barney, the then collector, unless the plaintiffs would pay a duty of 30 cents per pound. This the plaintiffs declined to do, and they withdrew their application, under protest. On the 2d of May following, the plaintiffs made a warehouse entry of the teas, and, on the usual bond being given, the goods were placed in a government warehouse. On the 3d of January, 1865, 500 packages of the teas were withdrawn, on an entry for consumption, and the payment of a duty of 25 cents per pound, without protest. On the 16th of January, 500 more packages were withdrawn, on a like entry, and on the payment, under protest, of the same rate of duty. On the 2d of February, 1865, more packages were in a similar manner withdrawn, paying a like duty, also under protest. These amounts of duty were demanded by the defendant by virtue of an act of congress passed June 30, 1864 (13 Stat. 202). This action was brought to recover the difference between a duty of 20 cents and a duty of 30 cents per pound on the teas, on the ground that the legal rate of duty chargeable under the circumstances was only 20 cents per pound.

Mr. Culver and Mr. Lowry, for plaintiffs.
District Attorney Silliman, for defendant.

BENEDICT, District Judge. The difference of opinion as to the proper rate of duty on the teas arises out of the somewhat anomalous legislation of 1864. On the 29th of April, 1864, the day on which these teas arrived, congress passed a joint resolution (13 Stat. 405), which provided, "that, until the end of sixty days from the passage of this resolution, 50 per cent. of the rates of duties and imposts now imposed by law on all goods, wares, merchandise, and articles imported, shall be added to the present duties and imposts now chargeable on the importation of such articles." The first section of the act of June 30, 1864, provided, that teas imported on and after the 1st day of July, 1864, should be subject to a duty of 25 cents per pound. The 19th section of the same act declared, "that all goods, wares, and merchandise which may be in the public stores or bonded warehouses on the day and year this act shall take effect, shall be subjected to no other duty, upon the entry thereof for consumption, than if the same were imported respectively after that day." The 20th section of the same act provided, that the joint resolution of April 29, 1864, "shall not be deemed to have taken effect until after the thirtieth day of April, eighteen hundred and sixty-four, and shall be and remain in force until and including the thirtieth day of June, eighteen hundred and sixty-four, and any duties which shall have been exacted and received, contrary to the provisions of this section, shall be refunded by the secretary of the treasury."

In this state of the law, I consider it clear, that the legal duty payable upon a consumption entry of teas, made April 30, 1864, was 30 cents per pound. The act of 1861 had fixed the duty at 20 cents, and the resolution of April 29, 1864, increased that duty by 50 per cent. This resolution took effect at the beginning of the day of its passage. U. S. v. Williams [Case No. 16,723]; The Ann [Id. 397]; U. S. v. Arnold [Id. 14,469]; Arnold v. U. S., 9 Cranch [13 U. S.] 104. These teas, having arrived on the 29th of April, were subject to the provisions of the resolution. It was, therefore, the duty of the collector to refuse the consumption entry, on the refusal of the plaintiffs to pay the duty of 30 cents, and any argument based on a supposed illegality in his action in this respect must fall.

It is insisted, on behalf of the plaintiffs, that the effect of the 20th section of the act of June 30, 1864, is, to forbid courts to declare that any other rate of duty than 20 cents was lawful before the 1st day of May, 1864, and that, consequently, the demand of 30 cents in this case must be held to have been illegal. I do not understand the statute to have such retro-active effect. There are no

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

words in the act which declare an intention that it shall be retro-active, while the provision for relief in cases where the extra duty has been paid, indicates a contrary effect. For, if the effect of the act were to make illegal all exaction of extra duties which had been made on the 29th and 30th of April, the provision directing the secretary of the treasury to refund such duties would be unnecessary. The ordinary remedy against the collector would give perfect relief.

The intention of this 20th section, was to equalize the operation of the joint resolution of April 29th, as between two classes of persons—those whose goods, owing to the failure to enforce the resolution until a late hour on the 30th of April, had gone into consumption upon payment of the former rates of duty, and those who, on later hours of the same day, had been compelled to pay the extra duty of 50 per cent. upon similar entries. The act provides, as a measure of relief, for refunding the extra duties actually paid on the 29th and 30th of April, and relieves from their obligation to pay such extra duties those who had entered their goods for consumption on paying only the former rates; but it makes no provision for those who, although their goods arrived on those days, did not enter them for consumption. I am unable to see how the plaintiffs can claim relief under this section. They are not within the classes there provided for. The duty which they seek to recover back was not the extra duty exacted under the resolution of April 29th, but was the duty of 25 cents per pound imposed by the 1st and 19th sections of the act of June 30, 1864. Those articles plainly declare, that all teas in warehouse on the 1st day of July, 1864, shall, on being entered for consumption, be subject to a duty of 25 cents per pound, and to no other duty. No question is raised before me, as to any want of power in congress so to declare. The teas of the plaintiffs were in warehouse on the day named in the act, and must be held to have been legally subjected to the rate of duty which the act prescribes, when they were entered after that day for consumption.

The argument on the part of the plaintiffs amounts to this, that an illegal demand by Collector Barney compelled them to put their teas into a warehouse; that such teas were there under duress; and that the subsequent exaction by the defendant must, therefore, be held to have been unauthorized. But the demand made by Collector Barney was not illegal, nor did it, in any legal sense, compel the plaintiffs to put their teas into a warehouse. That disposition of their goods was voluntarily selected by them on the 2d of May, to escape any present demand for duties, and to await future legislation. Moreover, if illegal action by Collector Barney, on the 30th of April, had compelled the plaintiffs to warehouse their teas, it is not clear how such action would make illegal the subsequent act of the defendant, and warrant a judgment against him in an action on his implied promise to repay moneys illegally exacted. The question raised by the action is—Did or did not the law in force when the duties were exacted, authorize the defendant to exact the duties which he did, upon a consumption entry of the teas so in warehouse? The words of the act are express, and it cannot be held that the act had no effect on the teas because the importer offered, on the 30th of April, to pay a less duty on them than was then legally chargeable.

It may, also, be noticed, as affecting any argument founded on the supposed duress in this case, that the act of warehousing the teas on the 2d of May, is the act which is claimed to have been performed under duress. But the act of warehousing on that day did not subject the teas to the charge of 25 cents duty. The teas might have been withdrawn for export before the 1st day of July, 1864, without payment of this duty. The allowing them to remain in warehouse until the statute of June 30, 1864, took effect, and then entering them for consumption, did, however, bring them directly within the provisions of that act; and then the defendant became authorized to demand the duty of 25 cents per pound. My conclusion, therefore, is, that the plaintiffs cannot recover; and it has been arrived at after giving to the elaborate and ingenious argument presented on their behalf the most careful consideration. The case has features of hardship, but the hardship arises from the failure of the act of June 30, 1864, to provide relief for such a case. I must declare the law as I find it laid down by the law-making power.

The view of the case which I have taken makes it unnecessary for me to notice the various questions raised by the defendant as to the sufficiency of the tender and of the protests, and as to the effect of the warehouse bond. There must be a judgment for the defendant.

Case No. 13,038.

SMITH v. DREW et al.

[10 Ben. 614.] [1]

District Court, S. D. New York. Nov., 1879.

CHARTER PARTY—TONNAGE DUES—PORT CHARGES—ACCOUNT STATED—PRESUMPTION.

1. S., the master of a schooner, chartered her in Jacksonville, Florida, to D. and B., to carry a cargo of lumber to Cape Haytien, "charterers to pay all the vessel's port charges at Cape Haytien, including pilotage, consul's fees," etc. The vessel took the cargo and delivered it at Cape Haytien to L., the consignee named in the bill of lading, who was a contractor for the building of a dock for which the lumber was destined, and who had an agreement with the Haytian government that vessels coming to the ports of Hayti, laden exclusively with materials for the dock and clearing in ballast for a foreign port, were exempted from tonnage dues.

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

This agreement was not known to either of the parties to the charter before the arrival of the vessel at Cape Haytien, and before her arrival the master had executed another charter to take a cargo from Miragoane, another Haytian port. By the laws of Hayti the schooner, before clearing from Cape Haytien for Miragoane, was bound to pay $381 of tonnage dues. The master claimed that under the charter the charterers were bound to pay the tonnage dues, as being "port charges." The consignee refused to pay them except by deducting them from the freight. This, therefore, he did, and took a receipt for the rest of the freight money, which read that it was "in full for freight, * * * less advances, tonnage dues, etc., paid for my account," which the master signed and he also made a protest against the deduction. The master then filed a libel against the charterers to recover the $381: *Held*, that the tonnage dues payable at Cape Haytien for the cargo to be taken on board at Miragoane were port charges payable by the charterers.

2. The parties being ignorant of the consignee's agreement when the charter was made, their rights, under the charter, were not affected by it.

3. The presumption would be, not that the vessel was going to leave Cape Haytien in ballast, but that she would take an outward cargo.

4. The giving the receipt did not, under the circumstances, constitute an account stated between the parties, and the libellant was entitled to recover.

[This was a libel by John Smith against George F. Drew and Louis Bucki to recover a balance of freight money.]

R. D. Benedict, for libellant.

G. H. Fletcher, for respondents.

CHOATE, District Judge. This is a suit on a charter party to recover an alleged balance of $381 of the freight money. The charter was executed in Jacksonville, Florida, on the 20th day of March, 1877, between the libellant, master of the schooner Col. S. W. Razee of Philadelphia, and the respondents Drew and Bucki, lumber merchants. The charter was of the whole of said vessel, with the usual necessary exceptions, for the carriage of a cargo of lumber at a certain stipulated freight, to the port of Cape Haytien in the republic of Hayti, "charterers to pay all the vessel's port charges at Cape Haytien, including pilotage, consul's fees," etc. The vessel gave bills of lading under which the cargo was deliverable to one Loynez at Cape Haytien, and in due course she arrived at that port and delivered her cargo. The freight amounted to $1785.19. When the master came to settle his account with the consignee, Loynez, he received $1069.59, Loynez charging him with $715.60 as disbursements advanced on account of the vessel. This sum of $715.60 included, besides other sums not objected to, the sum of $381 tonnage dues paid at Cape Haytien. The captain objected to this charge, claiming that under the charter the charterers were obliged to pay the tonnage dues as a port charge at Cape Haytien. By the laws of Hayti the captain could not clear the vessel without the payment of these tonnage dues, and the consignee positively refused to pay them except by taking them out of the freight money due; and the captain, in order to clear his vessel and having no other means to do so, accepted the balance which the consignee offered, protesting against the same, and signed a receipt therefor drawn up by the consignee. This receipt was as follows: "Received from C. F. Loynez in a draft on Pierson & Co., New York, at 30 days, the sum of 1069 59/100 dollars in full for freight of a cargo of lumber per the schooner Col. S. W. Razee, less advances, tonnage dues, etc., paid by him for my account. Signed in duplicate, Cape Haytien, May 3, 1877. John Smith." Immediately after this settlement the master noted a protest before the American consul.

By the laws of Hayti every foreign vessel bringing cargo to a port in the country was chargeable with tonnage dues which, by law, were required to be paid at her first port of discharge before she could be cleared from that port, and whether she left in ballast or with cargo for a port out of Hayti or for another port of Hayti to take on there her return cargo. If she went to another port in Hayti she also paid at her first port a fee for changing ports. The cargo of lumber carried out by this schooner was for the use of the contractors to build a wharf at Cape Haytien, who had a special convention with the government of Hayti, under which vessels coming to the port of Cape Haytien, laden exclusively with materials for this new wharf and clearing in ballast for a foreign port, were exempted from the payment of the usual tonnage dues. It did not appear that this special agreement was known to either of the parties to this charter-party prior to the arrival of the vessel at Cape Haytien, and by a charter for a return cargo, entered into by the libellant before his arrival at Cape Haytien, the vessel was bound to go to Miragoane, another port in Hayti, to load with a cargo, thence to Boston. She was therefore liable, before she could clear from Cape Haytien on her projected homeward voyage, to pay this sum of $381 tonnage dues at Cape Haytien. And soon after her arrival a question arose between the captain and the consignee as to whether the consignee or the ship should pay it. At the time this matter was arranged, as above stated, it was understood between the captain and the consignee that the captain would make a claim on the charterers for this sum which the consignee refused to pay otherwise than out of the freight money.

Several objections are now made by the charterers to the recovery of this sum: (1) that tonnage dues are not port charges; (2) that, if tonnage dues are port charges, yet these dues, though payment was required at Cape Haytien, were not levied as tonnage dues for that port, but as tonnage dues for the port of Miragoane, and therefore, and under the particular facts of this case, that they were not tonnage dues "at Cape Haytien" within the meaning of this charter-party which the charterers were bound to pay; and (3) that the libellant is precluded from claiming this sum

from the charterers by his assenting to an account stated and by his receipt of the balance paid him in full of that account at Cape Haytien.

1. I think there can be no question that tonnage dues are port charges.

2. The claim that these were dues for the port of Miragoane rests on the testimony of certain government officials at Cape Haytien, that this exaction is made, not for the port of discharge, but for the port where the return cargo is taken on board. They indeed give it as their opinion and understanding that the tax is levied on account of the cargo exported, but as it is uniformly exacted at the first port at which the vessel arrives, I think it is properly described, and must be held to be within the contemplation of both parties, a port charge at that port, whatever may be the grounds which actuate the government in imposing it. All that parties entering into such a contract in a foreign country can be presumed to know about it is, that it is exacted at the first port, and therefore it is properly to be considered as a port charge of or at that port, as they look at the matter. The distinction drawn by these witnesses is, it seems to me, a distinction without a difference, so far as this contract is concerned. It is said, however, that, in this particular case, if the vessel had come home in ballast from Cape Haytien she would not have been chargeable with any tonnage dues, and hence it is argued that as this charter-party provides for the outward voyage only, ending with the delivery of the cargo, it was not within the purview of the contract that the charterers should be made chargeable with any burden to enable the ship to bring home a return cargo, and that neither legally nor equitably is the libellant entitled to charge this payment on the charterers under this charter-party. The answer to this argument is, I think, conclusive that the parties must have contemplated the payment of tonnage dues, since the private agreement between the consignee and the government did not enter into their calculations, and the mere fact that by that agreement the consignee was relieved from paying it should not charge it upon the ship as between her and the charterers, nor can this court assume, as insisted on the part of the respondents, that the ship, within the contemplation of the parties to this contract, was to return from Hayti without cargo. On the contrary, there being nothing in the charter to restrict the ship-owner in this respect, this court will assume that it was understood that the ship would bring back a cargo if the same could be obtained. I see no equity in the respondents' position if these dues are properly held to be port charges at Cape Haytien, for it is distinctly agreed that the ship shall not be charged with them, and so far as either party knew when the contract was made they had to be paid, and certainly not by the ship.

3. The defence of an account stated cannot avail the respondents, because the captain did all that he could do to induce the consignee to pay these charges, and simply took all he could get of the freight from the consignee, without waiving any rights against the charterers. He was compelled to submit in order to clear his vessel, and the settlement that he made did not purport and was not understood by either party to be a settlement with the charterers, but only with the consignee of the cargo, who claimed that he was relieved of the charge by favor of the government, and did not profess or undertake to settle the account as between the ship and the charterers. It is evident that a clear case is made out which overcomes the prima facie case made by the account and receipt. The recital in the receipt that the payment was on the captain's account, was inserted by the consignee; so far as appears, it was not specially called to the attention of the captain and is inconsistent with the fact, as proved by the evidence.

Decree for libellant for $381 and interest from May 3, 1877, and costs.

Case No. 13,039.

SMITH et al. v. EASTERN RAILROAD.

[1 Curt. 253; [1] 16 Law Rep. 401.]

Circuit Court, D. Massachusetts. Oct. Term, 1852.

MARITIME LIEN—MATERIALS FURNISHED TO CONTRACTOR—NOTICE.

1. The act of Massachusetts (St. 1848, c. 290) does not give a lien for materials sold, to a person who has contracted with the owner of a vessel to make certain repairs for a stipulated sum, the vendor having notice of such contract.

[Cited in Purinton v. Hull of a New Ship, Case No. 11,472.]

[Cited in brief in Parker v. Bell, 7 Gray, 434.]

2. The object of the act was to create liens on domestic vessels for repairs, supplies, &c., to the same extent as the general maritime law gives such liens on foreign vessels.

[Cited in Harbeck v. The Francis A. Palmer, Case No. 6,045a.]

3. By the maritime law, the vendor of materials, who sells them to a mechanic whom he knows to have contracted to make repairs for a stipulated sum and to whom, exclusively, he gives credit, can have no lien on the vessel.

[Cited in The Wandrahm, 14 C. C. A. 414, 67 Fed. 359.]

This was an appeal from a decree of the district court. The cause was heard on an agreed statement of facts, which was as follows: "The libel in this cause was filed in the district court of Massachusetts, on the 19th of August, 1851, by the libellants [Oliver Smith and others], copartners, and dealers in lumber, to enforce a lien claimed by them upon the steamboat owned by the respondents. Judgment was entered against the respondents by consent, and thereupon

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

they entered an appeal to this court. The case is submitted on the following facts: On or about the 18th of February, 1851, said boat being in need of divers repairs, the respondents made a written contract with one Nathaniel P. Roberts, by which he agreed to do a portion of the work, and make a portion of the necessary repairs and improvements on said boat. By the terms of the contract of which the libellants had knowledge, said Roberts was to furnish all the necessary materials, as well as perform all the labor for the repairs, for a certain sum stated in the contract. And he performed and completed his work about the 20th of July, 1851, having furnished all the materials, pursuant to his agreement, and the respondents paid him therefor in full, before notice of any claim made by libellants. The lumber used for said repairs, was furnished and delivered to Roberts by the libellants at divers times, partly at their shop, and partly at planing-mills, on his orders, to the amount of $1,075.13. And there was an understanding, before they began, that the libellants should furnish the materials for this job. At the times these materials were delivered, they were entered and charged in the libellants' books, and a transcript of such entries in the journal and ledger is annexed, marked 'A,' which, it is agreed, may be used instead of said books and entries, and be entitled to the same weight as the books and entries, if, in the opinion of the court, such books and entries are admissible and competent evidence for the libellants, which the respondents deny. About the time of the completion of said work, Roberts failed in business. Previous to February 18, 1851, Roberts had been a customer of the libellants, and had had a running account with them to the extent of several thousand dollars annually, for several years, on a credit usually of six months; bills therefor being rendered usually, on the 1st of January and July, in each year. At the time Roberts purchased the materials in question, nothing was said or done by him or by the libellants, indicating that the materials were not sold on the individual and sole responsibility of Roberts, nor was any thing said or done by either indicating that he purchased or they sold, in any other manner than previously. During the time of the purchases in question, Roberts bought other lumber of libellants, to the amount of about $100, and there was an unsettled account for lumber, on which Roberts owed them $600 or $700. Prior to 1st August, 1851, and after the work was completed, the libellants demanded payment of said Roberts of the bill of materials in question; and on the 13th day of August, 1851, the libellants caused a writ to be sued out against said Roberts, a copy of which and the papers in that suit may be referred to as a part of this statement. Before the filing of said libel, but after the respondents had paid Roberts in full, the libellants made a demand on the respondents for the amount of said bill. The deposition of Roberts, and the contract, may be referred to as a part of this statement by either party. The steamboat in question is of the burden of 242 $^{33}/_{95}$ tons, and without masts. She was enrolled and licensed under the laws of the United States, 19th August, 1842. The license expired 19th August, 1843, and no other has been taken out, and she has been employed only as a ferry-boat to carry passengers to and from the railroad in the harbor of Boston, between Boston and East Boston. If upon the foregoing facts the court shall be of opinion that the libellants had a lien on said boat, which they could legally enforce at the time of the filing of said libel, judgment shall be entered for the libellants for a sum to be agreed upon, and for costs; otherwise judgment shall be entered for respondents for costs."

Milton Andros, for libellants.
William Dehon, for respondents.

CURTIS, Circuit Justice. The lien asserted by the libellants depends for its validity upon the construction of the act of the legislature of Massachusetts, passed on the 9th day of May, 1848, entitled, "An act establishing a lien on ships and vessels in certain cases." The principal question is, whether by this act it was intended to create a lien, for the security of a debt, incurred for materials sold to one, who had entered into a contract with the owner of the vessel, to make certain repairs for an agreed sum of money, to be paid to him by the owner, of which contract the vendor of the materials had notice at the time of the sale. That it is competent for the legislature to provide for liens on domestic vessels, to secure not only the debts contracted by, or on behalf of the owner, for labor, materials, and supplies, but also debts contracted by those undertaking the repairs of such a vessel, must be admitted. Such laws, in respect to buildings on land, exist in many of the states, and there is an act of congress to the like effect in the District of Columbia, which received a construction by the supreme court, in the case of Winder v. Caldwell, 14 How. [55 U. S.] 434. The question is, whether this act was intended to apply to any other debts than those of the owner of the vessel.

The first section is as follows: "Whenever a debt is contracted for labor performed, or materials used in the construction or repair of, or for provisions and stores and other articles furnished for, or on account of, any ship or vessel within this commonwealth, such debt shall be a lien upon such ship or vessel, her tackle, apparel, and furniture, and shall be preferred to all other liens thereon except mariners' wages." The terms of the section are not decisive respecting this question. "A debt contracted," may mean

by or on behalf of the owner of the vessel, or by and on behalf of one who, having undertaken the repairs, purchases the materials on his own account, and uses them upon the vessel in the execution of his contract. The intention of the legislature can be arrived at only by considering the nature of the act, and of the rights involved in it, and its adaptation to carry out the object contended for by the libellants. If the act is to be so interpreted as to embrace this case, it is obvious that by its operation double liens were created; one, securing the stipulated price agreed to be paid to Roberts for all the work and materials under his contract with the owner, and others securing to the libellants, and all persons with whom Roberts contracted for materials and labor, the prices he agreed to pay therefor. The act contains no provision for marshalling these liens, or for restricting the amount of those of the second class, to the contract price agreed to be paid to Roberts by the owners, nor for any means of protecting the owners, by notice or otherwise, against being compelled to pay twice for the same materials. Suppose Roberts had filed his libel to enforce his lien for the contract price; according to this act he must have had a decree. No authority is given to call in other parties with whom Roberts contracted, in order to ascertain whether debts are due to them, for materials used in the repairs, and the owners would ordinarily have no means of knowing with whom Roberts contracted for materials. And yet, having forced the owners to pay Roberts, if he failed to meet his own engagements, the court would be compelled, on the application of those who had sold materials to him, to make a decree in their favor; and thus oblige the owner, who was in no fault, and had neglected no means of self-protection, to pay Roberts's debts, contracted at his discretion, both as to amount and terms of credit, in addition to their own. This practical operation of the construction contended for, is so unjust, that I cannot suppose the legislature intended it. It would require very clear language to convince me that the law was designed to give rights which cannot exist, without producing so much embarrassment and wrong, that it would be really beneficial to no class of persons.

These views are strengthened by looking at other acts passed by the legislature of Massachusetts upon a kindred subject, and which may, therefore, be considered as in pari materia. Besides the provisions of the Revised Statutes, on this subject, there are two acts now in force for securing to mechanics and material-men payment for labor and materials used in erecting or repairing buildings on land—the Acts of the 24th day of May, 1851, and of the 21st day of May, 1852. The first applies only to labor; and it provides, in terms, for contracts with the owner, "or other person who has contracted with such owner for erecting, altering, or repairing such building," &c.; and it requires a notice of the claim to be recorded in the registry of deeds, within sixty days after the labor is performed. The other act applies to labor and materials, and limits the amount of the liens of sub-contractors to the amount of the contract with the owner; and declares that there shall be no lien for materials, "unless the person claiming such lien shall, before furnishing such materials, have given notice, in writing, to the owner of the land, and to the person who has contracted with the owner of the land, that he intends to claim such lien, for materials furnished as aforesaid." It can hardly be supposed that the legislature should thus enable the owners of buildings to protect themselves against embarrassment and injustice, and at the same time leave the owners of vessels no means of doing so; or that they should have used clear and express terms to confer a lien on sub-contractors upon buildings, and intend to confer it on sub-contractors upon vessels, by a mere ambiguity. My opinion is, that so far as respects vessels already built and equipped, the object, and the whole scope of this act was, to create the same lien upon domestic vessels, for materials, repairs, and supplies, as existed by the general maritime laws of the United States upon foreign vessels. The second section of the act provides "that nothing in this act shall alter, or be construed to alter, or in any way affect, the lien as now existing on foreign ships and vessels." To them it was not designed to apply; probably for the reason that the regulation of liens upon vessels engaged in commerce between the several states, or with foreign nations, and not belonging to citizens of the state, is not a proper subject of state legislation. It is a regulation of commerce, within the power conferred on congress by the constitution. Now, it is true that, under the maritime law, materials and supplies are presumed to be furnished on the credit of the vessel and owners until the contrary is proved. But the contrary is proved, when it appears that the materials were sold to a mechanic for his own account. It is true that the libellants expected, when they sold these materials, that they would be used on the steamer, and that, in point of fact, nearly all of them were so used. But they knew that Roberts did not purchase them under any agency for the owners; that he purchased them for himself; that they became his property when delivered; that they were at his risk; and he was at liberty to make any use of them, he might please to make. They were, therefore, bought by him on his own account, and the credit must be deemed to have been given exclusively to him, for he was and was known to be, the sole debtor; and in such a case there is no lien by the maritime law.

It has been argued that this act ought to receive a liberal construction, for the security

of those whose labor and materials go to the benefit of owners of vessels, and that such liens are favored by the maritime law from sound policy. I entertain no doubt that the liens which that law creates, are for the advantage of commerce, and of the seamen, mechanics, and material-men, in whose favor they exist. But I am equally clear that, to give sub-contractors liens upon vessels, with no adequate means to work them out, without embarrassment and injustice to owners, would, in the end, benefit no one. Its practical effect would be, either to compel owners to employ only those who had so much capital, as to afford undoubted security that they would meet their engagements with third persons, or to transfer the business of repairing vessels, to places where the laws created no such dangers. And either of these effects would be injurious to the classes of persons, whom this law was intended to benefit. In my judgment, sound policy requires an observance, in the case of domestic vessels, of those limits prescribed by the general maritime law, which have been deduced by experience from the practical necessities of commerce, and of the interests of those connected with it.

The decree of the district court must be reversed, and the libel dismissed, with costs.

SMITH (ELLICOTT v.). See Case No. 4,387.

Case No. 13,040.

SMITH v. ELLIOT.

[4 Cranch, C. C. 710.] [1]

Circuit Court, District of Columbia. March Term, 1836.

APPRENTICE—INDENTURES—PRESENCE IN COURT.

In the indentures of an apprentice, bound out by the orphans' court, it is not necessary to state that the apprentice was present in court. It will be presumed, unless the contrary appears.

[This was an action by Thomas Smith against Jonathan Elliot.]

Petition, by an apprentice, to be discharged from his indentures.

Mr. Brent, for petitioner, contended that the indentures were void because they did not state that the boy was present in the orphans' court when he was bound out as an orphan child, under Act Md. 1793, c. 45.

THE COURT (nem. con.) was of opinion that it was not necessary to state that fact in the indenture; as it will be presumed that he was present, unless the contrary should be proved.

The complaint was that the boy was not well fed and clothed; but THE COURT thought that the complaint was not supported by the petitioner's witnesses, and dismissed the petition, without hearing the defendant's witnesses.

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

Case No. 13,041.

SMITH v. ELLIOTT.

[9 Blatchf. 400; 5 Fish. Pat. Cas. 315; 1 O. G. 331; Merw. Pat. Inv. 193.] [1]

Circuit Court, S. D. New York. Feb. 7, 1872.

PATENTS—CORDED ELASTIC FABRIC—NOVELTY.

1. The reissued letters patent granted to William Smith, June 30th, 1868, division B, for an "improvement in corded elastic fabrics," the original letters patent having been granted to him April 5th, 1853, and subsequently extended, are void for want of novelty.

2. The claim of such reissued patent, namely, "the corded fabric, substantially as hereinbefore described, in which the cords are elastic, and are held between the upper and under weft threads, and separated from each other by the interweaving of the upper and under weft threads with the warp threads, in the spaces between the cords, and only there, substantially as above shown," is anticipated by a like fabric which existed before, although not woven of a width, or fineness, or elasticity, suitable to be used for the gores of boots, and not so used, and although the fabric introduced by the patentee possessed the qualities which fitted it to be used for the gores of boots, and it was so used, and displaced other elastic fabrics before used for that purpose.

[Cited in Meyer v. Pritchard, Case No. 9,517; Kilbourne v. W. Bingham Co., 1 C. C. A. 617, 50 Fed. 699.]

3. The fabric not being new, its application to a new use was not invention.

[Cited in Ansonia Brass & Copper Co. v. Electrical Supply Co., 144 U. S. 18, 12 Sup. Ct. 604.]

[This was a bill in equity by William Smith against Henry Elliott, administrator of Joseph T. Whitehouse.]

[Final hearing on pleadings and proofs. Suit brought on letters patent [No. 9,653] for an "improvement in corded elastic fabrics," granted to William Smith, April 5, 1853; reissued, in three divisions, June 30, 1868 [No's. 2,843, 2,844 and 3,014], and extended for seven years from April 5, 1867. The nature of the invention in controversy is fully set forth in the opinion.] [2]

Thomas A. Jenckes, for plaintiff.

George Gifford, Benjamin Dean, and William C. Witter, for defendants.

WOODRUFF, Circuit Judge. This case and seven other cases, brought by the same complainant against different defendants, were argued and submitted together, upon like pleadings and upon the same proofs, under a stipulation that the proofs taken in either should be read or used in all. The bills of complaint are filed to restrain the respective defendants from infringing a patent granted to the complainant, April 5th, 1853, and subsequently extended and twice reissued. The patent was last reissued to the

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 9 Blatchf. 400, and the statement is from 5 Fish. Pat. Cas. 315. Merw. Pat. Inv. 193, contains only a partial report.]

[2] [From 5 Fish. Pat. Cas. 315.]

complainant in 1868, in three divisions:—one, described as for "improvements in weaving," in which the process is claimed; another, entitled, "improvements in looms for weaving," wherein a certain part of the loom, in combination with mechanism, is claimed; and a third, in which the specification is entitled, "improvement in corded elastic fabrics," in which the fabric is claimed by the complainant as his invention. The bills allege, that the defendants, respectively, have infringed the last named division of the reissued patent, for the new fabric, which is dated June 30th, 1868, and is called, "division B"; and they pray an injunction and an account. Without setting out the answer, it is sufficient to say, that the defendants rest their defence on the denial of the novelty of the invention, and upon proofs tending to establish that a fabric answering fully to the description of the fabric described and claimed in the complainant's specification, was made by many persons, and was in public use and on sale in this country, several years before the alleged invention by the complainant.

The description in the specification first gives the loom in which the fabric is made, and its operation, then mentions the manner in which corded fabrics have theretofore been produced. and the peculiarities of such fabrics, and then proceeds to describe the fabric claimed to be new. Modified by a disclaimer, made pending these suits, the description is as follows: "The features which distinguish my improved corded fabric, from all others before known, are as follows, viz.: The cords are longitudinal, and may be termed cord warps. They are separated from each other by the interweaving of the warp threads and weft threads, * * * between the cords only, and not over and under the cords; and the cords are covered on both surfaces by weft threads only. The weft threads are not interwoven with the cords, * * * but each weft thread passes either over or under all the cords, instead of passing first under one cord, and then over the other, and so on across the fabric; and it is interwoven only between the cords, and only so interwoven with the warp threads. The fabric being so constituted at every part of the length. the cords are griped between two weft threads, one above and the other below, which two weft threads are drawn each half way around each one of all the cords, by being interwoven with the warp threads, in the several spaces between the cords." Then, proceeding, in terms, to limit himself to such fabrics when the "cords" are elastic, the patentee states his claim thus: "What, therefore, I claim as my invention, in this subdivision of my patent, is, the corded fabric, substantially as hereinbefore described, in which the cords are elastic, and are held between the upper and under weft threads, and separated from each other by the interweaving of the upper and under weft threads with the warp threads, in the spaces between the cords, and only there, substantially as above shown."

The proofs herein indicate, that the plaintiff, at or about the date of his patent, produced a woven elastic fabric of great utility, adapted to purposes for which no similar fabric before made in this country was suitable, possessing a beauty of finish and texture most desirable and attractive, and having firmness and durability combined with great elasticity, to a degree not before found in any fabric in the market. Although the purposes for which it might be used were several, its most important use was for gores inserted in the tops of gaiter boots, to be stretched in drawing on the boot, and, by contraction, binding the top of the boot firmly around the ankle, after the boot was drawn on. Made of silk, or silk and cotton, warp and weft, the latter covering elastic cords, (india rubber being, in practice, used therefor,) the threads of silk or cotton being of great fineness, the fabric has a fine glossy appearance. The cords lying very close to each other, the whole is not greatly unlike very rich, heavy, corded silk goods found in the stores. The manner in which the weft threads are tightly bound upon the enclosed elastic cords, by the interweaving of the warp threads therewith, holds the cords so firmly that they cannot slip or slide; and, hence, the fabric can be cut, and its cut edge may be attached, by sewing, to leather or cloth, &c., without any withdrawing of the elastic cords, when stretched in use. By reason of its excellence in these and, perhaps, other respects, the fabric has gone into extensive use; and it is alleged that it has occupied the market, and, for the especial purpose of elastic gores in gaiter boots, is the only fabric now used.

The complainant being the meritorious cause or agent in such a result, whether the same is due either to his industry as a laborer, his skill as a weaver, his judgment as an observer and experimenter, or his invention as an originator of either machinery, process or product, he is entitled to very favorable consideration; and a certain sense of justice would seem to require that, if possible, an adequate reward for the benefit derived therefrom by the public should be secured to him. The law, however, gives no monopoly to industry, to wise judgment, or to mere mechanical skill in the use of known means, nor to the product of either, if it be not new. These are within the proper field of competition, and open to all. In general, they will, in that competition, be justly appreciated, and will command their proper remuneration, if usefully employed. It is invention of what is new, and not comparative superiority, or greater excellence, in what was before known, which the law protects, as exclusive property; and it is that alone which is secured by patent. Whether the results attained by the complainant,

above mentioned, are due to improved machinery invented by him and secured to him by patent, or are due to a peculiarity in the process of manufacture invented by him and patented, it is unnecessary, in this case, to enquire. For aught that appears here, either of these may be true; but the defendants are not charged with violating his rights as an inventor of either machine, loom, or process, but only as invading his alleged exclusive title to the product itself.

On that subject, it should be observed, that there are many changes which may be suggested by the judgment or taste of the manufacturer, or by the particular uses to which the article produced is to be applied, which are not invention; and many exhibitions of superior skill, in producing an article of greater excellence, which are not invention. Thus—if a fabric be already known and in use, change of color, change of mere material, change in its degree of fineness, or in the fineness of parts thereof, if these changes involve nothing new in construction, in the relation of its parts, in the office or function of either part or of the whole, do not constitute invention, although, for many purposes, these may constitute the greater excellence of the fabric. Indeed, in the present case, not even such changes are claimed, in the complainant's specification, to have been made; and yet the argument submitted on his behalf dwells largely on peculiarities in the complainant's fabric, as it has actually been made and used, which are of this character only, and largely, also, on the special use to which it has been applied, namely, to the making of gores for boots, and its fitness for such use. But the complainant, in his specification, claims nothing on this ground. In practice, for the making of the fabric, the elastic cords now used are made of vulcanized india rubber, for greater elasticity and, perhaps, greater durability; but the claim of the patent is for any elastic cord, of whatever material; and it is by no means clear, that, when the complainant received his patent, he used vulcanized rubber himself. In practice, for the making of the fabric for shoe gores, silk, upon the upper surface of the fabric, is used, and, no doubt, is required, in order to the beauty and finish desired for that use, and, it may be, for other uses; but the claim of the patent is for any warp threads and weft threads, and this will embrace any fibrous materials from which such threads may be wrought. In practice, the threads used for warp and weft are very fine, by which, first, the cords are permitted to lie very close to each other, and, second, their covering by the weft is very smooth, and so the whole fabric has an evenly and compactly corded surface; but the claim of the complainant embraces warp threads and weft threads of whatever quality or fineness, only limited by the practicability of weaving them in the manner pointed out. In practice, few threads of warp are woven or interlocked between the cords; but the claim of the complainant includes warp threads interwoven with weft threads between the cords, whether such warp threads be few or many. In practice, when such fabric is intended for goring for boots, it is woven of a width corresponding with the length of the gore; but the claim of the complainant makes no discrimination in respect of the width of the fabric claimed. In fact, it is made, for other purposes, exceedingly narrow, and, within the description in the patent, it may be made of any width desired, and for any purpose. In practice, its special adaptation for gores of boots, and its value for that use, is illustrated in the particulars wherein they require fineness, smoothness, finish, durability and, especially, very great elasticity; but the claim of the complainant is not for any peculiarities in these respects, nor is it for an improved gore at all. If it were conceded that the complainant might have obtained a patent for an improved elastic gore for boots or shoes, founded upon facts appearing in the proof herein, it would, for the purposes of this case, be necessary to say, that he has not done so.

Once more, if the fabric be not new, the application of it to a new use is not invention, when nothing novel is required for its adaptation. If the complainant had first invented the combination of an elastic gore with the other parts of a boot or shoe, there might be therein something which was the proper subject of a patent; but this has no bearing on the question, whether the elastic fabric of which the gore is made is the complainant's exclusive property.

Aided by the foregoing observations, how stands the present case, upon the proofs? The complainant must abide by the specification and claim which he has made. If he has rights which, under that specification and claim, are not protected, the court cannot aid him. The question here is—was the fabric, which he has described and claimed to be his invention, new?

The claim is, for "the corded fabric, substantially as hereinbefore described, in which the cords are elastic, and are held between the upper and under weft threads, and separated from each other by the interweaving of the upper and under weft threads with the warp threads, in the spaces between the cords, and only there, substantially as above shown." This claim is, of course, to be construed with reference to the preceding specification; and above I have stated what is material to its full meaning. Width of fabric is not of the substance of this specification or claim. They embrace all widths. Degree of elasticity is of no significance, nor is fineness or coarseness of threads, nor the material of either the threads or cords, nor the number of weft threads, nor the number of warp threads between each cord. All these may be varied indefinitely, and yet be within the specification, and within this claim; and the

uses to which the completed fabric is adapted are in no wise suggested as any test of its likeness to what is claimed, or as at all entering into the complainant's alleged invention.

It is shown, on the part of the defendants, that, several years prior to the alleged invention, a fabric was made extensively, and was in general use, which answers in every particular to this claim of the complainant. It was chiefly used for suspenders, braces, garters, and the like. It was generally made of cotton warp and weft threads, and cords of native india rubber. True, it was not, in general, of either a color, fineness, width or finish which was suitable for the gores of boots. But it was a "corded fabric," in which the cords were "elastic," in which the cords were "held between the upper and under weft threads, and separated from each other by the interweaving of the upper and under weft threads with the warp threads," and in which this interweaving was "in the spaces between the cords, and only there." The testimony of the witnesses is to complete identity, in these respects, with the fabric claimed. A careful examination of the fabrics fails to disclose any difference in the crossing of the threads, in the interweaving, or in any other respect, which discredits or contradicts the witnesses; and they are uncontradicted, in fact, on these points, by other testimony. A short mode of disposing of this evidence was repeatedly suggested by the complainant, in the conduct of the examinations before the examiners, namely, by imputing to witnesses fraud and perjury—conduct, on his part, in the course of such examinations, deserving severe reprehension; and it may be added, that the proceedings before the examiners are returned to the court abounding in improper remarks, prolix statements touching the conduct of counsel, officers of the patent office, witnesses, and others, which are not proof, and which ought to have been expunged at the cost of the complainant, before the case was brought to a hearing, or the proofs printed for the use of the court.

The court must deal with the uncontradicted testimony according to the ordinary rules by which evidence is to be weighed; and it is quite clear, that the defendants have established the facts above stated. True, these fabrics do not appear to have been woven of a width sufficient for gores of boots. The material does not appear to have been of suitable fineness to render the fabric attractive for that purpose, although there is some evidence which may qualify this observation. Such a use does not distinctly appear to have been made of those fabrics, until the complainant commenced the manufacture. It is, at least, doubtful, whether those fabrics had the elasticity which is required for shoe gores; and, in other particulars, there were differences, not in construction or kind, but only in degrees and qualities, not of the substance of the invention claimed.

If the complainant's patent had been prior in date to the manufacture of these fabrics, and was otherwise valid, there is not a doubt, there can be none, that these fabrics are directly within the claim of the complainant, and would have been plain infringements of his patent. This is a rational and, in general, when they include the whole of an alleged invention, a conclusive test of the originality of the latter.

It would be a work of supererogation, as well as of great labor, to recite the testimony which establishes that such fabrics were made before the complainant even began his experiments. It runs through the mass of the testimony given by the witnesses examined by the complainant as well as those examined by the defendants. Those fabrics were made in various colors, and with various differences in ornamentation; some with a large number of threads of warp between the cords, so interwoven as to produce cloth in the intermediate spaces, and some with few threads binding the upper and lower weft threads together; some with a selvage like the complainant's and some with a round-corded selvage, and some with a cloth edge, which, when it was contracted, formed a ruffle. But the whole substance of the complainant's alleged invention is there, sometimes in its simple and literal exactness, and sometimes with accessories.

I am compelled to say, that the fabric, as claimed by him in the specification annexed to his patent, was not new, and that these actions cannot be maintained. The bills of complaint must, therefore, be dismissed.

[For other cases involving this patent, see note to Smith v. Glendale Elastic Fabrics Co., Case No. 13,050.]

Case No. 13,042.

SMITH v. ELWOOD.

[4 Cranch, C. C. 670.] [1]

Circuit Court, District of Columbia. March Term, 1836.

APPRENTICE—POWER OF JUSTICE OF PEACE TO BIND—PRACTICE.

1. Justices of the peace have no power to bind out an orphan child not brought before them.

2. If the court discharge an apprentice, they will order him to be bound out by the orphans' court to a person named in the order.

Henrietta Smith, a colored child, between nine and ten years of age, by J. A. M. Duncausen her next friend, filed her petition stating that she has no parent but her mother, a free colored woman of bad character, and unable to maintain the petitioner; that for three or four years past she was taken care of by Mrs. Dunkley, from motives of charity, who recently, on leaving this city, provided a home for the child with the said Duncausen, where she now is, and who is willing to keep her

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

as an apprentice. That the mother, to prevent the child being bound to the said Duncausen, has recently gone before two justices of the peace and entered into some writing purporting to be an indenture of apprenticeship, binding the child to one Isaac Elwood, who claims her as his apprentice. That the child was not brought before the said justices and that it was done on the day of the sitting of the orphans' court. It prays that Elwood and the mother may be cited to appear and answer the petition; that the supposed indentures may be declared void; and that the said Elwood and the mother may be enjoined from taking the child. The answer of the defendants denies all the facts charged in the petition, except that the mother was unable to maintain the child; and that the child never was before the justices.

W. L. Brent, for defendant, contended that it was not necessary that the child should be before the justices at the time of binding, or at any other time.

THE COURT, however (nem. con.), was of opinion that the justices had no jurisdiction, as the child was not before them.

Mr. Duncausen and Mr. Elwood, each applied to the court to have the child bound to him. THE COURT said they were willing to hear the statements of both, and any evidence which either might produce.

Mr. Duncausen then read a statement of the facts which preceded the present application; whereupon

THE COURT ordered the child to be discharged from the indentures, and to be bound out to Mr. Duncausen by the orphans' court, on the terms mentioned in the discharged indentures;

CRANCH, Chief Judge, doubting; being rather of opinion that it was a case in which the court could only discharge, and could not make, any further order.

Case No. 13,043.

SMITH v. ELY et al.

[5 McLean, 76;[1] 1 Fish. Pat. Rep. 339.]

Circuit Court, D. Ohio. Nov. Term, 1849.

PATENTS—DURATION OF GRANT—FOREIGN PATENT—ACT OF 1836—PLEADING—PLEA IN BAR—OYER OF LETTERS PATENT—PATENTABILITY—PRINCIPLE—APPLICATION OF MOTIVE POWER.

1. By the patent act of 1836 [5 Stat. 117], if a person claim a patent for an invention for which he had obtained a foreign patent, his domestic patent must be limited to fourteen years from the date or publication of his foreign patent.

2. If, under such circumstances, a domestic patent purports to give the exclusive right of fourteen years from its date, the patent is void.

[Cited in Canan v. Pound Manuf'g Co., 23 Fed. 186; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 38.]

3. The officers of the government have no power to grant an exclusive right, except in conformity with the law. They are the mere instruments of the law.

4. A plea in bar must show that the plaintiff has no right to recover.

5. If the facts of the plea may be admitted, and yet the action may be maintained, the plea is bad on demurrer.

6. Oyer is not demandable of letters patent.

7. A principle cannot be patented.

8. An exclusive right to a motive power of electricity or steam, can only be secured by the instrumentality of mechanical inventions or combinations which produce a certain effect.

[Action on the case by Francis O. J. Smith against Heman B. Ely and others. Demurrer to defendants' pleas. Suit brought on letters patent [No. 1,647] for the electro magnetic telegraph, granted to Samuel F. B. Morse, June 20, 1840, reissued January 13, 1848 [No. 117]; also on letters patent for new and useful improvement in electro magnetic telegraph, granted to said Morse, April 11, 1846. The alleged infringement consisted in making and using said inventions upon and over the magnetic telegraph route from Pittsburgh, in Pennsylvania, to Cleveland, in Ohio, the plaintiff being the grantee of the exclusive right to make for and use upon said route the said inventions. The facts of the case, and the points raised by the pleadings, are fully set forth in the opinion of the court.] [2]

Andrews & Swan, for plaintiff.

Chase & Gholson, for defendants.

BY THE COURT. (The following opinion was prepared by McLEAN, Circuit Justice, but not delivered, as the parties agreed to certify certain points to the supreme court, embracing the principal matters in controversy; but, as the opinion is on several questions arising under the patent law, it is published.)

This action is brought by the plaintiff, who claims the exclusive right to construct a telegraphic line between Wheeling, in the state of Virginia, and the city of Cincinnati, as assignee of Morse's patent, on the plan of his electro magnetic telegraph, against the defendants, who are charged with having infringed said patent, by establishing a similar line on the same route. The defendants filed eighteen pleas, to several of which the plaintiff has demurred, which brings before the court questions of law that are now to be considered. The sixth plea alleges, "that before the supposed grant of the said original letters patent, in the first count mentioned, to-wit, on the 18th day of August, 1838, the said Samuel B. Morse took out and received letters patent for the same invention and discovery in the said count mentioned, in a foreign country, to-wit, in the kingdom of France, and from the then king of the French; and said defendants aver that the said letters patent, in said count mentioned, are not limited to the term of fourteen years

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

[2] [From 1 Fish. Pat. Rep. 339.]

from the date or publication of said foreign letters patent." To this plea the plaintiff filed a demurrer, which admits that the patent bears date at the time of its emanation, without reference to the foreign patent. The seventh plea is substantially the same as the sixth, to which there is also a demurrer. By the 8th section of article 1 of the constitution of the United States, power is given to congress "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." The act of 10th April, 1790 [1 Stat. 109], which was the first law passed by congress on the subject of patents, authorized a patent to be issued for a useful invention, for any term not exceeding fourteen years. The same limitation is imposed in the acts of 1793 [Id. 318] and 1836 [supra]. The 8th section of the act of 1836 provides, that nothing contained in it "shall be construed to deprive an original and true inventor of the right to a patent for his invention, by reason of his having previously taken out letters patent therefor in a foreign country, and the same having been published at any time within six months next preceding the filing of his specification and drawings." This limits the right of application by a foreign patentee, to six months from the date of his foreign patent. But this limitation was repealed by the 6th section of the act of 1839, which provides, "that no person shall be debarred from receiving a patent for any invention or discovery, as provided in the act of 1836, by reason of the same having been patented in a foreign country more than six months prior to his application: provided, that the same shall not have been introduced into public and common use in the United States, prior to the application for such patent: and provided also, that in all cases, every such patent shall be limited to the term of fourteen years from the date or publication of such foreign letters patent."

The pleading admits that Morse's patent in this country, was dated at the time it was granted, for the term of fourteen years, although the foreign patent, for the same invention, had been obtained by him some time before; and this raises the question, whether the patent is valid for fourteen years from its date, or from "the date or publication" of the foreign patent. It is not pretended that the patent is good beyond the latter limitation; although upon its face it purports to grant an exclusive right for a longer period. It is insisted that a grant for a larger estate than the grantor possesses, is good for any lesser interest which he may have. This is true; but is such a case analogous to the one under consideration? The government has no power to grant, and can convey no right, except in the mode authorized by the law. It is the mere instrument of the law, and can exercise no discretion where the law has defined its power. The constitution authorizes congress to grant an exclusive right to the inventor for a limited term. And that term is limited in all the acts of congress, to a time not exceeding fourteen years. Morse's patent purports to give the exclusive right for fourteen years from its date; but the law limits it to fourteen years from the date or publication of his foreign patent. It is, therefore, a patent issued, not only without the authority of law, but in violation of it. As the law limits an exclusive right to fourteen years, it is argued that no limitation is necessary on the face of the patent. If this were admitted, it would not aid the patent under which the plaintiff claims. It contains a limitation which extends the exclusive right beyond the act of congress. And if this may be done in one case, it may be done in all cases. There are no circumstances which should exempt a foreign patentee from the limitation imposed by law. On the contrary, there are stronger reasons why he should be strictly limited, than any other person. The fact of his having obtained a foreign patent may not be known in this country, unless disclosed by him; and it is his duty to see that his patent here shall not exceed fourteen years from the date or publication of his foreign patent. Any concealment on his part, in this respect, however innocently done, counteracts the law, and is a fraud upon it.

By an examination of the records of the patent office, any one may correct the date of a domestic patent; but this cannot be done in regard to a foreign patent, without a trouble and an expense which the law does not impose. If patents which give an exclusive right beyond the limitation of law be considered valid for any purpose, the policy of the law is subverted, and numberless frauds may be practiced upon the public. Every act which regulates this right requires the applicant to state his claim in terms so clear and specific as not to mislead the public; and if there be any concealment, from which a fraudulent intent may be inferred, the patent is void. And it is also void, where the specifications do not describe the invention, so as to enable any person of skill to make the thing invented. The limitation of the exclusive right, is a material part of the patent, and it must be truly stated. And if this is not done, where a foreign patent for the same thing, of prior date, has been taken out, the neglect is not chargeable upon the officers of the government, but upon the patentee, for not representing his right truly. The demurrers to the sixth and seventh pleas must be overruled.

In taking this view of a patent for an invention so creditable to the country, and which, if original, renders so illustrious one of our citizens, we are relieved by the consideration that the error is not fatal to the right of the patentee, but may be corrected by an application to the patent office.

As the publication of this opinion has been

delayed some years, and the above point having been ruled by the supreme court differently from the above view, I take occasion here to say, that the reasons assigned in that opinion have not shaken my convictions as above stated. I yield to the authority, because it has been so decided by the court, but it fails to convince my judgment.

It is true, the application by Morse for a patent in this country was made before he obtained his French patent, but the application referred to was not in the pleading, and was rather with the view to save his right, than for any other purpose. At that time his discovery was imperfect, and if secured would have been of no advantage to him. Subsequent discoveries were made, and three or four patents were issued, assigning in each re-issue, that by reason of an imperfect description of the invention, the previous patent was void. The application was made, it is presumed, under the 8th section of the patent law of 1836, which provides that "whenever the applicant shall request it, the patent shall take date from the time of filing the specification and drawings, not, however, exceeding six months prior to the actual issuing of the patent; and on like request, and the payment of the duty herein required, by any applicant, his specification and drawings shall be filed in the secret archives of the office, until he shall furnish the model and the patent be issued, not exceeding the term of one year, the applicant being entitled to notice of interfering applications." But the corrected patent or specifications last issued, was issued, if I mistake not, more than two years after the application was made. Under the 13th section of the act, where a patent is void by reason of a defective specification, if the error has arisen by inadvertence or mistake of the patentee, he may have the mistake corrected by a surrender of the patent, and a new patent issued for the residue of the unexpired term. But the re-issued patents in this case do not appear to have been issued for the unexpired term. The term of fourteen years from the date of the patent, was the time specified on its face.

There is believed to be nothing in the patent office which shows that a foreign patent had been obtained by Morse, or that the officers of the patent office had any knowledge of the fact. In the 6th section of the act of 1839 [5 Stat. 353], which repeals the act of 1836, which limited to six months from the date of the foreign patent, within which application must be made in this country for a patent for the same thing, but to that section there is a proviso "that in all cases every such patent shall be limited to the term of fourteen years from the date or publication of such foreign letters patent." This limitation is as specific as the term of fourteen years in the obtainment of a patent and seven years on the renewal of it. And it seems to me if the time limited to the date of a foreign patent in the case stated, may be disregarded, it may be disregarded in the original grant and also in the renewal of a patent. If a patent were issued for twenty years instead of fourteen, and if it were renewed for fourteen years, under the general law, instead of seven, I suppose the patent could not be sustained. The same answer could be given to either of the above cases, as in the case of Morse, "the patent is limited by the law." But sound policy requires that the forms of the law should be observed, especially in the performance of a clerical duty, when a deviation from such forms may lead to endless frauds. The reason for accuracy is much stronger where a foreign patent has been obtained, than in the cases stated, for there is no means within the reason of the law, by which the date of the foreign patent can be ascertained, whilst our own patent office is accessible to every person. In their eighth plea, the defendants say, that the use of the motive power of the electric or galvanic current, "however developed, for making or printing intelligible characters, signs or letters at any distances, is a substantial and material part of the thing patented by the said letters patent in the said count mentioned; and the said defendants aver that the said Samuel F. B. Morse was not the original and first inventor or discoverer of the said part of the thing patented, but that the same was before known to one Dr. Steinheil of Munich, in the kingdom of Bavaria, and used on a line of telegraphs" in that country, &c. The ninth plea states that the mode and process of propelling and connecting currents of electricity or galvanism through two or more circuits of metallic conductors, is a substantial and material part of the thing patented, &c.; and the said defendants aver, that the said Samuel F. B. Morse was not the original and first inventor of the thing patented, but that the same was before known to one Edward Davy, of London, in England, &c.

By the 6th section of the patent act of 1836, to entitle the applicant to a patent his invention must be original; "not known or used by others before his discovery; and if, on examination, it shall appear to the commissioner that the applicant was not the original and first inventor or discoverer thereof, or that any part of that which is claimed as new, had before been invented, or discovered, or patented, or described in any printed publication in this or any foreign country," &c., no patent shall be granted. The 15th section of the same act provides that the defendant in any action, for an infringment of a patent, may plead the general issue, and give notice "that the patentee was not the original and first inventor or discoverer of the thing patented, or of a substantial and material part thereof claimed as new, or that it had been described in some public work anterior to the supposed discovery thereof by the patentee," &c., "provided, however, that when-

ever it shall satisfactorily appear that the patentee, at the time of making his application for the patent, believed himself to be the first inventor or discoverer of the thing patented, the same shall not be held to be void on account of the invention or discovery, or any part thereof having been before known or used in any foreign country; it not appearing that the same or any substantial part thereof had before been patented or described in any printed publication." This section is somewhat modified by the 9th section of the patent act of 1837 [5 Stat. 194], which provides, "that, whenever by mistake, accident, or inadvertence, and without any willful default or intent to defraud or mislead the public, any patentee shall have in his specification claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the first and original inventor, and shall have no legal or just right to claim the same, in every such case the patent shall be deemed good and valid for so much of the invention or discovery as shall be truly and bona fide his own; provided, it shall be a material and substantial part of the thing patented, and be definitely distinguishable from the other parts so claimed without right as aforesaid." And a right is given in the same section, to the patentee, to sustain an action at law or in equity, on the patent for an infringement of the part he has invented, notwithstanding he claimed, in his specifications, more than he invented, without costs, unless he shall have entered a disclaimer before the suit was commenced, and then he may recover costs; and provided, that he shall not have "unreasonably neglected or delayed to enter a disclaimer." These provisions must be construed as though they were embodied in the same act. Prior to the act of 1836, the patent was held to be void where the claim extended beyond the invention. And under that act it was void where a substantial part of the thing invented had "before been patented or described in any printed publication." These are exceptions to the proviso in the 15th section, "that the patent shall not be held void" if the patentee "believes himself to be the first inventor." This act embraces the case where the claimant, acting in good faith, had invented the thing patented, not knowing that the same thing had before been invented, and it had never before been patented nor described in any printed publication. And the 9th section of the act of 1837 somewhat enlarges the rights of the patentee, as it provides that, notwithstanding the 15th section of the act of 1836, the patent shall not be held void where the patentee has acted in good faith, if through "mistake, accident or inadvertence," he claimed more than he invented, and that the patent, under such circumstances, shall be held valid for so much as he invented; provided he has not unreasonably neglected or delayed entering a disclaimer. An action may be maintained without costs on a patent which is within these provisions, although the claim be wider than the invention.

The eighth and ninth pleas in bar, allege that the patentee was not the inventor of the thing claimed, and two persons are named, one in Bavaria and the other in England, who were the first and original inventors. This, it is insisted, is not a full defense in bar of the plaintiff's right, as the patentee, not knowing of the prior invention, may have invented the thing claimed, and believed himself to be the first and original inventor; and if the prior invention had never been patented nor described in a printed publication, the right of the plaintiff is sustainable under the 15th section of the act of 1836. A plea in bar must contain a full defense against the right of the plaintiff, and if it fall short of this, it is bad on demurrer. Now, if the truth of these pleas may be admitted, and the action is still maintainable, the pleas are essentially defective. It is said that the defendants could not aver that Morse did not believe himself to be the inventor, as a matter of belief is not susceptible of proof. And that such an averment can only be made by the party who has knowledge of the fact. It is true that the belief of any thing, being an act of the mind, can only be proved by external developments in words or actions. But the pleader is not limited to the matter of belief, or its ordinary developments. He may aver the fact of notice of the prior invention, and prove it on issue joined, by circumstances. No one can shelter himself under a belief, against facts; and any facts or circumstances which show a knowledge of the prior invention, would be fatal to the right asserted. And this may be averred and proved with as much certainty as that an individual had notice of an outstanding equity, when he purchased and acquired title to real property. I think the eighth and ninth pleas are defective in not averring this knowledge, and the demurrers to them are, therefore, sustained.

The eleventh plea of the defendant, which is to the second count in the declaration, alleges "that the said improvement in the said count mentioned, was at the time of the application of the said Morse for a patent therefor, in public use, with the consent and allowance of the said Morse." To which the plaintiff demurs. The 7th section of the patent act of 1839, provides, that where the right has been sold before the inventor obtains a patent, the purchaser may continue in the exercise of his right, but "that no patent shall be held invalid by reason of such purchase, sale or use, prior to the application for a patent, except on proof of abandonment of such invention to the public; or that such purchase, sale, or prior use, has been for more than two years prior to the application for the patent." This plea is defective. It does not state that the use was more than two years before the application for the patent, nor that the invention was abandoned by Morse. It may have been in public use through a purchase

made of the right within two years preceding the application for the patent, and this, under the above section, does not render the patent invalid. By the 6th section of the act of 1836, the inventor was entitled to a patent, on application, if the thing invented had not been "known or used by others before his invention thereof, and not, at the time of his application for a patent, in public use or on sale with his consent or allowance, as the inventor." But this provision being incompatible with the 7th section of the act of 1839, is necessarily modified. If the sale and use of the invention before the application for the patent, gives the assignee the same right after the emanation of the patent as before, to use the thing invented and to sell it to others, without affecting the validity of the patent, such sale or use, within the limitation of two years before the application, can constitute no objection to the obtainment of the patent. To bar the action, the plea should have averred an abandonment, or that the sale or prior use had been for more than two years before the application. The demurrer to this plea is sustained, and also the demurrer to the twelfth plea, which involves the same principle.

The 13th plea avers a public use of the improvement on several lines specified, "with the consent and allowance of the said Morse, to wit: on the first day of June, 1844." This plea differs only from the two preceding pleas by the averment of the date of the public use under a videlicet. The date as stated seems not to be material, and the plea is defective in not averring an abandonment, or a public use, more than two years prior to the application for the patent. We suppose the act refers to the original application for a patent, and not to the surrender of it with the view to correct some error in the specifications. The demurrer, therefore, to this plea must be sustained.

In bar to the second count, the defendants, in their 14th plea, say, "that the combination of a pen lever, pen point or points, and roller, in the specification annexed to the said letters patent, is a substantial and material part of the thing patented by the said letters patent," and they aver that said part was before known, and "was a part of an electro magnetic telegraph, for which the said Morse had taken out and received letters patent in the United States on the 20th June, 1840." To this plea the plaintiff filed a demurrer. The 12th and 15th sections of the act of 1836, which provide that the commissioner shall not issue a patent where the thing claimed to have been invented has been previously, or a substantial part of it, patented; or where the patent having been issued, shall be void under such circumstances, was designed chiefly, if not exclusively, to apply to a stranger to the application, and not to the applicant personally. But in a certain sense it may apply to him. An individual who has obtained a patent for a thing which he claimed to have invented, cannot at any future time claim another patent for a substantial part of the same thing; and this is what the plea alleges Morse to have done, which is admitted by the demurrer. In such a case there is no fraud in appropriating the invention of another, but it is an attempt, it would seem, to extend beyond the limitation of the patent law, the exclusive right. This act must be held void as against the policy of the law.

If there be any error or defect in the specifications, it may be corrected by a surrender of the patent without prejudice to the rights of the patentee. If any improvement be made on the original invention, a patent may be obtained for the improvement. But a substantial part of the original invention cannot be patented as an improvement. The specifications are not made a part of this plea by reference or otherwise, nor are they contained in the declaration, so as to enable the court to say whether the alleged improvement is so described as to distinguish it clearly from the original invention. We can judge only from the face of the pleadings, and from them it appears that a substantial part of the improvement was contained in the original patent.

On the principles laid down in relation to the 8th and 9th pleas, the 14th plea is defective. The truth of the plea may be admitted, and yet the action may be maintained under the 9th section of the act of 1837. The claim for more than was new, may have been made "by mistake, accident or inadvertence, and without any willful default or intent to defraud or mislead the public;" and the claimant may be "the inventor of a material or substantial part of the thing patented;" and under the circumstances, the patentee, &c., may not have "unreasonably neglected or delayed to enter a disclaimer." A defense is not complete against the right of the plaintiff, under the above section, which does not deny these hypotheses. "In all actions the defendant may plead any matter which shows why the action does not lie, and which being matter of law, is proper to be shown to the court." Bac. Abr. "Pleas," 9, 3, as in assumpsit, infancy, payment, &c. In these cases, from the nature of the defense, the plaintiff has an implied color of action, bad, indeed, in point of law, if the facts pleaded be true. 1 Chit. Pl. 444. And this is the character of every plea in bar. It must show, if the facts alleged be true, that the plaintiff has no legal right to recover.

In the 15th plea of the defendants, which is also to the second count in the declaration, they say, "that the mode of combining two or more circuits of electricity or galvanism mentioned and described in the specification annexed to the said letters patent as an improvement, is a substantial and material part of the thing patented, &c. And the said defendants aver that in electro magnetic telegraphs before known, modes of combining, on the same principle as that mentioned and described in the specification annexed to the said letters patent, two or more circuits of electricity or galvanism, existed and formed part thereof,

to wit: in one patented to the said Samuel B. Morse, on the 20th June, 1840, by the United States of America, and in one patented to one Edward Davy, of London, in England, on the 4th day of July, 1838, &c. And the said defendants further aver that the said specification annexed to the said letters patent in the said count mentioned, do not specify and point out the improvement in the said mode of combining two or more circuits, &c., so as to distinguish the same from the said modes before known and patented," &c. With the exception of the last clause, the remarks made on the fourteenth plea are applicable to this one. And as regards the objection to the last clause, that the new improvement is not distinguished from the former mode, it is sufficient to say that the specifications are not so incorporated into the plea as to constitute a part of it. Oyer of letters patent is not demandable, as of a deed (1 Archb. 164; 1 Term R. 149), but being a matter of record, it is accessible to the defendants, and should have been stated in the plea, as it is not necessarily a part of the declaration, so as to enable the court to act upon the face of the plea. The demurrer to this plea is sustained.

In the sixteenth plea of the defendants, which is to the first count in the declaration, they say, that "a system of signs, consisting of dots and spaces, and of dots, spaces and horizontal lines," set forth and described in the said letters patent in the said count mentioned, is a substantial and material part of the thing patented by the said letters patent, &c. And the said defendants aver that the said part of the thing patented is not any art, machine, manufacture or composition of matter, or any improvement of any art, machine, manufacture or composition of matter. The patent not being before us, as it would be, if offered in evidence, or copied into the declaration or plea, we cannot decide this question. Craving oyer does not make the specifications a part of the plea. It would seem that the system of signs named in the plea, constitutes a language, and would come appropriately under the copy-right act. But, if these signs are only named as the effect produced by certain mechanical inventions or combinations, they may not be liable to objection under the patent laws. This can only be decided by an inspection of the patent. The demurrer to this plea, on grounds stated in regard to other pleas, is sustained.

In the seventeenth plea, which also applies to the first count in the declaration, the defendants say, "that the use of the motive power of the electro galvanic current, however developed, for making or printing intelligible characters, signs or letters at any distances, is a substantial and material part of the thing patented by said letters patent, and separately and distinctly claimed in the specifications annexed to said letters patent;" and the defendants aver that Morse was not the first and original discoverer, &c. And in the eighteenth plea after stating the above, the defendants aver that the thing so "patented and claimed, is not any art, machine, manufacture or composition of matter, or any improvement on any art, machine, manufacture or composition of matter," &c. These pleas are subject to the objection that the specifications are not brought before us by the declaration or pleas, and we cannot, therefore, determine the points raised by the demurrers. It may not, however, be improper to remark, that a principle is not patentable. And "the motive power of the galvanic current, however developed to produce a given result," can no more be patented than the motive power of steam to propel boats, however applied. The discovery or application of a power in physics can give no monopoly of that power. Electricity and steam were long known as powerful agents in nature, before the application of either as a motive power. And neither can be exclusively appropriated, except through the instrumentality of mechanical inventions or combinations which produce a certain effect.

[NOTE. Pursuant to the agreement between the parties, the cause was certified to the supreme court. The cause was then remanded to the circuit court, with directions to permit either party to amend his pleadings, and also to allow the defendants an opportunity to distinguish their case from that of O'Reilly v. Morse, 15 How. (56 U. S.) 62, which the court relied upon as deciding this case. 15 How. (56 U. S.) 137.]

[For other cases involving this patent, see O'Reilly v. Morse, 15 How. (56 U. S.) 62; Morse v. Bain, Case No. 9,861; Smith v. Downing, Id. 13,036; French v. Rogers, Id. 5,103; Smith v. Cummings, Id. 13,034; Smith v. Selden, Id. 13,104; Clum v. Brewer, Id. 2,909; Western Tel. Co. v. Magnetic Tel. Co., 21 How. (62 U. S.) 456; Western Tel. Co. v. Penniman, Id. 460.]

Case No. 13,044.

SMITH v. ELY et al.

[10 N. B. R. (1874) 553.] [1]

Circuit Court, N. D. New York.

CHATTEL MORTGAGE—POSSESSION AND POWER TO SELL—PROCEEDS OF SALES—BANKRUPTCY—ASSIGNEE.

1. Where by the terms of a chattel mortgage the mortgagor is permitted to remain in possession and sell the goods, buying others to replace—under an agreement to let the goods bought replace those sold, this renders the whole mortgage void as an illegal hindrance to creditors outside of the bankrupt law [of 1867 (14 Stat. 517)].

2. Where a mortgagee leaves the mortgagor of personal property in possession as the agent of the mortgagee, the mortgagee will be chargeable as against other creditors with the amount sold by the mortgagor, whether applied on the debt or not.

3. An assignee in bankruptcy may set aside any conveyance or fraudulent transfer, that but for the bankrupt act might have been set aside by creditors after having obtained judgment.

In April, 1869, Jenkins, Newton, Pierce & Co. commenced business in the city of Rochester, as retail dealers in dry goods. The de-

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fendant [Joseph N. Ely] sold that firm between five thousand and six thousand dollars worth of goods, of which four thousand two hundred and thirty-three dollars was unpaid on January 1st, 1870. On that day that firm was succeeded by the firm of Jenkins, Newton & Pierce, which assumed the liabilities of the former firm. Jenkins, Newton & Pierce, wishing to secure this indebtedness and to secure future purchases, executed chattel mortgages to defendants. These mortgages were dated respectively January 13th and February 3d, 1870, were never released, and the firm of N. & R. M. Stearns took the property covered by them, with knowledge, and subject to the incumbrance. On the 28th of February, 1870, the firm of Jenkins, Newton & Pierce was dissolved, and was succeeded by the firm of N. & R. M. Stearns, of which this plaintiff [Vincent M. Smith] is assignee. N. & R. M. Stearns assumed the liabilities of Jenkins, Newton & Pierce, and took their stock of goods, subject to the chattel mortgages to the defendants. There was due on those chattel mortgages in the vicinity of six thousand seven hundred dollars. Early in March, 1870, one of the firm of N. & R. M. Stearns applied to the defendants for a line of credit. He was asked as to the condition of the firm, and said it had a capital of twenty-five thousand dollars over liabilities, and the members had also individual property. The defendants refused to give credit unless they had security, and N. & R. M. Stearns agreed to give a chattel mortgage on their stock of goods. This mortgage was accordingly executed, dated March 2d, 1870, and delivered to the defendants. It was duly signed in the clerk's office in Monroe county, on July 6th, 1870, and conveyed "the fixtures of N. & R. M. Stearns; also, the merchandise in the store, and what might be put in during the year ending January 12, 1871," conditioned to secure the defendants for goods to be sold N. & R. M. Stearns. Also, to secure one Nelson W. Stearns, who had guaranteed the firm's indebtedness to a certain amount, it was provided that Nelson W. Stearns should take immediate possession of the stock as trustee for himself and Ely, Oberholser & Co., and retain possession until that firm should be paid or should themselves take possession under the mortgage. Mr. N. W. Stearns did remain in the store, superintending and receiving a certain salary for his services as trustee, but N. & R. M. Stearns bought and sold goods in their own name, and the defendants' account was kept with them. Under this chattel mortgage the defendants sold N. & R. M. Stearns goods to the amount of thirty-nine thousand dollars. On November 12th, 1870, N. & R. M. Stearns were indebted to them for over thirty-five thousand dollars. The defendants sold the firm down to the 1st of November, selling them several thousand dollars worth in September. The Stearnses repeatedly stated that they were solvent in September, claiming they were worth twenty-five thousand dollars, and also stating that they bought goods on credit of no one but the defendants. On the 12th of November, 1870, as the Stearnses were slow in payments, the defendants' agent came up to Rochester and examined their books. Then for the first time, the defendants found that the Stearnses had bought goods on credit from other parties. Their total indebtedness, aside from that to the defendants, was for some six thousand or seven thousand dollars. The Stearnses had grossly misrepresented the value of their stock, and that it was not sufficient to satisfy the amount secured by the chattel mortgage. Thereupon, on November 12th, 1870, the defendants took possession under the chattel mortgages executed to them by Jenkins, Newton & Pierce, and by N. & R. M. Stearns, and afterwards sold the goods. The stock was worth fifteen to sixteen thousand dollars in cash. The proceeds failed to satisfy the indebtedness to Oberholser & Co. by sixteen thousand dollars. The goods taken possession of under this chattel mortgage, one thousand two hundred dollars worth, was in fixtures. From ten thousand to fifteen thousand dollars worth of the goods came from Jenkins, Newton & Pierce, and were subject to the mortgages executed by them. Not more than two thousand or three thousand dollars worth of these goods had come from any store but that of the defendants. On January 13, 1871, a petition in bankruptcy was filed against N. & R. M. Stearns, on which they were afterwards adjudicated bankrupts, and the plaintiff was chosen their assignee.

John M. Pomeroy, for complainant.

First. Independently of the provisions of sections 35 and 39 of the bankrupt act, the mortgage from N. & R. M. Stearns to the defendants, dated March 2, 1870, was null and void under the laws of the state of New York, on the ground that it was given to hinder, delay, or defraud other creditors of that firm; all the proceedings under it were, therefore, null and void, and the complainant, as assignee, representing the creditors at large, can maintain this action for an account of the proceeds of the goods, etc., taken by the defendants. It is the settled law of New York, and also of the bankrupt court, that when a chattel-mortgage purports to be given upon goods to be after acquired by, or afterwards to come into the possession of, the mortgagor, it is as a matter of law fraudulent and void as against other creditors, at least in respect to such after-acquired goods, even if not absolutely void in respect also to the goods on hand when it was given. This doctrine is too firmly established to require more than the citation of the recent cases directly in point. Edgell v. Hart, 5 Seld. [9 N. Y.] 213; Gardner v. McEwen, 5 Smith [19 N. Y.] 123; Mittnacht v. Kelly, 3 Keyes [*42 N. Y.] 407; Otis

v. Sill, 8 Barb. 102; Milliman v. Neher, 20 Barb. 37; Conderman v. Smith, 41 Barb. 404; Powers v. Freeman, 2 Lans. 127; In re Kahley [Case No. 7,593]; In re Eldridge [Id. 4,330]. The theory of the rule is, that such a provision is at most an agreement to sell, and does not amount to a transfer of property, even between the parties. As between them it creates only an equitable lien, which the mortgagee cannot enforce by taking possession, but can only enforce by a decree in equity establishing the lien. As an inevitable result there is no lien as against other creditors. Filing such a mortgage, and even actual notice of it, does not create a lien as against third persons, purchasers or creditors, because, in respect to such provision, it is not a mortgage or sale, but merely an agreement to give a lien.

Second. But the mortgage was wholly void as to goods on hand as well as to after-acquired goods, for another reason. It is settled that if a chattel mortgage, expressly or by necessary inference from its terms, allows the mortgagors as traders to go on and sell the mortgaged goods and buy others, and thus carry on a regular trading business, with stipulations that the mortgage shall continue to apply to and bind all the goods thus at any time on hand, it is void in toto. Edgell v. Hart, 5 Seld. [9 N. Y.] 213, 217, 219; Ford v. Williams, 3 Kern. [13 N. Y.] 577, 583, 584; Frost v. Warren, 42 N. Y. 204; In re Kahley [supra]; In re Manly [Case No. 9,031]; In re Hussman [Id. 6,951].

Third. If the mortgage stipulates, or parties agree, that the mortgagor may sell the goods, and that the proceeds shall be applied on the mortgage debt, then the mortgagor becomes an agent of the mortgagee; and moneys received by the mortgagor from sales are, so far as the other creditors are concerned, to be considered as applied on the debt, either diminishing or destroying the lien, as the case may be. This is so, even though the mortgagor actually applies such moneys to his own use and does not pay them over to the mortgagee. Conklin v. Shelley, 1 Tiff. [28 N. Y.] 360; Hawkins v. First Nat. Bank [Case No. 6,244]. As a chattel mortgage purporting to be upon after-acquired property, creates no lien even as between the parties, but is only a personal agreement, such a mortgage is not in itself a preference or transfer; but the taking possession of the goods under the mortgage, is the transfer and the unlawful preference condemned by sections 35 and 39. Harvey v. Crane [Id. 6,178]; In re Eldridge [supra]; Second Nat. Bank v. Hunt [11 Wall. (78 U. S.) 391]; Graham v. Stark [Case No. 5,676]. So in cases relating to warrants of attorney and judgments thereon; the preference dates from the time of taking possession under the judgment, and not from the time of giving the warrant. Golson v. Niehoff [Id. 5,524]; In re Lord [Id. 8,503]; In re Dibblee [Id. 3,884]; In re Terry [Id. 13,835]; Clark v. Iselin [Id. 2,825]. When an insolvent debtor transfers all his property, or even any considerable portion of it, to a creditor, a preference is necessarily created, and a fraud upon the act is necessarily perpetrated; and when, in addition to these facts the debtor and the preferred creditor know of the insolvency, both of them are conclusively charged with the intent to commit a fraud upon the act, which is made unlawful by the provisions of sections 35 and 39. This is a mere application of the familiar rule that a man shall be presumed to intend the natural and necessary consequences of his own acts. In re Drummond [Case No. 4,093]; In re Black [Id. 1,457]; In re Sutherland [Id. 13,638]; In re Dibblee [supra]; Farrin v. Crawford [Case No. 4,686]; In re Smith [Id. 12,974]; In re Bininger [Id. 1,420]; In re Silverman [Id. 12,855]; Rison v. Knapp [Id. 11,861]; In re Gregg [Id. 5,797]; In re Manly [supra]; Graham v. Stark [supra]; Scammon v. Cole [Case No. 12,433]; Driggs v. Moore [Id. 4,083]; Hall v. Wager [Id. 5,951]; Toof v. Martin [13 Wall. (80 U. S.) 40]; 8 N. B. R. 49; Warren v. Tenth Nat. Bank [Case No. 17,202]; Buchanan v. Smith [16 Wall. (83 U. S.) 277]; Walbrun v. Babbitt [Id. 577]; Stobaugh v. Mills [Case No. 13,461]; In re Forsyth [Id. 4,948]; Hall v. Wager [Id. 5,951]; Sawyer v. Turpin [Id. 12,410]; Traders' Nat. Bank v. Campbell [14 Wall. (81 U. S.) 87]; Golson v. Neehoff [supra]. The assignee does not take the rights and property subject to the equities of the defendants, but adverse to them, as he represents the other and innocent creditors, and may maintain actions which the bankrupts could not maintain. This is now settled by the highest court. Edmonson v. Hyde [Case No. 4,285]; Massey v. Allen [17 Wall. (84 U. S.) 351]; In re Leland [Case No. 8,234], per Woodruff, J.

James, Breck & Perkins and W. F. Cogswell, for defendants.

The chattel mortgage executed by N. & R. M. Stearns to the defendants, was valid, and can be supported on various grounds. So far as it conveyed the fixtures, etc., its legality cannot be questioned. This is expressly decided by Judge Blatchford, in Re Perrin [Case No. 10,995]. The fixtures composed about one thousand two hundred dollars of the property coming into the hands of the defendants. (Plff.'s Ev., fol. 194.) The mortgage is valid, because under the clause providing for the appointment of a trustee, the defendants at once took possession of the mortgaged goods. Mortgages somewhat similar to this have been held void, because there was no change in the possession of the mortgaged property. But no case can be cited where a mortgage was held void, containing such a clause as is here found. The validity of this mortgage is established by the case of Brown v. Platt, 8 Bosw. 324. In the opinion of Woodruff, J., he holds that

where a mortgage contained the same conditions as this as to after-acquired property, but the goods were delivered to the plaintiffs before the creditors questioned its validity, the mortgagor could hold the goods. This is precisely this case. The mortgage is certainly valid as to all property in the store at the time it was given. In re Eldridge [Case No. 4,330].

As to the goods coming from Jenkins, Stearns & Pierce, the assignee can make no claim. There are here no creditors of the firm of Jenkins, Stearns & Pierce, and no purchasers without notice. In re Stowe [Case No. 13,513]. The defendants had not the right to avoid the sales made by them to the Stearnses, and to seize the goods on the ground that the goods were obtained by fraudulent representations. The assignee cannot question the validity of the defendants' mortgage. He is neither a creditor, nor subsequent purchaser in good faith. This was held under the former bankrupt act by Mr. Justice Story. Winsor v. McClellan [Id. 17,887]. The court held, in Re Dalby [Id. 3,540], that an unrecorded mortgage was good against the assignee, though void against execution creditors. The reasoning covers this case. But this question has been finally settled by the late decision of the supreme court of the United States. Gibson v. Warden, 14 Wall. [81 U. S.] 244. This was an action brought by the assignees against parties holding chattel mortgages given by the bankrupt, and claiming the mortgages were void under the state laws. The statute rendered undeposited mortgages void as against "creditors, subsequent purchasers, and mortgagees in good faith." The assignees had judgment below. On appeal the supreme court reversed this judgment, and Mr. Justice Swayne, giving the opinion of the court, cites the wording of the statutes and says: "These assignees are neither. As between the mortgagor and mortgagee, and subsequent mortgagees, and purchasers with notice, the mortgage was valid and took effect from the time of its delivery, more than six months before the filing of the petition." Pages 249, 250.

WOODRUFF, Circuit Judge. This case involves the consideration of three questions. First. Were the mortgages which were held by the defendants valid irrespective of the alleged possession of the goods by Nelson W. Stearns? Second. What effect had the alleged possession of Nelson W. Stearns upon the rights of the parties? Third. How did the delivery or surrender of possession by the bankrupts to the defendants November 12th, 1870, affect the rights of the assignee? Upon these questions, my conclusions must be very briefly stated:

First. The mortgages were fraudulent and void as against creditors. They were so independently of the bankrupt law. Although it is not in terms so expressed in the mortgages, yet it is clear upon the evidence that the understanding of all parties was, that the mortgagors should continue their business as merchants, as such sell the goods then on hand, buy others, and sell them in turn in their discretion, for the purposes of gain. If they succeeded in making profits enough, or actually applied the proceeds of sales, or the profits, to the satisfaction of the mortgage debt, then the mortgagee would be content, but if not, then all the goods on hand when the mortgage was made, and all that should thereafter be added thereto, should be swept into the net prepared by the defendants, to gather whatever there might be of value into their possession. Such an arrangement is most clearly void as to other creditors, and has again and again been so adjudged by the courts of this state.

Second. The principal mortgage provided, at the time it was executed, that Nelson W. Stearns, who was surety for the payment to the defendants by the bankrupts, might take immediate possession of all the property in the store, and of all that might be thereafter placed therein, as trustee under the mortgage, and that he should retain possession until the mortgage indebtedness should be paid. If the intention was, as is most manifest, that notwithstanding this clause in the mortgage, the mortgagors should, as in fact they did, control the property, sell in their discretion, buy other goods to replenish, receive the proceeds of sale and appropriate them as they saw fit, the suggestion of actual possession and trusteeship becomes absurd; such possession and trusteeship was, at most, a pretense. What Nelson W. Stearns did was only to watch the progress of affairs, and as a watchman to observe that the business was regularly conducted agreeably to the obvious intention, viz.: by the bankrupts; they buying and selling and receiving the proceeds under some supervision not very well defined, and not in fact interfering with their actual conduct of the whole business. In this view, there was nothing in this which relieved the transaction from the condemnation first above stated. The ostensible possession and the actual possession were in the bankrupts, who were thus held out to the world as the owners of the property. The only alternative possible under this clause of the mortgage, is to treat Nelson W. Stearns as in possession and as trustee for the defendants, holding and controlling the property for their benefit and security. He held the property for them or he did not. If not, then what has been already said applies. If he did, then through and by the aid of the bankrupts he sold and received payment for them in cash, to the amount according to testimony, of between fifty thousand and sixty thousand dollars, a sum more than sufficient to satisfy the whole mortgage debt. If it be nevertheless said. that the bankrupts took the money, and that as among themselves it was competent to permit them to take and use the money, with-

out applying it to the mortgage debt, and so shift the lien from the goods sold to the goods purchased, and thus keep the mortgage alive, this only brings us around again to the exclusion of the idea that the trustee ever had, or was intended to have, any such trusteeship or possession as could add any validity to the mortgages, and they remain liable to the objection that the mortgagors had possession and control, with power to sell and appropriate the proceeds as they saw fit. That Nelson W. Stearns was a sort of supervisor or watchman to guard against the carrying off of the property, or its disposal in fraud of the understanding of the parties, does not help the defendants.

Third. Under these views of the rights of the parties and of the validity of the mortgages, how did the delivery or surrender of possession by the bankrupts to the defendants on the 12th of November, 1870, affect the right of the assignee in bankruptcy. If, as against creditors, the mortgages and the alleged title of the defendants to the property was fraudulent and void, their taking possession in the mere exercise of their claim of the title would not aid them. Their title remained fraudulent and void still as against creditors. If, on the other hand, the assent of the bankrupts to their taking possession, the delivery of the property and surrender of the keys were, of themselves, an appropriation of the property to the payment of the mortgage debt, then the bankrupt law pronounces it void for this reason, both parties then knew that the bankrupts were insolvent; it swept the entire partnership property into the hands of the defendants; it operated, and was clearly intended to operate to give them security and payment to the exclusion of their creditors, and it was within four months next preceding the filing of the petition upon which the defendants were adjudged bankrupts. The defendants can therefore gain nothing from this latter view of the transactions. Nor am I inclined to adopt the last-mentioned construction of the acts done in November. They were, on the part of the defendants, a setting up of their claim to the property, and the acquiescence of the debtors therein, when they supposed resistance would be useless, if not on their part improper. I do not think so harsh an effect should therefore be given to the taking of possession in November. To hold it the giving or acceptance of new title to the property, would exclude the defendants from any right to prove their debt against the estate of the bankrupts.

Fourth. It is not then on the ground that these instruments are made void by the bankrupt law itself, but because they are fraudulent and void as against creditors, and might be set aside at their instance independently of the bankrupt law, that the complainant is entitled to a decree. That an assignee in bankruptcy can set aside such fraudulent conveyance, and recover property so fraudulently held, is not, I think, doubtful. On general principles, without express words in the act, I should hold the assignee to represent creditors who, after adjudication, can no longer obtain judgments, and so place themselves in the position to attach fraudulent conveyances. But section. 14 expressly declares "that all property conveyed by the bankrupt in fraud of his creditors shall be at once vested in such assignee." The proviso in the 39th section, which requires that the petition of a creditor who asks that a debtor be adjudged a bankrupt against his will, must allege some act of bankruptcy committed within the six months next preceding, does not per se determine what property shall vest in the assignee.

Suppose the act of bankruptcy alleged be, suffering commercial paper to remain unpaid for more than fourteen days. If the creditors allow six months to pass they cannot make that a ground of adjudication. But on the other hand, if they do proceed in due time and obtain an adjudication, declaring the debtor a bankrupt, the effect, and the determination of the question what property vests in the assignee, is to be ascertained by the 14th section, as well as the 35th, 39th, and others. It may be that transfers which are otherwise lawful and valid, and which can in no wise be impeached, except upon the ground that they are expressly made acts of bankruptcy by the bankrupt law itself, cannot be impeached by the assignee if they are made more than six months before petition filed. The creditors may in such case be deemed to waive the illegality created by that act, and be not only forever barred to allege that they are acts of bankruptcy, but that they are invalid under that law. Although no transfer made more than six months before the filing of the petition, can be made the ground of adjudicating the debtor a bankrupt, it in no sort follows that when the debtor has upon lawful ground therefor been decreed a bankrupt, the assignee cannot impeach any conveyance and recover any property which, were there no bankrupt law, the creditors (having first obtained judgment) might impeach and recover on the ground that it was conveyed or transferred to defraud them. On the contrary, the 14th section expressly, and the general rules of equity, with equal certainty, do permit it.

The mortgages must be declared void, and the defendants must be decreed to account for the property of which they took possession on the 12th day of November, 1870. It appears that the defendants proceeded from that date to sell from the store, according to the usual course of business, down to the 12th of January, 1871, at or about which time the petition in bankruptcy was filed, and that they then sold out the residue in gross. I think that justice will be satisfied by charging the defendants with the proceeds of sales made in the exercise of reasonable diligence and discretion, and allowing them just and reasonable expenses of such sales, down to the said 12th day of January, 1871, and then charging them

with the fair market value of the property then on hand. As to that final sale, the assignee should not be concluded by the fact that they sold out in gross for fifty-five per cent. of the cost, if he can show that the property was worth more.

Let a decree for the complainants be entered in conformity with this view, with costs to the complainant, and let a reference be ordered for the taking of the account.

Case No. 13,045.

SMITH v. FAY et al.

[6 Fish. Pat. Cas. 446.] [1]

Circuit Court, S. D. Ohio. June, 1873.

PATENTS — MORTISING-MACHINE — ELEMENTS OF COMBINATION—SUBORDINATE DEVICE—NOVELTY—ANTICIPATIONS.

1. Patent for improvement in mortising-machines, granted Hezekiah B. Smith, January 10, 1854, construed and sustained.

2. The patent *held* to be for the combination of the power of reversing by friction, with a stop to arrest it, as distinguished from the specific devices.

3. This construction does not make it a patent for a principle.

4. The idea was new and highly beneficial, and deserves liberal protection.

5. The law demands no such strictness as that insisted upon by defendants, in reference to the employment of all the elements of a combination.

[Cited in Brickill v. Baltimore, 50 Fed. 276.]

6. A subordinate device is not an element within the rule applied to combination claims.

7. There are here but two elements.

8. When the instrumentalities described are used, by equivalent devices, operating in the same general way, for the same end, the patent is infringed.

9. When the idea is once suggested, and one mode of utilizing it pointed out, others are easily adopted.

10. The Holly machine *held* not to anticipate —First, on account of uncertainty as to what its principle was; second, on account of imperfect organization and imperfect power.

[Cited in American Bell Telephone Co. v. People's Telephone Co., 22 Fed. 313.]

11. The maker or workers of the Holly machine did not understand complainant's idea.

12. Holly's ignorance of it is shown by the fact that he, being a patent-man and dealer in machines, did not secure this improvement by a patent.

13. There is no such evidence on the point of time, as after twenty years' uninterrupted use of a valuable machine, should be supposed to antedate it.

14. The statute of limitations furnishes the philosophy for disposing of evidence of anticipations remote in date. In such cases a mere preponderance of evidence is not sufficient.

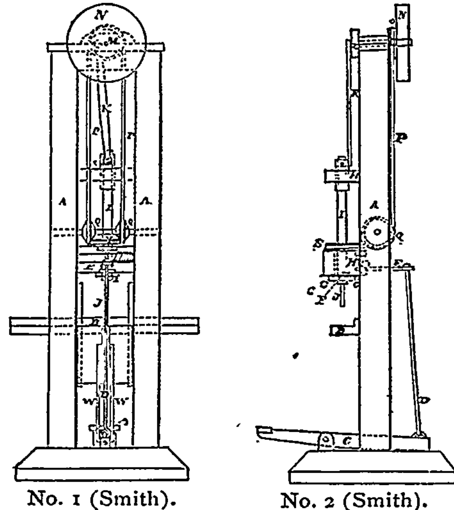
15. The presumption arising from silence is far stronger than preponderance in the number of witnesses.

16. Uncertainty as to the character of the machine adds greatly to the demand for certainty as to the time.

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

In equity. Final hearing on pleadings and proofs.

Suit [by Hezekiah B. Smith against J. A. Fay & Co. and others,] brought upon letters patent [No. 10,422] for "improvement in mortising-machines," granted to complainant January 10, 1854, and extended seven years from the expiration of the original term.



No. 1 (Smith). No. 2 (Smith).

In the above engravings, Fig. 1 represents a back elevation, and Fig. 2 a side elevation, of the complainant's machine, as shown in his patent. The following is the substance of the specification, with the claim:

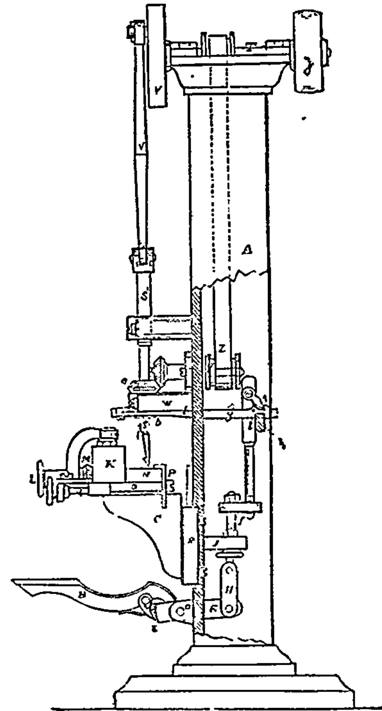
"The principal and main features of novelty in my mortising-machine consist of a combination so arranged and operated that the chisel is reversed by power (by friction, with band or other contrivance), and stopped in the required position to finish either head of the mortise. The stock to be mortised is to be placed upon the table, which can be seen at B. This table is connected to the treadle C by two rods, W. The operator, by placing his foot on the treadle C, and depressing the same, then the table B, together with the stock or wood to be mortised, will be raised until the chisel J penetrates or is forced into it by the vertical movement of the piston I and chisel J, sufficient to give the required depth of the mortise; then the stock or wood is moved longitudinally—by the hand or otherwise—until the chisel arrives at one end of the mortise; then, by raising or removing the foot from the treadle C, the table B, together with the stock or wood to be mortised, is lowered so that the chisel is entirely free from the piece being mortised; at that instant the rod D depresses or lowers the out end of the arm or lever E, said arm being connected with the slide U, the said slide being connected with the said arm, so that, as the outside end of the arm is depressed, the slide U is raised sufficiently to disconnect it from the stop-pins G, attached to the reversing cylinder F, which then in-

stantly reverses the chisel by means of the friction band P; the said chisel is not allowed to turn more than one-half of a revolution until the treadle C is again depressed and raised on account of the slide U, as it is raised from the stops G, and coming in contact with the tooth V, the said tooth V is firmly secured to the reversing cylinder F. In the piston that holds the chisel there is a spline or guide-pin. This spline guides or governs the vertical movement of the piston and chisel by fitting to a slot in the reversing cylinder. By this arrangement, the reversing band P, and the reversing cylinder F, govern perfectly the reversing of the piston and chisel, and also allow the said piston and chisel to move up and down freely. The out end of the lever E is forced upward by a spiral spring, when the foot of the operator is placed on the treadle C, and depressed. The rod D, by being connected with the out end of the said treadle C, is raised through the hole in the out end of the lever E, thereby lowering the slide U, thereby stopping the chisel by the stop-pins G; on the reversing cylinder F coming in contact with the said slide U, by means of the ring seen at X, at the upper end of the piston, the said piston is allowed to revolve freely, and at the same time to move vertically, by means of a groove being turned near the upper end of the piston, and a steady pin or spline fitted to the said groove, and firmly secured to the ring X, it being understood that the said ring moves only vertically, while the piston moves vertically, and is revolved, or reversed, at the pleasure of the operator. The piston-stands H may be seen as attached to the frame A at H. The connecting rod may be seen at K, the crank at L, and the driving-pulley at N. The reversing band pulley is seen at O. At M may be seen the driving-shaft, and at Q may be seen the friction rolls to guide the reversing band P. I have described the parts on which I base my claim much more thoroughly than the other parts of my improved mortising-machine, for the reason that the novelty of my improvement requires more explanation than the other parts that have been before known —all of which will be readily understood by inspection at the drawings. What I claim as my invention is the afore-described combination for reversing the chisel by power applied by friction (with band or otherwise), and stops operated so as to stop the chisel, when reversed in the manner essentially as set forth."

The defendants, in their answer, make the following admission:

"These defendants, further answering, say that it is true that they have been and are extensively engaged in the manufacture and sale of mortising-machines at Cincinnati, Ohio, but they deny that they have ever made, used, or sold any mortising-machines containing the patented improvement, or any part thereof covered by the said patent, or which the said complainant claimed, or had a right to claim, as his invention. They say that, in some of their mortising-machines, the chisel was reversed by positive motion; that in others the chisel was reversed by a device which was described and claimed in letters patent No. 68,791, granted to defendants, J. A. Fay & Co., as assignees of John Richards and William H. Doane, September 10, 1867; and that others differed from those made in accordance with said patent No. 68,791, in the fact that the belt did not slip upon the pulley in the rear of the standard, when the chisel was at rest, but said pulley turned freely upon its axis; but when the chisel was permitted to turn, it was rotated by means of a leather washer interposed between the said pulley and a wheel on the end of the horizontal shaft."

The accompanying engraving represents the Richards & Doane machine in side elevation, as shown in their patent of September 10, 1867. The substance of the following description is taken from their specification:



No. 3 (Richards & Doane).

"In Fig. 1, A represents the main column, forming the support on which the machinery is mounted, with the side removed to show the mechanism within. B is the treadle for operating the table C. It is hinged at D, and is adjustable at different heights by means of the pawl and ratchet shown at E, which determines its position with relation to the pivoted lever-piece F, and also regulates the throw of the table, which is moved by the link H and rod I, passing through

stem J, which is fastened into the table C, and works in a slot in the front of the post A. K is a feed-roller, of India-rubber, or other similar material, and is revolved by hand-wheel L and bevel-gear M, the roll resting at the bottom on the face of the match-gear below, which is not shown in the drawing. N is a piece of wood being mortised, and is kept down upon the table-plate O, and in proper position, by means of the guard P, which adjusts to take pieces of different depths. The piece N is moved by the friction of the roll K, in either direction, to suit the length of mortise required. Screw Q is to adjust the roll K. The main table-support C is pivoted on the plate R, so as to form angular mortises. S is the chisel-bar, receiving motion from shaft T by means of crank-wheel U and pitman V. S^2 is a shell, carrying the lugs t t, in which the bar S revolves by means of the reversing device at the lower bearing W, consisting of the gearing X, pulley Y, and belt Z. The hub of the gear a forms a shell around the chisel-shaft S, and passes down through the bearing at W, having a feather or spline for revolving the bar S."

Judge Emmons, at the time of delivering his opinion, had sketched it in brief, intending to elaborate it afterward. The state of his health prevented his doing so, and the opinion, as given below, is taken almost literally from this sketch, with only such insertions of data and slight changes in the phraseology as were necessary to make it intelligible, and could be made from the record, without in any way modifying the force of the language used.

Charles B. Collier, for complainant.
Fisher & Duncan, for defendants.

EMMONS, Circuit Judge. The court is of the opinion that defendants' machine infringes complainant's patent. We do not suppose they would seriously deny this if the claim is held to be for the combination of the power of reversing by friction, with a stop to arrest it, as distinguished from the specific devices. It is held to be for this. With any other construction, the patent would be of little value. It is so construed by two experts, whose testimony in this particular is uncontradicted. The court would, from an examination of all the devices in evidence and of the state of the art, reach the same conclusion. This construction does not make it a patent for a principle. The defendants certainly employ the idea of the patent. This idea was new and highly beneficial, and deserves liberal protection. The adjudications upon the doctrine of equivalents warrant such protection.

Although the court can not follow fully the precise distinctions taken by complainant, the law demands no such strictness as that insisted upon by defendants in reference to the employment of all the elements of a combination. Their error lies in the use of the term "element." A subordinate device is not, within this rule, an element. There are here but two elements—the constantly acting power by friction to effect the rotation, and the "automatic engagement and disengagement of stops." These are protected, so far as the instrumentalities described and their equivalents are concerned, and when these are used by equivalent devices co-operating in the same general way, for the same end, the patent is infringed. Overlooking all literalisms and dicta, the facts of the case, and what has been actually administered in the current of cases, compel the judgment given on this point. When this idea is once suggested, and one mode of utilizing it pointed out, others are easily adopted.

Were it necessary, we should say that the Holly machine did not in principle antedate the patent: first, on account of the uncertainty as to what its principle was; and, second, on account of its imperfect organization, want of success, and practical power.

We do not, in this, overlook what some witnesses say about its efficiency; but it went out of use. Those who contrived and worked it did not understand complainant's idea. Holly did not understand it or patent it. The reason he assigns for not patenting it is absurd, in view of the law, and his belief that he had invented so valuable a device. He was a patent-man, and knew his rights. He was a dealer in machines, and would have secured this improvement if it had been his. What he patented is what he before made, after he had perfected it. It was not the device described by the witness. Mistakes in this regard are not only probable, but morally certain.

But we find no such evidence, or approach to such evidence, on the mere point of time, as after twenty years' uninterrupted use of a valuable invention should be supposed to antedate it. The danger of such proof generally must be considered. The accident of discovering the engraving saved complainant from innocently using false evidence, and is conclusive on the point of time. The witnesses swore positively on this point, and are all conclusively contradicted. Westcott, of all men, ought to know whether he first used the Holly machine in 1853 or 1852. He refers to data from the iron-works books. His whole evidence is worth no more than theirs, and they, in the opinion of the court, fully contradict his conclusions from them, and all others who swear to a manufacture in 1851 and 1852. Had they been made then, the books would have disclosed it. No entries on them before 1854 have any plausibly certain connection with such a machine. These books do show pretty fully other machines. But Holly himself, although literally dating in 1852, is substantially uncertain. No witness fixes the time in a mode, or by a reference to facts, which show him dishonest, if wrong. Whenever a date or fact is fixed, the nature of the conditions show that it might just as well have been afterward. There is in no instance

a necessary connection. This is illustrated by cases cited by complainant on the question. The statute of limitations furnishes the philosophy for disposing of such a case. There may be cases where the proof is beyond criticism and without conflict. In such cases this rule does not apply; but, if there is any doubt, a mere preponderance of evidence is not sufficient. If this were sufficient, the same rule would apply as if recent facts were in issue. The presumption arising from silence, where there is so much interest to assert, an occasion to assert it, and the party intelligent, and the results certain, if the facts warranted it, has far more strength than any preponderance in number of witnesses and literal statements made by them in this case. Uncertainty as to the character of the machine adds greatly to the demand for certainty as to the time.

Decree for injunction and account.

Case No. 13,046.

SMITH v. FENNER.

[1 Gall. 170.][1]

Circuit Court, D. Rhode Island. June Term, 1812.

WILLS—FRAUD IN OBTAINING—DECLARATIONS OF TESTATOR—RES GESTÆ—INTENTION TO CHANGE—ALTERATIONS—HANDWRITING.

1. The declarations of the testator before and at the time of making a will, and afterwards, if so near as to be a part of the res gestæ, are admissible to show fraud in obtaining the will. But not declarations at any distance of time after the will has been executed, especially where the will has always been in the testator's possession.

[Cited in Comstock v. Hadlyme, 8 Conn. 264. Distinguished in Dinges v. Branson, 14 W. Va. 114. Cited in brief in Gibson v. Gibson, 24 Mo. 228. Cited in Herster v. Herster, 122 Pa. St. 256, 16 Atl. 346; Kenyon v. Ashbridge, 35 Pa. St. 159; Runkle v. Gates, 11 Ind. 98.]

[See Richards v. Dutch, 8 Mass. 507.]

2. The declarations of the testator as to his intention to alter his will, and being prevailed upon not to do so, are not admissible to show that the will was fraudulently prevented from being revoked, even supposing that under the statute of wills, such fraudulent prevention of a revocation would avoid a will, there being no act or attempt shown to revoke the will, &c. which act or attempt was fraudulently prevented.

[Cited in Robinson v. Hutchinson, 26 Vt. 45; Waterman v. Whitney, 11 N. Y. 163, 168.]

3. An alteration of a pecuniary legacy in the will, by the legatee or a stranger, does not avoid the will as to other bequests. Quære, whether it does as to any bequests.

[Cited in Doane v. Hadlock, 42 Me. 76. Cited in brief in McIntire v. McIntire, 19 D. C. 485.]

4. Where a question arises, whether an alteration in a will were made by the original draughtsman or by a stranger, evidence of other writings proved by witnesses, and also of witnesses, is admissible to show that the peculiarities in the alteration are such, as the party frequently used in his ordinary and genuine handwriting. Vide 3 Cas. Ch. 61, 94; 1 Greenl. Ev. (2d Ed.) § 581, and authorities there cited in note 2.

[Cited in Myers v. Toscan, 3 N. H. 48.]

This was a real action, to recover an undivided seventh part of certain parcels of land, described in the declaration. The title of the plaintiff [Freelove Smith] was derived from Arthur Fenner, senior, who was her father, and grandfather of the defendant, and who died on the 28th Jan., 1788. The defendant claimed the property by title by descent from his father, the late Governor Arthur Fenner, who claimed it by a devise from his father, the said Arthur Fenner, senior, under a will of the testator made in March, 1781, and proved 4th Feb., 1788.

Mr. Bridgham and Tristram Burgess, for plaintiff.

S. Dexter and Mr. Howell, for defendant.

The will was attempted to be impeached, 1st, as having been originally procured by fraud, circumvention and imposition. 2d. As having been fraudulently kept in force, whereas the testator wished to revoke it, but was fraudulently prevented. 3dly. Because the will was, after the testator's death, and before probate, altered by the devisee, Arthur Fenner, in a pecuniary legacy to one of his daughters, by inserting "seventeen" in lieu of "six hundred"—and the will thereby became void.

It was alleged on the one side, and denied on the other, that by the law of Rhode-Island, a probate of a will was conclusive, as well to real as personal estate. But on the counsel for the defendant's expressing a willingness to go into the evidence, and intimating that they should reserve the question ultimately for the consideration of the court, if the case should require it, the evidence was admitted to go to the jury.

To prove the first point, the plaintiff offered to prove by witnesses, the declarations of the testator to that effect, made before and at the time of the making of the will, and immediately afterwards; and the counsel then offered to prove declarations of the testator to the same effect, made afterwards at several times during the space of the seven last years of his life, and cited Swinb. Wills, pt. 7, c. 18, p. 540 (folio.)

The counsel for the defendant objected to the admission of the subsequent declarations of the testator, made so long after the execution of the will, that they could not be considered as a part of the res gestæ.

BY THE COURT. The declarations of the testator, made before and at the execution of the will, are admissible in evidence, to prove the point. And so declarations made after the execution of the will, if so near the time of the execution, as to be considered a part of the res gestæ or necessarily connected with it. See Richards v. Dutch, 8 Mass. 507. But I shall not admit any other subsequent declarations of the testator, because

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

such declarations are of the nature of hearsay, and have never been held admissible in any case, which is within my recollection. The nature of such evidence is exceedingly suspicious; of very easy fabrication, and yet of very difficult refutation. And the evidence ought not to be allowed one jot beyond what the authorities have already decided. Especially in the present case, the evidence is inadmissible, inasmuch as the testator lived in the full possession of his mind for many years after the execution of the will, and it is in proof, that it had remained completely in his own possession during all that time, and was found in his possession at his death. If fraud or imposition have been practised, it is competent for the plaintiff to prove it aliunde, but it will be too much to depend upon the light sayings of testators, made long after the deliberate execution of their wills, to set aside the force of their solemn and written declarations.

On the second point, the plaintiff's counsel offered to prove by the testator's declarations after the execution of the will, that he intended to give to his son John, by deed, a farm, which was devised to his son Arthur in the will, and that he intended to add codicils to his will, and to give further legacies to his daughters; and that he intended to have had his estate appraised in order to a more equal distribution among his family, and that his son Arthur had induced and prevailed upon him not so to do. But the plaintiff's counsel admitted, they had no evidence to show, that the testator ever attempted by any act to revoke his will, or to make a codicil, or to give a deed, and was actually prevented, by fraud, violence, or circumvention, and they cited in favor of the admission of this evidence, Swinb. Wills, pt. 7, c. 3, p. 476. Esp. Dig. 47.

This evidence was objected to by the counsel for the defendant, as contravening the express provisions of the statute of wills of Rhode Island, which as to revocations is the same in substance as the statute of frauds, 29 Car. II., c. 3.

STORY, Circuit Justice. The evidence is inadmissible. The mere declaration of the testator, as to his intentions to do or not to do any particular act, or to make any alterations in his will, is not of itself evidence to revoke or destroy it. Even supposing that under the statute of wills, the fraudulent suppression or prevention of a revocation, is equivalent in point of law to an actual revocation (see 1 Fonbl. Eq. 199, London Ed. 1799, cites 5 Vin. 521, pl. 31; Vane v. Fletcher, 1 P. Wms. 352), still it must be proved, not by mere declarations, but by acts done or attempted to be done, and suppressed by fraud, violence, circumvention or threats. No such proof is offered, and mere naked declarations cannot be permitted to control or annul solemn instruments. It is exceedingly doubtful, whether even evidence to the latter effect be admissible, since the statute of frauds; but if offered in this case, I will de bene esse admit it; but nothing ought, from such admission, to sanction its validity; it is rather admitted, because other circumstances in the case lead to great question, whether it can consist with the proof already before the court, of the will always having been in the control of the testator. As the exception has been taken to the declarations of the testator, it must prevail; but it will be difficult, if admitted, to give effect to such declarations, when there is positive proof that the testator always had the means, if he had the disposition, to revoke the will.

As to the third point, it was apparent that the word "seventeen" was written on an erasure in the will, and the principal controversy before the jury was, as to the time when made, whether before or after its execution.

But it was contended by the plaintiff's counsel, that an erasure by a devisee, or even by a stranger, in a will, after execution, avoided it in the whole; and at all events, when done by a devisee, it avoided all bequests in the will to him. And they cited Pigot's Case, 11 Coke, 27, and Master v. Miller, 4 Term R. 320.

The counsel for the defendant, in reply, argued that such erasure had no operation on the will, except as to the altered legacy. If the alteration was made, and the original legacy was known, it should, on the probate, be restored, otherwise the probate would be conclusive. 4 Burn, Ecc. Law, 49, who cites 1 P. Wms. 388; 2 Vern. 8, 17. If the original legacy could not be known, or perhaps if altered by the legatee himself, it might be void as to that particular legacy, but it would stand well as to the residue of the will: and they cited Hyde v. Hyde, 1 Eq. Abr. 405; 13 Vin. "Fait." (P.) 38, 41; Shep. Touch. 55. They further urged, that the presumption of law was, that the erasure was made before the execution of the will, unless the contrary appeared. Shep. Touch. 55; 13 Ven. "Fait," 41.

STORY, Circuit Justice. Supposing, that in Rhode Island, the probate of a will is not conclusive [2] (on which I give no opinion) an erasure or alteration in it after execution does not avoid the will in toto. If the interlineation, &c. be made by a stranger, and the original legacy be known, it will have no legal effect, and the legacy will be still recoverable, and ought to be proved as it originally stood. If made by the legatee himself, at most in odium spoliatoris it will only avoid the legacy so altered, but it cannot destroy other bequests in the will, either to the legatee himself or to others. This is not like the case of a contract, where the alteration of a security by the obligee himself avoids it. The legatees all take by the boun-

[2] See Tompkins v. Tompkins [Case No. 14,091], where this point is expressly decided. See the authorities collected in this case by counsel and court. See where the plaintiff's counsel cite Smith v. Fenner, and remark upon it.

ty of the testator; the object is to carry his will into effect, and not merely to attend to the merits or demerits of those who claim under it. If any alteration in a will would avoid it, the executor before probate might, by such alteration, destroy the rights of all third persons, which would be in the highest degree unreasonable. See Haines v. Haines, 2 Vern. 441; Parker v. Ash, 1 Vern. 256.

In the course of the trial, the plaintiff's counsel offered witnesses acquainted with the hand-writing of the scribe, who drafted the will, to prove that the altered word was not in his hand-writing, and the witnesses mainly relied on the manner of forming the letter "t," and the use of double hyphens. To rebut this evidence, the defendant offered witnesses, who were well acquainted also with, and swore to the scribe's hand-writing, and who swore that certain deeds, &c. then in their possession, which they produced to the jury, were the hand-writing of the scribe, and contained the peculiarity as to the "t," and the hyphens observable in the will, and that they had frequently known the scribe to write in this manner.

The plaintiff's counsel objected to the production of these deeds to the jury, because it was a mere comparison of handwriting.

THE COURT overruled the objection. Nothing is clearer than that this is not a mere comparison of hands. The witnesses swear as to facts and peculiarities of handwriting, and produce the best possible proof of their own accuracy. The evidence goes completely to rebut the testimony on the other side; and it rests on the same basis as the admission of witnesses to prove handwriting in ordinary cases. See 1 Greenl. Ev. § 576–579, where the cases are collected and commented on.

A great deal of evidence was offered in the course of the trial in favor of the will.

The jury, without difficulty, found a verdict for the defendant, and also found the fact specially that the erasure in the will was made before the execution of it by the testator. At the trial, the counsel for the plaintiff stated an intention to offer a bill of exceptions to the opinions of the court; but afterwards, on inquiry from the court, they declined to proceed further. Vide 6 Term R. 671; 8 Term R. 147.

Case No. 13,047.

SMITH v. FLICKENGER et al.

[1 MacA. Pat. Cas. 46; Cranch, Pat. Dec. 116.]

Circuit Court, District of Columbia. March 25, 1843.

PATENTS — INTERFERENCE PROCEEDINGS — POSTPONEMENT OF HEARING—INFORMAL DEPOSITIONS —POWERS OF COMMISSIONER — APPEAL—OBJECTIONS NOT MADE BELOW.

[1. The provision of the fourth of the rules prescribed by the commissioner for the taking of evidence in contested cases, that no evidence shall be considered on the day of the hearing which has not been taken and filed in compliance with such rules, does not prevent the commissioner, previous to the hearing, from looking into depositions which have been informally transmitted, for the purpose of ascertaining the character of the evidence. And, if he is then of opinion that the ends of justice require it, he has authority, on his own motion, to postpone the hearing until the informality may be corrected.]

[2. An objection to the sufficiency of notice of the taking of depositions cannot be insisted upon before the judge, if not made at the hearing before the commissioner.]

[This was an appeal by Benjamin M. Smith from a decision of the commissioner of patents, in an interference proceeding, awarding priority to Daniel Flickenger and Sebastian Krim in respect to an invention of a machine for separating garlic from wheat.]

J. J. Greenough, for appellant.

CRANCH, Chief Judge. Mr. Smith was an applicant for a patent for a machine for separating garlic from wheat. The commissioner being of opinion that it would interfere with a patent already granted to Flickenger and Krim, gave notice thereof to the applicant and patentees, as required by the act of congress of the 4th of July, 1836 (chapter 357, § 8), and assigned the 19th of December, 1842, for hearing the parties upon the question of priority of invention. Upon that day it appeared that the depositions on the part of the applicant, Mr. Smith, were taken and transmitted in due form, according to the regulations which the commissioner of patents had (by virtue of the twelfth section of the act of congress of the 3d of March, 1839) made "in respect to the taking of evidence to be used in contested cases before him." The depositions on the part of the patentees, Flickenger and Krim, were correctly taken, but not transmitted in the form required by these regulations, and therefore, according to the commissioner's fourth rule, could not be considered by him upon the day assigned for hearing touching the matter at issue. But as it appeared to the commissioner that the facts stated in the depositions thus informally transmitted would, but for that informality, clearly show that the applicant was not the first and original inventor, he postponed the hearing to the 27th of February, 1843, of which he gave to Mr. Smith the following notice: "The day of hearing in the matter of interference between your claims and those of Messrs. Flickenger and Krim has been postponed to the 27th of February, 1843, the evidence on their part being informal in the manner of transmission to the commissioner of patents. The case is open for the reception of further evidence taken and transmitted, according to the rules in the enclosed circular." At the hearing on the 27th of February, 1843, the depositions on the part of the patentees, Flickenger and Krim, having been regularly taken and transmitted, they were considered with the other evidence in

the case by the commissioner, who thereupon made the following decision: "This case came up for hearing on the 27th instant; and on examination of the evidence on the part of Messrs. Flickenger and Krim it appears that he invented and constructed a machine for separating garlic from wheat, by passing the grain between elastic rollers, in the year 1835. On the part of Benjamin M. Smith it appears that he first invented a similar machine in the year 1837. The testimony on both sides being duly taken and transmitted to this office, it is hereby decided that Messrs. Flickenger and Krim are the first and original inventors of the said improvement, and as such entitled to their patent."

From this decision Mr. Smith has appealed, and filed his reasons of appeal, with a petition that it may be heard and determined. Those reasons of appeal are:

1st. That the commissioner could not lawfully postpone the hearing of the case from the 19th of December, 1842, to the 27th of February, 1843, on account of anything appearing in the depositions which had been informally transmitted, because, by the fourth of the rules which he had made in respect to the taking of evidence to be used in contested cases before him, he had precluded himself from considering any "evidence, statement, or declaration upon the day of hearing which shall not have been taken and filed in compliance with these rules," unless in the case provided for in that rule, which case is not applicable to these patentees. The applicant contends that it was his right to have the case decided on the 19th of December, 1842, the day assigned for the hearing, upon such legal and competent evidence as was then before the commissioner, who had no authority to postpone the hearing, without the consent of the applicant, upon any ground appearing in the depositions informally transmitted.

2d. The second reason of appeal is "that the appellees did not give a sufficient time for the appearing of the opposite party to cross-examine the witnesses, as required by the rules for taking evidence; and therefore the deposition taken by the appellees on the 23d of February, 1843, is not legal, and should not have been entertained in deciding the case; for the appellant would have been required to travel four hundred miles in five days to appear at the time appointed for taking the evidence, which is obviously impossible."

These are all the reasons of appeal alleged by the appellant, and to these the "revision" is expressly required to be "confined;" and the appellant says, at the close of his first reasons of appeal, that he has foreborne to go into the merits "of the two claims at this time, because he considered his right to a patent under the rules as fully substantiated, and prefers deciding the validity of the former patent before a jury."

The grounds of the commissioner's decision, which he is required by the eleventh section of the act of March 3d, 1839 [5 Stat. 354], fully to set forth in writing, are to be confined to the points involved in the reasons of appeal. As to the first reason of appeal—the postponement of the hearing—he says that "upon examination of the papers, the affidavits clearly showed that Mr. Smith was not the first and original inventor;" that the affidavits to show this were duly taken, but not duly transmitted; that this fact was presented to his consideration by the examiner, and that, having a due regard to the public interest, he postponed the case to a future day, giving both parties the opportunity to procure further testimony if they thought proper, of which he gave notice to Mr. Smith by the letter produced by him with his reasons of appeal; that no motion of the opposite party was filed for postponement, and that he adopted that course to further the ends of justice. As to the second reason of appeal—that sufficient time was not given to Mr. Smith, the appellant, to be present at the taking of the deposition taken on the 23d of February, 1843—the commissioner says that this objection did not arise at the time of trial, and should have then been made, but Mr. Smith was anxious to hasten, rather than postpone, the case for any cause.

The question arising upon the first reason of appeal is whether the commissioner was bound to hear and decide on the merits of the case upon the evidence which was regularly taken and transmitted to him, and which, according to the rules for taking and transmitting evidence, he could, on the 19th of December, 1842, have considered upon the hearing of the matter at issue, or whether he had a right to postpone the hearing to enable the patentees to cure an informality in the transmission of their evidence, if he should deem such a postponement necessary to further the ends of justice, giving, at the same time to both parties an opportunity to procure further testimony. The argument of the appellant rests upon the construction of the fourth of the five rules made by the commissioner "in respect to the taking of evidence to be used in contested cases before him," which rules were made by virtue of the power given him in the twelfth section of the act of March 3d, 1839. The fourth rule is in these words: "4th. That no evidence, statement, or declaration touching the matter at issue shall be considered upon the said day of hearing which shall not have been taken and filed in compliance with these rules: provided, that if either party shall be unable from good and sufficient reasons to procure the testimony of a witness or witnesses within the above-stipulated time, then it shall be the duty of said party to give notice of the same to the commissioner of patents, accompanied with statements of the cause of such inability, which last-mentioned notice to the commissioner shall be received by him ten

days previous to the day of hearing aforesaid, viz., the —— day of —— next." It is contended by the counsel for the appellant not only that the commissioner cannot consider the deposition informally transmitted as evidence upon the hearing of the matter at issue, but that he cannot look into it for any purpose, and therefore there was no cause whatever for postponing the hearing; and for that reason the decision of the commissioner upon the merits of the case ought to be reversed. But the prohibition contained in the rule is not to the commissioner's looking into the deposition thus informally transmitted, or to his reading it and ascertaining its contents, but to his considering it on the day of hearing as evidence touching the matter at issue. The commissioner did not consider it upon the day of hearing as evidence touching the matter at issue, and, in that respect, complied with his own rule. The proviso in the fourth rule is applicable only to the case where the party is unable to procure the testimony in sufficient time for the appearance of the opposite party and for the transmission of the evidence to the patent office before the day of hearing, in which case it shall be the duty of said party to give notice of the same to the commissioner of patents; but the rule does not say what the commissioner shall do in consequence of such notice—whether he shall receive the testimony, although taken without reasonable notice, or whether he shall postpone the hearing, so that if the patentees had given such notice to the commissioner he would have still been as much without power to postpone the hearing as he was on the 19th of December, 1842. The notice, therefore, would have availed them nothing. There is nothing in the laws relating to the patent office, or in the rules adopted by the commissioner, to prevent him from postponing the hearing of a cause if, in his opinion, the justice of the case should require it, and especially for the correcting of an irregularity in matter of form. To deny him this power would be to stifle justice in her own forms.

As to the second reason of appeal, viz., that sufficient time was not given to Mr. Smith to be present at the taking of the deposition taken on the 23d day of February, 1843, it is a sufficient answer to say that the objection was not made at the hearing; but it appears also that the notice was served on Mr. Smith personally on the 11th of February, at Massillon, in Stark county, Ohio, to take the deposition of witnesses at Manhime, in York county, in Pennsylvania, on the 23d of February—eleven days—which seems to be a reasonable time, even if the distance was four hundred miles, as suggested in the reasons of appeal.

Upon the whole, therefore, I am of opinion that in this case the alleged reasons of appeal are not sufficient to sustain it, and that the decision of the commissioner of patents as to all points involved in the reasons of appeal must be affirmed.

Case No. 13,048.

SMITH et al. v. FRAZER et al.

[5 Fish. Pat. Cas. 543; 29 Leg. Int. 196; 3 Pittsb. R. 397; 2 O. G. 175; Merw. Pat. Inv. 121; 19 Pittsb. Leg. J. 154.] [1]

Circuit Court, W. D. Pennsylvania. May 13, 1872.

PATENTS—ORE CRUSHER—NOVELTY—PROOFS—NOTICE.

1. A claim for introducing water into the pan of a stone-crushing machine to aid in disintegrating the rock and to cleanse and discharge the pulverized sand, the auxiliary and dependent relations of the water to the mechanism and its co-operative agency being fully set forth in the specification, embodies a patentable subject-matter.

2. The letters patent of John R. Smith, for improved machine for crushing and washing sand, granted August 27, 1867, are void for want of novelty.

3. Where the gate in a machine for crushing and cleansing gold ores had been placed in the side of the pan, above the bottom, with a view to discharging the water and lighter impurities, but retaining the gold: *held*, that if it were desired to discharge the entire contents of the pan, this could so obviously be effected by extending the aperture to the bottom that the change would fall below the rank of an invention. To conceive and make it would require but a small amount of mechanical knowledge.

4. If in the notice of special matter relating to the novelty of the patented invention, the sources of defendant's proofs are indicated with such distinctness that the complainant can identify and resort to them, the purpose of that provision of the law which requires the defendant to give the "names and residences of those whom he intends to prove to have possessed a prior knowledge of the thing, and where the thing had been used," is answered.

5. Where the defendants gave the name of certain mining establishments in a specified county as the places where the prior use of the invention had taken place: *held*, that they had fairly supplied the complainants with the means of verifying their proofs, and had filled the measure of their legal duty.

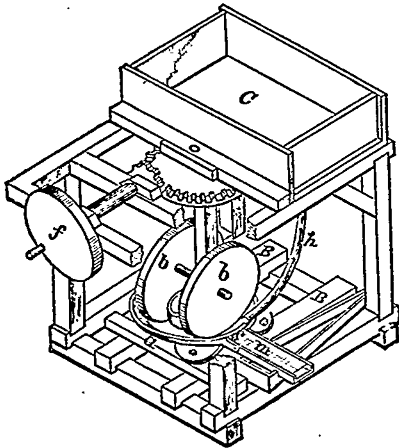
[This was a bill in equity by John R. Smith and others against William E. Frazer and others.]

Final hearing upon pleadings and proofs. Suit brought upon letters patent [No. 682,481] for an "improved machine for crushing and washing sand," granted to John R. Smith and William H. Denniston, assignees of John R. Smith, August 27, 1867. The invention will be readily understood by reference to the accompanying engraving, in connection with the claims, which were as follows:

1. The introduction of a stream or flow of water into the crushing-pan of a revolving sand, sand-rock, or sandstone-crusher, to aid the crusher or crushers in disintegrating the rock, and to cleanse and discharge the pulverized sand, substantially in the manner and for the purposes hereinbefore set forth.

2. The rotating and revolving crushing-wheels b in a sand-rock crusher, in combination with a crushing-pan, a, provided with a

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 121, contains only a partial report.]



discharge-gate, s, and a water-supply pipe, h, or its equivalent, all constructed and operated substantially as and for the purposes above set forth.

Bakewell & Christy, for complainants.
John Mellon and John H. Bailey, for defendants.

McKENNAN, Circuit Judge. The first claim of the patent in controversy is for the use of water as a detersive agent, in connection with the mechanism described in the specification. The functions of the water and its auxiliary and dependent relations to this mechanism, are fully set forth in the specification, which is expressly referred to and made part of the claim. Both are inseparable constituents of a method indicated for the production of a specific result. While each of them has its special office, the coefficiency of all is expressly stated as necessary to effectuate the patentee's method.

By the words of the specification the patentee purposes to employ only the co-operative agency of water, and the patent must, therefore, be construed to claim, not its abstract functions, but the special mode in which, in connection with the mechanical devices described, its power is made available. In this view of the patent, the objection that the claim is for a subject not patentable, is clearly unfounded.

The second claim is for "the rotating and revolving crushing-wheels in a sand-rock crusher in combination with a crushing-pan provided with a discharge-gate, and a water-supply pipe, or its equivalent, all constructed and operated substantially as and for the purposes set forth" in the specification. The invention, then, as here claimed, consists in the combination of the described devices. Each of them had been in use before, and unless the patentee's combination of them is new, and originated with him, he can not recover.

The first claim can not be sustained independently of the second, because, as the use of water in rock-crushing processes was not new, the patentability of its use must depend upon the novelty of the mechanical organization by which its efficiency is made available. Claimed, as it is, as merely an auxiliary agency in the method of operation set forth, the patentee can not assert an exclusive right to its use, except when employed as a coefficient with the mechanism with which he has inseparably associated it. Both claims must, therefore, stand or fall together.

The invention in question must not be confounded with that of a machine, or of an improvement in a machine, where a difference of operation is to be taken as establishing a difference of construction from previously existing machines. As before stated, it consists of a combination of specified mechanical elements, in aid of which water is used in producing the prescribed result. If the elements of the combination are shown to have been substantially embodied in a crushing-machine previously constructed and used, the patent here can not be sustained.

Upon this point I regard the proofs as decisively against the complainants. To support this conclusion it is sufficient to refer to the testimony of Charles E. Seidel. While acting as superintendent of several mining companies in Louisa county, Virginia, and near Fredericksburg, Virginia, in 1848 to 1852, he used what are known as the Chilian mills for crushing and cleansing ores containing gold. These mills were constructed with two rotating crushing-wheels which revolved in a pan, provided with a hole in its side to wash the sand and debris away, and with a constant stream of water flowing into the pan. There can be no doubt, from the explanation given of their construction and mode of operation, that they are substantially identical with machines embodying the invention claimed by the patentee. It is true that their discharge-gate does not extend to the bottom of the pan, so that the gate was adapted to carry off the water with only the lighter impurities suspended in it. And such was its intended function where the machine was used for crushing and cleansing gold ores, and it was desired to retain the particles of gold in the pan; but where it is desired to discharge the whole contents of the pan, it could be so obviously effected by extending the aperture to the bottom that the change would fall far below the rank of an invention. To conceive and make it would require but a moderate degree of mechanical knowledge. Certainly it would evince no patentable merit, and can not, therefore, in any of its relations, be treated as within the protection of a patent.

This evidence is, however, objected to on the ground that the notice of special matter in the answer is not sufficiently specific. The act of congress requires notice to be given by a defendant of "the names and places of residence of those whom he intends to prove to have possessed a prior knowledge of the thing, and where the same

had been used;" and the averment in the answer is, that prior knowledge of the invention claimed and of its use at the works of the Walnut Grove Mining Company, of the Louisa Mining Company, and of the State Hill Mining Company, all in Louisa county, Virginia, and at the works of the Vancieuse Mining Company, near Fredericksburg, Virginia, was possessed by Charles E. Seidel, residing in the city of Pittsburg.

In Latta v. Shawk [Case No. 8,116], Cincinnati was stated as the place of residence of the witnesses, and Cincinnati, Covington, Newport, Pittsburg, Philadelphia, and Wayne county, Indiana, as the places of use; and the specification was held to be too indefinite, for the reason that it should name the street or factory where the patented structure was used, or that the name of the owner or person using it should have been given.

In Hays v. Sulsor [Id. 6,271], the court said: "This provision is designed to give the patentee the benefit of an examination into the facts of the supposed prior use. It has been ruled by the court that the notice given for this purpose in this case was defective in referring merely to the county in which the thing was used. This reference the court held was not sufficiently definite and explicit as to the place to fill the requirements of the spirit of the act." The act was designed to secure the disclosure of specific facts, presumptively without the complainant's knowledge so that the patentee might be informed of the exact nature of the defense set up, and might be enabled to obtain full knowledge of all the facts and circumstances pertaining to it. Where prior knowledge and use are alleged, he must be informed of the name and residence of the person possessing such knowledge, and of the place where such use occurred. But it was not intended to dispense with the necessity of inquiry and research on the part of the patentee. The notice is only a guide to the sources of the defendant's proofs. If they are indicated with such distinctness that the complainant can readily identify and resort to them, the purpose of the law is answered. So in Phillips v. Page, 24 How. [65 U. S.] 168, where the notice set forth the name and place of residence of the person having knowledge of the prior use, and Fitchburg, Massachusetts, as the place of such use, Mr. Justice Nelson said: "The name of the person, and of his place of residence, and the place where it has been used, are sufficient. * * * With this information of the nature and ground of the defense, the plaintiff was in possession of all the knowledge enabling him to make the necessary preparation to rebut, that the defendant possessed to sustain it." And in the cases cited by the complainant's counsel, above referred to, it is evident that the name of a street or factory in a populous city, or of a village or hamlet in a county, were regarded as sufficiently explicit to meet the demands of the act.

Now, in the present case, at least as much precision as these cases seem to require is observed. Not only is the name of the county furnished, but the localities within it of the prior use are precisely indicated by the names of three several mining establishments where it is alleged to have occurred. Thus the respondents have fairly supplied the complainants with the means of verifying their proofs, and have filled the measure of their legal duty.

The bill must be dismissed at the cost of the complainants, and it is so decreed.

SMITH (FREEMAN'S NAT. BANK v.). See Case No. 5,089.

Case No. 13,049.

SMITH v. FRYE.

[5 Cranch, C. C. 515.] [1]

Circuit Court, District of Columbia. Nov. Term, 1838.

BANKS—EXPIRATION OF CHARTER—DEBTS DUE—RIGHT TO SUE FOR—NOTE IN RENEWAL—AGENCY.

The debts due to the late Bank of the United States on the 3d of March, 1836, were not extinguished by the expiration of the term for which the corporation was created; and it had a right to use its corporate name, style, and capacity, for a further period of two years, for the final settlement of its affairs. A note given after the 3d of March, 1836, to the plaintiff, (who was an agent of the Bank of the United States,) by way of renewal of a note due before that day, was not void; nor was it necessary to use the name, style, or capacity of the bank to enable the plaintiff to recover upon such a note.

Assumpsit [by Richard Smith against Nathaniel Frye] upon the defendant's note, dated May 17, 1836, by which 60 days after date he promised to pay to the order of Richard Smith, cashier, &c., $6,063, for value received, payable at the office of the Bank of the United States, at Washington. This note was given in renewal of a note to the plaintiff dated March 15, 1836, which was given in renewal of a note to the plaintiff, due November 17, 1835.

Mr. Hellen, for defendant, contended that the debts due to the bank were extinguished by the expiration of the term for which the charter was granted, unless there is some saving clause. 2 Kent, Comm. 307. The note was given to the plaintiff as agent of the bank, and must be considered as given to the bank itself. But the bank was not competent either by itself, or an agent, to make a new contract. If the plaintiff was appointed as agent before the 3d of March, 1836, his authority ceased on that

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

day by the expiration of the charter. Ang. & A. Corp. 161. The renewal of a note constitutes a new contract, which abrogates the old one. Thornton v. Bank of Washington, 3 Pet. [28 U. S.] 41, 42. The charter reserves no authority to make a new contract. The twenty-first section of the charter, which authorizes "the use of the corporate name, style, and capacity, for the purpose of suits, for the final settlement and liquidation of the affairs and accounts of the corporation, and for the sale of their estate, real, personal, and mixed; but not for any other purpose, or in any other manner whatsoever, nor for a period exceeding two years after the expiration of the said term of incorporation," gives no power to make new contracts. It gives no implied powers; it only saves existing contracts. It is only a power to use the corporate name, style, and capacity, for the purpose of suits on subsisting contracts; and of suits for the final settlement and liquidation of their affairs and accounts. The use of the name, style, and capacity, is limited to the objects named in the twenty-first section; otherwise the words, "for no other purpose," would have no meaning or use. The bank might have enforced the payment of the note due on the 17th of November, 1835, and may yet.

Mr. Hellen then prayed the court to instruct the jury, in substance, as follows, namely: That if the note of 17th May, 1836, upon which this suit was brought, was given in renewal as aforesaid, to the plaintiff, as agent of the Bank of the United States, he cannot recover in this action; the charter of the bank having expired on the 3d of March, 1836. Which instruction THE COURT (THRUSTON, Circuit Judge, absent) refused to give.

He then prayed the court to instruct the jury, in effect, that if the plaintiff, as agent of the bank, discounted the note on which suit was brought, he cannot recover. Which instruction THE COURT also refused to give.

He then further prayed the court to instruct the jury, in effect, that if the note in suit was given to the plaintiff as agent of the bank, according to the usage or direction of the bank, in renewal of notes for $6,000, theretofore discounted by the bank, or its branch at Washington, and that the plaintiff has charged and taken from the defendant more than six per cent. interest on the loan, the same is usury and in violation of the charter of the bank, and the plaintiff is not entitled to recover. But THE COURT refused this instruction, also, and the defendant took his bill of exceptions; but has not taken a writ of error.

SMITH (GARDEN CITY MANUF'G CO. v.). See Case No. 5,217.

SMITH (GATES v.). See Case No. 5,286.

SMITH (GEORGETOWN v.). See Case No. 5,347.

SMITH (GIVEEN v.). See Cases Nos. 5,466 and 5,467.

Case No. 13,050.

SMITH v. GLENDALE ELASTIC FABRICS CO.

[1 Ban. & A. 58;[1] Holmes, 340; 5 O. G. 429.]

Circuit Court, D. Massachusetts. Feb. 13, 1874.[2]

PATENTS—WEAVING—NOVELTY—ABANDONED EXPERIMENTS.

1. Where the complainant's patent is assailed for want of novelty, and neither of the witnesses give any drawings or models of the looms, which they testify were used prior to the complainant's invention, and neither of them nor the experts testify that the mechanism described by them was substantially like that described by the complainant in his specification, and it is not easy to determine how much of the product was made by the use of such looms, they are to be regarded as abandoned experiments, and will not affect the validity of the complainant's patent.

2. The fact that defendant prefers to use the mechanism patented to complainant, instead of other mechanism which would accomplish his purpose and not infringe complainant's patent, is evidence that there is sufficient utility in the invention to support a patent.

3. Divisions, numbers 2,843 and 2,844, of the reissued patent, for an improvement in weaving, granted to William Smith, January 14, 1868, *held* valid.

[This was a bill in equity by William Smith against the Glendale Elastic Fabrics Company for the infringement of certain letters patent.]

Thomas A. Jenckes, for complainant.

B. R. Curtis, and Benjamin Dean, for defendant.

SHEPLEY, Circuit Judge. This is a bill in equity founded on alleged infringement of letters patent, reissued to the complainant, numbered respectively, 2,843 and 2,844. The original patent was granted to the complainant on the fifth day of April, 1853; extended for seven years from the fifth day of April, 1867; reissued on the eighteenth day of June, 1867; and again reissued in three divisions, numbered 2,843, 2,844 and 3,014. The latter reissue, 3,014, covered the fabric made upon the mechanism covered by reissues 2,843 and 2,844, and was the foundation of the suit in behalf of this complainant against Nathan Nichols, decided against this complainant at the October term, 1872, of this court. The claims of division A, 2,843, and division C, 2,844, are respectively as follows: "The process herein specified, of weaving, consisting in the use of stationary warps in combination with moving warps and filling that inclose such stationary warps, substantially as set forth." "The heddle or its equivalent, for supporting the stationary central warps, in combination with mechanism, substantially as set forth, for performing the weaving."

The answer does not specifically deny that

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

[2] [Affirmed in 100 U. S. 110.]

the defendant has used looms and processes in the manufacture of elastic webbing substantially like those covered by the complainant's patents, and the evidence in the record establishes the fact of such use.

The defence is based upon a denial that the complainant was the original and first inventor of what is claimed in the reissued patents.

The evidence in the very voluminous record presented in this case relates principally to the product, and but a small portion of it has any relevancy to the issue of the novelty of the invention of the mechanism described in the claim in reissue 2,844. Ferdinand Doebly and Henry G. Gurney, witnesses in behalf of the defendant, testify to the use of looms with stationary warps before the date of complainant's invention. Neither of them give any drawing or model of the looms to which they testify, nor do the witnesses themselves, or any experts in the case, testify that the mechanism described by them was substantially like that described by the complainant in his specification. In the case of Gurney, only a trifling quantity of the elastic web was made in the loom described by him. It is not easy to determine from the testimony how much of the product, which Doebly says was made by his father, was made on the loom with a stationary warp. I think they are to be regarded in the light of abandoned, and, judging from the specimens of the work filed as exhibits in the case, as unsuccessful, experiments before the date of complainant's invention. There is considerable testimony in the case tending to show that the elastic webbing can be well made by the use of a rising and falling rubber warp. Machinery operating in that way is open to be used without infringing the complainant's patent. The fact that defendant prefers to use the mechanism patented to complainant is evidence that there is sufficient utility in the invention to support a patent.

Decree for complainant.

[On appeal to the supreme court this decree was affirmed. 100 U. S. 110.

[For other cases involving this patent, see Elastic Fabrics Co. v. Smith, 100 U. S. 110; Smith v. Elliott, Case No. 13,041; Smith v. Nichols, Id. 13,084; s. c., 21 Wall. (88 U. S.) 112.]

Case No. 13,051.

SMITH et al. v. GLOVER.

[2 Cranch, C. C. 334.] [1]

Circuit Court, District of Columbia. Oct. Term, 1822.

NOTES—NOTICE OF DISHONOR—CUSTOM IN WASHINGTON.

In the county of Washington, D. C., according to the usage and practice of the banks and notaries public in that county, demand of payment of a promissory note, and notice to the indorser on the day after the last day of grace, is not too late to charge indorsers resident in that county having a knowledge of such usage and practice at the time of indorsing.

Assumpsit against the indorser of the promissory note of Cruikshank and Owens, for $216.85 at four months after date, due 13th–16th of June, 1817. The demand and notice were on the 17th.

Verdict for the plaintiffs [Smith & Morgan] subject to the opinion of the court on a case which stated, that it had for many years been the usage of the banks and notaries public in the county of Washington to demand payment of promissory notes on the day after the last day of grace, and, if not paid, to give notice to the indorsers on the same day, although the usage had been different in the other county in this district, and in the commercial cities of the United States generally, where the usage was to demand payment and give notice on the last day of grace. That in 1816, and at other times, payment of notes drawn or indorsed by the defendant [Charles Glover] had been demanded on the day after the last day of grace; and that the defendant had been a director of one of the banks in Washington county. That the makers of the note, Cruikshank and Owens, had made a deed of assignment to the defendant of all their stock in trade and the debts due to them, in trust to sell the goods and collect the debts, and out of the proceeds thereof, to indemnify himself against all his indorsements for them, and to divide the surplus among his other creditors pari passu.

THE COURT rendered judgment for the plaintiffs.

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

SMITH (GOODYEAR DENTAL VULCANITE CO. v.). See Case No. 5,598.

Case No. 13,052.

SMITH v. GORDON et al.

[2 N. Y. Leg. Obs. 325; 6 Law Rep. 313.]

District Court, D. Maine. Oct. 2, 1843.

BANKRUPTCY—SUIT BY CREDITOR—RIGHT OF ASSIGNEE TO PROSECUTE—LIEN.

1. A creditor of a bankrupt by filing a bill in equity against the bankrupt and his trustee for discovery and relief, before the petition of the debtor to be declared a bankrupt, does not require a lien or right of priority against the assets in the hands of the trustee, that is protected under the last proviso of the second section of the bankrupt law [of 1841 (5 Stat. 440)].

[Distinguished in Trow v. Lovett, 122 Mass. 572.]

2. If the suit is pending at the time of the petition in bankruptcy, the assignee, when appointed, has a right to take upon himself the control and management of the suit, for the benefit of the general creditors.

3. If he elect to prosecute the suit for the benefit of the estate, it must be on condition indemnifying the plaintiff in the suit for all his reasonable expenses incurred in prosecuting it, and in taking himself the responsibility of costs.

[Cited in Norton v. Switzer, 93 U. S. 366.]

4. If he elect not to take the suit into his own hands and allow the plaintiff in equity to proceed to a final decree, such decree will give the plaintiff a lien or right of priority against the property that is within the saving of the proviso.

5. Though all the property and rights of property of the bankrupt, are by operation of law transferred to and vested in the assignee by virtue of the decree of bankruptcy, the assignee is not bound in all cases to take possession of every part.

[Cited in Re Ten Eyck, Case No. 13,829; Glenny v. Langdon, 98 U. S. 30.]

[Cited in Berry v. Gillis, 17 N. H. 15.]

6. If any of the property or any right of property would be rather a burden than a benefit to the estate, the assignee will not ordinarily be bound to take possession of it.

[Cited in Glenny v. Langdon, 98 U. S. 30; Garrett v. Sayles, 1 Fed. 377.]

7. If he elect not to take, the possessory right remains in the bankrupt, and is good against all the world but his assignee.

[Cited in Amory v. Lawrence, Case No. 336.]

8. The assignee's right of election must be exercised within a reasonable time. If he lie by for an unreasonable time and allow third persons in the prosecution of their legal rights to acquire an interest or lien on the property, he will be held by such delay to have made his election not to take.

[Cited in Re McKinney, 15 Fed. 538; Taylor v. Irwin, 20 Fed. 620.]

In bankruptcy. This case was heard on a motion to dissolve an injunction issued on the petition of Smith, the assignee of [A. D.] Lowell, to restrain the defendant from carrying into execution a decree in equity of the state court in his favor, against Lowell and his trustee, Tukey. The bill was filed by Gordon in December, 1839, charging that Lowell, having in 1836, failed in trade and stopped payment, purchased a valuable farm in China, and paid for it with his own money, and caused the same to be conveyed to Tukey for the purpose of keeping it from his creditors, who held it in secret trust for the benefit of Lowell, the bankrupt. The cause proceeded, and was brought to a hearing in June, 1841, but owing to causes which it is not necessary here to state, the decree was not made until June, 1843. While the bill was pending, Lowell petitioned for the benefit of the bankrupt law, and was by a decree of the court duly declared a bankrupt, March 2, 1842, but no certificate of discharge has yet been granted. After the decree of the court on the bill in equity in favor of Gordon, on the petition of the assignee claiming the benefit of the decree as assets for the general creditors, an injunction was granted restraining the plaintiff in equity from carrying the decree into execution, and the question now was on dissolving the injunction.

Mr. Rand, for assignee.

F. Allen, for Gordon.

WARE, District Judge. It is contended on behalf of the defendants that they acquired a lien against the property in question, by the filing of their bill, that is within the saving of the last proviso of the second section of the bankrupt act; and the case Ex parte General Assignee [Case No. 5,305], is relied upon as a conclusive authority in their favor. If that case, decided under another jurisdiction, is applicable to the jurisprudence of this state, it must be admitted that the authority is directly in point. That case was decided in the Northern district of New York, and was, what in that state is called a creditors' bill; that is, a bill by a judgment creditor for the purpose of discovering and reaching property, which cannot be taken on an execution at common law. "It is," says Judge Conkling, "a highly stringent remedy in favor of judgment creditors given (or recognized) and regulated by statute," and by the construction of the statute, or by usage in that state, is held to give to the creditor a lien, a priority or privilege against the assets discovered, to have them appropriated to the payment of his debt, in preference to the other creditors. It is to be observed that the decision in this case is professedly placed on the statute and the local usage of that state, and not on the general principles of equity jurisprudence. Eager v. Price, 2 Paige, 333; Corning v. White, Id. 567. It does not, therefore, necessarily follow that a lien will be gained by the mere filing of such bill in this state, where no such statute exists and no such local usage prevails, modifying or extending the general remedies in equity. The clause of the bankrupt act saves rights and liens, which are valid by the laws of the states respectively and these liens may be various in the different states. The bankrupt act adopts the laws of the states respectively, and saves the liens in each state, which are valid by its own laws.

Whether the filing of a bill in equity by a judgment creditor, for the purpose of reaching property, which the debtor had conveyed in fraud of creditors, will give the plaintiff a lien or right of prior payment out of the property discovered over the other creditors, has never yet been decided in this state. The case of M'Dermutt v. Strong, 4 Johns. Ch. 687, in some of its features bears a strong analogy to the present case. That was a controversy between the assignees of an insolvent debtor and a judgment creditor for the possession of equitable property, which could not be reached by an execution at common law. The defendants claimed to hold the property as assignees of an insolvent debtor for the benefit of his general creditors, and the plaintiffs claim it as judgment and execution creditors, entitled to a preference over the general creditors. The court decided in favor of the claims of the plaintiffs. And the reasoning of the court proceeds on the general principles of equity, and not on the local statute or any peculiar usage of local jurisprudence. Their preference, however, was placed not on the ground that they had filed a bill in equity for the purpose of reaching their property and having it ap-

plied to the satisfaction of their debt, but that they had acquired by their judgment and execution a legal preference and lien on the property. It was the judgment, and not the filing of the bill in equity, that was held to give them the preference. The decision, if I rightly understand it, stands on the general rule of equity in the administration of assets, that a creditor, who by his diligence has obtained a judgment, is entitled in the administration of the assets in a court of equity, against the heir of an executor, to a preference over the general creditors. Thompson v. Brown, 4 Johns. Ch. 643. Under the bankrupt law a judgment creditor has no such preference over the other creditors, but must come in under the bankruptcy, and share equally with them. If indeed the judgment creditor had attached this property to his suit at law, and thus acquired an inchoate lien, that might have been so perfected by a judgment as to bring it within the saving proviso of the act; but in the case of this creditor there was no attachment, and by the law of this state a naked judgment without an attachment gives no lien on the lands of the debtor.

The creditor's lien, therefore, if he has one, stands on his bill in equity, and the proceedings under it. The special object of the suit was to reach property particularly described in the bill and alleged to have been fraudulently placed by Lowell in the hands of Tukey for the purpose of keeping it from his creditors, under a secret trust for Lowell, the bankrupt. It is supposed that a bill of this nature is a sort of proceeding in rem, and gives to the creditor in equity a preference or right of prior payment out of the property over other creditors. But if the institution of a suit in equity gives to the plaintiff a privilege or priority, it is a privilege or lien analogous to that of an attachment, and in this circuit it has been decided upon grounds that I believe are satisfactory to the profession, that the lien created by an attachment is not such a lien as is within the proviso until it is perfected by a judgment. Ex parte Foster [Case No. 4,960]. Allowing, then, for the filing the bill all the effect that is contended for, by this analogy it will not create such a lien as is within the proviso until it is confirmed by a decree. And as the lien was but inchoate and imperfect when the decree of bankruptcy passed, the right of the bankrupt to the property, whatever it was, passed to the assignee. And this conclusion is in conformity with the principles which govern in equity, in the administration of assets. A creditor may file a bill against the personal representative or the heir of a deceased debtor, for the discovery of assets and the payment of his debt; and on such a bill the court may make a decree in his favor. 1 Story, Eq. Jur. § 546. And as a decree is in equity, although it is not regarded at law, of equal dignity with a judgment, the decree will give the same priority or preference in the administration of assets as a judgment; that is, it will give to the creditor a priority or preference over the other creditors. Though it seems that the court may on such a bill enter a more general decree for the benefit of all their creditors, such as is entered on what in equity is properly called a creditors' bill, that is, a bill which a creditor brings for himself and for all the other creditors who choose to come in and prove their debts under the decree (1 Story, Eq. Jur. § 546, note 2, § 547; Thompson v. Brown, 4 Johns. Ch. 620, 631), if in point of fact such is not the decree most usually made (4 Johns. Ch. 631, 638; Martin v. Martin, 1 Ves. Sr. 211; Douglas v. Clay [1 Dickens, 393], cited in 10 Ves. 40; Brooks v. Reynolds, 1 Brown, 183). Such a general decree is considered as a judgment for all the creditors, and binds the assets so as to exclude all preferences after the decree. But a creditor neither at law nor in equity gains any preference by a race of diligence before judgment or a decree. It appears to me therefore that Gordon gained no preference or exclusive right to have his debt satisfied out of this property by the institution of his suit alone, on the general principles of equity, however it may be under the statute of New York; but when that suit was carried to a final decree, the decree did give him such preference. The true course, it seems to me, would have been for the assignee, after the decree of bankruptcy, to have come in and taken the management of the suit into his own hands, for the benefit of all the creditors.

But there is another ground upon which I think Gordon has a right to hold his property, or so much of it as will satisfy this debt against the assignee. By the bankrupt act, all the property and rights of property of the bankrupt, by force of the decree of bankruptcy, pass to the assignee by operation of law, and become vested in him as soon as it is appointed. But though the legal title passes, he is not bound to take possession of all. It is perfectly well settled with respect to leasehold estates, under the English bankrupt laws, that the assignee is not bound to take the lease, and charge the estate with the payment of rent. Copeland v. Stephens, 1 Barn. & Ald. 593. The rent may be greater than the value of the lease, and thus the estate may be burthened instead of being benefited by taking the lease, and in such a case the damnosa hereditas may be abandoned by the assignee. I have had occasion to consider this question in another case, and I came to the conclusion that this doctrine equally holds under our bankrupt law. Ex parte Whitman, Dec., 1842.[1] And I take the principle to be a general one, that the assignee is not at least ordinarily bound to take into his possession property, which will be a burthen instead of a benefit to the estate. If the assignee elects not to take, the property remains in the bankrupt, and no one has a right to dispute his possession. His posses-

[1] [Unreported.]

sory title is good against all the world but his assignee. Webb v. Fox, 7 Term R. 391; Fowler v. Down, 1 Bos. & P. 44. Thus in this case if the assignee elected not to take the right of the bankrupt and charge the estate with the costs of a suit in equity, the issue of which was uncertain, the right, whatever it was, remained in the bankrupt, and might be pursued by any creditor who had not proved under the bankruptcy. But the assignee now elects to claim the property. Admitting that the claim might have been maintained, if it had been asserted while the bill in equity was pending, and I am of the opinion, on the whole, that it might, and conceding further that a final decree of the court is not a bar to the claim which I think it is; still my opinion is, that for another reason it is too late for the assignee successfully to make the claim now. If the assignee may elect to take or not to take any part of the bankrupt's property, some period of time must be limited within which the election is to be made. If he elects not to take, the property remains in the bankrupt, for his possession gives him a good title against every person except the assignee, and the assignee cannot be allowed to hold the title in this kind of abeyance for an indefinite or unlimited period. If with the knowledge of the bankrupt's title, or with the means of knowledge, he stands by without asserting his claim for a length of time, and allows third persons in the prosecution of their legal rights to acquire an interest in the property, it appears to me that he then comes too late to assert his claim; that the time for his election is then passed. In this case, the property or right of property, had been in litigation for more than two years, when Lowell was declared a bankrupt. Large expenses had been incurred in the prosecution of the suit, and the issue was still undecided and doubtful. Admitting that the assignee had then a right to assert and maintain his claim, he must be allowed a reasonable time to investigate the title, and determine whether it would be for the interest of the creditors to assert his claim or not. If he had elected to assert his rights, it must have been on the condition of reimbursing to the plaintiffs in equity the reasonable expenses they had incurred in the prosecution of the suit, and of becoming responsible for costs. If the assignee had no assets in his hands to meet these expenses, and such was the fact in this case, it would be unreasonable to require him to assert a doubtful claim for the sole benefit of the creditors at the hazard of being personally liable for the expenses and costs. But the general creditors might have come forward and required him to assert his rights by giving him an indemnity. But it would be highly inequitable to allow either the creditors or the assignee to stand by and await the issue of a doubtful suit, and where it is decided in favor of the plaintiff, to come forward and wrest from him the fruits of an expensive and hazardous litigation. On this ground, I think it is too late for the assignee in behalf of the general creditors, now to elect, to assert his title. The injunction must therefore be dissolved.

SMITH (GREELEY v.). See Cases Nos. 5,747 and 5,748.

SMITH (GREELY v.). See Cases Nos. 5,749 and 5,750.

Case No. 13,053.

SMITH v. HAMMOND.

[Hoff. Op. 532.]

Circuit Court, N. D. California. 1854.

SHIPPING — REGISTRY LAWS — REPEAL — SALE TO FOREIGNERS—REPURCHASE—MISCONDUCT OF COLLECTOR—LIABILITY FOR DAMAGES.

[1. The act of March 27, 1804 (2 Stat. 296), taking away the privileges of American ships from vessels owned by naturalized citizens who continued to reside for a certain time in foreign countries, but which further provided that nothing therein contained should prevent the registering anew of vessels before registered, in case of a sale thereof to American citizens, did not repeal the act of June 27, 1797 (1 Stat. 523), which denied registry to American vessels captured and condemned by a foreign power, etc., even if they again became American property.]

[2. The act of June 27, 1797, which declares that no registered American vessel "seized or captured, and condemned under the authority of any foreign power, or that shall by sale become the property of foreigners," shall thereafter be permitted to receive a new register although she again becomes American property, does not apply to American vessels sold at private sale to foreigners, and again repurchased by Americans; and such vessels are entitled to be registered anew.]

[3. A collector who wrongfully refuses to reregister a vessel which, being originally American, was sold to a foreigner, and then again purchased by an American, is not personally liable in damages, when his refusal is based on an honest mistake in the construction of the law.]

[This was an action at law by Smith against Hammond, collector of the port, to recover damages for his refusal to grant a certificate of registry to a certain vessel.]

HOFFMAN, District Judge. This action is brought against the defendant, collector of this port, to recover damages for a refusal by him to grant a certificate of registry to a certain vessel alleged to be entitled thereto. The ship in question is an American vessel, and has been heretofore registered. Her former American owner sold her, however, to a foreigner, by whom she has been resold to her present owner, an American citizen. During the whole time that she continued to be the property of her foreign owner she remained in this port, and was used as a storeship; but her American owner now desires a certificate of registry, in order that she may be sent to sea and enjoy the privileges of an American vessel. It is not suggested that the refusal of the collector proceeds from malice, caprice,

or willfulness; but it is founded solely on the construction given by him to the registry laws, under which, as he considers, the vessel is not entitled to be registered anew. It is said that the department concurs with him in the view taken of the statutes.

Under these facts two questions arise: 1. Is the vessel entitled to be registered anew? 2. If she be, is the collector, under the circumstances, personally liable for damages occasioned by his refusal to register?

1. The provision of the statute which, in the opinion of the collector, prohibits the registering anew of the vessel, is as follows: "Be it enacted, that no ship or vessel which has been or shall be registered pursuant to any law of the United States, and which hereafter shall be seized or captured, and condemned under the authority of any foreign power, or that shall by sale become the property of a foreigner or foreigners, shall, after the passing of this act, be entitled to, or capable of receiving a new register, notwithstanding such ship or vessel should afterwards become American property, but that all such ships or vessels shall be taken and considered to all intents and purposes as foreign vessels: provided, that nothing in this act contained shall extend to or be construed to affect the person or persons owning any ship or vessel at the time of the seizure or capture of the same, or shall prevent such owner, in case he regain a property in such ship or vessel so condemned by purchase or otherwise, from claiming and receiving a new register for the same, as he might or could have done if this act had not been passed." Act June 27, 1797.

It is contended by the counsel for the plaintiff that this act is repealed by the proviso to the first section of the act of March 27, 1804. But to this construction of that section I am unable to assent. Independently of the fact that the section does not refer in any manner to the act of 1797, but purports to amend an entirely different act, that of 1792 [1 Stat. 287],—and should therefore be construed, if possible, so as to give efficacy to the statutes. I do not see that its language admits, still less demands, the construction sought to be put upon it by the plaintiff's counsel. The object of the law was to take away the privileges of American ships from all vessels owned by naturalized citizens who have continued to reside for a certain time in foreign countries, unless such resident be a consul or public agent of the United States. The proviso merely enacts "that nothing herein contained"—that is, in the enactment just recited—"shall prevent the registering anew of any ship or vessel before registered in case of the sale thereof to any citizen or citizens resident in the United States." The object and effect of this law are apparent: To deprive the ship of her American privileges while owned by a nonresident naturalized foreigner, but to restore her to those privileges whenever she passed into the hands of a resident citizen. This was the whole intent of the law, nor can I perceive that it, either in terms or by implication, repeals the law of 1797, which applies to a different case, and was intended to accomplish a different object. But the inquiry presents itself,—an affirmative answer to which seems to have been assumed,—does the act of 1797 prohibit the registering of a ship in the situation of the plaintiff's vessel? In my opinion, it does not. If the operation of that act be to deprive forever every American vessel which may, for no matter how short a period, have become the property of a foreigner, of all right to be restored to American privileges, though she may afterwards be owned by a citizen, it is difficult to conjecture the motive of the law. The policy of the registry law is to give certain advantages to American built and American owned vessels. Vessels in the situation of the plaintiff's ship satisfy both these conditions. What motive can be assigned for depriving a ship—belonging to the very class which the laws intended to protect —of all her privileges for the seemingly insufficient reason that during one period of her existence she may have been owned by a foreigner. If such be the law, not only is an American owner of an American built ship unreasonably deprived of an important privilege, but the value of the vessel in the hands of her original American owner is unnecessarily impaired, for the foreign purchaser will be unwilling to offer for her a price as high as he might have been ready to give if he were able to dispose of her to some American vendee, in whose hands she would regain her national character. If the object of the act were to denationalize forever all American vessels sold to foreigners, it would seem that enrolled vessels are at least as much within its policy as registered vessels; and yet the first clause of the act only mentions "vessels which have been or shall be registered," and declares such vessels incapable of receiving a new register. But the strongest argument against the construction under consideration, is that derived from the terms of the proviso. The vessels referred to in the first clause of the section, are those "which shall hereafter be seized or captured, and condemned under the authority of any foreign power, or that shall by sale become the property of a foreigner or foreigners." These vessels were declared incapable of being re-registered by any American citizen. The proviso obviously was intended to make an exception in favor of the previous American owners. The exception in the proviso ought, therefore, to embrace the owners of all vessels included within the description in the general clause of the law. But if that description be construed to embrace vessels which have been sold at private sale to foreigners, the exception does not in terms extend to the owners of such vessels,—for the proviso only enacts "that nothing in the act contained shall extend to or affect the persons owning any ship or vessel at the time of the seizure or capture of the same, or shall prevent such owner, in case he regain a property

in such ship or vessel so condemned, from receiving a new register," etc. If the terms of this proviso be considered in connection with the foregoing enactment, to limit the operation of which it was introduced, it seems clear to me that the true intent of the statute was to embrace within its provisions only such vessels as might be seized or captured and condemned, or, by sale under the authority of any foreign power, become the property of a foreigner. By construing the word "or" to mean "and," in the last part of the clause descriptive of the vessels to which it was intended to apply, the meaning of the enactment would be unmistakable; and such a construction has sometimes been resorted to by courts in cases like the present, Douglass v. Eyre [Case No. 4,032]; Smith, Comm. 733; Cro. Eliz. 307,—and the same effect would be given to the statute if the order of the phraseology is inverted, and the words "under the authority of any foreign power" are placed after the word "sale." If such be the meaning of the statute its object and policy are at once apparent. Passed at a time when our commerce was continually the subject of spoliation, it was intended to provide that the ships so taken from us should in the hands of their captors have the least possible value; that the price, at which on condemnation they might be sold, should at least not be enhanced by the expectation on the part of the foreign purchaser, of subsequently selling her to an American citizen in whose hands she might regain her national privileges; and that as we were unable at that time to maintain our neutral rights inviolate, we would at least diminish as far as possible to foreigners the fruits of their spoliations. Under this view of the statute the proviso becomes expedient and consistent, for it secures to the former owner the advantage of being able to buy back his vessel at a diminished rate, as in his hands alone she regains her national privileges, and the effect of the injury he has suffered by her seizure and condemnation is thus mitigated so far as congress could effect that object. But if this act be construed to embrace vessels sold at a private sale to a foreigner, it is difficult to imagine why an exception should be introduced or a discrimination made in favor of the previous owner, for every consideration of policy would seem to apply to the vessel in his hands, as strongly as in those of any other American citizen. If the object of the law was to denationalize forever all vessels which might become the property of a foreigner, it is singular that the act did not say so in terms; and yet it speaks only of vessels which shall "by sale" become such property, leaving the case of vessels which may by gift or in any other mode become foreign property unprovided for; and yet there is as much reason for denationalizing such vessels as those which may be sold to a foreigner.

If then the statute be construed as prohibiting the registering anew of those vessels only which have by seizure, condemnation, or sale under the authority of any foreign power become the property of a foreigner, the next point for determination is, can this action be maintained against the collector for damages arising from the refusal to register, that refusal having arisen solely from a mistake in the construction of the law? I think that it cannot. In Drewe v. Coulton, 1 East, 563, note, Wilson, J., says: "This is in the nature of an action for misbehavior by a public officer in his duty. Now I think that it cannot be called misbehavior unless maliciously and wilfully done, and that the action will not be for mistake in law." In Jenkins v. Waldron, 11 Johns. 121, Spencer, J., says, for the whole court, "It would in our opinion be opposed to all the principles of law, justice and sound policy, to hold that officers called upon to exercise their deliberate judgments are answerable for a mistake in law, either civilly or criminally, when their motives are pure and untainted with fraud or malice." And the same views were expressed in Vanderheyden v. Young, 11 Johns. 160. The same doctrine was held in Wheeler v. Patterson, 1 N. H. 90, and in Seaman v. Patten, 2 Caines, 313–315, and it received the sanction of the supreme court, in Wilkes v. Dinsman, 7 How. [48 U. S.] 131, where all the cases above cited are referred to with approbation. This principle, thus firmly established, is decisive of the present case, as no doubt can, I think, be entertained of its applicability to it. The demurrer must therefore be sustained.

SMITH (HANOVER NAT. BANK v.). See Case No. 6,035.

SMITH (HARPER v.). See Case No. 6,092.

Case No. 13,054.

SMITH et al. v. HARTWELL.

[4 McLean, 206.] [1]

Circuit Court, D. Illinois. June Term, 1847.

JUDGMENT—MOTION TO SET ASIDE—POWER OF ATTORNEY.

A judgment will not be set aside on motion, if entered under a power of attorney, before the obligation becomes due.

[This was an action by Smith, Murphy & Co. against John Hartwell to recover the amount of a bond.]

Thompson & Lincoln, for plaintiffs.
Mr. Warren, for defendant.

OPINION OF THE COURT. On the 11th November, 1846, John Hartwell executed a bond to the plaintiffs, in the penalty of eight thousand dollars, conditioned for the payment of four thousand in one year from the date. On the same day, a power of attorney was executed by Hartwell to Sibley, or any

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

other attorney at law, authorizing him to appear in any suit brought or to be brought against said Hartwell, at the suit of the plaintiffs, on said obligation, as of any term or time, past, present, or any other subsequent term or time, there or elsewhere to be held, and confess judgment thereupon against me, the said Hartwell, for the sum of eight thousand dollars, etc. In December, 1846, by virtue of the above warrant, a judgment was confessed by E. A. Thompson, an attorney at law in this court, for eight thousand dollars; and a remittitur at the same time was entered for upwards of five thousand dollars, so as to reduce the judgment to the sum due. And a motion is now made to set aside the judgment, on the ground that it was entered on the bond before it was due. Affidavits were read, showing the transactions between the plaintiffs and defendant, and the amount due. The court set aside the judgment, on the ground that there was no appearance, and the judgment was entered prematurely. There was no appearance by the defendant. The bond was a part of the power of attorney. From the facts, the court have no doubt that the attorney acted in good faith.

Case No. 13,055.

SMITH v. HAZEL.

[3 Cranch, C. C. 55.] [1]

Circuit Court, District of Columbia. Dec. Term, 1826.

REPLEVIN—TITLE—MITIGATION OF DAMAGES.

In an action upon a replevin bond the defendant may, in mitigation of damages, give evidence of title in himself of the property replevied. Quære?

Debt on replevin bond [by William Smith against Zachariah Hazel]. The plaintiff in replevin was non-prossed, and the defendant had judgment for a return. The writ of retorno habendo was returned "elongata."

Mr. Wallach, for defendant Hazel, offered to give evidence, in mitigation of damages, that the property of the goods replevied was in him; and cited McDaniel v. Fish [Case No. 8,744], in this court, at December term, 1818, and Wilson v. Slye [unreported].

THE COURT, at first, thought that the evidence was not admissible, because it was matter of defence to the original suit, of which the plaintiff in that suit might have availed himself, but did not, and that the defendant could not give evidence that the plaintiff in this suit ought not to have had judgment in the replevin; but, upon reconsideration, permitted the defendant to give the evidence, reserving a right to the plaintiff to move for a new trial, on the ground of admitting improper evidence.

Verdict for the plaintiff, $200 damages.

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

Case No. 13,056.

SMITH v. HEISKELL.

[1 Cranch, C. C. 99.] [1]

Circuit Court, District of Columbia. Nov. Term, 1802.

FIXTURES—STOVES—VENDOR AND PURCHASER.

Franklin stoves fixed, in the usual manner with bricks and mortar, pass to the vendee of the house.

[Cited in Rahway Sav. Inst. v. Irving St. Baptist Church, 36 N. J. Eq. 62.]

Trover for Franklin stoves fixed in the fireplaces of the house which the defendant purchased of the plaintiff. They were fixed in the usual manner with bricks and mortar. The jury found that when the plaintiff sold the house to the defendant, he expected to be paid for the stoves in addition to the price of the house. The cases cited were, Lawton v. Lawton, 3 Atk. 13; 2 Bac. Abr. (Gwillim's Ed.) 420.

Judgment for the defendant, it being a case between vendor and vendee.

Case No. 13,057.

SMITH v. HIGGINS.

Circuit Court, S. D. New York. 1856.

PATENTS—INFRINGEMENT—DAMAGES—THEORY OF

1. The general rule is, that the patentee or his assignee, in case of an infringement or appropriation of his invention by another without his license, is entitled to the actual damages he has sustained by reason of such infringement.

2. The theory or principle in respect to damages is, that a third person who adopts, appropriates, or uses the improvement of another, interferes with his custom, his monopoly, or, rather, property, and affects the benefits which he would otherwise be entitled to.

3. The rule excludes any exaggerated or vindictive damages which are sometimes allowed in cases of wilful trespass.

4. In order to constitute an infringement, it is not necessary that the arrangement and combination of the party charged with the infringement should be the same to the eye, or in point of fact. If they embody the ideas of the patentee, and the machinery of the defendant operates by such adoption and appropriation, then, though the arrangement may be apparently different, in reality and in judgment of law, an infringement exists.

[Cited in Law, Pat. Dig. 238, 369, to the points as stated above. Nowhere reported; opinion not now accessible.]

Case No. 13,058.

SMITH v. HIGGINS.

District Court, S. D. New York. 1857.

PATENTS—COMBINATION—DAMAGES—PRESUMPTIONS—PRIOR KNOWLEDGE AND USE—IDENTITY.

1. Where the right of recovery rests on a combination, the plaintiff must prove that all those parts substantial to their combination

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

have been used by the defendants. The employment of one or more of those parts less than the whole will not constitute an infringement.

2. No precise standard by which damages are to be measured is supplied by the law. The statute gives the patentee his actual damages, but these must be proved; they cannot be presumed. If he fails to give evidence to the point, the jury can award no other than nominal damages.

3. It is exceedingly difficult to give direct evidence of the real amount of damages. Facts, which imply damages, may be regarded as proof of damages, under the restriction that they do not warrant giving presumptive or speculative damages. There must be either positive proof of damages, or facts proved which import the amount proper to be awarded.

4. It is a presumption of law that what the patentee does not distinctly assert to be his invention was known before.

5. It is to be assumed that persons obtaining patents have acquainted themselves with the state of the art in which they are interested as made known in books, or by machines built and put in use, and evidence is not admissible to prove the contrary; nor is it matter of inquiry whether machines described in printed works were ever practically put to use or not.

6. A change in the forms or proportions of instrumentalities—a substitution of one motive-power for another, a different position or gearing of the working apparatus, a superior finish in any other particular, resting in mere mechanical skill or taste, and not involving invention—does not render machines appearing to the eye exceedingly unlike substantially different in judgment of law.

7. As to the question of infringement, it is a standing principle of law that every person is entitled to the free use of whatever was known and used prior to the patent which attempts to appropriate it as a new discovery; and it is unimportant whether the character and capacities of machinery open to general use are understood or not by the public at large, or had been used by many. It is sufficient to show the public had free means of access to it, and to employ it, and the law then presumes it was well known and in public use.

8. If the thing used by a defendant corresponds substantially with that known and in use before the discovery of the patentee, or described in printed works, then his acts are no infringement of any right of a patentee; and, if the thing used by the defendants and that patented to the plaintiff are substantially alike, the question of infringement will still depend upon the further inquiry whether the patentee was the first and original discoverer of the patented invention.

9. The question of identity is one of fact to be determined by the jury upon the evidence, under the instructions of the court as to what in law constitutes a substantial identity.

10. One machine need not be a perfect transcript of the other, nor correspond exactly in arrangements, manner of action, or results. But a patentee is protected against any use of his invention by the employment of means apparently dissimilar to his own, if they possess the same functions, are employed for the same purpose, and embody a common principle.

11. Nor is the substantial identity of two machines established by proof that they bring out the same products, and use the same mechanical powers, and have other resemblances. But in such case the evidence must show that the two are of the same nature and character, and constructed and operated upon a common principle, and to the same purpose.

12. And it is exclusively the province of the jury to ascertain and determine whether the patentee is the original inventor of the invention described in the patent, and whether the patent embraces the thing used by the defendants.

[Cited in Law, Pat. Dig. 190, 239, 284, 337, 364, 439, 457, to the points as stated above. Nowhere reported: opinion not now accessible.]

Case No. 13,059.

SMITH et al. v. HIGGINS et al.

[1 Fish. Pat. Cas. 537.] [1]

Circuit Court, S. D. New York. Dec., 1859.

PATENTS—ARRANGEMENT AND COMBINATION—PRINCIPLE OF PATENT.

1. In order to constitute an infringement, it is not necessary that the arrangement and combination of the party charged with the infringement should be the same to the eye as the patented invention. If they embody the ideas of the patentee, and the machinery of the defendant operates by such adoption and appropriation, then, though the arrangement may be apparently different, in reality and in judgment of law an infringement exists.

[Cited in brief in Tillotson v. Ramsay, 51 Vt. 311.]

2. Hence, it will not only be proper, but essential, that the jury should look into the arrangement and operation of the machinery used by the defendant, for the purpose of ascertaining whether or not it embodies within it the principle of the patentee; whether, or not, its successful operation is attributable to such appropriation. If it does, then it is an infringement. If it does not, then there has been no infringement.

This was an action on the case [by Alexander Smith and Jonathan Smith against Alvin Higgins and others] tried by Mr. Justice NELSON and a jury, and brought to recover damages for the infringement of letters patent [No. 7,446] granted to Alexander Smith, June 18, 1850, and reissued May 11, 1852 [No. 217], for a new and useful "apparatus for parti-coloring yarn," an undivided half of which was assigned to Jonathan Smith.

The claims of the reissued patent were as follows: "What I claim as my invention, and desire to secure by letters patent, is the method substantially as specified, of parti-coloring yarns that have been reeled, by direct and free immersion by means of frames carrying the reeled yarns, and combined with the vat containing the dyeing liquor, by means of machinery adapted to let down and draw up said frame, and measure the extent of immersion substantially as set forth. I also claim connecting one or both of the reels in each frame by means of slides, to admit of moving the reels from contact with the yarns, while in the process of dyeing, substantially as specified."

Chas. M. Keller and Samuel Blatchford, for plaintiffs.

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

George Gifford, for defendants.

NELSON, Circuit Justice (charging jury). The patent in this case was originally granted to Alexander Smith, June 18, 1850. On December 10, of the same year, an undivided half of the patent was assigned to Jonathan Smith. The suit is in the name of the two. The patent was surrendered and reissued with an amended specification on May 11, 1852. The suit is founded upon this reissued patent and amended specification.

The first question to be considered by the court and jury is, what is the invention of the patentee? This we must ascertain and settle in order to be able to determine intelligibly whether or not it has been appropriated or infringed by the defendants. The invention is described by the patentee as a new and useful apparatus for parti-coloring yarn.

It is therefore a patent for machinery—for the means to be used in this work. The patentee then refers to the modes of parti-coloring in use at the time he made his invention; the first being by printing, and the second by dipping the skeins into a dye-vat, the part not to be dyed being clamped, or tied, or wrapped around, to prevent the access of the dye.

He then states that these methods in previous use were imperfect, the printing not admitting of permanent colors, besides requiring complex machinery, and the dyeing by clamping, tying, etc., being unsuccessful on account of the access of the dye to the parts sought to be excluded. He then speaks of the nature of his improvement, which he says consists of parti-coloring yarns that have been reeled, by means of direct immersion in the dye, by the use of movable frames, adapted to receive and hold the skeins at they are arranged upon a reel, and so combined with the dye-vat that they will permit the yarn to be let down to a determinate distance in the dye. There is then a particular description of the machinery used in this process, and finally, the more material part of the specification, particularly when we are inquiring as to the thing invented or discovered—the claim. What the patentee claims to have secured is the method substantially as described, of parti-coloring yarns which have been reeled, by direct and free immersion, by means of frames carrying the reeled yarns, combined with the dyeing-vat by machinery adapted to let down and draw up the frame and measure the extent of the immersion. The reel on which the yarn is reeled (which was exhibited in court) is not a part of the combination, and as regards this question of novelty in the combination described by the patentee, and in which his invention consists, may be laid out of view. The thing invented, then, is this: The horizontal frame carrying the reeled yarns combined with the dyeing-vat by machinery adapted to let down and draw up this frame and measure the extent of the immersion, or the extent of the line of dyeing upon the yarn. In other words, the thing discovered is the combination of the horizontal frame carrying the reeled yarns with the dyeing-vat by machinery—which must always be kept in view as very important—which lets down the frame carrying the yarn, and draws it up, and at the same time measures the line of yarn to be dyed.

Now, this being the thing invented—the improvement patented—the next question is, is it new and useful? It must be both in order to constitute a valid patent. The utility of the arrangement and combination I have not understood to be contested by the learned counsel for the defendants.

As to the novelty of the arrangement and combination, there has been introduced in the course of the trial, intending to bear upon this question, as well as upon the question of infringement, the previous printing apparatus, the clamping process and apparatus, and the methods of Graham, Stevenson, Whittock, and that of Kerr, one of the witnesses who testified on the part of the defendants.

Now, the question of novelty is not whether free immersion has been before used for dyeing parti-colored yarns; but whether this dyeing of parti-colored yarns by free immersion was done previous to the date of the invention of the patentee, by an arrangement and combination of machinery like that described in his patent. This is not a patent for the discovery of the idea of dyeing parti-colored yarns by immersion in the dye. but it is for an arrangement and combination of machinery, as a means to be used in dyeing parti-colored yarns by immersion in the dye. In order, therefore, to disprove the novelty of the invention, it must be shown that these previous modes used practically in dyeing parti-colored yarns by immersion, or otherwise, embraced within them this combination and arrangement of the machinery described in the patent. If it were done by modes and processes not embracing this combination and arrangement, then such previous use would not disprove the novelty of the plaintiffs' invention.

On this point, therefore—the question of novelty—it will be your duty to look into these old modes of parti-coloring yarn by immersion, or otherwise, in the dye, and say whether they contain the special combination and arrangement of the machinery described and used by the plaintiffs.

If you should arrive at a conclusion in favor of the plaintiffs as to the novelty or utility of their improvement, the next question will be as to the alleged infringement by the defendants in the adoption of machinery whereby yarn is parti-colored by immersion. That question will depend upon the fact whether or not the arrangement of the machinery used by the defendants in dyeing yarn embraces the combination of the

plaintiffs; in other words, whether the defendants' mode and machinery embodies within it the new ideas of the patentee; whether or not they have appropriated the ideas which lie at the foundation of the plaintiffs' improvement or discovery.

In order to constitute an infringement, it is not necessary that the arrangement and combination of the party charged with the infringement should be the same to the eye, but in point of fact. If they embody the ideas of the patentee, and the machinery of the defendants operates by such adoption and appropriation, then, though the arrangement may be apparently different, in reality and in judgment of law an infringement exists. Hence, it will be not only proper, but essential, that the jury should look into the arrangement and operation of the machinery used by the defendants for the purpose of ascertaining whether or not it embodies within it the principle of the patentee; whether or not its successful operation is attributable to such appropriation. If it does, then it is an infringement. If it does not, then there has been no infringement.

It has been insisted by the learned counsel for the defendants that they do not use the reeled yarn, or rather the yarns on a reel, as is done by the plaintiffs; and hence it is insisted that, in this respect, the defendants' arrangement or combination of machinery differs from that of the plaintiffs'. It is true, however, that the combination and arrangement of the machinery of the plaintiffs is useless, and would not be patentable without yarn to be operated upon in the process of dyeing; and in order to make out an infringement, it must appear that the defendants not only used the combination of the plaintiffs, but that it is used for dyeing by letting down and taking up the reeled yarn into and out of the vat, and measuring the extent of the immersion at the time.

I will state this proposition again, as it is undoubtedly important. I have said that the combination and arrangement of the plaintiffs' machinery is useless, and would not be patentable without yarn to be operated upon in the dyeing process. The invention is the combination for the purpose of dyeing by immersion, and the machinery which is employed to effectuate this process. It must therefore appear, in order to constitute an infringement, that the defendants use this combination and arrangement for the purpose of dyeing by immersion, by means of machinery which lets down the yarn into the dye; that they use the combination of machinery which effects, or appears to effect this, and at the same time measures the extent of the dyeing. Whether or not the yarn to be dyed is on a reel, like the plaintiffs', is not material. If the yarn is so arranged as to be acted upon by the plaintiffs' combination, and is so acted upon by the defendants' arrangement that it may be let down into the dye and taken up, and at the same time measure the extent of the immersion, then an infringement exists. There would then be an embodiment of the ideas of the patentee in the arrangement or combination of the machinery of the defendants, and an appropriation of the improvement of the patentee. Gentlemen, this branch of the case, the question of infringement, is a question of fact which, under the views of the law which I have endeavored to explain to you, must be examined and determined for yourselves. Undoubtedly, before the plaintiffs are entitled to recover, they must have established to your reasonable satisfaction that their new mode, method, combination, arrangement of machinery for the purpose of dyeing parti-colored yarns, and the ideas involved and embodied in this new arrangement and combination which enabled them to work out their improvement is a useful one; that these are substantially, practically involved and embodied in the defendants' arrangement and operation of their machinery. If you find these there, although the form may be different to the eye—if you find the essence of the plaintiffs' arrangement, the practice and operation of it embodied within the defendants', then, in judgment of law, there is an infringement. This is a question of act, which it is your province to determine.

The remaining question in the case is the question of damages, which has been presented by the counsel for the plaintiffs. Upon this question the general rule is, in case of an infringement or appropriation of his invention by another without his license, the patentee or the assignee, as the case may be, is entitled to the actual damages, which he has sustained by reason of this infringement. It is often, indeed, almost always, an exceedingly difficult question to arrive at, upon any certain or satisfactory data. The theory, or the principle in respect to the damages, is that a third person who adopts, appropriates, or uses the improvement of another, interferes with his custom, his monopoly, or rather property (for it is not a monopoly, being the fruits of his own mind), and affects the benefits which he would otherwise be entitled to; and the jury should look into the case with a view to ascertain the actual damage which the patentee, under such circumstances, has sustained. The rule of law excludes any exaggerated or vindictive damage, which is sometimes allowed in cases of willful trespass. That rule of damage has no application in this case.

In this case, one view probably to be taken upon the question of damages would be this: the benefits and advantages, whatever they may be, if there are any, derived in the use of the plaintiffs' improvement over the old modes practiced and in use; and this is the useful result, if any, consequent upon the new invention over old modes. If it can be shown that there are benefits and advantages derived by the use of the new mode over

the old, these are such as are to be taken into consideration upon the question of damages.

You have heard the testimony which has been offered. I shall not go over or call attention particularly to it. These estimates and opinions are not always reliable or very certain. But still they are competent and admissible on the question of damages, and proper to be taken into account by the jury in attempting to arrive at the actual damages which the plaintiffs have sustained. This is also a question of fact which belongs to the jury, and with which I do not desire to interfere.

Mr. Gifford then submitted the following points, to which the court assented:

First. That it is for the jury to decide whether or not the defendants' clamp-frame is or is not combined by machinery with the vat.

Second. That unless the jury find that the clamp-frame of the defendants is combined with the vat by machinery, there is no infringement.

Third. That unless the jury find that in the use of such combination the machinery measures in its use the extent of the immersion, there is no infringement.

The jury disagreed.

[For another trial of this case, in which judgment was rendered for defendants, with costs, see Case No. 13,060.]

Case No. 13,060.

SMITH et al. v. HIGGINS et al.

[2 Fish. Pat. Cas. 97.][1]

Circuit Court, S. D. New York. Aug., 1860.

PATENTS—MACHINE FOR DYEING YARN—COMBINATION.

1. Smith claimed "the method, substantially as specified, of parti-coloring yarns that have been reeled, by direct and free immersion, by means of frames carrying the reeled yarns and combined with the vat containing the dyeing liquor, by means of machinery adapted to let down and draw up the said frame, and measure the extent of immersion substantially as set forth." *Held*, that this was a claim for a combination of the frame carrying the reeled yarns and the vat containing the dyeing liquor, by means of machinery adapted to let down and draw up said horizontal frame and measure the immersion; and not a claim for the parts.

2. A machine which dispensed with the horizontal frame, or its equivalent, and contained no arrangement for measuring the extent of the immersion of the yarn, was no infringement of the patent.

This was an action on the case [by Alexander Smith and others against Alvin Higgins and others] tried, by consent of parties, by Mr. Justice Nelson, without a jury, to recover damages for infringement of letters patent [No. 7,446], granted to Alexander Smith June 18, 1850, and reissued May 11, 1852 [No. 217], for an "improvement in apparatus for parti-coloring yarn." A report of a former trial, in which the jury disagreed, will be found in [Case No. 13,059]. The claims of the patentee will be found in the opinion of the court.

Charles M. Keller, for plaintiffs.
George Gifford, for defendants.

NELSON, Circuit Justice. This suit is founded on a patent for "the improvement in apparatus for parti-coloring yarn." The patent was issued to Alexander Smith, June 18, 1850, and surrendered and reissued May 11, 1852.

The patentee recites that yarns heretofore have been parti-colored either by printing, or dipping skeins in a vat of dyeing liquor, with the parts not to be colored tied or clamped so as to exclude the dye, and states the difficulties attending the use of these modes, and also the nature of his own invention—namely, that it consists in coloring yarns that have been reeled by direct immersion in the dye, by means of moveable frames, adapted to receive and hold the skeins, and so combined with the dye-vat as to admit of letting down the yarns to the determined measured distance, and then withdrawing and shifting them as required; and, after giving a detailed description of the machinery used by him, he winds up with his particuar claim as inventor, and which is "the method substantially as specified, of parti-coloring yarns that have been reeled, by direct and free immersion, by means of frames carrying the reeled yarns, and combined with the vat containing the dyeing liquor, by means of machinery adapted to let down and draw up the said frame, and measure the extent of immersion substantially as set forth."

The yarns to be parti-colored are wound round two reels particularly described in the specification, and then the reel-frame is suspended on a horizontal frame also described; and as many of such reel-frames, containing the skeins of yarn as the horizontal frame will carry, can, in like manner, be suspended. A scale is then applied to one of the reel-frames, and, by turning a crank-handle, the whole is let down into the vat to the depth desired, as indicated by the scale, depending on the figure to be produced in the weaving of any given fabric, such as carpets and the like. These reel-frames may be inverted to dip the other end of the skeins in like manner, in the same vat, or in one of any other color, or the reels may be turned to bring other parts of the skeins in position to be immersed in the same vat, or a vat of another color.

The claim, which we have given above verbatim, is not entirely free from difficulty in its construction. The phrase, "by means of frames carrying the reeled yarns," may embrace, not only the horizontal frame upon which the reels are suspended, but the reel-frames upon which the yarn has been reeled.

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

The difference in the construction is material, for, if the reel-frames are included, then the combination with the vat would be a different one from that on which the horizontal frame alone is embraced.

When this case was before us at the circuit, on the jury trial, we were inclined to think, and so held, for the purpose of the trial, that the combination embraced only the horizontal frame which carried the reels, and confined it to that in connection with the vat. From the view we have taken of the case upon the evidence, the difference in the construction would not change the result; but, we are free to say, that on further examination of the claim, in connection with the description, we think the better opinion is, that the reel-frames were intended to be embraced in the combination.

Assuming, however, for the present, that the horizontal movable frame only is embraced, then the claim consists of a combination of this frame carrying the reeled yarns, and the vat containing the dyeing liquor, by means of machinery adapted to let down and draw up the said horizontal frame, and measure the extent of the immersion, substantially as described. The parts are not claimed —the combination only.

The idea of parti-coloring yarns, in skeins, by free immersion in a vat containing the liquor, was not new, nor the measuring the extent of the immersion at the same time. The novelty consists in the machinery, or means by which the parti-coloring is effected in equal and measured proportions; and, conceding the novelty of this combination, which we think is fully established by the evidence, the material question in the case is, whether or not the means or machinery used by the defendants infringe upon it?

In other words, do they use the combination of the horizontal frame, carrying the reeled yarns, and the vat by means of the patentee's machinery to let down and draw up the said frame, and to measure the extent of the immersion, or do they use the combination by equivalent means?

After the best consideration we have been able to give to the case, we have come to the conclusion that these questions must be answered in the negative.

We have already said that the idea of dyeing parti-colored skeins of yarn by free immersion into the dye, and, at the same time, gauging or measuring the extent of coloring of the skein, was not new—the idea is not the patentee's. He is entitled to the merit only of embodying it into machinery and adapting it to practical use in a new and superior mode to any that had preceded it. And, in order to establish an infringement against the defendants, he must show that they are employing substantially the same description of machinery. If they employ machinery of a different description, a different mode of accomplishing the same result, the patentee has no ground of complaint.

Now, in the first place, the defendants do not employ the reel-frames of the patentee, upon which the skeins of yarn are reeled or placed, at all; nor any equivalent for the same, nor, indeed, any arrangement resembling them. And hence there is no necessity for the horizontal movable frame found in the patentee's combination, in the defendants' arrangement, as this horizontal frame is important only as connected with the reel-frames. Nor is there, in fact, any frame resembling the peculiarities or functions of the horizontal frame employed by the defendants. And the machinery for letting down in, and drawing up the skeins of yarn from, the liquor in the vat used by the patentee, is altogether different from that used by the defendants, and there is no arrangement at all used by them for measuring the extent of the immersion by machinery in the process of letting the yarn down into the vat.

By the arrangement of the defendants, the skeins of yarn are stretched upon two poles —one above the other; and while thus situated, the skeins are clamped by a clamp of wood at the distance from the bottom desired to be colored, or rather fixing the measure of the immersion. This clamp is attached to a frame independently of the two poles which support it. The poles are then withdrawn, and the clamp frame attached to and carried by a lever, operated by machinery, to the vat of liquor and lowered into it, the clamps, which float, determining the extent of the immersion. This extent is not determined by the machinery, as in the patentee's arrangement, but is fixed in advance by the hand of the operator. There is no machinery adapted to let down and draw up the frame with the skeins of yarn, and at the same time, or in the same process, measure the extent of immersion. The functions of the machinery are simply to carry the clamp frame to the vat, and lower it into it, and afterward lift it out.

The measurement is by an independent operation, namely, by the clamp, which is fixed to the yarn by the hand. The truth is, that the defendants' device is but an ingenious improvement and adaptation of the old mode of parti-coloring by clamping the skeins of yarn, and immersing them in the vat. Instead of immersing the entire skein, separate parts or portions are colored at a time, the clamp serving to exclude or stop the coloring material, and, at the same time, determining the extent of the immersion, this depending upon the portion of the skein to which the clamp is applied. The germ of the device may be found in Graham's patent of May 13, 1842, for "an improved manufacture of that kind of carpeting, usually denominated Kidderminster carpeting."

I am entirely satisfied that judgment should be rendered for the defendants, with costs.

SMITH (HILL v.). See Case No. 6,499.

Case No. 13,061.

SMITH et al. v. HOFFMAN et al.

[2 Cranch, C. C. 651.] [1]

Circuit Court, District of Columbia. April Term, 1826.

PARTNERSHIP—CONTRACT IN NAME OF ONE—PAROL EVIDENCE—APPEAL—BILL OF EXCEPTIONS.

1. Parol evidence is not competent to vary a written agreement.

2. A written contract by one of two joint partners, made in his own name, does not bind the other partner, although the money obtained thereby is brought into the joint concern.

3. The court will not sign a bill of exceptions to the terms in which a certain paper, which had been offered in evidence, is described in the instruction of the court to the jury (the paper itself being referred to;) but will sign a bill of exceptions to the refusal of the court to sign the former bill of exceptions.

4. A written contract, the terms of which are clear and unambiguous, is conclusive; and parol evidence is not admissible to contradict it.

This was an action of assumpsit [by Walter and Clement Smith], against Jacob Hoffman and George Johnson, for money paid, laid out, and expended by the plaintiffs, for the use of the defendants, and at their request. Johnson only was taken, and the writ abated, as to the other defendant, by the marshal's return that he was not an inhabitant of the district.

Upon the trial of the general issue, the plaintiffs offered evidence, that on the 10th of December, 1823, the defendants entered into a special partnership in the business of making bacon and packing pork, which partnership was dissolved by mutual consent on the 21st of January, 1824. That the defendant Hoffman borrowed of the plaintiffs their two notes for $5,000 each, at 60 days, one dated January 9, 1824, the other, January 17, 1824, and as security against the first of those notes, the plaintiffs received from Mr. Hoffman, the said George Johnson's note, indorsed by Mr. Hoffman for the like amount at 60 days, dated on the 8th of January, 1824, so as to fall due one day before the plaintiff's note of the 9th of January, 1824; and when they lent Mr. Hoffman their note of the 17th of January, 1824, he gave them his receipt therefor in the following words: "Georgetown, 17th January, 1824. Received from Walter and Clement Smith, their note dated this day for $5,000 payable in the Bank of Alexandria, being issued for my use I promise to provide for and pay the same at maturity. Jacob Hoffman." The plaintiffs also offered parol evidence, by the deposition of the said Jacob Hoffman, that he borrowed of the plaintiffs their note, dated January 9, 1824, for $5,000, for the use of Hoffman & Johnson; that he informed them of their partnership in purchasing pork; that the note was discounted in the Bank of Potomac, and the proceeds exclusively applied to the payment for pork in the concern of Hoffman & Johnson; that the said Hoffman obtained from the plaintiffs their other note for $5,000, dated January 17, 1824, for the use of the bacon concern of Hoffman & Johnson. That in applying for that loan, he stated to one of the plaintiffs, that the character of the said Johnson was most respectable, and that he was competent to transact the business in case of the ill health of the said Hoffman. That about the same time he made an assignment of steamboat stock and slaves, to one Richard Smith, to secure the plaintiffs for the loan of those notes. That the last-mentioned note was discounted at the Bank of Alexandria, and the proceeds (except $508,) applied to the bacon concern of Hoffman & Johnson. That the only sum paid upon those notes, to his knowledge, was $500, paid by himself in April, 1824. That the effects of the concern were placed in the hands of Mr. Johnson in May, 1824, to be disposed of conformably to the articles of copartnership. That when he borrowed the notes, the understanding was, that they were to be renewed until he could pay them out of the effects of the bacon concern of Hoffman & Johnson. The plaintiffs also offered parol evidence that the said Hoffman kept an account in the Bank of Alexandria, in his own name, which, by the officers of that bank, was usually denominated as the "pork account," and was intended and declared by both the defendant and the said Hoffman to contain the bank account in relation to the pork business of the concern of the said Hoffman & Johnson. That the offer of the said note for discount in the said bank, (of which the said Johnson was one of the directors,) by the said Hoffman, and the discount of the same were entered in the books of the bank as for the use of the said Hoffman, and the proceeds thereof credited to the said Hoffman in the said account, and drawn out by checks of the said Hoffman alone, and applied as aforesaid. That the said note of the 17th of January, 1824, was renewed from time to time, until it was finally taken up by the plaintiffs on the 19th of October, 1824, the discounts upon the renewals having been paid by Mr. Hoffman, except the two last in May and July, 1824, which were paid by Mr. Johnson. The plaintiffs also offered in evidence a letter from Mr. Hoffman to Clement Smith, president of the Farmers and Mechanics Bank in Georgetown, and one of the plaintiffs, bearing the same date as the note, (17th January, 1824.) in which he says, "This will be handed to you by Mr. George Johnson, my partner in the pork establishment, and friend. He will hand you a check for $2,500 to meet a check for that amount drawn on you yesterday," &c. Also a letter from Mr. Johnson to the same, dated March 2d, 1824, in which he says, "I inclose a note of Mr. Hoffman for $2,500, which he says was promised to be discounted at your bank to-morrow, to renew the same amount paid there the last week. Mr. Hoff-

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

man is absent from town, and the money absolutely relied on to meet engagements to same amount. I hope therefore your board will be so good as to give us the money. Please write me, by to-morrow's mail, when I may check for the amount." And the plaintiffs further offered parol evidence that on one or two occasions when the account of Mr. Hoffman in the Bank of Alexandria was overdrawn, the defendant, being notified thereof, said, "he would see Mr. Hoffman and have it attended to." That the note of the 9th of January, 1824, which was discounted for Mr. Hoffman at the Bank of Potomac, was curtailed and renewed from time to time until October, 1824, when it was taken up by the plaintiffs, the discounts having been paid by Mr. Hoffman, except the two last, which were paid by Mr. Johnson. The plaintiffs also gave in evidence sundry advertisements in the name of Hoffman & Johnson.

The defendant then offered in evidence the before-mentioned receipt and promise of Mr. Hoffman of the 17th of January, 1824; and two deeds of trust, of certain slaves, and steamboat stock from Mr. Hoffman to Richard Smith, of the 17th of January, 1824, (executed on the 22d of January, 1824,) and the 10th of November, 1824, to secure the plaintiffs against their notes loaned as aforesaid, both of which deeds state the note to have been loaned to the said Jacob Hoffman, and that he was desirous to secure the plaintiffs from any loss which might accrue to them "from the non-payment of the said notes by the said Jacob Hoffman;" and authorize the trustee to sell the said slaves, &c., "if the said Jacob Hoffman, his heirs, executors, or administrators, shall fail to pay, when required, the notes aforesaid of the said Walter and Clement Smith." The defendant also offered in evidence the advertisements aforesaid, and testimony to prove that the said Hoffman & Johnson carried on their said pork concern in that name, and kept their books of sales and accounts in that name; and the said Hoffman at the same time carried on various branches of trade and business, in which the said Johnson was not concerned. That the said Hoffman, during the continuance of the said concern of Hoffman & Johnson, was in the habit of drawing checks for credits standing in his name in the said account in the Bank of Alexandria, as well as in other banks indiscriminately for the general purposes of all his concerns and for his private expenses. That the defendant also, at the same time, was engaged in other trade and business on his own account, in which the said Hoffman had no concern or interest, and never drew out or attempted to draw out of any of the said banks any money standing to the credit of the said Hoffman.

The plaintiffs, upon the evidence aforesaid, claimed to recover of the defendants the amount of the plaintiffs' note of the 17th of January, 1824, thus taken up by them, deducting half of the proceeds of the sales of the negroes, the other half having been applied to the credit of the other note of the 9th of January, 1824.

Whereupon THE COURT (THRUSTON, Circuit Judge, absent) instructed the jury that the written documents, so given in evidence in this case, immediately relating to the note of the 17th of January, 1824, lent by the plaintiffs to Jacob Hoffman, and discounted at the Bank of Alexandria, taken in connection with the written documents relating to the nature, name, and extent of said partnership, do by their own terms import that the said note of the 17th of January, 1824, was lent by the plaintiffs to Jacob Hoffman, upon his sole credit and responsibility, and not upon the credit and responsibility of Hoffman & Johnson; and that the promise of the said Hoffman, in the said receipt, to provide for and pay the said note at maturity, was the sole and separate promise of the said Hoffman, and not the joint promise of Hoffman & Johnson. That the parol evidence produced by the plaintiffs in this case as aforesaid, is not competent and sufficient to change the import or terms of the said written documents, so as to charge the defendant, in this action, for the failure of Hoffman to provide for and pay the said note at maturity, according to the promise contained in his said receipt. To which instruction the plaintiffs excepted, and took their bill of exceptions. And the plaintiffs by their counsel objected to that part of the foregoing instruction which describes the said paper, purporting to be the receipt of the said Jacob Hoffman, as having been "given by said Hoffman to the plaintiffs for the said loaned note, and as promising to provide for and take up the said note at maturity," because no other evidence was offered in relation to the said facts than is hereinbefore stated in the statement of all the evidence in the cause as offered both by the plaintiffs and by the defendant, the said statement comprehending all the evidence offered on both sides in relation to said receipt.

But THE COURT, notwithstanding this objection, retained the said words in their instruction, and described the said receipt as having been given to the said plaintiffs by the said Hoffman for the said loaned note of 17th January, 1824; to which description of the said note the plaintiffs, by their counsel, excepted, and prayed the court to sign and seal their bill of exceptions. But THE COURT refused to sign the same; to which refusal the plaintiffs excepted, and THE COURT signed and sealed the bill of exceptions to such refusal, on the 3d of May, 1826.

The plaintiffs, then, upon the statement of facts upon which their first prayer in the trial of this cause was predicated, prayed the court to instruct the jury, that the receipt signed "Jacob Hoffman," offered in evidence by the defendant, and its being in the plain-

tiffs' possession, are not conclusive to show that the plaintiffs took the said receipt as their security for the loan of their note of $5,000, of the 17th of January, 1824; and that if the jury believe from all the circumstances given in evidence, that the same was not so taken as their security for such loaned note of the plaintiffs, then the plaintiffs are not precluded from recovering by such receipt. Which instruction THE COURT refused to give as prayed; but instructed the jury, that the said receipt, being admitted by the plaintiffs to be in the handwriting of the said Jacob Hoffman, and having been produced at the trial of this cause by the plaintiffs in consequence of a notice from the defendant calling upon them to produce the same, is primâ facie evidence, and, in the absence of contradictory evidence, is conclusive that the said receipt was given by the said Hoffman to the said plaintiffs, at the time it bears date, and that it relates to the aforesaid note of the 17th of January, 1824, for $5,000, discounted as aforesaid, at the Bank of Alexandria; and that if the jury should be satisfied by the said evidence that the said receipt was so given and does so relate, then the said receipt, taken in connection with the other written documents given in evidence in this cause, is conclusive evidence that the said note of the 17th of January, 1824, was lent by the plaintiffs to the said Jacob Hoffman, upon his sole credit and responsibility, and not upon the credit and responsibility of the said joint concern of Hoffman & Johnson. To which refusal to give the instruction prayed by the plaintiffs' counsel, the plaintiffs excepted, and took their bill of exceptions.

After the delivering of the foregoing opinions and instructions of the court to the jury, the plaintiffs' counsel having still insisted and argued before the jury upon the supposed inconsistency between the deposition of Jacob Hoffman and his said written receipt and promise of the 17th of January, 1824, as contradictory evidence, from which, with the other evidence, the jury may infer that the said receipt was never given by the said Hoffman; the defendants still objected and prayed the opinion and instruction of the court, that the said deposition contains no evidence from which the jury could infer, (against the evidence of the production of the said receipt by the plaintiffs, and their admission of the handwriting,) that the said receipt was never given as it purports; which instruction THE COURT gave as prayed, and the plaintiffs took their fourth bill of exceptions.

Mr. Jones, for defendants, cited Emly v. Lye, 15 East, 7.

Mr. Swann and Mr. Key, contrà, cited Willet v. Chambers, Cowp. 814.

The jury found a verdict for the defendants.

The plaintiffs carried the cause to the supreme court by writ of error, where the parties settled the matter by compromise, and the writ of error was dismissed by consent at January term, 1828.

[See Case No. 13,067.]

SMITH (HOLMEAD v.). See Case No. 6,630.

SMITH (HORTON v.). See Case No. 6,709.

Case No. 13,062.

SMITH v. HOUTZ.

[25 Leg. Int. 244; [1] 15 Pittsb. Leg. J. 409.]

Circuit Court, W. D. Pennsylvania. July, 1868.

COURTS — FEDERAL JURISDICTION — FOLLOWING STATE PRACTICE—PUBLIC LANDS—SURVEY —PLAT—WARRANT—VACANT LANDS.

1. Jurisdiction of the circuit court of the United States in civil cases. Courts of the United States, in their decisions, are independent of the courts of a state, except as to the laws regulating landed property.

2. As to these, when they differ, the courts of the United States are governed by the decisions of the supreme court of the state.

3. Where surveys are made and returned into the land office in blocks, they are to be located, on the ground, in blocks.

4. If any of them are found to interfere with tracts belonging to the older blocks, the younger must give way to the elder.

5. The marks on the ground really constitute the survey, and determine the rights of the party. The plot or diagram returned to the land office being only evidence of the survey. Where they differ, the latter must yield to the former.

6. The act of 1785 requires that every survey made, and to be returned upon warrant, shall be made by actually going upon the ground and marking the lines—otherwise it is clandestine and void.

7. A "chamber survey" is where the surveyor contents himself with plotting out a supposed survey, in his chamber, with all the appearance of an actual survey, and returns it to the land office.

8. Such survey, not returned, is utterly worthless and void. But if returned and accepted, it is not void, but voidable, and a new survey may be made upon the same warrant upon an order of re-survey.

9. Warrants only authorize the survey of vacant lands, for they, alone, belong to the commonwealth to grant.

10. Whether lands are vacant or not, the surveyor general and his officers do not undertake to determine, and, in many instances, have not the means of ascertaining. Of that the applicant must judge for himself.

11. It is against conscience, to take out a warrant, if the warrantee knew that the lands were appropriated by prior right.

12. For decisions upon other questions see the answers of the judge to the points submitted.

This is an action of ejectment for two tracts of land in Clearfield county. What gives it consequence is, that the decision affects titles to farms and timber lands of great value, and

1 [Reprinted from 25 Leg. Int. 244, by permission.]

covering an area of many miles around the lands in controversy. To the old land lawyers of Pennsylvania, the legal principles decided, will seem familiar. By the juniors of the profession this report will be appreciated. The history of the case, the trial of which occupied nearly a month, will be found in the charge by the court to the jury.

John G. Miles, Henry D. Foster, J. B. McEnally, and Thomas J. Keenan, for plaintiff.

Mr. Purviance and H. B. Swope, for defendant.

McCANDLESS, District Judge (charging jury). The jurisdiction of the circuit court of the United States, in civil actions, extends only to cases between the subjects of foreign nations and citizens of the United States; and to cases between citizens of the United States residing in different states. Also to cases of patents for new and useful inventions, and to all actions where the government is a party. Pruner and Burley, the warrantees, being citizens of Pennsylvania, could not sue another citizen of Pennsylvania, but would be compelled to resort to the courts of Clearfield county, where the lands lie. Their vendee, Samuel C. Smith, being a citizen of New Jersey, gives us jurisdiction. This provision was designed to give citizens of other states a forum, free and unembarrassed by the supposed partialities and prejudices which might exist in the locality of the subject-matter in controversy. Jurors in the federal courts are selected from the body of an extensive district, which, in this district, is two-thirds of the territory of Pennsylvania. You come here wholly ignorant of the parties or the subject matter, and after a patient hearing of several weeks, whatever your decision may be, the parties are bound to presume that they have had a fair and impartial trial, before an upright and enlightened jury.

Except life and liberty, there is nothing so important to the citizen, as that the rules of property should be known and certain, and that he should feel secure in the enjoyment of his title. What gives gravity and significance to this case is, not merely the land immediately in dispute, but the fact that its result may affect and unsettle surveys for miles around, and disturb parties who have been for years in the peaceable and quiet possession of their lands. In all matters of litigation, the courts of the United States are independent of the courts of the state, with the exception of the laws regulating landed property. However we may differ on these questions, we are bound by their decisions, and it always affords us pleasure to concur with them in opinion. In the conclusion, therefore, at which you and the court may arrive, in the adjudication of this case, we shall be guided and governed by the land laws of Pennsylvania.

With these preliminary observations, we shall now proceed, as briefly as possible, to consider the merits of the controversy which has occupied nearly four weeks of your time. This is an action of ejectment brought by Samuel C. Smith against Dr. Daniel Houtz, to recover between six and seven hundred acres of land in Clearfield county. The plaintiff derives title by two warrants from the land office, one dated 3d October, 1859, to E. J. Pruner, a survey by H. P. Trezulney for Mr. Cuttle, the deputy surveyor, which was accepted at the land office on the 29th of the same month, and a patent from the commonwealth, dated the same day; the other warrant to Jacob Burley, dated the 3d October, 1859, survey made by the same person, on the 15th October, returned and accepted on the 29th, and a patent issued on the same day. Both of these surveys have a warning written upon them by the deputy surveyor, that they are believed to interfere with the surveys of 1793. On one it is said, "the above survey is believed to interfere with the surveys made in 1793 on warrants granted to George Bickham and Benjamin Johnston," &c., and on the other, that "the above survey is believed to interfere with surveys in the name of George Bickham, William Shaff, Jacob R. Howell, &c., made on warrants dated in 1793." With this notice of prospective litigation, the plaintiff accepts a deed from Pruner and Burley, on the 30th December, 1864, for the consideration of $17,000, for what his grantors paid the commonwealth about $200, five years before.

Thus far, this shows a prima facie case for the plaintiff. To repel this the defendant exhibits warrants to Bickham, Howell, Wm. Johnston and Loast, dated in 1793, surveys regularly made and returned into the land office, patents to Richard Peters, and with the exception of one deed, deduces a regular legal title from Morgan, Rawle and Peters, the owners of a batch of thirteen surveys, through the Bank of North America, at Philadelphia, and the representatives of the Rawle and Peters estate, by deeds dated in May, 1853, to Daniel Houtz, the defendant. They further show a continued possession by the payment of taxes from 1805 to 1863, a period of nearly sixty years. They then call the deputy surveyor, who locates their surveys on the land in dispute and within the surveys of 1793. This, being the elder survey, must prevail unless the plaintiff can show you that the location was not made there, but upon other and different ground, and that is a question of fact for the determination of the jury.

Here really begins the wager by battle—the point in controversy. The plaintiff throws down the gauntlet which is promptly taken up by his adversary, with what success you must decide. The plaintiff shows the warrants, surveys and patents for the surveys of 1784, and also the warrant and survey of 1794 on the north, and the residue of the batch of thirteen. of 1793, relying upon that of Casper Haines as the leading warrant, by the location of which as contended for by him, all the rest are to be governed. This warrant calls for "400 acres on the north side of Big Mushanon creek,

and west of the upper Beaver dam, beginning at a beech, corner of land surveyed for John Musser & Co., bounded on the southeast by a line of marked trees, that run south fifty degrees west, and to extend north and westwardly." It will be well for the jury to keep in mind this description. The plaintiff claims that this warrant was located west and north of the line of the surveys of 1784, beginning at the Anderson white oak, and to sustain this position calls five surveyors, Mr. Africa, Judge Guinn, Mr. Trezulney, Mr. Moore and Mr. McCloskey. They do so locate it, but their testimony as to what they found upon the ground was more of a negative than of a positive character. They found some lines and corners which corresponded with the surveys of 1793, but omitted or failed to find others, and they did find a line at the southern base which carried them into, and overlapped the Phillips surveys. That line was so faintly exhibited on the plaintiff's map, that I requested Mr. Africa to define it more distinctly in the one before the court, and which exhibits on that side a correspondence with defendant's location. It could not be expected that at the period when these gentlemen ran the lines the artificial marks upon the trees made in 1793, would manifest themselves as distinctly to them, as they did to surveyors of an earlier date. These are liable to decay, but natural objects, such as rocks, streams of water, beaver dams, &c., are more durable and more satisfactory.

It is not my purpose to advert further to the testimony of these witnesses. You have heard it ably and eloquently discussed by distinguished lawyers, and it is your province, and not that of the court, to decide upon the facts. Does it satisfy you that the Casper Haines warrant was actually located on the ground, as claimed by plaintiff, and that on their map it is "on the north side of the Big Mushanon creek, and west of the upper Beaver dam." Has it satisfied you that the Haines survey on the ground, "begins at a beech, corner of land surveyed for John Musser & Co.," and is bounded on the southeast by a line of marked trees that runs south fifty degrees east," and that it extends "north and westwardly?" If I am not mistaken, in the connected draft from the land office, the Casper Haines should lie in the same range with the Benj. Johnston, part of the boundaries of which seem well defined. Is it clear to you that the Casper Haines was the leading warrant actually located on the ground, or were the other twelve of the block first surveyed, and the Casper Haines afterwards, being on irregular lines blocked at home by the deputy surveyor, and returned to the land office? These are questions of fact for you.

There are one or two legal principles to which I here invite your attention. These thirteen are to be treated as one survey. As Chief Justice Woodward says in 8 Casey [32 Pa. St.] 355: "Where surveys are made and returned into the land office in blocks, they are to be located on the ground in blocks. If any of them are found to interfere with tracts belonging to the older blocks, the younger must give way to the elder." As you have observed here in the surrender of a portion of these lands to the prior claims of the Phillips survey. Another legal principle, well established by a long current of authority is, that the marks on the ground constitute the survey, and determine the rights of the party; the plot or diagram returned to the land office being only evidence of it; and when they differ, the latter must yield to the former. Serg. Land Laws, 126. By the 9th section of the act of 1785, it is provided that every survey to be returned on any warrant issued after the passing of the act, shall be made by actual going upon and measuring the land, and marking the lines, to be returned on such warrant and every survey made theretofore was deemed clandestine and void, and of no effect whatever. This act has been deviated from in several ways. The deputy surveyor may never go upon the ground at all, but content himself with plotting out a supposed survey in his chamber, with all the appearance of an actual survey, and return it to the surveyor general. This is termed a chamber survey, and is a manifest breach of the law and of the officers' duty. Such survey, not returned, is utterly worthless and void. But if returned to the office, and accepted, as has sometimes been the case, it is not void so as to be treated as a nullity, and so that the warrant may be again surveyed, as if retaining all its original validity. 2 Watts, 397. Other legal questions will claim your attention, when I come to answer the points submitted respectfully by the counsel for the plaintiff and defendant.

We now recur to the defence. They give in evidence sundry warrants and surveys of 1793, 1794 and 1784, together with connected drafts of numerous tracts, and a certified copy of the purchase voucher which shows the John Roll's to be leading warrant of the surveys of 1784. It is described as "on the head of Mushanon creek, to include a large Beaver dam, above the upper forks of said creek." They then call Maj. David Hough, an old, intelligent and practical surveyor of thirty-five years standing familiar with this and the neighboring surveys, and who had run and blocked some of the lines in 1855 or '56, when some of the trees, dating to 1793, were green and standing. He made a subsequent survey in 1864, recognizing the old corners he had been at in 1856, and blocking not only the interior lines of the thirteen surveys, but the exterior of the Benj. Johnston, and found them counting to 1793. He also testified to the Dan. Turner reference line of 1792, and showed, I think, to the satisfaction of the jury, that whatever might be the discrepancies in that line, at the land office and upon the official drafts, that on the ground, there was no break in its entire

length, a distance of nineteen miles. And further, that according to the marks he found there, that that line would be the southeastern boundary of the Casper Haines survey. If you believe the testimony of that witness, and we see no reason why you should discredit him, that establishes the location claimed by the defendant.

The deposition of David Ferguson, a surveyor from 1806, since dead, shows that in 1829 he spent a week trying to make the batch of thirteen surveys fit the Vought and Anderson surveys of 1784, by the call of the Casper Haines for the Anderson white oak, and could not do it. That it could not be so located without abandoning all the marks on the ground, and this, we have it by other evidence in the cause, would extend to several miles. He says further, that the Benj. Johnston being an outlying tract, with its exterior lines well marked on the ground, blocking to date (1793) to make it correspond to the call of the Casper Haines for the Anderson white oak, would move it two tracts from its lines thus marked on the ground. This is strong evidence for the defendant's location. The credibility of the witness is for you. You have also the deposition of John D. Hoover, taken on a commission to Iowa, sustaining the same location. He ran the lines in 1852. Then Samuel Hagarty, who ran the lines as early as 1822, testifies to the lines and corners, then green and living, and counting to the date of the survey, 1793. Henry Haggarty corroborates this as to some of the trees which he saw in 1838, when he was in the company of the surveyor, John Hoover. Isaac Toss, who lived on the Henry Shaffer tract for twenty-four or twenty-five years, was present at a survey by Hoover in 1842, and proves the lines of 1793. And Abraham Toss says that, thinking there was some vacant land somewhere there, he got Mr. Trezulney to search for it, and that after running from the hickory down to the birch on the bank of the Mushanon creek, Trezulney said there was no vacant land there. It will be remembered that Mr. Trezulney was the surveyor who located the warrants under which the plaintiff now claims. The credit to be given to these several witnesses is a matter wholly for the consideration of the jury.

I do not know how it struck the minds of the jury, but to the court, after the testimony of Major Hough, that of Major Criswell shed a flood of light upon this case. He is evidently a gentleman of high intelligence, and a skillful and accomplished artist, perfectly at home in the woods and with a theodolite. After finding and tracing the lines of 1793, both the interior and exterior of the batch of "thirteen," so often repeated in your hearing, he took up the individual returns made to the land office. He then says: "With these surveys in my hand, and having been over the ground, I believe the surveys were located by the surveyor on the ground, as I have found the marks; and that location is correctly represented upon the large map of the defendant." He then gives satisfactory reasons for the faith that is in him. "I find the marks of the date (1793) on the ground, and cannot find them anywhere else. I find both the artificial and natural marks upon the ground to correspond with it (defendant's location, as exhibited on the large map,) sufficient to relieve my mind of all doubt." He proceeds: "The official copy of the Geo. Bickham, which I hold in my hand, shows that the Casper Haines survey joins it on the east, and it shows that the Casper Haines lies there by the dotted line and the 'Casper Haines' written upon it, and that dotted line is called for north of the maple. In the location of the surveys as I find the marks on the ground, the hickory corner north of Beaver run (Beaver dam branch) is common to four surveys, to wit, the Howell, the Wm. Johnston, the Matlock and the Casper Haines. I find the Beaver run on the ground, about as represented by the official drafts of the Howell and the Matlock. By that location the southeast boundary of the Casper Haines intersects the Geo. Bickham line above the maple. The call of the Casper Haines designates a beech, corner of the Pigot, Shaw and Joseph Ashbridge, and calls for a line of marked trees running south fifty degrees west. That beech is found, and is within the boundary of the George Bickham survey. The Bickham, then, includes a portion of the ground called for in the Haines warrant. Finding no work on the ground for the Casper Haines of the date according to the location of either plaintiff or defendant, except the work from the hickory, on the north side of the Beaver branch, for the whole distance of the Casper Haines running south from there, and finding the surveys of the George Bickham, Jacob R. Howell, Israel Wheelan and Wm. Johnston well defined, I would locate the Casper Haines at that place on defendant's map. The calls for the John Anderson and Gilbert Vought, I do not consider as having been made after actual inspection, and going upon the ground, by the artist. But I do consider the Casper Haines a 'chamber' survey. And that from the fact that the Beaver dam branch as laid in the Howell and Matlock surveys, both of which the Haines survey calls for, is not laid down in the Haines. Neither are the streams, flowing into the surveys of 1784 from the north, laid on the survey of the Casper Haines as returned to the land office. According to the location of either plaintiff or defendant, water should be found flowing through the Casper Haines. The survey as returned shows no water. There is further evidence on the face of the papers, the returns of survey, which to my mind affords conclusive evidence that the artist did no work on the ground east of the north and south lines running from the maple to the hemlock sapling. The tier of surveys, of which the Casper Haines is one,

was protracted from the north and south line as found on the ground. One of the facts favoring such an opinion is that the stream (of water) as laid in the official return, flowing out of Wm. Johnston through the north west corner of the Joseph Matlock across the south east corner of the Robt. Hiltziman is erroneously made to run over a high hill, according to the papers." He testifies further "that the stream on the western boundary of the Benj. Johnston, flowing into Clearfield creek, is found upon the ground. A stream is called for in the official return of the Benj. Johnston." He concludes his examination in chief by saying: "From what appears on the ground, I could not make any other location than that on defendant's map. To obey the call for the Anderson white oak, would abandon all the work on the ground, and transpose all the corners."

If you believe this testimony,—and I do not see why you should disbelieve it, and if you believe the testimony of Maj. Hough, there is an end to the plaintiff's case. For I have already announced to you the legal principle, well established, that the artificial marks and natural boundaries, found upon the ground, control and are paramount to all the papers in the land office. It is therefore for you to say, whether there was any vacant land there at the date of the warrants to Pruner and Burley. The warrants only authorized the survey of vacant lands, for they alone belonged to the commonwealth to grant. Whether the lands applied for were vacant or not, the land officers do not undertake to examine or determine, and in many instances do not possess the means of ascertaining. Of that the applicant must judge for himself. But if he knew they were appropriated by prior right, (and in this case he was warranted by the caveat of the deputy surveyor) it was against conscience to take out a warrant for them, or to have them surveyed as vacant. 4 Watts, 150.

I will now proceed to answer the longer and shorter "catechism," propounded to me by the learned counsel of the plaintiff and defendant; and after that submit the case for your decision.

Plaintiff's Points—Answer of the Judge.

The plaintiff's counsel ask the court to instruct the jury as follows:

(1) That as the Casper Haines warrant was the leading warrant of the Morgan, Rawle and Peters batch of surveys, it was the duty of the deputy surveyor, in locating them upon the ground, to execute that warrant first, and the others in the order of their calls. 9 Casey [33 Pa. St.] 474.

Answer. Assuming the Casper Haines to be the leading warrant, this point is affirmed.

(2) That if in making that location the Casper Haines warrant was executed upon the old line of the surveys of 1784, in the names of John Anderson and Gilbert Vought as a boundary, and returned by that line as a boundary, and by the white oak corner of the John Anderson survey, as a common corner of the Anderson and of the Casper Haines surveys, that location cannot be departed from in ascertaining the present position of the Haines survey upon the ground. 9 Casey [33 Pa. St.] 474; 10 Watts, 263; 4 Watts & S. 326.

Answer. If the jury believe from the evidence that the Casper Haines was actually located on the ground, by the Anderson white oak and the line of 1784, it cannot be departed from in ascertaining its present position.

(3) That if the Casper Haines survey was so located upon the line of 1784 as a boundary, and by the Anderson white oak, as one of its corners, there was no necessity for remarking either the corner or the line, and it would have been improper to do so; that if the marks of the date of the survey are not found upon either at the present time, it affords no presumption that the survey was not thus located. 3 Serg. & R. 283; 8 Watts & S. 139; 7 Barr [7 Pa. St.] 73.

Answer. The first part of this proposition is affirmed with the qualification that the jury must be satisfied that it was so located. If so, then the second branch of the proposition is true, and the absence of marks at the present time would afford no presumption that it was not thus located.

(4) That the fact that marks of the date of the survey are found upon a part of the old line of 1784, from the Anderson white oak, a short distance below the intersection of the short east and west line of the survey, raises a powerful presumption that the deputy surveyor did actually run that line upon the ground in executing the warrant, and did remark it, although the marks of that date may not now be found on the line. 3 Serg. & R. R. 283; 8 Watts & S. 139; 7 Barr [7 Pa. St.] 73.

Answer. We refuse so to instruct you.

(5) That the thirteen warrants of Morgan, Rawle and Peters having been shown to belong to one party or person, and to have been surveyed at one time as a block, the surveys are to be treated as one entire survey. 9 Casey [33 Pa. St.] 474; 7 Casey [31 Pa. St.] 348; 1 Wright [37 Pa. St.] 67.

Answer. This point is affirmed.

(6) That if the Haines survey was located upon the line of the Anderson and Vought surveys, and by the white oak corner as a common corner of the Anderson and Haines, surveys, that location must fix that corner and line as a boundary of the block on that side, and if the maple grub, as proved by Thomas Henderson, is a corner of the Benjamin Johnston and Thomas Maston surveys, or of the Israel Wheeler, occupying the same ground as the Benjamin Johnston, that corner and the lines running south from it, to the southwest corner of the Thomas P. Wharton survey, those lines counting to the date of the surveys if believed by the jury to be the original lines of the block, and that corner will fix the

boundaries on the opposite side, and must have a controlling influence in determining the position and location of the entire block. See authorities already cited.

Answer. If the Casper Haines was actually located on the ground by the Anderson white oak, and it was the leading survey of the batch, it does not fix the eastern boundary of the batch, but it is for the jury to say whether a line running south from the maple grub in Henderson's field is the western boundary, when the Benjamin Johnston, by the official return of survey, is surrounded on three sides by vacant land, and three of its lines are well marked, and counting to 1793, the date of the survey, can establish the western boundary of the batch.

(7) That if the jury believe the Haines survey was located upon the Anderson and Vought line as a boundary, and the Anderson white oak as a corner of the survey, after the time that had elapsed since the making of the surveys constituting the block, they may presume the existence of the birch corner called for in the return of survey as a corner of the Robert Hiltzheimer and the Joseph Cox surveys on the line running north from the Anderson white oak, and that the line was run upon the ground from the white oak to the birch, even in the absence of marks counting to the date of the surveys, (if they shall not be satisfied that the marks found beyond the forked hemlock was an original mark of the survey,) and the line running north from the white oak to the birch, and from the birch to the northeastern corner of the Jacob Cox survey, will fix the boundary of the block on that side. 10 Casey [34 Pa. St.] 462; 3 Casey [27 Pa. St.] 9; 2 Watts & S. 18; 1 Watts & S. 79.

Answer. We refuse so to instruct you. The jury cannot presume a state of facts that dislocates and abandons all the interior lines of the block which are proven to have been found upon the ground.

(8) That after the length of time which has elapsed since the return of the surveys constituting the block in question (being more than twenty-one years) they are now to be presumed not only to have been regularly made, but to have been made upon the ground as returned 'n the surveyor general's office. See authorities of 7th point.

Answer. Such is not the law as decided by the supreme court of Pennsylvania in 12 Wright [40 Pa. St.] 431, and we refuse so to charge you.

(9) That if the jury are satisfied from the evidence that the general location of the block of thirteen surveys as claimed by the plaintiff is more in accordance with the return to the office of the surveyor general than that of the defendant, that location is to be adopted by them as the true one.

Answer. This is refused,—the marks found upon the ground override and control the returns in the surveyor general's office.

(10) That where there are conflicting lines and corners upon the ground, the presumption of law is in favor of those which agree with the return and against those which would do violence thereto.

Answer. Such a presumption might exist if there was uniformity and correspondence in the returns made to the land office; but, as the official papers produced upon the trial exhibit a conflict in the land office as well as on the ground, no such presumption can avail.

(11) That if a survey has been returned for more than twenty-one years, it must be presumed not only to have been rightly made, but the records of the land office must furnish the best evidence of what was done by the surveyors and others who are not now living to give evidence on the subject. 10 Casey [34 Pa. St.] 462; 3 Casey [27 Pa. St.] 9; 2 Watts & S. 18; 1 Watts & S. 79.

Answer. This would be the law if there were no marks on the ground conflicting with the returns of survey; but if there are, then the location on the ground governs and controls, all the papers in the land office.

Defendant's Points.

The court is respectfully requested to instruct the jury as follows:

(1) The marks on the ground dating to 1793, corresponding with the thirteen surveys constitute the true survey, and control all calls for older surveys, or other fixed boundaries. Walker v. Smith, 2 Barr [2 Pa. St.] 43; Hall v. Tanner, 4 Barr [4 Pa. St.] 247; Henry v. Henry, 5 Barr [5 Pa. St.] 249; Mahon v. Duncan, 1 Harris [13 Pa. St.] 463; 5 Rawle, 350; 10 Wright [46 Pa. St.] 484.

(2) If the jury believe there is a preponderance of marks of 1793 suiting the location of the defendant which would be abandoned by the plaintiff's location, their verdict should be for the defendant.

(3) The marks of 1807, and all marks of a later date than 1793, are to be entirely disregarded by the jury in determining the location of the thirteen surveys.

(4) The location of the surveys of 1794 cannot in any way affect the location of the surveys of 1793. The junior surveys having been received as a species of hearsay evidence, and only equivalent to the declaration of a deceased surveyor as to where he believed the location of the older surveys to be. Bellas v. Cleaver, 4 Wright [40 Pa. St.] 268.

(5) The warrant of Casper Haines being descriptive, its proper location is a question of fact for the jury; and if they believe the Beaver dam, the beech, and the line of marked trees, running south fifty degrees west, called for by the warrant, to be on the ground as claimed by the defendant, it is powerful evidence taken in connection with the lines of 1793, on the ground south of the plaintiff's location, to sustain the position claimed by the defendant.

(6) Before the jury can find that the lines and corners of 1793, on the ground south of the plaintiff's location, were abandoned by

the surveyor who laid the warrants, they must be satisfied either that he obliterated the marks or made new marks corresponding with his return. Walker v. Smith, 2 Barr [2 Pa. St.] 45; 4 Watts & S. 78.

(7) If the jury believe the testimony of defendant's witnesses, that the hemlock sapling, the locust, the hemlock, the hickory, the birch and maple on the one line; the white oak, the double sugar, the hemlock, the pine and the hemlock on the other line; and the maple and pine on the western end of the Benj. Johnston, as defendant lays it, were, on the ground, marked as corners to 1793, with lines to and from them of the same date, corresponding with the thirteen tracts, these corners and lines constitute the survey, control the call of Casper Haines for the white oak and surveys of 1784, and the verdict must be for the defendant. Malone v. Sallada, 12 Wright [48 Pa. St.] 426, 428, 430.

(8) In determining the location of the block of thirteen surveys the jury is to be guided by the following rules: 1. The artificial marks on the ground constitute the survey, and are the highest proof of location. 2. The next most important evidence of location is natural objects, especially streams of water. 3. In the absence of both of them, and then only, adjoining surveys called for are to be resorted to. 4. The location may be determined by fixing any one of the block, whether the leading survey or not, by the marks on the ground, and then laying the rest in their order as returned into the land office. Gratz v. Hoover, 4 Harris [16 Pa. St.] 235.

(9) If in accordance with these rules the jury believe that the Howell and Bickham surveys, under which the defendant claims, and for which he takes defence, are fixed upon the ground by the hemlock, pine, hemlock, maple, birch and hickory corners called for, and by lines blocking back to the date of the surveys; they may fix the location of the body by laying the other tracts to adjoin them as returned into the land office, without regard to the call of Casper Haines for the surveys of 1784, and their verdict should be for the defendant.

(10) In the location of the survey the configuration of the block is to be preserved, and it cannot be distorted or dislocated by laying one survey upon another. The Benj. Johnston calls to adjoin the William Sheff and for vacant land on three sides; it is therefore an outlying tract on the face of the papers and must be located accordingly.

(11) If the jury believe that the lines of Benjamin Johnston, as an outlying tract, are upon the ground, counting to the date of the survey, and that the maple and pine called for, as its western corners were upon the ground, as claimed by defendant, it fixes the location of the block, and the verdict must be for the defendant.

(12) The undisputed testimony of the surveyors of both plaintiff and defendant establish the fact that the lines on the ground, blocking back to 1793, and corresponding with the thirteen surveys, interlock with the older surveys of Phillips, and therefore no vacancy exists upon which the plaintiffs could lay their warrants, unless the jury is clearly satisfied that these lines and corners on the ground were obliterated or abandoned by the surveyor who made the return, of which the interference and the location of junior surveys are not sufficient evidence.

(13) As plaintiff's surveyors, Africa and Moore, concur with defendant's surveyors, Hough, Cuttle, Criswell, Ferguson and Hoover in saying that they would locate according to the defendant's plot, if they found the lines and corners therein designated, dating to 1793, if the jury is satisfied that such lines and corners were upon the ground, their verdict should be for the defendant.

PER CURIAM. These points are each and all affirmed.

The jury returned a verdict in favor of the defendant.

SMITH (HUNT v.). See Case No. 6,899.

Case No. 13,063.

SMITH v. HUNTER.

[5 Cranch, C. C. 467.] [1]

Circuit Court, District of Columbia. March Term, 1838.

PERSONAL PROPERTY—DEED—POSSESSION—CREDITORS.

A deed, from one to another, of personal property, to be void if the grantor shall on demand pay a certain sum to the grantee, is void, in law, as to the creditors of the grantor, unless the possession accompanied and followed the deed, although acknowledged and recorded agreeably to Act Md. 1729, c. 8, §§ 5, 6.

Replevin, for a hackney-coach and two horses, taken by the defendant [Alexander Hunter] as marshal of the District of Columbia, under a fieri facias against one William Smith, the brother of the plaintiff [John Smith]. Plea, property in the defendant, and traversing the title of the plaintiff.

The plaintiff claimed title under a deed from the said William Smith, dated May 21, 1833, duly acknowledged and recorded on the same day, agreeably to Act Md. 1729, c. 8, §§ 5, 6. The consideration was stated to be $333; and the deed was to be void if William should pay the said sum and interest to John on demand. John lived in Annapolis, William in Washington, and the carriage and horses always remained in the possession of William, until seized as his property by the marshal under an execution against William.

Messrs. Brent & Brent, for plaintiff, contended, that as the deed was duly acknowledged and recorded agreeably to Act Md.

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

1729, c. 8, §§ 5, 6, it was not necessary that the possession should accompany and follow the deed, in order to protect the property from creditors; the acknowledgment and record being substituted for possession.

But THE COURT (MORSELL, Circuit Judge, contra), at the prayer of Mr. Marbury, for defendant, instructed the jury, that if they should be satisfied, by the evidence, that the possession of the property did not accompany and follow the deed, it was fraudulent, in law, as to the creditors of the said William Smith, although acknowledged and recorded agreeably to the act.

CRANCH, Chief Judge, observed, that it did not appear to have been the intention of the legislature to make valid against creditors any deed which would be void, as to creditors, by the common law.

A motion for a new trial was made, but was refused at November term, 1838.

NOTE. On the 7th of July, 1838 [5 Stat. 306], congress established a criminal court for the District of Columbia. Thompson F. Mason, Esq., of Alexandria, was appointed judge of that court, and held one session in Alexandria, and one in Washington, but was too ill to hold the December session in Washington, and died on the 21st of December, 1838. James Dunlop, Esq., of Georgetown, was appointed in his place, and sworn in about the 9th of January, 1839.

SMITH (HURLEY v.). See Case No. 6,920.

SMITH (HYER v.). See Cases Nos. 6,978 and 6,979.

Case No. 13,064.

SMITH v. JACKSON.

[1 Paine, 453.] [1]

Circuit Court, N. D. New York. Sept. Term, 1825.

COURTS—FEDERAL JURISDICTION—CIRCUIT COURT—DISTRICT COURT—SUPREME COURT—MANDAMUS.

1. The jurisdiction of the supreme court is pointed out by the constitution; but the distribution of the powers of the inferior courts is regulated and governed by the laws by which they are constituted.

2. The circuit courts have no supervising power or control over the district courts other than is given by the laws of the United States; which is to compel a rendition of a judgment or decree, and to re-examine it on error or appeal.

[3. Cited in The Martha, Case No. 9,144, as a case implying a doubt whether, after a definitive judgment pronounced, the court can revoke or reconsider that judgment.]

4. The circuit courts have no power to issue writs of mandamus, after the practice of the king's bench, but only where they are necessary for the exercise of their jurisdiction.

5. As, where a district court refuses to give judgment, a mandamus lies to compel it.

[Cited in The New England, Case No. 10,151.]

6. But a mandamus will not lie to a district court, to compel it to expunge amendments improperly made in the record returned to the circuit court on a writ of error.

[1] [Reported by Elijah Paine, Jr., Esq.]

[This was an action at law by Smith against Jackson. Heard on motion for a mandamus.]

T. A. Emmet and T. Wood, for plaintiff.

J. Lynch, for defendant.

THOMPSON, Circuit Justice. The application in this case is for a mandamus directed to the district judge of the Northern district of this state, requiring him to vacate a rule which had been granted, allowing certain amendments of the record in this cause, and also to vacate and annul such amendments. If it was proper to enter into an examination of the regularity of such amendments, or the authority of the district court, to allow them under the circumstances disclosed in the affidavits, the propriety of the amendments would at least be very questionable.

But the first inquiry is, whether, admitting the amendments to have been irregular and made without authority, it belongs to this court to order the rule to be vacated, and the record restored to its original form. Without the amendments, the record was clearly erroneous, and the judgment must have been reversed. They were material and essential for the purpose of showing that the district court had jurisdiction of the cause, and the avowed object of the mandamus is to expunge the amendments, so as to reverse the judgment upon a writ of error.

By the act of congress of the 9th of April, 1814 (4 Laws [Bior. & D.] 679 [3 Stat. 120]), the state of New-York is divided into two districts, and a district court directed to be held in each; and the act declares, "that the district court in the Northern district, shall, besides the ordinary jurisdiction of a district court, have jurisdiction of all causes except of appeals and writs of error, cognizable by law in a circuit court, and shall proceed therein in the same manner as a circuit court; and writs of error shall lie from decisions therein, to the circuit court in the said Southern district, in the same manner as from other district courts, to their respective circuit courts." By the 11th section of the judiciary act of 1789 (2 Laws [Bior. & D.] 61 [1 Stat. 78]), it is declared, that "the circuit courts shall have appellate jurisdiction from the district courts, under the regulations and restrictions hereinafter mentioned," and which is provided for by the 22d section of the same act, which declares "that final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court holden in the same district."

The only jurisdiction therefore expressly given to this court over the proceedings of the district court, in the Northern district, is to re-examine and reverse or affirm its final decrees and judgments; and which can only be done on appeal or writ of error. If then

this court has authority to issue a mandamus, it must result as an incident to its appellate power, and grow out of the 14th section of the judiciary act, which gives to the courts of the United States power to issue "all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." It is necessary that final judgment should be given before this court can assert its jurisdiction over it by writ of error. If the district court should refuse to give judgment, a proper case would be presented for a mandamus to compel the court to proceed and give judgment.

This court has not the like superintending authority over the district courts, as the king's bench in England, and the supreme court of this state have over inferior tribunals. Many cases therefore which have arisen in those courts where writs of mandamus have been issued, are not applicable here. Although the judicial power under the constitution may be broad enough, yet congress has not seen fit to give to the circuit courts any other control over the district courts, than a re-examination of their final judgments and decrees. The constitution vests the judicial power of the United States in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The jurisdiction of the supreme court is pointed out by the constitution. But the distribution of the powers of the inferior courts, is regulated and governed by the laws by which they are constituted.

This seems to be the light in which these courts have been viewed by the supreme court. In the case of M'Intire v. Wood, 7 Cranch [11 U. S.] 504, it was decided that the power of the circuit courts to issue writs of mandamus, is confined by the judiciary act of 1789, exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. That was a case where application was made to the circuit court of Ohio, for a mandamus to the register of a land-office, commanding him to issue a final certificate of purchase of certain lands. The court in delivering its opinion, said, if the 11th section of the judiciary act had covered the whole ground of the constitution, there would be much reason for exercising this power in many cases wherein some ministerial act is necessary to the completion of an individual right arising under the laws of the United States, and the 14th section of the same act would sanction the issuing of the writ of mandamus for such a purpose; but although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature has not thought proper to delegate that power to its circuit courts, except in certain specified cases. This question is again brought up, and the same doctrine maintained and established in the case of M'Clung v. Silliman, 6 Wheat. [19 U. S.] 598.

It is very evident that the want of jurisdiction in the circuit court in these cases, did not arise from the circumstance, that the application was for a mandamus to a ministerial officer, but because the power was not given by any law of the United States. If the authority of the circuit court to issue a mandamus, stood on the same footing with that of the king's bench in England, or the supreme court of this state, it might have been exercised in the cases referred to. For in numerous instances have those courts exercised the authority in analogous cases. But in the sense of the constitution, the circuit as well as the district courts are inferior courts, and their respective jurisdiction is pointed out by acts of congress, and the former has no supervising power or control over the latter, other than is given by laws of the United States, and which, as has before been observed, is to compel a rendition of a judgment or decree, and to re-examine the same on writ of error or appeal.

It may not be amiss barely to observe, that the complaint in this case is for having improperly allowed certain amendments, which generally rest in the sound discretion of the court when the proceedings are pending, and if this was a matter resting in the discretion of the district court, it cannot be corrected or controlled either by a mandamus or writ of error. But the motion in this case is denied on the ground that this court has not authority to issue the mandamus applied for. Motion denied.

[A motion was afterwards made to set aside a judgment of reversal in this cause. The motion was denied. Case No. 13,065.]

Case No. 13,065.

SMITH v. JACKSON.

[1 Paine, 486.][1]

Circuit Court, N. D. New York. Sept. Term, 1825.

APPEAL—AMENDMENTS—FORM—SUBSTANCE—WRITS—SERVICE.

1. The circuit courts, on appeal from the district courts, have power by the 32d section of the judiciary act, to allow any amendments of defects in form occurring in the court below, which could have been amended there, or to disregard them in giving judgment.

[Cited in Buchanan v. Trotter, Case No. 2,075; Heye v. Lieman, Id. 6,445a; Tyson v. Belmont, Id. 14,315a; Elting v. Campbell, Id. 4,422.]

2. But this power does not extend to defects in substance. Such defects may however be amended in the district court, on terms. This power is more extensive than any given to the English courts. But the amendments must be made before final judgment. And this is agreeable to the state practice in such cases.

[Cited in Buchanan v. Trotter, Case No. 2,075.]

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[1] [Reported by Elijah Paine, Jr., Esq.]

3. An omission of the averment of citizenship is a defect in substance, not cured by verdict, and which cannot be amended after judgment.

4. So of the averment of the value of the property in dispute when necessary to give jurisdiction.

5. Amendments at common law were for trivial errors, and where there was something to amend by. Anciently they could be made only during the term when the error occurred in the record; afterwards they were allowed at any time pending the suit; but never after final judgment.

6. Confusion and contradiction in the English cases arising upon the various statutes of amendments and jeofails.

7. A judgment was entered in the district court of the Northern district of New-York, sitting with circuit court powers, in January, 1824, the record filed and execution issued. In September of the same year it was removed by error into the circuit court, and in January following, the district court allowed the record to be amended by inserting in the declaration the averments of citizenship, and of the value of the property in dispute, which were essential to jurisdiction: *Held*, that the amendments were irregular, and that this court would not receive them after the original record had been sent up.

8. There is no practice in this court of service of papers upon the agent of an attorney, as in the supreme court of the state.

In equity.

THOMPSON, Circuit Justice. This is a motion to set aside the judgment entered in this cause during the present term, reversing the judgment of the district court of the Northern district of this state. The motion is founded, on an allegation that the judgment was irregularly entered, being in violation of an order to stay the proceedings; and the motion is resisted on the ground, that the order was not duly served on the plaintiff's attorney. The service was upon the law agent of the attorney in the supreme court of this state, and the first question is, whether this was a good service. I think it was not. The rules of the supreme court do not govern the practice of this court. But admitting they did, the service was bad. The rule of that court would require the attorney to appoint an agent; and if he had none, the service required is, by putting up the notice in the clerk's office. But it would not follow, that the agent in that court would be the agent in this. But there was evidently a misapprehension with respect to the service of the order, and this court would set aside the rule for judgment on payment of costs, if any merits were shown on the part of the defendant in error, of which he could avail himself. It is not pretended but that the record as it now stands is erroneous, and the judgment of the district court must be reversed, unless the record is amended, and the object of setting aside the judgment of reversal, is to make way for an application for a certiorari, to bring up the amendments which have been made in the district court. The question then arises, whether those amendments would be received here, and attached to the record which has already been returned into this court upon the writ of error; and I think those amendments ought not to be received here. They were made according to my judgment irregularly, and without authority. The judgment in the district court was entered in January term, 1824. The record was filed, and execution issued on the 3d of March following. The writ of error was returned in the September term, 1824, of this court, and in the January term, 1825, of the district court, the amendments were made, which were, by allowing two averments to be inserted in the declaration. 1. That Smith the defendant was a citizen of the state of New-York. 2. That the value of the property in question was over five hundred dollars; and then receiving proof on affidavit to support these averments. It has been decided by this court, at the present term, that it cannot by mandamus compel the district court to vacate the rules for amendment, and restore the record to its original form; and if the record so amended, had come up on the writ of error, it would present a very different question from the present. [Case No. 13,064.] This court might be bound to receive that as the only record in the cause, without any inquiry about the amendments. But as the record or a transcript thereof, has been returned, and as this court must lend its aid by a certiorari, to bring up the amended record, if it is brought up, we have a right to exercise our discretion, whether or not to lend this aid; and if the amendments were improperly made, the certiorari ought to be denied.

The inquiry then properly arises as to the power of the court over amendments. 1. At common law. 2. By statute.

The exercise of the authority of courts to amend at common law, has in the history of the judicial proceedings of the English courts undergone very considerable changes, and courts grew much more liberal on that subject, even before any provision was made by statute. Anciently the amendment could be made only in the term in which the judicial act was done and recorded; as during this term the proceeding was deemed to be in the judges' breasts, and not in the roll. Afterwards a more liberal practice was introduced, and amendments were allowed at any time pending the suit or proceedings, and whilst they were considered in fieri, and until final judgment was rendered and enrolled. But in no instance will it be found, I believe, that the court made any amendment whatever after the expiration of the term in which final judgment was given. And as to what amendments the courts would make at common law, there seems to be much confusion and uncertainty. As it was a matter in some measure of discretion, liberal judges would allow amendments that more scrupulous ones would not. The amendments, however, made at common law were

generally speaking, of trivial errors, and then only where there was something to amend by. It is unnecessary however to pursue this inquiry, for the amendments made in this case were a year after final judgment, and so, clearly not within any common law powers of the court.

2. The limited powers of the courts at common law, gave rise in England to the various statutes of amendments and jeofails. Those in England are I believe twelve or thirteen in number, passed at various periods, from the time of Edward the 3d to George 1st. These statutes thus passed by piecemeals, and in reference to the successive parts and steps, in the pleadings and proceedings in the cause, gave rise to almost innumerable cases on this subject, which has occasioned no little confusion, if not some contradiction. With these, however, we have no concern, any farther than they are decisions upon statutes analogous to our own. So far as any statutory provision goes, we must be governed by the act of congress on this subject. The 32d section of the judiciary act [1 Stat. 91] declares, that no summons, writ, declaration, return, process, judgment, or other proceedings, in civil causes in any of the courts of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but judgment shall be given without regarding matters of form, except such as shall be specially demurred to. And authority is given to the courts to amend such imperfections and wants of form, except such as shall be specially excepted to by demurrer; and they may at any time, permit either of the parties to amend any defect in the process or pleadings, upon such conditions as the said courts respectively shall, in their discretion and by their rules, prescribe. That every part of this section, except the last clause, relates to such defects as are deemed matters of form, cannot admit of a doubt. And this power over such defects of form, extends as well to the appellate court, as to the court where the proceedings have been had; not that the amendment is always actually made in the appellate court, but the defect is not to be regarded as matter of error. And the act declares, that judgment shall be given without regard to such imperfections or want of form, and no conditions are to be imposed on parties by reason of such formal defects. The last clause in the act, however, may be extended farther, and embrace matters of substance; it authorizes the court at any time, to amend any defect in the process and pleadings, upon such conditions as the court shall direct. This power is confined to the process and pleadings, and reaches all defects; it does not extend to the judgment. When, therefore, an amendment is made in substance, it must be whilst the proceedings are in fieri, and before judgment; and the court then does it upon such terms as shall be deemed just and equitable; and this is giving much greater power over amendments, than existed at common law. The court below might in this case before final judgment, have permitted the amendments upon terms as to costs, pleading anew, or issuing a venire de novo, &c. Under the English statutes of amendments and jeofails, neither the aid of a verdict, nor an amendment can extend to matters of substance, or whatever is essential to the gist of the action, but only to defects in matters of form. All matters of substance must be stated in the pleadings; and if stated, may occasion a different verdict from that given when not stated. Hence, whatever is thus essential, cannot be cured by verdict, nor introduced by way of amendment; but by the express intent of some statute allowing the amendment, or aiding the defect. It is a general and essential rule of law, that all substantial facts be stated in proper time and place, so that the other party may know what in substance he has to answer to, and prepare accordingly. Every material matter must be so clearly and directly stated, that the opposite party may put it in issue if he pleases. Much nicety may be found in the books, as to what is to be deemed form and what substance. But as it respects the present case, no doubt can exist but that the amendments were in matters of substance. That it was essential to aver, that the defendant was a citizen of a state different from that of the plaintiff, has been repeatedly decided by the supreme court of the United States; and many judgments have been reversed for this defect. This was a fact that might have been denied, and an issue joined thereon, and must be tried by a jury. If there be no such averment, there need be no such proof; and the verdict of the jury can therefore afford no inference, that there was any such proof on the trial.

In the supreme court of this state amendments have been made in matters of form, after writ of error brought; the court saying, as the record remains in the supreme court, and only a transcript is sent up, it has power to make the amendment. The statutes of this state in relation to amendments are very analogous to the English statutes. But I am persuaded the supreme court of this state would not have made the amendments which were made in this cause, and received affidavits to establish the truth of the averments; for by the express terms of the statute, such amendments only are to be made, either in the court where the judgment is given, or to which the record is removed by writ of error, as are not against the right of the matter of the suit, nor whereby the issue or trial are altered. And this is evident, from the course adopted in the case of Pease v. Morgan, 7 Johns. 468. The note on which suit was brought was drawn by one of a firm; but in the declaration it was alleged to have been made by the

two, without any averment of the partnership. The court decided, that the note was not admissible in evidence, without an averment of the partnership, and that the judgment must be reversed, unless the defendant in error would have the necessary amendment made on certain terms, viz.: To pay all costs in the court below after the declaration, with leave to the plaintiff in error to plead anew, and a venire de novo to issue. And the court expressly admitted, that this was going farther than any case had as yet gone. Had the court adopted the rule which the district court pursued in the present case, the amendment would have been made, and affidavits admitted to support the averment, without directing a venire de novo to be issued. The court doubtless considered, that a jury must pass upon the fact contained in the averment. So, in the present case, the averment that the defendant was a citizen of New-York, was a material averment, and upon which the defendant might take issue, and was proper matter for a jury. As to the question of the value of property in dispute, I do not see why the same rule should not prevail; it is matter essential to give jurisdiction to the court, and a fact that might be put in issue, and which must be proved. It would seem, however, from the case of Den v. Wright, 1 Pet. [26 U. S.] 73, that after verdict in ejectment, affidavits were admitted as to the value of the property. Were it necessary to decide this point, I should reluctantly yield my assent to the doctrine of this case. But if affidavits are admissible, it must undoubtedly be before final judgment is given; and the case of Den v. Wright goes no farther. The practice of the supreme court, in admitting affidavits of the value of the matter in dispute, in order to sustain its jurisdiction on writs of error, does not apply. That court has no other mode of ascertaining the value. But admitting that affidavits might have been received by the district court as to the value of the property, at a proper stage of the cause, no authority or practice has been shown that affidavits are admissible to prove that the parties were citizens of different states. And numerous cases have occurred in the supreme court where this would most likely have been done, if such a course had been deemed proper. I am accordingly of opinion, that the amendments in the district court were improperly made, and that no certiorari ought to be allowed to bring them up as a part of the record in this cause.

The motion to set aside the judgment of reversal must, therefore, be denied.

SMITH (JANNEY v.). See Case No. 7,214.

SMITH (JANVRIN v.). See Case No. 7,220.

Case No. 13,066.

SMITH v. JOHNSON.

[4 Blatchf. 252.] [1]

Circuit Court, S. D. New York. Jan. 4, 1859.

COPYRIGHT — PROVISIONAL INJUNCTION — REFERENCE TO MASTER.

1. On a motion for a provisional injunction, for the alleged violation of a copyright for a map, a reference will not be made to a master to examine the rival maps, and report the facts, with his opinion.

2. Such a motion must be disposed of on the moving papers of the plaintiff and the affidavits on the part of the defendant.

In equity. This was an application for a provisional injunction, to restrain the defendant [D. Griffing Johnson] from publishing and selling a map, in violation of a copyright granted to the plaintiff [Robert P. Smith].

Alfred Conkling, for plaintiffs.

Peter Y. Cutler, for defendant.

INGERSOLL, District Judge. It does not satisfactorily appear that what the defendant has thus far done is, or what he intends to do will be, in violation of the rights of the plaintiffs. The proof on the part of the defendant is explicit, that, in preparing his map, he has used materials which he had a right to use, and that, in the production of his work, so far as it has progressed, he has not been aided by any of the maps of the plaintiffs. Neither does it appear that he will, in the further progress of his work, infringe upon any of the rights of the plaintiffs. Judging from the affidavits which he has exhibited, he intends to make his map from materials and sources to which the plaintiffs have no exclusive right. Should it hereafter appear, in the further progress of this suit, that the defendant is doing anything in contravention of the exclusive rights secured to the plaintiffs, the motion for an injunction can be renewed.

It has been suggested that it should be referred to a master to examine the maps of the plaintiffs, and also the map of the defendant, and to report the facts as they may be made to appear to him, with his opinion on the question of the infringement of right. Such a course is sometimes adopted upon the final hearing, but not when the question comes up on a motion for a preliminary injunction. Such motion must be disposed of on the moving papers of the plaintiffs, and the affidavits on the part of the defendant in opposition thereto.

I do not see sufficient ground to grant the injunction prayed for. The motion must, therefore, be denied.

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

Case No. 13,067.

SMITH et al. v. JOHNSON.

[2 Cranch, C. C. 645.] [1]

Circuit Court, District of Columbia. April Term, 1826.

NOTES—PLACE OF PAYMENT—DEMAND—PAYMENT.

1. In action against the maker of a promissory note, payable at a particular bank, it is not necessary to aver or prove a demand of payment at that bank.

2. A promissory note, given as collateral or counter security for a note borrowed, is not discharged or vacated by the borrower's discharging or taking up the borrowed note with funds furnished by the lender.

Debt against the maker of a promissory note for $5,000, dated January 8th, 1824, payable to and indorsed by Jacob Hoffman to the plaintiffs [Walter and Clement Smith], and given by Hoffman to them as a collateral guaranty to secure them against their note for the like amount, dated January 9th, 1824, lent to Hoffman for the use of the defendant [George Johnson] and Hoffman in a business in which they were jointly concerned. The note was made payable at the Farmers' and Mechanics' Bank in Georgetown, and the declaration avers a demand at that bank.

Mr. Jones and Mr. Taylor, for defendant, prayed the court to instruct the jury, that they must be satisfied that payment of the note was demanded at the said bank before the plaintiffs can recover in this action. Rowe v. Young, 2 Brod. & B. 165; Chit. Bills, 321.

Mr. Key, contra, cited the case of Rhodes v. Gent, 5 Barn. & Ald. 244; 7 Serg. & R. 84; Foden v. Sharp, 4 Johns. 183; Wolcott v. Vantvoord, 17 Johns, 248; 3 Chit. Pl. 4; Butterworth v. Le Despencer, 3 Maule & S. 150; Pearse v. Pemberthy, 3 Camp. 261.

THE COURT (nem. con.) refused to give the instruction; considering the averment in the declaration as immaterial in an action against the maker.

The counsel for the defendant, prayed the court, in substance, to instruct the jury, that if the defendant, or Mr. Hoffman, his partner, had paid and taken up the lent note, the plaintiffs could not recover upon the guaranty note. And the plaintiffs prayed the court, in substance, to instruct the jury that, if the lent note was taken up, in whole, or in part, with funds furnished by the lenders, the plaintiffs are entitled to recover upon the guaranty note, to the extent of the funds thus furnished by them. Both of which instructions THE COURT in effect gave.

Verdict for the plaintiffs, $2,135.68, and interest from the 31st of May, 1825.

Five bills of exception were taken; but no writ of error was issued.

[See Case No. 13,061.]

SMITH (JONES v.). See Case No. 7.497.

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

Case No. 13,068.

SMITH v. JORDAN.

HITCH et al. v. SAME.

[Brunner, Col. Cas. 627; [1] 21 Law Rep. 204.]

Circuit Court, D. Massachusetts. May Term, 1857.

APPEAL—DAMAGES—SEAMEN—DISRATING.

1. In a case of marine tort the decree of the district court will not be reversed on appeal on a question of the amount of damages, unless it is clearly excessive.

2. The power of the master to disrate an officer or seaman is remedial and not penal, and does not authorize a degradation to the lowest place, if there is an intermediate office which the man may be supposed competent to fill.

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

[These were libels by Edward Jordan against James L. Smith and Charles Hitch and others for marine torts, and subtraction of wages. From a decree in favor of libelant in the district court (case unreported), respondents appealed.]

L. F. Brigham, for appellants.

C. M. Ellis, contra.

CURTIS, Circuit Justice. The first of these cases was an appeal by the respondent in a suit in admiralty, brought by the appellee in the district court for several marine torts, on account of which that court pronounced for damages in the sum of four hundred and sixty-five dollars. The libelant shipped as cooper at New Bedford, in May, 1852, for a whaling voyage, on board the bark Cleora. He has pleaded that he was unlawfully put in irons and imprisoned in the afterhold of the ship; that this imprisonment was continued for about the space of four months, during some part of which time, however, he was allowed to be on deck during the day; that it was accompanied by circumstances of degradation and cruelty; and that on the 17th day of January, 1854, he was forced on shore at Lahababoo, an island in the Pacific Ocean inhabited only by savages, whence he made his escape, through the humanity of the master of a British vessel, which was there to procure some supplies. The respondent admits that the libelant was unlawfully set on shore; but has attempted to justify the imprisonment on the ground that the libelant, being found indisposed to do his duty as cooper, was disrated, and ordered before the mast; that he refused to perform the duty of a foremast hand, and thereupon was imprisoned. In the second case, wherein the opinion will presently be stated, I have fully considered the question whether the master was justified in requiring the libelant to perform foremast hand's duty, and having come to the conclusion that he was not, it necessarily follows that the measures resorted to, to compel the libelant to do that duty were unjusti-

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

fiable. It appears, upon this view of the case, and upon the admission of the respondent, that he unlawfully set the libelant on shore, and that this appeal involves a question of the quantum of damages due for aggravated marine torts. I have had several occasions to say, what I here repeat, that in such a case I cannot reverse the decree of the district court, unless I can see that the damages are plainly excessive. No two minds would come to the same result upon such a question, viewed as res integra, and when the court of the first instance has fairly exercised its judgment upon no erroneous principle, it is not cause for reversing it, that, viewed as an original question, I might, and probably should, have come to a somewhat different result. In this case I am not dissatisfied with the amount of damages, and the decree is affirmed, with costs.

The second case is a cause of subtraction of wages. The lay of the libelant as cooper was to be one fortieth. The district court pronounced for wages, but did not allow that lay to the libelant. Both parties appealed. The case presents two principal questions. First, whether the libelant was lawfully disrated, and if so, what deduction ought to be made from his lay by reason thereof.

It is admitted by the respondents that the libelant "was a fair cooper." I consider this to amount to an admission that he was competent in point of ability to do the duty for which he was engaged. It is pleaded by the respondents "that the libelant, after a fair trial of his abilities and disposition to do his duty as cooper, being found indisposed to do such duty, was disrated from the station of cooper, and ordered to do foremast hand's duty." If a person contract to perform a particular service on shore, and prove incapable or negligent, the employer may dismiss him, but cannot require him to do other work not included in his contract. The necessities of the sea services have occasioned a different rule in the maritime law. The services of each of the crew are necessary, there being ordinarily no supernumeraries on board; and the master must keep and provision the men, and bring them home. Consequently when he removes one man from his station for sufficient cause, and promotes another to his place, the services of the man who is disrated are needed to supply the deficiency occasioned by such promotion; and as the man must continue on board, he is required by the maritime law to obey the lawful commands of the master, and perform such work as he is capable of doing, and as the master may assign him in the just exercise of his authority, and this rule of law may be properly said to qualify the express contract for service by superadding to it the condition that in case of inability or indisposition to perform it the man will do such other service on board during the voyage as the master may properly assign to him.

The first inquiry in this case is whether the libelant after a fair trial was found indisposed to perform his contract. The station of cooper on board a whale ship is one of much responsibility. Negligence in discharging its duties must inflict loss upon all concerned in the voyage, and may seriously impair, and even destroy, the fruits of the enterprise. The large lay of one fortieth, exceeding that of any other person on board, save the master and first and second officers, clearly indicates that skill and diligence of no ordinary character were contracted for. The necessity for having this service well performed, and the difficulty of replacing the cooper in the course of the voyage, rendered it for the interest of the master, who was interested in the enterprise to the extent of one twelfth, not to remove the cooper without adequate cause. The officers and crew have the same interest, though less in degree. Upon the evidence, I find that there was a general opinion among the officers that the libelant did not discharge his duties satisfactorily. There is evidence of two specific instances of neglect; but of these, two of the witnesses who speak of them admit that the oversight might have been made by any cooper. On the other hand, the conduct of the master towards this man evinces a strong personal dislike, which appears to have originated some time before he was disrated, and which was very unfavorable to a just and calm consideration of his case. Nor does he appear to have remonstrated with, or reproved him for any instance of neglect before he was disrated. There is also a wide discrepancy as to the time when he was disrated, between the answer of the claimants and the answer of the master printed in the same record, and the accounts of the making up of the voyage. The answer of the claimants seems to fix the 9th of February as the date, though its allegations are very loose and imperfect. The answer of the master says he was disrated on the 23d of July, while the accounts show the promotion of another man to the place of cooper on the 6th of April. It is the duty of the respondents to plead the cause for and the fact of disrating, with reasonable certainty, and to prove it as alleged, in all necessary particulars. The libelant having taken no exception, and both parties having gone into proofs on this appeal, I do not reject the allegation. But such uncertainty upon the point of time seriously enhances the difficulty of coming to a conclusion favorable to the respondents. It must be remembered, also, that, properly speaking, the displacement of a man from the position in which he contracted to serve is a remedial, and not a penal, act. The power is not conferred on the master so to punish for past offenses, but to prevent future injury arising from neglect or incompetency; and therefore, if it be found that the officer can no longer be intrusted with the duties of his place with safety to the interests involved, it does not follow that he is to be degraded to the lowest

place possible. He must be removed from his post as far as may be necessary, but no further; and in this particular I am satisfied the master did wrong. I think, upon all the evidence I cannot say the master was bound to retain the libelant in the place of cooper, with all the responsibility and control which belong to that place. But being a cooper of competent skill, as it is agreed he was, he should have been put into the subordinate place of cooper's mate, where he would have been under the supervision of the person promoted to his place, who could have taken care that his negligence occasioned no serious injury. It was urged that his fault being a want of disposition to do his duty, he could not be trusted at all; but it does not follow that occasional instances of neglect should necessarily destroy all confidence; and, at all events, I think the experiment of employing him under proper supervision should have been fairly tried. The power to take a mechanic from the work which he has contracted to do, and is able to do, on shipboard, and put him to perform what, it is admitted in this case, he was very ill-fitted for, is one to be used with much care and caution, and no further than shall appear to be necessary for the fair protection of the interests involved.

My opinion is that, though the libelant's insufficient performance of his duty as cooper should cause a proper deduction to be made from his wages from the date when another was promoted to his place, he should not have been deprived of the benefit of a fair trial in the place of cooper's mate, and consequently should receive the lay which appears by the ship's accounts to have been paid to the person who filled that place. Having made a computation, I find its result is the same sum allowed by the district court, which, I infer, acted on the same rule I have adopted.

Let the decree of the district court be affirmed, with six per cent damages and costs.

Case No. 13,069.

SMITH et al. v. The JOSEPHINE.

[9 Betts, D. C. MSS. 20.]

District Court, S. D. New York. March 8, 1847.

SALVAGE—SERVICE BY UNITED STATES VESSEL—COSTS.

[This was a libel for salvage by Joseph Smith and others, crew of the sloop of war Plymouth, against the brig Josephine, her tackle, apparel, and cargo.]

BETTS, District Judge. It appearing to the court upon the pleadings and proofs in this case, that this action is founded solely upon services rendered on the high seas, by the United States sloop of war Plymouth, her officers and crew, to an American vessel and cargo, found a wreck and derelict at sea: It further appearing to the court that such services were in no way extraordinary, and consisted wholly in boarding the said vessel, securing hawsers to her, and towing her into the port of New York, the crew being removed from her when the weather rendered it dangerous for them to remain with the wreck: It further appearing to the court that the services aforesaid were rendered the said brig in obedience to the orders of the officer in command of the said sloop of war, and not at the request or the procurement of the claimants and owners of the brig, and were performed and participated in by the officers and crew of the said sloop of war as required and directed by said officer in command: and that no acts specially meritorious were performed by the libellants or other individuals of the crew. It further appearing to the court that the commissioned officers on board said sloop of war do not unite in, or promote this suit and decline to claim or receive any reward of salvage if made therein: It further appearing to the court that under the laws and regulations governing the navy of the United States it is a part of the official duty of ships of war and their officers and crews, to afford relief to American vessels wrecked or otherwise in distress: Wherefore it is considered by the court that the services rendered the aforesaid brig by the said sloop of war, her officers and crew, or any part of them, are not of the character of salvage services for which they or any of them are entitled to demand compensation out of the vessel and cargo so relieved: It is therefore ordered and decreed by the court that the libel in this cause be dismissed.

But it appearing to the court that the libellants had probable cause upon which to demand the judgment of the court, in the premises, it is further ordered, that no costs be taxed or recovered by the claimants against the libellants. It is further ordered that the said vessel and cargo be discharged from arrest in this cause, or if sale thereof has been already decreed, that the proceeds in court be paid over by the clerk to the claimants or their proctor, after deducting therefrom the costs of the officers of court chargeable thereon.

Case No. 13,070.

SMITH et al. v. The JOSEPH STEWART.

HOY et al. v. The JOSEPH STEWART.

[Crabbe, 218; 1 Liv. Law Mag. 606.] [1]

District Court, E. D. Pennsylvania. July 9, 1838; July 23, 1838.

SALVAGE—AMOUNT OF COMPENSATION—SEAMEN—WAGES—LIEN.

1. Where salvors are very meritorious, and the value of the vessel and articles saved is very

[1] [Reported by William H. Crabbe, Esq. 1 Liv. Law Mag. 606, contains only a condensed report.]

small, the court will exceed, in its allowance of salvage, the proportion usually given.

[Cited in The Carl Schurz, Case No. 2,414.]

2. Where a vessel is abandoned at sea, the crew, shipped for an indefinite period, have a lien on her, in the hands of salvors, for their wages due at the last port of delivery before the abandonment.

[These were two libels against the schooner Joseph Stewart, Crandell, master,—the first for salvage, by George Smith and others, mariners, and Richards & Bispham, for the schooner Caspian, and the other for wages, by Charles Hoy and others, mariners.]

The Joseph Stewart having been libelled for salvage by the parties in the first of the above suits, the claimants in the second suit, who had abandoned the schooner at sea, filed their libel for wages up to the date of the abandonment. It appeared that the libellants in the second suit shipped for indefinite periods; that they had made several voyages in the Stewart before the abandonment; and that the abandonment took place by order of the master.

HOPKINSON, District Judge. There are thirteen claimants in this case, for salvage, including the owners of the Caspian. Nobody appears to oppose the claim, or to offer any reasons for regulating the allowance. I am obliged to proceed on ex parte evidence, and on that evidence the case appears to be as follows: On the 12th April last the schooner Caspian sailed from Mobile for Philadelphia. On the 25th of the same month she fell in with the schooner Joseph Stewart, on the coast of Florida. The Stewart was loaded with lumber, and was so far sunk as to have nearly two feet of water on her deck; her hatches were off, and she was abandoned by her crew. She had been stripped by another vessel of some of her sails, chains, running rigging, and many other articles. Some of the crew of the Caspian went on board of the wreck; the sea was breaking over her the whole time; they made fast to her a hawser from the Caspian and hauled her alongside that vessel, took off her deck load and put it on board the Caspian, as also the anchors, hatches, and everything left on deck. This so lightened her that they could commence bailing. They gained on the leak, and got her about half clear of water. After pumping for twenty-four hours, two plugs were discovered floating in the cabin, and, on searching, two holes were found in the bottom of the vessel, under the captain's berth. The holes were four or five inches apart, bored with a 2½ or 3 inch auger, were freshly cut, and the plugs new. The holes were then plugged up, and the vessel easily pumped out dry. A fresh breeze having sprung up, the hawser parted. Some of the crew of the Caspian then went on board the Stewart, taking with them provisions and other articles; and with great exertions and labor, and no small degree of good management and skill, finally brought her into this port. This is the general outline of the case, without dilating on the state of the weather and the hardships and dangers incurred in performing the service. It seems that the Caspian had some passengers on board who took part with the crew in these services, and stand on an equal footing with them in point of merit.

The difficulty in this case arises, not in estimating the nature and value of the service, nor in ascertaining, from the frequent adjudications in our own country as well as in England, a rule of proportion for the reward of such a service; but the similarity, between this case and those alluded to, fails in the amount of property to be distributed by the court. The fund in those cases was large, and, of course, a fourth, a third, two-fifths, or even, as in one case, one-tenth, would afford a handsome remuneration for the labor and risk of the service, still leaving a large amount for the unfortunate owner. Here the fund is so small that the whole of it, distributed among these thirteen salvors, could hardly be considered an extravagant reward for their services. Yet we have no authority to treat this as a derelict. Authority is against it. Indeed the libellants claim as salvors, not as finders of property which had no owner; they ask for salvage, for a reward out of the property saved, for their services in saving it. The very nature of this claim is a demand on the owner, for a reasonable compensation, for the service rendered to him in rescuing his property from a total loss; but if the salvors are to take all, the loss would be as total, to the owner, as if his property had been swallowed up by the sea. It would be manifestly absurd to call on the owner with such a demand, to restore him no part of the property saved, but to tell him they must have all for saving the rest. He is to pay for saving, when nothing is saved. Every reason and principle applied to a claim for salvage, implies that a part of the property saved is to be awarded to the salvors, and the rest restored to the owner. Heretofore under even the most desperate cases, by far the greater part was restored to the owner. Here is our difficulty in the case. After deducting the expenses of these proceedings—necessarily heavy,—and allowing to the salvors even a very moderate, perhaps it may be thought, an inadequate compensation, for their services and paying the demand for wages of the crew of the Stewart—not to the time of abandoning her by order of the captain, but to the last port of delivery—there will be but a few dollars left for the owners of the wreck. I will do the best I can for these salvors, consistently with the regard I am bound to pay to the legal adjudications on the subject.

I will make a short review of these adjudications. I have found no case where one-half of the gross proceeds have been given to the salvors. In The Aquila, 1 C. Rob. Adm. 37, the ship and cargo were found at sea, absolutely deserted, and there would have been a total loss but for the salvors. Sir William Scott allowed two-fifths. In The Trelawney, 4 C. Rob. Adm. 223 (Am. Reprint, Phila., 1804, p. 184), the ship was recovered from insurgent slaves, after a severe conflict; it was considered by the court as a recapture from pirates, and one-tenth allowed. In The Blenden-Hall, 1 Dod. 414, the ship was captured by the French and scuttled, and so found by the salvors. One-tenth was allowed. In The Raikes, 1 Hagg. Adm. 246, the ship was relieved by a steamboat from a perilous situation. The judge wished to encourage this service by steamboats, and allowed £200 for a ship and cargo worth £12,500. In Warder v. La Belle Creole [Case No. 17,165], the judge, professing to give "an exemplary reward," allowed one-third, in a strong case of service and danger. In Tyson v. Prior [Id. 14,319], a strong case, one-third was allowed. In Bond v. The Cora [Id. 1,620], one-third the gross amount of sales was allowed. In Weeks v. The Catherina Maria [Id. 17,351], which was a case of mere wreck, without any hope of safety, one-third of the articles saved was given.

The French ordinance says: "If the effects, however, wrecked, are found on the sea, or drawn from its bottom, the third part shall be immediately delivered, without expense, either specifically or in money, to those who saved them."

In this case the whole amount of sales, of vessel and cargo, was..........		$926 40
One-half of gross sales allowed to salvors, is..........	$463 20	
Charges of sale...........	36 60	
Proctor's, clerk's, and marshal's fees and commission	121 55	
Costs on wages' suit.......	12 79	
Wharfage	32 20	
Allowed to owners of Caspian, for articles furnished to the wreck...............	55 20	
Wages of crew to last port of delivery	151 25	
		872 79
		$53 61

This statement shows, that by allowing to salvors one-half of the gross sales, and deducting from the other half, all the charges and claims upon it, there will remain, for the owners, but $53.61. The salvage will be divided into thirteen parts, one of which shall be given to the owners of the Caspian, and one to each of the twelve salvors.

Decree for the libellants.

On the 23d July, 1838, HOPKINSON, District Judge, decreed for the libellants, in the second suit, the whole amount of their wages, due at the last port of delivery before the abandonment.

Case No. 13,071.

SMITH v. KEHR et al.

[2 Dill. 50;[1] 7 N. B. R. 97; 6 West. Jur. 451.]

Circuit Court, E. D. Missouri. 1872.[2]

BANKRUPTCY—VOLUNTARY CONVEYANCE BY HUSBAND TO WIFE—ARTICLES OF SEPARATION—SUBSEQUENT RECONCILIATION—HOMESTEAD EXEMPTION.

1. A and his wife separated and executed articles under which A gave for his wife's benefit $2,000 in cash, and his notes for $5,000, secured by deed of trust on his realty, she and her trustee covenanting in consideration thereof that she would not claim maintenance from A, or contract debts on his account, or claim dower in his estate. After six weeks' separation, the parties came together again and executed new articles, declaring the former articles void except so far as they created a separate estate in favor of the wife. They lived together for several years thereafter, when A fled the country and was adjudged bankrupt on a creditor's petition. *Held*, in a suit by the assignee in bankruptcy of A, that the conveyance for the wife's benefit was voluntary and therefore void as against creditors.

2. *Held*, also, that subsequent as well as antecedent creditors should be admitted to share pro rata in the proceeds of the property.

[Cited in Phelps v. Sellick. Case No. 11,079.]

3. The conveyance, though void as against creditors, was good as between husband and wife, and conveyed the husband's right of homestead. *Held*, therefore, that the wife was entitled to a homestead allowance out of the proceeds of the property.

[Cited in Fellows v. Lewis, 65 Ala. 343.]

[4. Cited in Re Hufnagel, Case No. 6,837, to the point that a party who has levied an execution upon the property of the bankrupt before adjudication ought not to proceed to a sale without the permission of the court, and if he does so the sale may be set aside, and he may be held liable for the actual value of the property, regardless of the amount realized upon such sale.]

This is an appeal in bankruptcy from a decree of the district court for the Eastern district of Missouri.

The appeal is taken by the assignee [John Ford Smith], by Mrs. Meyer, the wife of the bankrupt [Martin Meyer], and by Vogler, a creditor. Mrs. Meyer claims that the district court erred in not allowing her the amount of the notes for $5,000 given to her by the bankrupt under the articles of separation; the assignee complains of so much of the decree as allows Mrs. Meyer's $1,000 as a homestead exemption, and Vogler insists that the court erred in not recognizing that he was entitled to priority of payment over the other unsecured creditors of the bankrupt. The facts of the case and the grounds of decree which was rendered in the district court were carefully stated in the following opinion of the district judge delivered at the time:

TREAT, District Judge. In the fall of 1867, the bankrupt executed to [Edward C.] Kehr, as trustee, a deed to secure the payment of $5,000 to his wife's trustee. Kehr,

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

[2] [Affirmed in 20 Wall. (87 U. S.) 31.]

under the deed of trust and pending bankruptcy proceedings against Meyer, sold the property to her trustee for her benefit, for a sum greatly less than the value of the property, but had not delivered the deed when this bill was filed.

The bill alleges that there was no consideration for the deed to Kehr, and that said deed was fraudulent as to creditors, said Martin Meyer being largely indebted at its date. There was a prior deed of trust on the property to secure the payment of $2,000 and three interest notes for $180 each, one of which interest notes was due when the deed was made to Kehr.

Pending this bill the property was, by order of court, sold under the prior deed of trust, the assignee in bankruptcy joining in said order, reserving to the parties the right to proceed against the fund. At that sale the property brought $10,500. At the previous sale by Kehr, it brought only $5,000, subject, however, to the deed of trust. As the sale by Kehr was made after the petition in bankruptcy was filed, and without any action had thereon by this court, that sale would have been set aside if the subsequent sale under a prior deed of trust had not passed the title. As it is, Kehr will be perpetually enjoined from delivery of deed to Mrs. Meyer's trustee. The controversy now is against the fund. It is not disputed that the amount due under said prior deed of trust must first be paid. Meyer, at the time of making the deed for his wife's benefit, was indebted to Vogler, who has interpleaded, in the sum of $7,126.

In August, 1867, Meyer and wife separated. By formal articles of separation, it was agreed, among other things, that he should pay to Schæffer, as her trustee, $7,000 for her maintenance, and she and her trustee covenanted that she would not claim thereafter any maintenance or support from said Meyer, but that said $7,000 should be in full satisfaction for any claim for alimony; that she would contract no debts on his account; would make no claim to any interest or dower in his estate, &c. It was also agreed that the separation thus voluntarily stipulated should not be considered as any confession of guilt on the part of either, and that neither should be precluded from an action for divorce, if any cause therefor existed.

On the execution of these articles, Meyer paid to Schæffer, as his wife's trustee, for her benefit, $2,000 in cash, and executed the deed to Kehr to secure the payment of the other $5,000 with interest. On the 18th of October, 1867, Meyer and wife and Schæffer made another agreement, whereby Meyer and wife agreed to live together again, forgiving all past differences and to rescind all the stipulations of the articles of separation except so much thereof as created a separate estate for her benefit, with the modification that while they lived together Meyer should not pay interest on said $5,000. It was also agreed that the new arrangement should be "a complete condonation." Afterward Meyer and wife continued to cohabit as if no separation had occurred, and they occupied the property in controversy until he fled from the country. Does the condonation operate as a revocation of the post-nuptial settlement? The agreement of October prevents such a result, further than that, it rids the case of the question, whether the covenant by the trustee in the articles of separation made the consideration for the conveyance "valuable and meritorious," instead of "purely voluntary." The effect of the deed for $5,000, and of the October agreement, is to leave that deed a purely voluntary conveyance, unless there entered into the consideration other elements than appear on the face of the papers. It is contended by her counsel that there were such elements.

His views are as follows: Mrs. Meyer was the widow of John Johle, and administratrix of his estate when she married Martin Meyer. He, on her marriage with him, became administrator de bonis non. The property belonging to Johle's estate was sold by order of the probate court, and the realty was bought by Meyer for $2,200—a sum far less than its real value—with the understanding that when Meyer resold it he would settle on his wife whatever profit was made thereon. It is also alleged that the profit realized by Meyer from that transaction and from the estate of Johle was about $5,000, and, pursuant to his repeated promises, the deed of trust to Kehr for her benefit was made, and therefore should be upheld in equity as a valid post-nuptial settlement. Without discussing the doctrines invoked with regard to post-nuptial settlement, it is sufficient to state that they are inapplicable to the facts before the court. The settlement of her account in the probate court as administratrix shows $6,765 in her hands belonging to the estate.

Mr. Meyer's settlement shows that he was charged with that balance, and that on final settlement Johle's estate was indebted to him $7,430. Hence, unless those records were falsified, nothing came to Meyer as belonging to that estate. The sale of realty was made by the clerk of the probate court, by order of that court, and as Johle left two children, any such pretended agreement between Meyer and wife as is alleged, whereby he was to acquire that property at less than its real value, and give to her the difference between the price at which he bought it and that at which he might sell it, would have been, if made, a palpable fraud on creditors and heirs. But there is no evidence to support such allegation; nor is there any evidence that the real estate was sold by Meyer for more than he paid for it. The deeds offered in evidence, together with the abstract of titles, indicate that the property bought by Martin Meyer at the probate sale he sold the same day to F. J. Harke; but as the deed to Harke is not produced, the price does not appear. There is a deed of trust

from Harke reciting the sale to Meyer, and by Meyer to Harke, as occurring the same day, and as being for same property, said deed of trust being to secure three notes, for $450 each, as part of the purchase money. The probate deed to Meyer and his deed to Harke were dated the same day, and there is no evidence whatever that Harke paid an advanced price for the property. But it is contended that the deed to Kraut for $6,500, dated April 16, 1866, was for the Johle property, and consequently indicates a large profit over the $2,200 paid for it. But the Goodfellow deed, dated March 31, 1866, is for that property, showing that Meyer acquired his title thereto from the Goodfellow estate for $3,000, and not from the Johle estate. The deed to Kraut is for the Goodfellow tract, and also for the improvements thereon. It may be that there was a leasehold or some other interest in Johle, but, if so, no evidence to that effect has been adduced. True, Mrs. Meyer relinquished her dower in the deed of trust to Klein, and in the deeds to Harke and to Kraut, but there is no evidence of any agreement that she was to be compensated therefor by her husband. But suppose that Meyer did promise that he would give to her what profits he made out of his Johle purchases, it was a voluntary promise, and would not change the legal aspects of the case, even if any profits were shown to have been made. The deed must then rest for its validity upon other grounds, viz: that Meyer, at the time he made it, had ample property to meet the demands of existing creditors; that after $7,000 had been given to his wife, there was other property ample to satisfy his creditors' demands. In order to show what property he had, Mrs. Meyer and others state that at times he had large amounts of money about his person; that he was reported to be rich; that prior to 1867 he was doing a prosperous business, &c. Now testimony of that loose kind is of small value in the light of subsequent events. But various deeds of trust in his favor are offered to show that he was loaning money on real estate security.

Such evidence is very unsatisfactory. Thus it is said Xavier Meyer, his brother, had given to him a deed of trust to secure $1,000 loaned; but Xavier testifies that his brother sold the note to the German bank, and such might have happened with regard to the other real estate notes. Harke's deed was dated February 8, 1866, to secure three notes for $450, each one of which fell due before the deed in question, leaving in August, 1867, due $900.

Anthony's deed for $2,000 was due in June, 1867, and was released in September, 1867. The Oberselp deed of trust for $3,000 fell due in November, 1866, and released March, 1867. The Geisel deed for two notes of $1,400 each was for the benefit of Martin Meyer (saddler), evidently a different person. It is shown, indisputably, that when the deed for Mrs. Meyer's benefit was made, her husband owed, secured by a deed of trust on the property in question, $2,180; that he owed Vogler $7,126 —making a total of $9,306.

Witnesses differ as to the real value of this property, but the testimony of one of respondents' witnesses is confirmed by the result.

It brought, free from all incumbrances	$10,500 00
Meyer owned two other lots, say...	600 00
If he still owned the St. Ferdinand block, all the evidence of its value which we have is what he gave for it	32 00
Now suppose he had in addition, as connected with his loans and personalty, even	5,000 00
Total	$16,132 00
Deduct, then, the $7,000 to his wife..	7,000 00
	$9,132 00

Thus he would have only $9,132.00 to meet his existing debts, amounting to $9,306.00.

A voluntary conveyance under such circumstances cannot be permitted to stand as against existing creditors. The next inquiry is as to the distribution of the fund. The prior deed of trust to Klein under which the sale was made must be first paid, for that was a valid subsisting lien. The contest for the balance takes this shape:

Vogler insists that as he was an existing creditor, and the deed for Mrs. Meyer was void only as to existing creditors, he must be paid before any of the subsequent creditors are let in.

Mrs. Meyer contends that if her deed is set aside, then after Vogler and Klein (the only existing creditors) are paid, she is entitled to recover her $5,000; for the deed for her benefit was void only as to those, and not as to subsequent creditors.

The subsequent creditors contend that, as the deed for Mrs. Meyer was void, it is as if never made—it is void in toto; and therefore Mrs. Meyer has no claim whatever on the fund until at least all creditors are paid; also, that as Vogler had no lien on the property, although he was an existing creditor, he is, as to this property, since Mrs. Meyer's claim thereto is out of the way, in no better position than the subsequent creditors. The argument is, that the existing and subsequent creditors are on the same footing, just as if no deed had been made for Mrs. Meyer's benefit.

In some English and American cases, it is said that when a voluntary conveyance is set aside, subsequent creditors are let in; but it is not said on what footing. In other cases, it is said, they are let in to share pro rata with the prior creditors. That ruling must be based on the ground that as the prior creditors had no lien on the property they are like all other creditors at large, and are entitled to no preference. It may not be entirely satisfactory to hold that when a deed is declared void only as to existing creditors, it shall be held void also as to all creditors, and more especially under the American system of recording deeds. A man in debt is supposed to act fraudulently towards

existing creditors when he gives away so much of his property as to embarrass them in the collection of their demands, for he must be just before he is generous; but subsequent creditors, it is supposed, knowing, at least constructively, that the conveyance is made, do not deal on the faith that the debtor still owns that property. On the other hand, the subsequent creditors did not know that there were prior creditors, and had a right to suppose that the residue of the debtor's property would furnish ample means for the payment of subsequent debts. Were the questions now to be decided for the first time, there might be some hesitancy in holding that a deed void as to existing creditors was to be considered void as to all creditors; for practically, such is the effect of letting in subsequent creditors, especially to share pro rata. The courts hold, with great uniformity, that the deed will not be set aside at the instance of subsequent creditors; yet they give to the latter the same benefit when the prior creditors do cause it to be set aside. Why such discrimination as to the right to attack the deed when there is none as to sharing in the result?

The well settled doctrines under the statute of fraudulent conveyances are:

1. That a voluntary deed is not fraudulent merely because there is some indebtedness existing, as was ruled in Reade v. Livingston, 3 Johns. Ch. 481, but that such a deed is void as to existing creditors only when made by a person in such embarrassed circumstances as not to leave ample margin in favor of existing creditors. The statute does not use the term voluntary conveyances, but fraudulent; and the good faith of the transfer is always open for review. It is now settled that when there are existing debts for the payment of which an ample margin is not left, the voluntary conveyance is made in bad faith towards existing creditors.

2. A voluntary conveyance, when there are no existing debts, may be void as to subsequent creditors, if it be shown, by facts and circumstances, that the deed was made with an actual intent to defraud subsequent creditors: Woodson v. Poole, 19 Mo. 340; Potter v. McDowell, 31 Mo. 62; Pratt v. Curtis [Case No. 11,375]; Salmon v. Bennett, 1 Conn. 525; Duhme v. Young, 3 Bush, 350; Holmes v. Penney, 3 Kay & J. 90; Sexton v. Wheaton, 8 Wheat. [21 U. S.] 250; Hindes v. Longworth, 11 Wheat. [24 U. S.] 211; 1 Am. Lead. Cas. 1; Mattingly v. Nye, 8 Wall. [75 U. S.] 370; 1 Story, Eq. Jur. § 355 et seq.

3. Where a post-nuptial settlement is made in consideration of relinquishment of dower, and of maintenance, especially where the wife's trustee joins in the covenants, that the wife will, in consideration of the settlement made, relinquish all claims to dower in her husband's estate, and will contract no debts on his account, etc., such a settlement is for a valuable consideration, and will be upheld in law, and cannot be assailed in equity by the husband's creditors, unless the amount so settled on the wife is unreasonable or excessive: Worrall v. Jacob, 3 Mer. 268; Stephens v. Olive, 2 Brown, Ch. 75; Clancy, Mar. Wom. 358; Compton v. Collinson, 2 Brown, Ch. 304; Hale v. Plummer, 6 Ind. 123; Harvey v. Alexander, 1 Rand. (Va.) 219; Wiley v. Gray, 36 Miss. 510; Bullard v. Briggs, 7 Pick. 536; Harrison v. Carroll, 11 Leigh, 484; Hargroves v. Meray, 2 Hill, Eq. 226; 35 Pa. St. 357; 2 Story, Eq. Jur. § 1427 et seq.; Madd. Ch. Prac. 275, 387. [Respondent's counsel criticise the bill in this point with some force, inasmuch as it does not charge in clear and distinct terms that the deed in question was made to defraud creditors, but simply charges that the notes, to secure which the deed was given, were without valuable consideration and fraudulent. If, however, the bill was not so distinct in its allegations as it should be, there was no special demurrer to it, and the answer and evidence present fully the real question at issue.] [3]

The deed of settlement as originally drawn and executed was, in legal contemplation, for a valuable consideration, and if the second agreement had not rescinded all provisions of the first, except the grant of the separate estate, that grant would remain valid. But, unfortunately for Mrs. Meyer the last agreement withdrew all of the consideration which was "valuable" as contradistinguished from "voluntary." After the last agreement there was no covenant to relinquish dower, etc.; all covenants on the part of herself and trustee were expressly rescinded. The grant thus existed as if made for love and affection merely. The legal inference from "condonation" (concerning which, see 2 Cox, Ch. 99; 2 Wend. 422; 3 Paige, 483; 9 Cal. 479; [Walker v. Walker] 9 Wall. [76 U. S.] 752; 1 Smale & G. 501; 3 Barn. & Adol. 743) does not arise in the case, because the intention of the parties is clearly expressed in writing, and is therefore not left open for inference. The case of Walker v. Walker, 9 Wall. [76 U. S.] 751, does not apply to this case.

4. When a deed is void as to existing creditors and is therefore set aside, all the creditors, prior and subsequent, share in the fund pro rata. Magawly's Trust, 5 De Gex & S. 1; Richardson v. Smallwood, Jac. 552–558; [Gilman v. N. & A. Co., Id. 460–464;] [4] Savage v. Murphy, 34 N. Y. 508; Iley v. Niswanger, Harp. Eq. 295; Robinson v. Stewart, 10 N. Y. (6 Seld.) 189; Thomson v. Dougherty, 12 Serg. & R. 448, 455, 458; 3 Dev. 12–14; 7 Ired. 32–38; 1 Am. Lead. Cas. 45; Norton v. Norton, 5 Cush. 529; 4 Dev. 197–204; 3 Johns. Ch. 481–499; 2 Ves. 10; 3 Drew. 419–424.

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[3] [From 7 N. B. R. 97.]

[4] [From 7 N. B. R. 97.]

It has been suggested that under the peculiar facts and circumstances of this case, Martin Meyer has a homestead right to $1,000 out of the surplus. The doctrine held in Clark v. Potter, 13 Gray, 21, and recognized in White v. Rice, 5 Allen, 73, favors the suggestion of counsel. Recently, in the case of Cox v. Wilder [Case No. 3,308], the circuit judge held that where a deed executed by husband and wife was set aside as fraudulent, it being designed to defraud creditors, neither the homestead nor dower right was lost, but the husband's right to a homestead and the wife's right to dower remain just as if the fraudulent or void deed had never been made. Taking the doctrine in the two Massachusetts cases and the views of the circuit judge, and applying them to this case, it seems that this result follows, viz: That Meyer, so far as the Klein deed is concerned, retained a homestead right to the surplus as against his assignee in bankruptcy; but as the deed of settlement is valid as between the husband and wife, this homestead right passed to her.

Hence the decree will be that the deed of trust to Kehr be declared null and void, as to Meyer's creditors; that Kehr be perpetually enjoined from delivering a deed under the sale made by him as trustee, and that out of the funds derived from the sale of the property in question, there be paid, first, the expenses of said sale; second, to the creditor secured by the deed to Klein, the amount of the debt due to him; third, to Mrs. Meyer $1,000; fourth, the costs of this suit; and that the residue of the fund be held by the assignee, to be divided pro rata among all the creditors of the bankrupt's estate under the orders of the district court in bankruptcy.

On the appeal from the foregoing decree the case was argued by:

N. Myers, for Mrs. Meyer.
John Ford Smith, for assignee.
Slayback & Haussler, for Vogler.

DILLON, Circuit Judge. In the summer and fall of 1867, when the articles of separation and reconciliation were made, Meyer, the bankrupt, was engaged in business. The articles of separation and of reconciliation were only a few weeks apart, and there does not seem to have been in the meantime any change in the property or pecuniary situation of Mr. Meyer. He confessedly owed at that time to Mr. Klein, $2,180, secured by deed of trust on his homestead property; and to Vogler the sum of $7,126, not secured, and which together amounted to $9,306. His assets were uncertain beyond his homestead property, worth about $12,000, and his interest in two other lots, worth $300. The evidence as to his personalty and credits does not satisfy me that they exceeded the estimate of the district court, which was $5,000. The debts to Klein and to Vogler have never been paid; and after the allowance of $1,000 for the homestead right, the estate of the bankrupt, consisting chiefly of the homestead property, will not much more than equal the amount due on debts which antedated, in their creation, this settlement upon Mrs. Meyer.

And the main question now made is whether Mrs. Meyer has a right, as against creditors, to have paid to her out of the proceeds of the sale of the homestead property the amount of the notes which were given for her benefit by her husband, and secured by a deed of trust on the homestead property.

She claims that this is a valid lien upon the property in her favor, and that it should be recognized and enforced as such.

I have grave doubts whether a man in business, with assets not exceeding, if, indeed, they equal, $17,000 or $18,000, and who is shown to be in debt over $9,000, can, as against existing creditors, even if there be no actual intention to defraud them, make a settlement of $7,000 upon his wife, which will stand in a contest by her with creditors who were such at the time, and where the alternative is that if the settlement or provision in favor of the wife is sustained the creditors must suffer. But I am of opinion, with the district court, that the effect of the reconciliation and of the articles then executed, was to make the notes and deed of trust in favor of the wife substantially a voluntary settlement or conveyance, and not one for value. If this is so, then it is clear that it cannot be upheld to the prejudice of creditors then existing. Conscious of the inability to sustain the transaction in favor of the wife, unless the agreement to pay her the $5,000 can be made to rest upon a valuable consideration, her counsel has labored with great ingenuity to show that such a consideration existed.

But what value did she give that can uphold the promise in her favor as against the husband's creditors? The promise, by the husband to pay her $5,000, was for her maintenance apart from him and in consideration of her release of dower, &c. All the promises were executory. She returns, and the parties rescind every portion of the articles of separation except that by which he agrees to pay her in the future $5,000—and it is this sum that she now seeks to be allowed, as against creditors of the husband existing at the time. I fail to see any value that a court of equity, which looks at substance, can regard in a controversy between the wife and creditors of her husband. It is argued that the promise of the husband was valid when made, and if so that it cannot be rendered bad by matter afterwards arising. But when the parties in a few weeks rescinded the whole agreement, except in the particular named, when all that the wife had promised as a consideration for the husband's promise had been cancelled, how can equity say that here is a consideration to the husband which as against his creditors will sustain a transaction otherwise fraudulent in contemplation of law? This question is so satisfactorily presented in the opinion of the

district judge, with whose views respecting the case in its various aspects I concur, that I consider it to be quite unnecessary to dwell longer upon it.

The husband fled the country and abandoned his wife, leaving her, however, in the actual possession of the homestead property. The assignee concedes that if the husband claimed it, he would be entitled to the $1,000 homestead exemption, but insists that the wife cannot claim it, or that it cannot be allowed to her. It is evident, both from the statute and its policy, that its provisions are intended for the benefit of the family, and, under the circumstances, I find no difficulty in securing this provision to the wife. To that extent the court could, if necessary, give efficacy to the deed of trust in her favor; if it be necessary that the exemption should be applied for in the name of the husband, the court would even allow her to apply in his name, so as to prevent the amount from going into the hands of the assignee, who has no claim or equity whatever to it. The act of congress of June 8th, 1872 (17 Stat. 334), has no application to this case, as it was enacted after the adjudication of bankruptcy. The decree of the district court is affirmed. Affirmed.

NOTE. An appeal to the supreme court of the United States was prayed by Mrs. Meyer, and allowed. [The decree of the circuit court was affirmed. 20 Wall. (87 U. S.) 31.] As to the homestead exemption, see Cox v. Wilder [Case No. 3,308], and note.

SMITH (KELLY v.). See Case No. 7,675.

SMITH (KING v.). See Case No. 7,806.

SMITH (LAMBERT v.). See Cases Nos. 8,027 and 8,028.

SMITH (LEAGUE v.). See Case No. 8,159.

SMITH (LEWIS v.). See Case No. 8,332.

SMITH (LINKER v.). See Case No. 8,373.

SMITH (LINN v.). See Case No. 8,375.

Case No. 13,072.

SMITH v. LITTLE et al.

[5 Biss. 490;[1] 9 N. B. R. 111; 6 Chi. Leg. News, 86.]

Circuit Court, N. D. Illinois. Nov., 1873.

BANKRUPTCY — PREFERENCE — LIMITATION—PRACTICE IN EQUITY.

1. Where the obligor on a bond, in order to indemnify his sureties, obtains securities from one of his debtors and turns them over to his sureties, the transaction is a preference between the parties, under the first clause of the thirty-fifth section of the bankrupt act [of 1867 (14 Stat. 534)], and not a transfer under the second clause, and the four months' limitation applies.

2. The fact that the securities were made to run directly to the sureties does not change the character of the transaction when they were obtained at the instance of the obligor. A court of equity will look at the substance rather than the form of the transaction.

3. Where a bill must be dismissed for want of equity, jurisdiction will not be retained to settle the priorities or equities between the defendants.

This was a bill in chancery filed by Joseph H. Smith, assignee of Jacob and Ezrom Mayer, against Charles H. Little and others, to set aside certain mortgages made by said bankrupts to the defendants.

Geo. Scoville, for complainant.

J. M. Bailey, for defendant.

T. J. Turner, for Mrs. Wm. B. Mayer.

BLODGETT, District Judge. The facts in the case, as they appear from the pleadings and proofs, I find to be these:

On the 14th of May, 1870, and for some years previous thereto, Ezrom Mayer had been treasurer of the Freeport school district, embracing the city of Freeport, and had given his official bond as such treasurer, with defendants Little, Clayton, Bartlett and McCall as his sureties. He was also at the same time school treasurer of town 27, N. R. 8, in Stephenson county, with defendants Little, Clayton, Bartlett, McCall and Miller as his sureties.

At about the date mentioned, it was ascertained that said Ezrom was a defaulter in his office as such treasurer, and that his sureties would probably be compelled to make good the delinquency. They accordingly applied to him for indemnity and he procured his father, Jacob Mayer, to make and deliver to said sureties a mortgage on his farm, near Freeport, for $5,000, dated May 14, 1870, also to assign to said sureties a mortgage for $2,100, dated May 21, 1869, from Wm. B. Mayer and wife, to said Jacob Mayer. At the same time Ezrom and wife made and delivered to his said sureties a mortgage for $2,000, on his homestead in Freeport.

Suit was brought on the official bond of Ezrom, as treasurer of the Freeport school district, and judgment recovered against him and his sureties, Little, Clayton, Bartlett, and McCall, for $7,351.36 and costs, at the December term of the Stephenson county circuit court, which judgment on appeal was affirmed by the supreme court, and has since been paid by said sureties, each contributing equally, the total amount at the time of payment being about $8,000.

There did not seem to be any defalcation as township treasurer, and the defendant Miller sets up no claim to the securities turned out. These mortgages, although dated on the 14th of May, 1870, were not delivered until the 16th of that month, on which day the transaction was consummated.

On the 12th day of November, 1870, a petition in bankruptcy was filed in the district court of this district, against said Jacob Mayer and Ezrom Mayer, on which they were subsequently adjudicated bankrupts. The plaintiff was duly elected assignee of said bankrupts, and now brings this suit to set aside said conveyances as having been made

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in violation of the bankrupt act. It is admitted that the homestead of Ezrom is incumbered by a prior mortgage to its full value, so that no importance is attached to the $2,000 mortgage by him and no argument is made in regard to that point.

It appears from the evidence that Ezrom Mayer had been for several years prior to the transactions complained of, cashier of the First National Bank of Freeport, and that during the years 1865, 1866 and 1867, Jacob, Ezrom, and Martin Mayer were engaged in carrying on the confectionery and bakery business, in Freeport, under the firm name of Jacob Mayer & Sons. This firm was dissolved on the first of January, 1868, and Jacob Mayer took and continued to carry on the confectionery branch of the business, the bakery being taken and caried on by his son Martin.

Jacob Mayer is now about sixty-nine years old, and has never taken any active part in the management of the business of either said firm of J. Mayer & Sons or J. Mayer. At the dissolution of the firm it was indebted to Ezrom Mayer in about the sum of $3,367. And after the dissolution of said firm said Jacob became further indebted to Ezrom to the amount of about $4,500. This, together with the indebtedness of the old firm to Ezrom, with interest, made, as he states, the amount upward of $9,000, due from Jacob to Ezrom at the time of giving the mortgages in question.

It does not appear from the evidence that any direct dealing was had between defendants Little, Clayton, Bartlett and McCall, and Jacob Mayer, in regard to these mortgages. They called on their principal, Ezrom Mayer, to indemnify them against their liability as his sureties, and he induced his father to make the $5,000 mortgage and assign to them the one for $2,100. The negotiations by which the mortgages were obtained from Jacob Mayer were conducted by or on behalf of Ezrom, and not by or on behalf of the sureties. And it does not appear that in these negotiations Ezrom claimed these mortgages from his father on account of the indebtedness due him from his father.

The complainant insists that this mortgage for $5,000 and the assignment of the one for $2,100, should be set aside as fraudulent within the second clause of the 35th section of the bankrupt law.

The defendants contend that this transaction comes within the first clause of said section,—or, in other words, that all the facts, when taken together, characterize this as a preference by Ezrom Mayer in favor of the sureties on his treasurer's bond within the provisions of the first clause, rather than a conveyance by Jacob Mayer within the second clause. This is the turning point in the case.

If this transaction be deemed only a preference by Jacob Mayer, debtor, to Ezrom Mayer, his creditor, and by Ezrom to his sureties, then it is barred unless a petition in bankruptcy is filed within four months of the transaction; while if it is to be treated as a transaction between Jacob Mayer and the defendants, under the second clause, then the six months given by that clause had not transpired, within four days, at the time the petition was filed.

The case is not free from doubt in my own mind upon the facts proven, but my conclusion, after careful consideration, is that the giving of these mortgages should be treated as a preference of Ezrom Mayer's creditors.

The defendants had no dealings with Jacob Mayer. They demanded security from Ezrom, and he brought them these mortgages. They did not know Jacob Mayer in the transaction, and had no concern with the means by which Ezrom obtained the security from Jacob. The proof shows that Jacob was indebted to Ezrom to an amount largely in excess of the two mortgages, and although Jacob was not requested to execute them on the express ground of his indebtedness to Ezrom, but rather on the ground that Ezrom needed these securities to relieve his embarrassments with his sureties, and save him from going to jail, yet there was ample consideration to support them on account of the indebtedness to Ezrom.

Suppose Ezrom Mayer had taken the $5,000 mortgage and the assignment of the other directly to himself and had then transferred them to defendants, I think there would be no doubt but that the transaction would only amount to a preference, and a court of equity will not regard the form in which a thing is done, but rather its substance and effect.

Although no allusion seems to have been made to the indebtedness existing between them at the time Ezrom applied to his father for the securities, yet I must presume that it was in the minds of the parties, and formed the moving consideration for them. It being abundantly established by the proof that Jacob was at that time indebted to Ezrom in more than the amount of the two mortgages, being so indebted, he gave a preference to Ezrom, his creditor, and Ezrom by causing the securities to be transferred directly to them, gave a preference to the defendants, who are under liability for him. As I said before, the defendants had no claim on Jacob, and did not deal with him, but the form of the proceeding ought not to change the rights of the parties in equity. If the assignee of Jacob or Ezrom Mayer had questioned the transaction within four months after the adjudication in bankruptcy, they could have had it set aside on a proper case being made, but they have waited till after the four months expired, and I think are now too late. The transaction was not kept secret. The documents in question were duly recorded within a short time after their date, and the defendants have made no secret of the assertion of their rights.

It is true there is plausible ground for the

argument made by complainant's counsel, that this was a fraudulent gift or grant by Jacob Mayer, within the second clause of the section, and I admit that the facts bring the transactions fairly upon the debatable ground between the two clauses. But the weight of evidence, I think, strongly preponderates in favor of the view I have taken.

There was a collateral issue raised in the case which has also been quite fully argued, and on which much proof has been presented. It seems that the property covered by the $2,100 mortgage was at one time owned by Susanna Schlott, the wife of John H. Schlott, and while so owned by her, she and her husband, John H., gave a trust deed dated Nov. 16, 1867, to one Barton, to secure the payment of two notes, one for $96.59, and the other for $2,419.60, to Wm. B. Mayer. Afterwards, Mrs. Schlott and her husband conveyed this land to Jacob Mayer, and he conveyed it to Wm. B. Mayer, who gave the $2,100 mortgage in question to Jacob, to secure a part of the purchase money. Complainant insists that when the fee became vested in Wm. B. Mayer, it merged the Schlott mortgage, so that the mortgage from Wm. B. to Jacob Mayer became the first lien on the property. Much evidence has been put upon the record in regard to the intention of the parties as to whether the Schlott mortgage should be kept alive, but I do not deem it necessary for me to follow out and decide these questions in the light of the proof taken and points made, because I think that when I have determined that the assignee in bankruptcy has no claim to the property, I have gone as far as my jurisdiction extends. The parties contending for this mortgage, or rather for the question of its priority, are Mrs. Mayer, wife of Wm. B. Mayer (who claims that she loaned the money to Schlott, and is now the holder of the Schlott mortgage), and the assignee in bankruptcy, and Ezrom Mayer's sureties. They are all citizens of this state and district, and when I hold that the assignee has no title, I can not retain jurisdiction to settle the controversy between Mrs. Mayer and the defendants Little, Clayton, Bartlett, and McCall.

The decree should therefore be that the bill be dismissed for want of equity, as against defendants Little, Clayton, Bartlett, McCall, and Miller; and dismissed without prejudice as between these defendants and defendants Wm. B. and Lucinda Mayer and Barton, touching the validity and priority of the Schlott mortgage.

NOTE. Where the creditor loaned the bankrupt money to take up notes on which the creditor was liable as indorser, at the same time taking a mortgage to secure the loan, *held* a preference under the 35th section of the act. Scammon v. Cole [Case No. 12,433]; Cookinham v. Morgan [Id. 3,183].

SMITH (LOCKINGTON v.). See Case No. 8,448.

SMITH v. LONG. See Case No. 8,478.

Case No. 13,073.

SMITH v. McCLEOD et al.

[1 Cranch, C. C. 43.][1]

Circuit Court, District of Columbia. Oct. Term, 1801.

PLEADING AT LAW—PLEA TO JURISDICTION—WHEN ALLOWED.

In a court of a limited jurisdiction a plea, that the cause of action did not arise within the jurisdiction of the court, is a plea in bar, and good after office judgment.

Debt, in the court of hustings [by Smith against McCleod & Braden]. Plea to the jurisdiction that the cause of action did not arise within the town of Alexandria.

Plaintiff demurred generally, and contended that the plea was not a proper plea after an office judgment.

Mr. Faw, for defendant, cited Downman v. Downman, 1 Wash. [Va.] 28; Chumley v. Broom, Carth. 402; 1 Bac. Abr. 35. This is a plea in bar and not in abatement; it is not a dilatory plea—not necessary to be sworn. The plaintiff's remedy is not by demurrer. He ought to have objected to receiving the plea at the time the office judgment was set aside. The plea is good both in form and substance. Several terms have passed since it was filed. The court cannot now go back and say the plea ought not to have been received. They cannot correct their own errors after the term. But this plea was received in the court of hustings, before the existence of this court. Gordon v. Frasier, 2 Wash. [Va.] 135.

Mr. Swann, contra, contended it was a dilatory plea, and if put in at an improper time, the plaintiff might demur, and cited Imp. Pl. 294; Barnes, Notes Cas. 264.

Judgment for defendant, on the demurrer quod breve cassetur.

Case No. 13,074.

SMITH v. McLEAN et al.

[10 N. B. R. (1874) 260.][2]

District Court, S. D. Mississippi.

BANKRUPTCY—CHATTEL MORTGAGE—PROCEEDS OF SALE—RIGHTS OF PURCHASER—PARTNERSHIP—PREFERENCE.

1. M. and C. were partners in trade, and on the dissolution of the firm, M. purchased of C. his interest in the business, giving his notes in payment, and executing a mortgage to secure the notes on the stock of merchandise and accounts of the firm. M. continued in business some time thereafter, and finally sold and transferred to C. the entire stock of goods then in his (M.'s) store. C. took possession of the stock and made sales on his own account. At the time of the sale M. was hopelessly insolvent. *Held*, that as the mortgage contained no

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

[2] [Reprinted by permission.]

provision by which the collections and proceeds of sales should be either applied to the purposes of the conveyance, to the payment of the debts to be secured, or indemnity to be provided, or by its reinvestment so as to augment the trust fund, the want of which is inconsistent with the alleged purpose of the conveyance, and therefore it is void upon its face.

[Cited in Re Foster, Case No. 4,964.]

2. The sale gave C. a preference over the other creditors and was therefore invalid; and C. knew of the insolvency of M. at the time of the transfer, therefore he must pay into court the value of the property, with interest from the time of the sale and transfer.

In equity.

HILL, District Judge. This is a petition in the nature of a bill in equity, filed by the complainant [J. J. Smith], as assignee in bankruptcy of said George P. McLean, against said McLean and Charles B. Clark, to set aside a sale of a stock of goods and other property alleged to have been made by McLean to Clark, in January, 1873, and to subject the value thereof to the payment of the debts of McLean under the bankrupt law [of 1867 (14 Stat. 517)], the goods and merchandise so sold having been disposed of by Clark or consumed by fire.

The pleadings and proofs upon which the questions for decision arise are voluminous, but need not be stated in detail, as the following facts, appearing therefrom, are all that need be stated:

After the close of the war, McLean, being an old merchant without means, and Clark a planter with a surplus cash capital, entered into a copartnership for the purpose of carrying on a commercial establishment at Rocky Springs, in this state, in which McLean was to give the business his personal attention, and Clark was to advance five thousand dollars as capital stock, and to share profits and divide losses equally. Under this agreement the business was commenced, and conducted in the firm name and style of George P. McLean & Co., until July, 1871, when an agreement for dissolution of copartnership was entered into between them, and McLean gave to Clark his note for thirteen thousand five hundred and ninety-nine dollars and eighty-nine cents, three thousand dollars being for the estimated profits due to Clark, and the remainder for the cash and cotton advanced to the firm, inclusive of the five thousand dollars, originally advanced as capital stock. In other words, it was a purchase by McLean of Clark of his interest in the business for the amount stated, the notes to secure which were made due and payable one day after date, and dated on the 14th day of August, 1871. That, to secure payment of this amount and to save Clark harmless against the payment of the indebtedness of said firm to their other creditors, then amounting to about ten thousand dollars, McLean executed a mortgage to Clark conveying to him all the stock of merchandise then on hand, or to be thereafter received, also all the notes and accounts then due to him or to said firm, and all those to be thereafter acquired, also seven mules and one wagon. At the time of the dissolution of the partnership it was agreed between McLean and Clark that the business should be continued under the firm name and style of George P. McLean & Co. Notice of the dissolution was given in the local newspaper of the county, and posted at public places in the neighborhood, but there is not sufficient proof of notice to those formerly dealing with them, or in the cities where subsequent purchases were made. McLean remained in the possession of the property thus conveyed, and conducted the business as though no change had been made by the dissolution of the firm or conveyance of the property, until the 17th of January, 1873, when, by a private arrangement between McLean and Clark, the entire stock of goods, etc., estimated at twelve thousand one hundred and fifty-five dollars and fifty-six cents, was sold and transferred to Clark, who took possession of them as his own under said agreement, and continued to make sales of the same until some time thereafter, when the store-house with its contents was consumed by fire. At the time this transfer was made McLean reserved the debts due either the old firm or himself under the old firm name. The goods, etc., sold by McLean to Clark consisted principally of a stock of merchandise purchased by McLean, in the firm name, of merchants in New Orleans and St. Louis, in the fall of 1872. At the time of this sale McLean was unable to pay his mercantile debts as they fell due in the usual course of business; indeed, had no money to pay either Clark or his mercantile creditors, although the notes and accounts held by him amounted to some sixteen thousand dollars, as they are proved to have been of but little value, being upon persons destitute of means, and consisted of the accruing of bad debts from the commencement of the business. That McLean was then hopelessly insolvent, both legally and commercially, there can be no doubt.

Under this state of facts two questions are presented: First. Was the mortgage made upon the 14th of August, 1871, a valid conveyance as against the creditors of McLean? Second. If not, was the sale and transfer made on the 17th of January, 1873, a valid sale as against the creditors of McLean under the provisions of the bankrupt law?

It is insisted for complainant, representing the creditors, that both the mortgage and sale were void as against McLean's creditors, and by Clark that both were valid; that the mortgage was valid and embraced the entire property sold and transferred, and that the sale was in fact but a foreclosure of the mortgage, made by private arrangement, instead of by judicial proceedings. The first question to be considered is, was the mortgage void upon its face by means of its conditions? If not, was

it void in fact, by reason of the fraudulent intent of the parties? in other words, was it void in law or in fact? The stipulations and conditions contained in the mortgage are contradictory; it professes to be made to secure the prompt payment of the notes upon their maturity, which occurred upon the next day, or allowing days of grace, upon the fourth day thereafter. There is no power of sale given in the mortgage, but it is a conveyance, to become void upon prompt payment of the notes; and indemnity against liability upon the partnership debts, or failure of payment upon the maturity of the notes, authorized a foreclosure of the mortgage; or if paid, a failure to indemnify him against liability upon the partnership debts, authorized the same thing. Yet the conveyance embraced subsequent merchandise to be brought into the business, and subsequent credits to be acquired, evidently contemplating a continuance of the business for an indefinite period of time; as further evidence of this intention, it was agreed that McLean should carry on the business, in the same firm name, but for his own benefit; Clark permitted the business to be so carried on for about eighteen months, and until McLean's inability to continue his business, when he made the purchase. The intention of the parties as shown upon the face of the mortgage evidently was that McLean was to buy and sell and to collect the debts due and to have the entire control of the property and credits embraced in the mortgage, then in hands or afterwards to be acquired, until Clark should see proper to demand payment of his demands, the income and benefits in the meantime to be received by McLean. There is no stipulation in the mortgage that the collections or profits shall be applied to the payment of either the creditors of the old firm, or of that due to Clark, and nothing prohibiting McLean from, in the meantime, making any disposition of the funds received either from sales or collections as he might desire. Whilst it is true that, aside from the provisions of the bankrupt act, a debtor may prefer one creditor to another, yet a conveyance for that purpose by which a benefit is reserved by the vendor to himself is void as against creditors. This has been the well settled rule from Twyne's Case down to the present time Any condition in the conveyance inconsistent with the appropriation of the thing conveyed to the payment of the debt intended to be secured, or the indemnity intended to be provided, will render the conveyance void upon its face; this rule is so universally admitted, that reference to authorities or illustrations to support it is deemed unnecessary. Applying this rule to the stipulations and conditions in this mortgage, and it will be found difficult to sustain it as a valid conveyance, and especially so as to the after acquired property and credits.

It is true that it is now a settled rule that a railroad company may encumber by mortgage or other security after-acquired property, necessary to the running and operation of the road. It is for a reason that does not apply to the case now under consideration. The value of a railroad consists in the profits of operating it; the railway without machinery to operate it would be worthless; the railroad and its rolling stock, and all the property necessary to its successful operation are to a great extent one entirety; but not so with a mercantile establishment and its income. The merchandise is worth nothing aside from its sale. The receipts from the sales may or may not be reinvested in other purchases; the remaining stock may be sold without it. A crop to be planted and cultivated may be encumbered for means to produce it; such means becomes a part of it. The mortgage in this case contains no provisions by which the collections and proceeds of sales shall be either applied to the purposes of the conveyance, to the payment of the debts to be secured, or indemnity to be provided, or by its reinvestment, so as to augment the trust fund, the want of which is inconsistent with the alleged purpose of the conveyance, and renders it void upon its face. Again, the dissolution of the copartnership, and this conveyance, although bearing different dates, must be taken as but parts of the same transaction, one part of which was that the business was to be continued by McLean for his own benefit in the firm name of Geo. P. McLean & Co. What was the purpose of continuing in the old firm name, if it was not to hold out the inducement to those who might thereafter give credit that Clark was still a partner, and liable; if not, that some other than McLean was? If so, this was an intentional fraud upon subsequent creditors. Clark had a deep interest in enabling McLean to obtain credit, and thereby increase his security. The firm owed debts to the amount of ten thousand dollars, besides between thirteen and fifteen thousand dollars to him—in all about twenty-four thousand dollars; if, therefore, the after-acquired property inured to his security, the more the better. It is not to be presumed that any sane man, knowing that the moment he sold goods to McLean they became subject to this mortgage, would extend credit to McLean for their payment. It is true that both McLean and Clark testify that they intended no fraud, but they must be held as intending that which was the natural and almost unavoidable result of their act. Other reasons might be stated for holding this conveyance void, but it is presumed those stated are sufficient, and that this conveyance cannot aid the subsequent sale.

The remaining question is, was the sale and transfer of the stock of merchandise made on the 17th of January, 1873, void under the provisions of the bankrupt act? The sale was made in bulk and by wholesale, not in the usual course of business of a retail merchant. This, under the provisions of the bankrupt law rendered it prima facie void as to creditors, and threw upon the vendee the burden of

proof to show its fairness and validity. The testimony of both vendor and vendee is that it was a fair sale, and that no fraud or preference was intended; but whilst these men, from the testimony, bear a high character for truth and integrity, it nevertheless becomes the court to consider the whole transaction and determine the validity of the sale, as tested by the provisions of the law. That McLean was then both legally insolvent, that is, had not sufficient property subject to execution to pay all his debts if sold under legal process, or commercially insolvent, that is, had not the means to pay off and discharge his commercial obligations as they became due in the ordinary course of business, cannot be doubted. The further question is, did Clark know that fact, or have cause to believe that it existed? he certainly had cause to believe, whether he did so or not, that McLean was not able to pay him his demands and continue his business. No other reason is given, or can truthfully be given, for the sale. Again, he must be held to have known, or to have inquired about that which an ordinarily sensible, prudent man, as he is shown to be, would have inquired into, being a subject in which he was so deeply interested. He claims to have had a mortgage upon the whole establishment, including the merchandise on hand and credits, not only for the payment of his demands, but from liability against the debts of the old firm. Such being the case, he must be held to have examined into its condition, and if he did so, to have known its insolvency; and if he did not, cannot avail himself of his ignorance to the injury of the creditors of McLean, who gave the credit in ignorance of his demand. It was the duty, and if not was the interest of Clark when the dissolution took place, to know the amount of indebtedness for which he was then liable. If he inquired he must have known it was a large amount for an establishment of that kind. When he purchased in January, 1873, he must have examined the stock, and observed that they were mostly new goods, and should have inquired whether or not they had been paid for; if he did he would have ascertained that they had not, and whilst he might have been informed that there were nominal debts due more than the amount of indebtedness, he must have known that most of them, if not worthless, would be difficult to collect. In other words, if he had done that which a man of ordinary prudence occupying his position, would have done, he must not only have had reasonable cause to believe, but must have known of the insolvency of McLean, and if he neglected to make this inquiry must suffer the consequences, or rather cannot be permitted to take advantage of his ignorance of that which it was both his duty and interest to know. This transfer divested McLean of his property subject to execution, of all his means which could immediately be converted into cash. His credits being of but little value could only be reached by the tedious, expensive, and uncertain process of garnishment. That this transfer gave Clark a preference over the other creditors of McLean there can be no doubt, and under all the facts, it is difficult to come to any other conclusion than that such preference was intended, and the statements made to the contrary only to be reconciled by the belief upon the part of McLean and Clark that the mortgage was a lien upon the property sold.

The plain provision of the bankrupt law is, that when a debtor is insolvent and makes a payment of money, or a transfer of property to his creditors, in payment or as security for the debt due, and the creditor, at the time of its reception or transfer, knows, or has cause to know, that his debtor is insolvent, the payment or transfer is invalid, and the amount so paid, or the property transferred, or its value, must be returned for the benefit of all the creditors whose claims may be proven or admitted. It is equally well settled, that when the circumstances brought to the knowledge of the creditor, or those which his relation to the subject requires him to know, are such as would lead a prudent man to investigate, and which, if investigated, would communicate to him a knowledge of the insolvency of his debtor, he will be equally affected by it, whatever his knowledge or belief may have been.

Applying this rule to the facts in this case, it is clear that the transfer made by McLean to Clark, in payment of his indebtedness to him, was invalid; and that Clark must pay into the court the value of the property, with interest from the sale and transfer, to be distributed equally among his creditors.

The question as to whether Clark will now be permitted to prove his debt and share with the other creditors, is reserved.

Case No. 13,075.

SMITH et al. v. The MANSANITO.[1]

District Court, S. D. New York. Oct. 19, 1861.

SALVAGE—SALE OF DERELICT—RIGHT TO FREIGHT—BLOCKADE OF PORT.

[A derelict vessel and cargo were sold under a decree awarding one half to the salvors. The original owners of the vessel purchased her at the sale, which was before the sale of the cargo, and thereupon notified the cargo owners that they held themselves ready to carry the cargo to its destination, on the raising of the blockade which had been declared in the meantime, and claimed a lien for freight. *Held*, that there was no lien, and that the owners of the cargo were entitled to the entire proceeds thereof after satisfaction of the salvage decree.]

[This was a libel by Jonas Smith and others against the bark Mansanito and cargo, to recover for salvage services. Heard on application for payment of surplus proceeds of cargo to the cargo owners.]

This case came up on an application to the court for payment of the remnants and proceeds out of the registry. The vessel and her cargo were abandoned at sea on March 28, 1861, brought into this court by salvors

[1] [Not previously reported.]

as derelict, and libeled by them, and the court awarded one-half the proceeds of the vessel and her cargo as salvage. At the time of her abandonment the vessel was carrying a cargo of iron, under a charter to deliver it at City Point in Virginia. The owners of the cargo abandoned the cargo to the underwriters, and appeared in the salvage suit only as respecting them. The vessel arrived in New York April 10th, the decree in the case was rendered June 13th, the vessel was sold June 29th to the original owners, and the cargo was sold July 6th. On July 2d the owners of the vessel gave notice to the owners of the cargo that they held themselves in readiness to forward the cargo to its destination as soon as the blockade of Virginia, established April 30th, was removed, and claimed their right to hold the cargo for that purpose, and suggested that one-half of the cargo should be delivered up to satisfy the salvage decree against it, and that, if the owners of the cargo desired to have the cargo remain here, some settlement be made as to the freight; otherwise, the vessel would claim her lien on the cargo and its proceeds for freight. No such agreement was made, and the cargo was sold, and the proceeds remaining in court, after satisfying the salvage decree, amounted to about $6,200. The owners of the cargo now applied for the payment to them of all the proceeds so remaining, while the owners of the vessel claimed that the freight should be paid to them out of such proceeds.

Mr. Nash, for the vessel.

Mr. Lord, for the cargo.

THE COURT (SHIPMAN, District Judge), after hearing counsel for the respective claimants, made an order that the proceeds should be paid in full to the owners of the cargo, thus disallowing the claim for freight. Costs to be divided proportionally between vessel and cargo.

Case No. 13,076.

SMITH v. MANUFACTURERS' NAT. BANK.

[See Case No. 9,051.]

SMITH (MARKET BANK OF TROY v.). See Case No. 9,090.

Case No. 13,077.

SMITH et al. v. MARSHALL et al.

[2 Ban. & A. 371;[1] 10 O. G. 375.]

Circuit Court, W. D. Pennsylvania. Aug. 26, 1876.

PATENTS — COMBINATION — INFRINGEMENT — ONE ELEMENT DISCARDED—FLASKS FOR CASTING IRON PIPE.

1. The defendants, having discarded one of the essential elements of the patented combination, *held*, not to be infringers.

2. The invention described in the patent consisted of a combination of the two halves of a flask for casting iron pipe; of flanges on each side of the halves; of stop-hinges applied to these flanges on one side; of clamps to be applied to the flanges on the opposite side; and of staples attached to each half about the middle of it. None of the elements were new. The defendants used flasks divided horizontally into two equal parts, each with flanged edges and with staples or handles on each part, and clamps applied to the flanges on one side of the halves to hold them together, but instead of the hinges on the flask, the halves of the flask were fastened together by means of bolts and nuts, applied to the flanges on one side through holes therein provided for that purpose: *Held*, that the bolts and nuts were not the equivalents of the hinges described in the patent.

[This was a bill in equity by William Smith and others against James Marshall and others for the infringement of letters patent No. 142,661, granted to J. B. Aston, September 9, 1873; letters patent No. 53,883, granted to G. Ross, April 10, 1866; and letters patent No. 37,037, granted to Firth & Ingham, December 2, 1862.]

Ranken D. Jones, J. J. Coombs, and A. M. Brown, for complainants.

Bakewell & Kerr, for defendants.

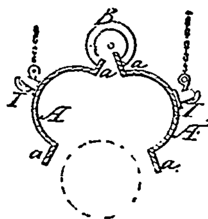
McKENNAN, Circuit Judge. The bill in this case is founded on three patents, viz.: No. 142,661, to James B. Aston, for improvement in devices for blackwashing molds; No. 53,883, to George Ross, for improved molding and casting apparatus; and No. 37,037, to John Firth and John Ingham, for improved flasks for cast-iron pipes.

No infringement of the first two of these patents has been proved, and it has, therefore, been agreed that the bill, so far as it relates to them, may be dismissed without prejudice.

To the complaint founded on the Firth and Ingham patent several defences are set up in the answer, but as the case is decisively with the respondents on the question of infringement, it is only necessary to consider this defence.

The first claim of the patent is the only one involved in the controversy, and is as follows: "The combination, substantially as set forth, of the two halves A and A' of the flask hinged together, the staples I, or their equivalents, the flanges a a, and clamps B B, or their equivalents, for the purpose specified."

[Drawing of patent No. 37,037, granted December 2, 1862, to Firth & Ingham; published from the records of the United States patent office.]



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

From the specification it appears that the invention is applicable to flasks for casting iron pipes. These flasks consist of iron cylinders divided horizontally into two equal parts. The semi-cylindrical parts are each provided with a flange, and are held together on one side by stop-hinges attached to the flanges, and on the other by clamps tightened by wedges. When the parts are brought into contact and thus secured they constitute a "rigid iron tube, incapable of being disarranged." After being placed vertically in the casting-pit, and then suitably manipulated, the molten metal is poured into the mold, and the flask is then ready to be removed and its contents discharged. This is effected by attaching the tackle of a revolving crane to the staples in each half of the flask, and swinging it round to a proper position above the foundry floor, where it will be suspended horizontally. The clamps are then removed, and the halves of the flask will then open sufficiently to allow the contents to fall out on the foundry floor, but will be prevented by the hinges from opening further than is necessary for this purpose. This is the specific and peculiar function of the hinges, and they have no distinctive utility, except as necessary devices in the mode of manipulating and emptying the flask described in the specification.

The invention, then, as described and claimed in the patent, consists of a combination of the two halves of a flask for casting iron pipe, of flanges on each edge of the halves, of stop-hinges applied to these flanges on one side, of clamps to be applied to the flanges on the opposite side, and of staples attached to each half about the middle of it. None of the elements of this combination are claimed as the invention of the patentees. In point of fact, they are all old, so that the novelty of their combination, and adaptation to the use for which they are intended, constitute the essence of the invention.

Whether the respondents have infringed the patent will depend, then, upon the fact of their use of a flask substantially embodying this combination in its entirety in the manufacture of iron pipe. That their flasks are divided horizontally into two equal parts, each with flanged edges, that there are staples or handles on each of these parts, and that clamps are applied to the flanges on one side of the halves to hold them together, is not denied. But the respondents do not use hinges on their flasks, instead of which, the halves of the flask are fastened together by means of bolts and nuts, applied to the flanges on one side through holes therein provided for that purpose. And these bolts and nuts are claimed to be merely the equivalents of the hinges described in the patent. They cannot be considered abstractly as mechanical equivalents, because they have apparently very different mechanical adaptabilities. Mechanical equivalents are not those merely which produce the same result. "A mechanical equivalent, * * * as generally understood, is where the one may be adopted instead of the other, by a person skilled in the art, from his knowledge of the art." Curt. Pat. § 332, note. Certainly no degree of skill would suggest the substitution of a bolt and nut for a hinge to perform the well-known office of the latter.

Nor are they equivalents in the sense even of producing the same results. The prescribed function of the hinges is to allow the two halves of the flask to separate when the clamps on the opposite side are removed, and to prevent them "from opening farther apart than is necessary to allow the pipe and sand to fall out and insure the correct closing of the two halves together." That they may perform this function at all it is indispensable that the flask should be removed from the casting-pit and suspended in a horizontal position in pursuance of the method indicated in the specification.

But the mode of manipulation employed by the respondents is essentially different from this. They do not discharge the contents of the flask from its side; they do not remove the flasks from the casting-pit, but retain them there in a vertical position. The halves of the flasks are held together tightly by clamps, and the bolts are used solely to prevent the halves of the flask from becoming detached from each other. When the pipe is cast, and it is desired to discharge it from the flask, the clamps are taken off the flanges, and the bolts being left loose, with half an inch or less play, the flasks are pried apart as far as the bolts will permit. The chain of a crane is then attached to the bowl of the pipe, and it is drawn out vertically, without removing the flask from its place in the pit, and the sand is permitted to fall out into the pit at the other end.

Now, in a mode of operation so different from that in which a hinge is an appropriate device, it is obvious that it would be neither a necessary or proper auxiliary. The distinctive capabilities of a hinge are available only in a process which contemplates an automatic discharging of the flask, from its side, when it is horizontally suspended for that purpose. But in a method wherein the flask is kept in an upright position, and the pipe inclosed in it is withdrawn vertically by the direct application of mechanical force, there is no required or useful place for the peculiar office of a hinge, and the use of a bolt cannot, therefore, be regarded as merely substitutionary.

It remains only to add that the respondents, having discarded one of the essential elements of the patented combination, are not infringers. Assuming that they use all the other elements of the invention, they do not encroach upon the right of the patentees, unless they appropriate the invention as a unit, or employ merely a colorable substitute for one or more of its constituents. This is the

result of the application of a very familiar principle of the law of patents, and rules the case in favor of the respondents.

Let a decree then be entered, dismissing the bill so far as it relates to patents Nos. 142,661 and 53,883 without prejudice, and as to patent No. 37,037 generally, with costs.

SMITH (MARTIN v.). See Case No. 9,164.

SMITH (MATCALM v.). See Case No. 9,272.

SMITH (MATTINGLY v.). See Case No. 9,-293.

SMITH (MAYO v.). See Case No. 9,355.

Case No. 13,078.

SMITH et al. v. MERCER et al.

[5 Pa. Law J. 529; 4 West. Law J. 49; 3 Pa. Law J. Rep. 444.]

Circuit Court, E. D. Pennsylvania. 1846.

PATENTS—REISSUE TO ADMINISTRATOR—EFFECT ON GRANTEES OF TERRITORIAL RIGHTS—FOREIGN ADMINISTRATORS—STATE LAWS—PLANING MACHINES.

[1. The administrator of a deceased patentee is the only one who, under the act of 1836, has a right to surrender the patent for the purpose of receiving an amended patent, and his right to do so is not affected by the fact that he had previously made grants of exclusive rights, under the patent, for certain parts of the United States.]

[2. The amendments in a reissued patent inure to the benefit of grantees of exclusive rights, under the original patent, for particular localities.]

[3. A patent signed by the secretary of state, and countersigned under the seal of the patent office, by the chief clerk of that office as "acting commissioner," during the absence of the commissioner, must be recognized as valid, irrespective of the question whether the chief clerk has authority to act as commissioner of patents during the mere absence of the commissioner, and while he yet retains his official character.]

[Cited in Woodworth v. Hall, Case No. 18,-017.]

[4. A grantee of a patent right may sue upon the patent in the Pennsylvania courts, notwithstanding that he derived his right from a foreign administrator, although such administrator has never taken out letters of administration in Pennsylvania, for the local laws have no application in respect to patent suits.]

[Cited in Goodyear v. Hullihen, Case No. 5,-573.]

[5. The Woodworth reissue patent of 1842, for an improvement in the method of planing, tongueing, grooving, and cutting into moldings, planks, boards, etc., is not invalid as covering a different invention from that of the original. Woodworth v. Stone, Case No. 18,021, followed.]

[6. The original Woodworth patent of 1828 *held* valid, and declared to be so well supported by judicial decisions as to give a right to a preliminary injunction against an infringer.]

7. The Woodworth patents analyzed and construed, and *held* infringed.]

In equity.

G. W. Biddle and W. W. Meredith, for complainants.

C. Gillon and H. J. Williams, for respondents.

KANE, District Judge. This case came before the court on bill and affidavits, upon a motion to restrain the defendants, by special injunction, from constructing, selling, and using Woodworth's planing, tongueing and grooving machine, or any of the parts or combinations thereof. It was fully examined and ably argued by the gentlemen who are of counsel in the several cases growing out of Mr. Woodworth's patent-right; and it was agreed, that the evidence adduced in the case of Sloat and Plympton, which was considered immediately after this, should be applied to both cases.

The facts, so far as they are undisputed, are these: On the 27th December, 1828, letters-patent were issued to William Woodworth, of Troy, in the state of New York, conferring on him exclusive property of his "improvement in the method of planing, tongueing, grooving, and cutting into mouldings, or either, plank, boards or other material." The patentee having died on the 9th of February, 1839, letters of administration on his estate were duly granted to his son, William W. Woodworth, by the surrogate of New York, at which place the father was residing at the time of his death. On the 29th July, 1842, the administrator applied for an extension of the patent for seven years; and the board of commissioners, to whom the application was referred, under the act of 1836 [5 Stat. 117], having certified in his favor, the patent was extended in the name of the administrator as such. On the 8th July following, the administrator surrendered his letters-patent, in accordance with the provisions of the 13th section of the act of 1836, for the purpose of obtaining a renewal upon an "amended specification, describing the invention in more full, clear, and exact terms"; and the amended patent was issued to him on the same day, under the hand of the secretary of state, countersigned and sealed with the seal of the patent-office, by "Henry H. Sylvester, Acting Commissioner of Patents." The complainants are acting under a grant of the exclusive right within and throughout the county of Philadelphia, made by the administrator, on the 29th November, 1842, and duly recorded. It is admitted that the defendants, Plympton and Hogeland, have been using, and they claim the right to use again, a machine known as Ira Gray's, which effects the same purposes as Woodworth's, and which is alleged by the complainants to be in principle and substantially the same.

Upon these facts, several preliminary questions have been discussed by the counsel for the parties, which I shall briefly consider.

1. It is said that the administrator had no power to surrender the patent of 1828, after assigning exclusive right under it, and that the new letters-patent, being founded on such

surrender, are void. It is not easy to see how this objection, if valid, could affect the case before the court. The complainants do not claim under the new letters-patent but under the old; and these cannot have been invalidated by an unlawful surrender of them. But it seems to me a mistake to regard the complainants, or any other persons whose rights have been brought to the notice of the court, as the assignees within the meaning of the patent laws. There are four classes of persons recognized by the 13th and 14th sections of the act of 1836 as parties "interested." These are the original patentees, their executors, or administrators, their assignees, and the grantees under them of the exclusive right for a specified part of the United States. These last, by the express words of the 14th section, have the same rights of suit as the patentee or his assignees; and it is by force of this, that the complainants, who are merely grantees of a limited right, are admitted as parties here. But they have no power over the letters-patent; these remain with the party to whom they were issued, or the general representative of his interest; and the power of surrendering them for amendment and renewal is vested exclusively by the 13th section in "the patentee, his executors and administrators, or the assignee of the original patent." The administrator, therefore, upon the facts disclosed, was the only person who could make the surrender and receive the amended patent; and there is nothing in the act of congress which restricts his right to do so, because of his having previously made special or limited grants or licences.

2. It is said that the amendments of the specification, as made upon the re-issue of the patent in 1843, do not enure to the benefit of the assignees or grantees under the patent, as it stood before; in other words, that they must stand or fall with the original specification. I cannot assent to this. The complainants are not grantees of the patent, or any part of it; they are grantees of certain rights, of which the letters-patent are the evidence and definition. If those rights are made more clear and definite, not more extensive, by any new or additional act whatever, from whomsoever proceeding, why shall the complainants be denied the advantage of using that clearer and less equivocal evidence? This is not the case of a surrender and re-issue with amended specification, where the grantee for a district prefers resting his claims on the specification as it stood when he purchased his right; as when the patentee makes a disclaimer of part of the invention, the prior grantee might in such case refuse to be affected by it. But here the objection comes from third persons. The complainants adopt the amended specification, by making it a part of their bill; and the only inquiry is, as to their authority for doing so. The question is settled as to third parties by provision of the act, that the amended specification shall have the same effect and operation in law, on the trial of actions, as though it had been originally filed in its corrected form.

3. The 5th section of the act of 1836 directs that all patents shall be issued under the seal of the patent office, and be signed by the secretary of state, and counter-signed by the commissioner. It is argued that this patent is invalid, because signed by an acting commissioner. Mr. Sylvester, the countersigning officer, was the chief clerk of the patent office at the time,—and as such, by the words of the 2d section of the act, in all cases, during the necessary absence of the commissioner, or when the principal office became vacant, had the charge and the custody of the seal, record, and other things belonging to the office, and was required to "perform the duties of commissioner during such vacancy." It is contended by the complainants, that the words "during such vacancy" apply as well to the case of the necessary absence of the commissioner as to that of the commissionership being vacant by death, resignation, or removal. This may be a grave question. I am not prepared to say, that the absence of the commissioner, while he retains his official character, constitutes a vacancy in the office; or that the inferior officer can succeed to or exercise the powers of the principal station, while that station has a lawful incumbent. But I do not regard the question as properly before me, at the present stage of the cause. I recognise the signature of the secretary of state, the public seal of the patent office, and the counter-signature of a person who has the custody of it during the absence of the principal commissioner, and the right to use and attest it in a certain contingency. I find him designating his official character for the time, by words that imply his legal substitution to the duty in question. There is no allegation of fraud or usurpation on his part. On the contrary, his act is sanctioned by the commissioner now acting in person.

It would be too much for me, in an interlocutory proceeding like this, to deny the validity of these letters-patent. I am inclined rather to adopt for the time the language of Judge Story, in the case of Woodworth v. Stone [Case No. 18,021] 1st Cir., May term, 1845, on a question not unlike the present, and take the countersignature, as he did the re-issue of the patent, "to be a lawful exercise of the officer's authority, unless it is apparent on the very face of the patent that he has exceeded his authority."

4. It is contended, that a grantee of a right under letters-patent cannot maintain a suit in a circuit which forms part of Pennsylvania, if he derives his title through

a foreign administrator. This idea refers itself to the local laws of Pennsylvania, which, as it seems to me, have no application to the case. By the act of 1836, "all actions, suits, controversies, and cases" whatever, arising under the patent laws, are without any exception originally cognisable in the courts of the United States; and it has been held in the case in which the question has arisen (Parsons v. Barnard, 7 Johns 144) that this jurisdiction is exclusive. The right, which is vested by letters-patent, has its origin in the patent-laws, and is transferable and transmissible according to their provisions. On the death of the patentee in this case, it passed under them to his administrator; and, as it was a personal right, the administrator constituted by the forum of the domicil, became liable to account for it. If the right has been since violated, he may sue for damages in his own name, as for a wrong to his possession. If he has sold it in whole or in part, he may recover the price in his own name, as for a breach of contract with himself. Grier v. Huston, 8 Serg. & R. 402; Wolfersberger v. Bucher, 10 Serg. & R. 13.

I cannot doubt, therefore, that William W. Woodworth, the administrator, to whom the letters-patent passed upon the death of the patentee, might himself have maintained an action in the circuit court for a breach of the patent right, without taking out new letters of administration in Pennsylvania. Still less can I doubt the power of this court to interpose by injunction in such a case, to prevent an intended violation of right. It would be almost equivalent to a judicial repeal of the letters-patent upon the death of the patentee, to affirm that the restraining actions of the courts shall have no operations beyond those of the twenty-eight or thirty states in which the patentee is represented by a local administrator. But were the law in this particular otherwise than I believe it to be, it is by no means true, that the incapacity of a foreign administrator to sue implies the same consequence to his alienee. On the contrary, it has been expressly declared by the highest of our courts, that where a plaintiff's title is derived through a foreign administration; it may be asserted in a judicial proceeding here, without constituting a domestic administrator. Trecothick v. Austin [Case No. 14,164]; Harper v. Butler, 2 Pet. [27 U. S.] 239.

5. A good deal of evidence was adduced to show that the amended specification describes a different improvement from that which is embraced in the original patent; and it was argued, that the amended patent was invalidated by the variance. This, however, on the authority of Judge Story, in a case affecting this very patent (Woodworth v. Stone, ut supra), I do not regard as open to question at this time. "It appears to me," he said, "that primâ facie, and at all events in this stage of the cause, it must be taken to be true that the new patent is for the same invention as the old patent; and that the only difference is not in the invention itself, but in the specification of it." For the purpose of the injunction, if for nothing else, I must take the invention to be the same in both patents, after the commissioner of patents has so decided by granting a new patent.

Though thus relieved from the necessity of passing upon the question, I feel bound to remark that the evidence has not satisfied me of the fact it was intended to establish. The very title of the patent, in the words of the inventor, "is improvement in the method of planing, tongueing, and grooving, or either," and the expression in the body of the specification, that after the planing is completed, the tongueing and grooving apparatus is to be used "if required," indicate to me that the patentee had in his mind from the first a machine of several parts or systems, which could be used separately or in combination, as his administrator has developed more fully in the amended specification. So, too, his omission to declare in the first specification, that he employs rollers for retaining the board in its place while planing, though fully set out in his amended specification, cannot, in my view, support the idea that the inventions described are not essentially the same. The rollers which he refers to in the first specification, and which are more unequivocally shown in the drawing annexed to it, as giving motion to the board, would almost necessarily perform the double office, besides which there are other devices well known to mechanics, which could be conveniently adapted to the object. I see nothing in the two specifications which could justify me in referring them to different machines.

These preliminary objections being disposed of, three questions present themselves: (1) Was William Woodworth the inventor of the machine, for which he obtained letters-patent in December, 1828? (2) Has he had, since the issuing of the letters-patent, such an exclusive and continued possession under them, or have his rights as patentee been so vindicated by judicial action, as to claim for him the summary intervention of equity at this time for his protection and repose? (3) Is the machine now made or used by the defendants the same in principle and substance with the machine so patented, or with any material and distinguishable part of it?

The two first of these questions have been so often decided in the circuit courts of the United States as to dispense with the consideration of them at this time: In the case of Van Hook v. Scudder [Case No. 16,853], in the circuit court for the Southern district of New York, in 1843; and in another case in the Northern district of the same state; in that of Wilson v. Curtius [Id. 17,800], in

the Fifth circuit, Louisiana district; in Washburn v. Gould [Id. 17,214], in the First circuit before Judge Story, at May term, 1844; and in twenty other cases decided summarily, immediately afterwards by the same judge; and again in Woodworth v. Stone [supra], at May term, 1845. In all of these, and in numerous other cases which have been alluded to in the arguments, the Woodworth patent has been recognised as valid, and the claimant under it as entitled to protection by injunction. Two cases only have been mentioned as implying a different opinion. The first is that of Woodworth v. Wilson [Id. 18,023], in the circuit court for Kentucky, where an injunction which had been granted was dissolved after more full hearing. But in this case the decree dissolving the injunction was reversed by the supreme court at its last session, and a perpetual injunction directed. The other case is that of Richards v. Swimley [Id. 11,773], on the equity side of this court (No. 1, of April sessions, 1841), in which Judge Hopkinson is supposed to have refused an injunction to claimants under the Woodworth patent, against a person who used a machine closely resembling that of these defendants. But an inspection of the record shows the supposition to be mistaken. The bill in that case was filed on the 4th November, 1840; and notice was given of a motion for an injunction, to be made on the 14th. On that day the complainants filed two affidavits, which defined the infraction to consist in the use of Woodworth's tongueing and grooving apparatus, making no mention of the machinery for planing. It does not appear that the motion was ever heard; and on the 16th. two days after the time noticed for making it, it was withdrawn by the complainants; since which no proceedings have been had in the cause. The right of the complainants in the machine expired in 1842. No judicial opinion on the part of Judge Hopkinson can be inferred from these facts; and I am left therefore to the concurrent judgments that have been pronounced in other circuits. I may add that my own very careful examination of the different inventions that are supposed to interfere with Woodworth's has not led me to a different conclusion from that which a proper judicial comity invites me to adopt.

6. The only remaining question is that which regards the substantial identity of the machine used by the defendants with that patented by Woodworth. The patent of Woodworth, as defined in his amended specication, is for a machine, capable of performing the operations of planing, tongueing, and grooving, at one and the same time, but which admits of their being performed separately. It consists essentially of two parts or systems,—one for planing or smoothing the surface; the other for fashioning the tongue and groove upon the edges. The apparatus for feeding the machine, and the rollers by which the elastic material is held firm while undergoing its action, are subsidiary to these. I shall consider the two systems of machinery in succession.

(1) The planing machine: A practically smooth surface may be given to plank or other substances, by the application of either of three forms of tool: The chisel, which, with a gauge to regulate its action, becomes the ordinary plane; the drawing-knife, which with a similar gauge, forms the spokes-shaver; and the adz. Each of these has its appropriate or characteristic motion, though by the ingenuity of the workman, the motion of either of them can be modified so as to approach that of another. The chisel, when in the form of a plane, has its blade fixed at an acute angle with the surface to be reduced, and works parallel to that surface. the edge cutting generally at right angles. The gauged drawing-knife differs from the plane in this: That, by means of its two handles, its edge may be made to cut obliquely or at right angles, at the pleasure of the workman. Its general motion is parallel to the surface; though, being more under the control of the hand, and having its blade sometimes slightly arched, it may be made to deviate upwards or downwards, with a varying angle, or in a curve.

The adz has an arched edge, and cuts only in curves; the level surface being attained proximately by a succession of such cuts. The plane and drawing-knife operate by shaving the surface, the adz by chipping. The chisel-plane was combined with apparatus for giving it motion and direction, in the machines of Bentham in 1791, Bramah in 1802, and Muir of Glasgow in 1837. In the first and last of these, the character and direction of the motion were those of the same tool when worked by hand. In Bramah's the planing-blades or irons were fixed upon a revolving disc; the character of the motion thus becoming circular, but still continuing to be parallel with the surface. The planing machine of Woodworth, though it uses knives or cutters resembling plane-irons in form, is essentially a series of adzes. These are attached to the outside of the cylinder, in lines either parallel or oblique to its axis; and, as the cylinder revolves, they cut with an adz-like or revolving motion; the knife which is parallel to the axis presenting its whole edge to the plank at the same moment, and in this respect cutting like the plane; the knife which is oblique or in the helix form presenting the parts of the edge in succession, and in this respect cutting like the drawing-knife; but both forms of knife cutting in vertical curves, like the adz, not in plane surfaces like the chisel-plane, and its combinations by Bentham, Bramah, and Muir. Regarding the Woodworth machine as substantially different from the three last mentioned, I find the substantial difference to consist in this: That they act in planes parallel to the surface to be removed, Woodworth's in vertical curves;

that theirs produce an absolutely level surface; his a surface apparently level, but in fact corrugated or grooved.

(2) The tongueing and grooving machine: The idea of tongueing and grooving by modifications of the circular saw is at least as old as 1793, when it was described by General Bentham, from whom Muir copied his machine many years after. The specifications of the two concur in describing a thick revolving saw or cutter to make the groove, and two wheel saws set at right angles with each other on each side the plank, making four in all. to cut the rebates of the tongue. The machine of Woodworth is an improvement on these, by substituting a single firm cutting wheel for the four circular tongueing saws, and combining this with the equally firm grooving cutter on the other edge of the plank, to reduce it to an exactly equal width throughout. I do not see an essential difference between the grooving cutter in this machine and the circular saw or cutter described by Bentham and Muir. But their tongueing apparatus is cleary not the same as Woodworth's; and I doubt very much whether the tongueing and grooving could be practically combined in their machines, with the same effect as they are in his; they certainly are not. These two systems of machinery, the planing, and the tongueing and grooving, seem to me to constitute the essential and only essential parts of the Woodworth improvement. The amended specification claims them, in the several combinations of which they are susceptible, as follows: (1) The employment of the rotating planes, in combination with the subsidiary rollers, or any analogous device; (2) the combination of those planes with the tongueing and grooving wheels; (3) the combination of the tongueing with the grooving apparatus; (4) the combination of either the tongueing or grooving wheels with the rollers, which by their pressure hold the plank steadily in its place.

Having thus analyzed the patent right under which the complainants claim, it remains to determine whether the machine used by the defendants is in part or in whole substantially the same; and (1) of the planing machine, it is apparent that so soon as a planing machine having a general resemblance to the revolving disc of Bramah ceases to operate in an absolutely plane surface, it loses one of the characteristics of his machine. On the other hand, it is clear that a machine like Woodworth's may not exactly conform in its structure to the rigid definition of a cylinder. The smallest change of diameter between the two ends of the revolver, on which the planing knives are placed, would convert the cylinder into the frustrum of a cone; and a corresponding inclination of the axis of motion, or a corresponding adjustment of the plank to be acted on, would make the machine operate as well, or nearly as well, as if the exact character of the cylinder had been retained. Yet, just in proportion as the sides of the Woodworth revolver approximate to a cone, the machine approaches the planing disc of Bramah. It ceases to cut as the adz merely, but takes in some degree the characteristic action of the chisel-plane or the drawing-knife.

So, too, when you give a disked form to the disc of Bramah, thus converting the disc into a cone, you lose in part the characteristic action of the chisel-plane and drawing-knife, and introduce in the same degree the appropriate motion of the adz. This deviation from the strict form of the Woodworth machine towards that of the Bramah, or from the Bramah towards the Woodworth, may go on increasing till the appropriate action of the original machine effectively disappears; the cylinder, by a series of progressive changes, having lost itself in the disc, or the disc in the cylinder. It is impossible to define, for the practical objects of a judicial decree, that angle or degree of deviation at which one of these geometric forms shall be said to pass into the other. Between the two machines, then, the Bramah, unprotected by a patent in this country, which cuts parallel to the surface with a planing motion. and the Woodworth, which cuts with the dubbing action of the adz, where is the line of separation? Obviously, it is at the point of the first deviation from the free machine to that of which the use is prohibited.

Turning now to the machine used by the defendants, we find it to be a revolving cone, its axis or spindle so arranged that the tangent plane of its curve shall coincide with the surface to be made smooth. It partakes of the disc character, and cuts as the drawing-knife and chisel-plane also; but just so far as it varies from the simple disc of Bramah, it embraces the principle of Woodworth's machine, by involving the dubbing action of the adz. It cuts as the drawing-knife and the plane, while approaching the point at which the knives act upon the finished surface; and its cutters continue to revolve with a similar motion after passing that point; but at the effective moment it is not the plane or the drawing-knife, but the adz cut, that finishes the work.

Much stress has been laid upon the fact that the knives in the defendants' machine are not in the lines of the radius, but have a certain obliquity, which brings one part of the edge in contact with the board before the rest, and gives a sloping or drawing action, not unlike that of the pocket-knife while cutting a stick. But I see nothing in this action or arrangement to distinguish it in principle or substance from that of the Woodworth rotary cutter, when placed in the oblique line of the helix. Whether it be be the knife, that moves in part lengthwise during its revolutions, presenting the points of its edge to the board in succession, or the board, which, moving onwards, presents its face to the several points in succession of the knife edge, or whether the action results

from the combined motion of the two, the machine and its mode of operation are substantially the same. I am, therefore, of opinion, that the planing machine of the defendants is an infringement of the complainants' patent right.

(3) As to the tongueing and grooving machine: This part of the machine in use by the defendants does not vary sensibly in form or character from the tongueing and grooving apparatus claimed by Woodworth. Until his patent shall be invalidated, he has a right to claim of this court the protection of its restraining process in regard to this also.

It is my duty, therefore, to grant the full injunction as prayed for. In doing so, I am not insensible to that which was so ably pressed in argument, that, if I am in error, the respondents may be seriously prejudiced. But the court can seldom encounter a case that does not involve a similar responsibility for consequences. To withhold judicial action is not to escape from this. The right of a party to the most speedy and effectual protection against a meditated wrong, is as complete as his right to redress for wrongs already inflicted; and the accident of position confers no right on one party, whether he be plaintiff or defendant, at the expense of the other. The special injunction of equity, like the arrest on mesne process of the law, may be abused to the injury of an opponent; but it is no less on that account the duty of the judge to further them both, when, in the exercise of his best discretion, he believes that they are called for by the merits and the exigency.

This is the case of an ancient and highly important patent-right. It has been contested at law and in equity with an eagerness and pertinacity proportioned to its value. Yet, during the lifetime of the inventor,—eleven years,—it was "never successfully impeached." Story, J., in Washburn v. Gould [Case No. 17,214]. Since his death, numerous questions have been raised as to the title of his administrator under the renewal of the patent, which were only settled by the supreme court within the present year. It is under the decision of that tribunal, in the case of Wilson v. Rosseau [4 How. (45 U. S.) 646], that the claimants assert their right to come before this court as parties in interest. They have lost no time. The decision at Washington was made in March, and they filed their bill in April. The motion for an injunction, argued before my predecessor in office, and left undecided by his death, was brought to my notice on the day I first took my seat on the bench. There is here no acquiescence, no laches; but, on the contrary, all promptness and vigilance.

I accordingly direct a special injunction to issue according to the prayer of the bill, and to remain until the hearing of the cause, or the further order of this court.

Case No. 13,079.

SMITH v. MIDDLETON.

[2 Cranch, C. C. 233.] [1]

Circuit Court, District of Columbia. April Term, 1821.

JUDGMENT—SUPERSEDEAS—SURETIES.

A supersedeas judgment is absolutely void, unless acknowledged by the original defendant and two sureties.

[Cited in Chesapeake & O. Canal Co. v. Barcroft, Case No. 2,644.]

This was a motion to quash a ca. sa. issued against Middleton alone, upon a supersedeas judgment against Alexander McCormick, and the defendant Middleton. The judgment was confessed by McCormick with only one surety, whereas the act of Maryland of 1791 (chapter 67) requires that the judgment should be confessed by the principal and two other persons.

Mr. Key, for defendant, contended that the supersedeas judgment was a mere nullity. It was a special jurisdiction given to a magistrate out of court, and must be strictly conformable to the power given by the statute, or it is absolutely void.

Mr. Taney, contra. The statute requiring two sureties was for the benefit of the plaintiff, and he alone has a right to complain, if only one be taken. The principal debtor has had the full benefit of the supersedeas, and the plaintiff had waived the error.

THE COURT (nem. con.) stopped Mr. Key in reply, and said that the supersedeas judgment was absolutely void.

Ca. sa. quashed.

Case No. 13,079a.

SMITH v. MILES.

[Hempst. 34.] [2]

Superior Court, Territory of Arkansas. Oct., 1825.

CONSTABLES—LIABILITY FOR TRESPASS—REGULARITY OF WRIT—MALICE—PROPER ACTION.

1. If the subject-matter is within the jurisdiction of the magistrate, and the execution regular on its face, the officer executing the same cannot be *held* liable as a trespasser.

2. No person acting under a regular writ or warrant can be liable in trespass, however malicious his conduct; but case for the malicious motive, and want of probable cause for the proceeding, is the only sustainable form of action.

3. In such a case, a motion is not the proper remedy to reach the officer executing the writ.

[This was an action by Benjamin L. Miles against Henry L. Smith to recover moneys illegally collected.]

OPINION OF THE COURT. This was a motion made in the Chicot circuit court by Miles against Smith, as constable of Oden

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

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

township, to compel him to refund money collected from Miles. Andrew Latting obtained judgment against Miles before Thomas James, a justice of the peace of Oden township, which was taken to the Chicot circuit court by certiorari; and pending the writ of certiorari, the justice issued execution, delivered it to Smith to execute, which he did do, so far as to make the costs; and this is the money prayed to be refunded, and judgment was rendered for the purpose. It is not shown that Smith, the officer, had any knowledge of the existence of the certiorari; and under this state of case, Smith's counsel contend that he is not liable at all, but, if so, not by motion; and this we hold is a correct position. If the subject-matter is within the jurisdiction of the magistrate, and the execution is regular on its face, the constable cannot be liable as a trespasser. 1 Chit. Pl. 210; Wise v. Withers, 3 Cranch [7 U. S.] 331; 8 Johns. 45. This case falls within that rule, as far as we can judge from the record.

If Smith had knowledge of the certiorari, and acted maliciously, he might be liable to an action on the case for such malicious conduct. In speaking of the action of trespass, it is said, that "no person who acts upon a regular writ or warrant can be liable in this action, however malicious his conduct; but case for the malicious motive, and want of probable cause for the proceeding, is the only sustainable form of action." 1 Chit. Pl. 214; 1 Strange, 509; 2 Term R. 653; 6 Term R. 245; Willes, 32. There is no pretence that Smith acted with a malicious intention, and therefore could not be liable in case (1 Chit. Pl. 152); and we have seen is not liable in trespass. Can it, then, be seriously contended, that if not liable in any form of action, he could be held responsible on motion? Supposing Smith, however, to have acted maliciously, it is a question of fact to be tried by a jury, and not by motion, the latter remedy being founded on the record alone, except in a few cases under the statute, and provided for by statute, to prevent the delay and costs of a regular suit, and which does not usually admit of a trial of disputed facts. Judgment reversed.

Case No. 13,080.

SMITH v. MILLER.

[5 Mason, 191.][1]

Circuit Court, D. Rhode Island. Nov., 1828.

REAL PROPERTY—WATER ON LAND—FISH—LEASE.

A lease for 500 years of certain land covered with a pond of water conveys, as incident, the water and the fish therein.

[Cited in Turner v. Hebron, 61 Conn. 187, 22 Atl. 952; Sterling v. Jackson, 69 Mich. 534, 37 N. W. 868.]

Trespass [by Stephen H. Smith against William Miller] for entering the plaintiff's close, partly covered with water, and taking fish from his pond. Plea, the general issue. At the trial, the principal question was, whether the plaintiff had any property in the fish. The title of the plaintiff was under a lease for 500 years of a certain factory lot, and dam lot, in &c., "together with all the land which may be flowed by raising said dam seven feet high from the bed or bottom of the river."

Mr. Searle, for plaintiff.

Mr. Bridgham, for defendant.

THE COURT said: The lease having conveyed all the land under the pond, it passed the pond of water and the fish therein to the plaintiff, as incidents to the principal grant.

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

SMITH (MILLER v.). See Cases Nos. 9,589 and 9,590.

SMITH (MILLS v.). See Case No. 9,615.

Case No. 13,081.

SMITH v. MILN.

[Abb. Adm. 373.][1]

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

GARNISHMENT—DEFAULT—SUMMONS—PRACTICE IN ADMIRALTY.

1. Where a warrant of arrest, although containing a foreign attachment clause, gives no direction to bring the garnishee before the court, nor any citation to him to answer the libel, a default entered against him for non-appearance on the return of the process is irregular.

2. The primary purpose of the attachment is to effect the appearance of the defendant in the action, and not that of the garnishee.

3. The practice of courts of admiralty in respect to the process of foreign attachments defined.

[Cited in Atkins v. Fibre Disintegrating Co., 18 Wall. (85 U. S.) 306; The Alpena, 7 Fed. 363.]

4. In order to authorize proceedings in a suit prosecuted in a court of admiralty by foreign attachment, to be carried on against the garnishee personally, it is necessary that the warrant or process served upon him should contain a summons or notice, warning him of the claim in suit, and citing him to appear and answer.

This was a motion, made on behalf of a party against whom, as garnishee, proceedings in a suit were being prosecuted, to set aside the proceedings in relation to him, for irregularity.

Burr & Benedict, for the motion.

Alanson Nash, opposed.

BETTS, District Judge. The following facts are presented upon affidavits and the files of court, as the foundation of the motion and of the opposition to it:

A libel was filed in this court on the 2d

[1] [Reported by Abbott Brothers.]

day of September last, by the present libellant against one Montgomery, master of the brig Margaret, for the recovery of wages. The libel charged that George Miln, in whose behalf the present motion is made, had in his hands freight moneys out of which the libellant was entitled to receive his wages for the voyage named in the libel, and that he also held other moneys belonging to the master and owner of the brig, by whom the wages demanded in the suit were owed to the libellant. It prayed process of arrest against the master of the vessel, and that he might be cited to appear and answer; and that, if he could not be found, that the property before mentioned might be attached to satisfy the libel, and that George Miln himself might be compelled to answer the interrogatories annexed thereto.

A warrant was issued against Montgomery on the second of September, and the return upon it by the marshal being "Not found," an alias was sued out upon the fifth, for the arrest of Montgomery, accompanied with a mandate that, if he could not be found, the marshal should attach his credits and effects in the hands of George Miln, as garnishee.

The return of the marshal to this writ, filed September 11th, was again that respondent was "Not found," and that a copy of the process had been served on George Miln as garnishee, personally.

No one appearing upon the return of the process, the proctor for the libellant caused a default to be entered against the garnishee, with an order of reference to a commissioner, to ascertain and report the amount of wages due to the libellant.

The report of the commissioner was filed on the 19th of September, finding the sum of $38.16 wages to be due to the libellant; and on the same day an order was entered confirming that report, with the addition that, "on motion of the libellant, it is ordered that the libellant recover in this action, against the credits and effects of the respondent in the hands of George Miln, the garnishee, the amount reported due, together with his costs to be taxed; and that the libellant have his execution against the said credits and effects in the hands of the said George Miln, to satisfy this decree."

The decree having been perfected, the libellant took out process of execution, returnable on the third Tuesday of October. It recited the libel, and that such proceedings were had thereupon, that by the judgment and decree of the court in the cause, entered on the 19th of September, the said George Miln was required to pay to the libellant the sum of $38.16, besides costs to be taxed, and that the costs had been taxed at $34.49, as by the files of the court fully appeared; and it commanded that out of the goods and chattels of the said George Miln, in his district, the marshal cause to be made $72.59; and it further commanded, that if for want of goods and chattels, lands and tenements of said garnishee, he (the marshal) could not make that sum, he should then arrest the body of the said garnishee, and hold him safely to answer said decree.

The marshal having proceeded to levy the execution on the property of the garnishee, an order was granted, at his instance, by the court, staying all proceedings in the cause; and on that order, and on the preceding facts, a motion is now made by the advocate of the garnishee that all the proceedings in relation to him be set aside for irregularity, and with costs.

All the steps in the cause were taken sub silentio on the part of the libellant, without the consideration or sanction of the court; and the orders entered and the processes sued out were accordingly at his peril; no other acts being done in court, than to call the party and take the common orders of course upon his non-appearance, and to move a confirmation of the commissioner's report. The consequences to the libellant must be the same if the steps taken in court were irregular and unauthorized, although his proctor, on an ex parte motion, obtained the assent of the court to a formal default, because the terms of the order thereon are not prescribed or exhibited to the court. They are almost invariably drawn up and entered on the minutes, as of course, by the clerk. If they are found improvident or contrary to the course of practice, the aggrieved party may come in and have them summarily vacated for irregularity. This principle pervades the practice of courts of every denomination.

The exhibit of the papers and minutes of court demonstrates the entire irregularity of the libellant in obtaining execution against the property and person of the garnishee. There is no legal foundation laid for process of that character in any antecedent proceeding in the cause. No judgment was obtained or asked against the respondent, and accordingly there was no decree determining the right of the libellant to the wages or money demanded by the libel.

The libel only prays the attachment of Montgomery's effects in the garnishee's hands. It does not make the garnishee a party to the suit, or demand his arrest or citation; the prayer merely asking that he may answer interrogatories annexed to the libel, in no way connects him with the subject-matter of the action.

The warrant of arrest, with a foreign attachment clause, gave no direction to bring the garnishee into court by monition or capias; and accordingly furnished no authority for entering an order against him for contumacy or default, in not appearing upon its return. He was not brought within the jurisdiction of the court over the cause in such manner as entitled the libellant to a decree touching his property or person. If he held funds belonging to the respondent, they could not be rightfully exacted from

him, except upon the footing and by virtue of an existing debt against the respondent, duly ascertained and established.

The order or decree entered on confirming the commissioner's report was evidently awarded on the assumption that the respondent was duly in court, and adjudged indebted to the libellant, and it brought back the proceedings to their legitimate restriction, in directing that execution should go against his credits and effects in the hands of the garnishee.

The writ of execution taken thereupon was an entire departure from the decree, in subjecting the individual property and the person, also, of the garnishee, to the satisfaction of the debt.

The irregularity of this step is most gross and palpable. The antecedent proceedings on the part of the libellant in court furnish him with no color of authority for issuing final process of this stringency, or indeed for any final process against the garnishee. He might, with equal right, have put the fi. fa. and ca. sa. into the hands of the marshal in the first instance, and without filing a libel or obtaining an interlocutory order or decree in the cause; because all those proceedings had relation to Montgomery, the respondent, alone, and none of them in terms or spirit embraced the garnishee.

These considerations render it imperative upon the court to set aside the execution in toto, with costs to the garnishee.

Upon the argument, however, it was sought by the libellant to maintain the correctness and necessity of the practice adopted, as the only method by which it was practicable to give parties the benefit of a foreign attachment. It was urged that the notification of the existence of such warrant to the holder of the debtor's property was sufficient to compel him to come into court and surrender the property, or be held to admit, impliedly, that it was in his hands, and that it was adequate to satisfy the libellant's demand; and thus to novate him as debtor for the amount.

Although the remedy of foreign attachment is frequently resorted to in admiralty courts, there does not seem to be a very definite or uniform understanding with the profession in respect to the relation between the garnishee and the prosecuting party, or the method by which the assets of the debtor in the hands of the garnishee are to be brought under the authority of the court. It may, therefore, be useful to inquire into the correct and feasible course in respect to these proceedings.

The jurisprudence of civilized communities seems studious to furnish means for rendering the effects of debtors liable to the claims of their creditors; and probably no other tribunals than courts of common law have found themselves incapacitated to effectuate that end by their inherent powers, without having first brought the debtor personally under their authority. What, then, in the English common law is an exceptional rule, limited in its operation to two small districts, is, in other systems, a common and pervading principle.

The proceeding by way of foreign attachment is one of the most familiar and effective instrumentalities supplied the judicial authority to that end. In England it is recognized in the local customs of London and Exeter only, but is established on a broader foundation in the polity and practice of the judicatories of the continent, Scotland, and the United States. In these countries its force and utility is grounded in the high principle that personal obligations may be enforced by justice by preliminary and direct action on property, both for the purpose of compelling an appearance of the debtor, and his submission to the mandate of the courts, and also by the sequestration or transfer of such property to the benefit of those to whom it rightfully belongs, without other action against or coercion over the person of the debtor.

The scope and efficiency of this important remedy, and the method of its application, is instructively pointed out in the decision of the supreme court of the United States, in Manro v. Almeida, 10 Wheat. [23 U. S.] 473. It is a well-established branch of admiralty processes, not derived from the customs of London, but embodied in the admiralty jurisdiction, in common with other essential elements of its powers. That case also supplies rules sufficiently explicit and full to direct the use and application of this particular power.

The proper object for the libellant to seek in this case, by means of a foreign attachment, was to compel the appearance of Montgomery, the respondent, to the suit instituted against him. He could not be reached by capias or summons, and at common law the libellant would be remediless against him except by the complicated and dilatory proceeding to outlawry. 3 Bl. Comm. 284.

The writ of foreign attachment would have accomplished this purpose, expeditiously and with facility, if properly framed and conducted. In actions in personam in this court, a foreign attachment is never employed as an original or independent process. It is auxiliary to a capias or monition to the debtor, and subserves only the end which an arrest or appearance of the defendant by stipulation answered. Betts, Adm. Prac. 30. It may be directed against goods and chattels, or rights and credits of the debtor, and be carried into operation by actual arrest of goods, when they can be found, or by notice of the object of the proceeding to those who have either or both in their possession. Conkling, Adm. Prac. 478.

When the service of the attachment is by notice, and not by actual levy upon the goods, it must necessarily be shown to the court, before any order can be taken against the garnishee, that he has been warned of the remedy which the process demands, and for what cause, and of the time and place he must appear before the court. His duty on appearance is to discharge himself of the effect of the citation, by showing that he holds nothing be-

longing to the debtor, or by specifying exactly what it is, and submitting himself, in respect thereto, to the authority of the court; or he may contest the justness or amount of the libellant's demand.

A garnishee is a trustee, or one warned by legal process in respect to the interest of third parties in property held by him (Webst. Dict.; Bouv. Law Dict.; Enc. Am. tit. "Attachment, Foreign"), and garnishment is the process of warning or citation. Jac. Law Dict. Under the custom of London, the garnishee must be warned to refrain from paying money to the debtor held for him, and to appear and answer to the plaintiff's suit therefor. Bohun, Cust. & Priv. Lond. 256; Com. Dig. tit. "Attachment." So it seems he may plead to the general action, and deny the indebtedness of the defendant. Com. Dig. tit. "Attachment," E. The same rule obtains in respect to trustee process. 6 Dane, Abr. c. 192, art. 1. And in the American courts the proceeding seems to be termed indifferently, "garnishment," "trustee process," or "foreign attachment." Serg. Attachm.; Hildreth, Elem. of Law, 269–273; Bouv. Law Dict.; Enc. Am. tit. "Attachment, Foreign."

Under the English law, the garnishee may appear by attorney, and plead that he has no property of the defendant in his hands; or he may confess it, or he may wage his law, or plead other special matter. Bohun, Cust. & Priv. Lond. 256. The general issue is whether the garnishee had, at the time of the attachment, or at any time after, any money or goods of the defendant in his hands. Id. 255. The plaintiff is thus put to prove that the garnishee had moneys in his hands; and if this proof is not made, a verdict will be rendered for the garnishee. Id. 258.

When the proceeding is for the purpose of bringing the defendant into court, and he makes default on proclamation, a scire facias issues against the garnishee. Com. Dig. tit. "Foreign Attachment," A. On the appearance of the defendant, all proceedings against the garnishee cease. Cro. Eliz. 157, 593; Savage's Case, 1 Salk. 291. And he must have notice of the foreign attachment to bind him in the allotment of his effects to the debt by the garnishee. Fisher v. Lane, 3 Wils. 297.

In those courts of the different states of the Union in which the remedy of foreign attachment is employed, its effect is principally regulated by statute; but in all cases the cardinal principle in the proceeding is that the trustee or garnishee shall, by summons or scire facias, be brought into court with notice of the claim upon him, and that he should have a full opportunity to oppose the demand. 6 Dane, Abr. p. 492, c. 192, arts. 1–8; and see the practice in various states, as explained in Graighle v. Notnagel [Case No. 5,679]; Mankin v. Chandler [Id. 9,030]; Fisher v. Consequa [Id. 4,816]; Franklin v. Ward [Id. 5,055]; Flower v. Parker [Id. 4,891]; Picquet v. Swan [Id. 11,133]; Barry v. Foyles, 1 Pet. [26 U. S.] 315; Brashear v. West, 7 Pet. [32 U. S.] 621; 2 U. S. Dig. Supp. 884.

Although the process of foreign attachment, as employed in courts of admiralty, is not borrowed from that given by the custom of London, yet both remedies being directed to a common object, and founded upon unity of principle, light is reflected by the one upon the other; and we may accordingly recur with advantage to the practice of the law courts for explications of the methods by which the common design may be best effectuated.

In this case, however, the more specific inquiry is, how the law and practice on this head stand in the courts of admiralty. The books are not full or explicit on the subject. They furnish little more than a clear recognition of the remedy, and give but scanty details of the method used in administering it.

Clarke's Praxis, the earliest historical record of the practice in admiralty, was compiled, as appears by the preface to the edition in Latin, during the reign of Elizabeth, and became a standard authority long before it was published; and the scattered manuscripts were ultimately revised and arranged for publication under the sanction of men of great eminence and experience in that branch of the law. It has always been accepted as the most authoritative exposition extent of the early course and usages adopted in admiralty proceedings. 1 Browne, Civ. & Adm. Law, 396; Sir Henry Blount's Case, 1 Atk. 295; Marv. Leg. Bib. tit. "Clerke," F. He speaks of attachments of property by warrant in admiralty, as an ordinary usage of the court, in case a debtor is concealed or absconded, and in case his goods are held by others, in order to compel his appearance in court, and also to appropriate his effects to the satisfaction of his debts. The primary purpose of the warrant was to enforce the personal appearance of the party, that his condemnation might afford ground for sequestering his property; and to that end, both the debtor and the person holding his goods are to be cited to appear in court, and answer to the matter of claim in the libel. Clarke, Prac. tits. 28, 32. Hall's additions to those articles show the root in the then civil law from which the proceedings by foreign attachment sprung. Hall, Adm. Prac. 60, 70. It is plainly the origin, also, of creditor's bills in chancery.

The United States district court in South Carolina (Bouysson v. Miller [Case No. 1,709]), under that authority, issued a warrant to arrest property of a debtor to compel his appearance to a libel; and although the form of the warrant is not given, the case implies that the process conformed to the directions given by Clarke.

The rules of practice of this court, first compiled in 1828, and revised in 1838, pro-

vide, that if a party against whom a warrant of arrest issues cannot be found, and return to that effect be made upon the writ, the plaintiff may, upon the mandate of the judge, have a warrant to attach the property of the defendant, and may also have a clause of foreign attachment inserted therein, according to the course of the admiralty. Dist. Ct. Rule 25. The same practice prevails in the First circuit. Dunl. Adm. Prac. 139.

The foreign attachment sued out here must be "according to the course of the admiralty;" and that has been shown to require that a notice or citation to the garnishee shall compose a part of the process. The argument against this motion is, that by rule 29 of the district court, the garnishee was obliged, on the mere attachment of the goods of a debtor in his hands, to file his affidavit, giving a full statement of the property in his hands, or to pay it into court; and it is accordingly contended that such attachment was all the notice or warning necessary to be given him.

The rule referred to will not justify that interpretation. It does not prescribe the contents or regulate the manner of serving a foreign attachment. These proceedings are supposed by the rule to have been already taken conformably to the course of the admiralty; and the rule then supplies a summary and cheap method by which the holder of the property impounded may become discharged from the case, and whereby, also, the creditor may be secured the control of the property attached.

Rules 2 and 37 of the supreme court (adopted since the decision of Manro v. Almeida, 10 Wheat. [23 U. S.] 473) specify concisely the course which the creditor and the garnishee are respectively to pursue under a foreign attachment. The process is described by which a defendant may be arrested in suits in personam. The mesne process may be merely a warrant of arrest of the person, or a simple monition, in the nature of a summons, to appear and answer to the suit, as may be prayed for in the libel, or the warrant for the arrest of the person may have a clause therein directing the officer, if the defendant cannot be found, to attach his goods and chattels, or if such property cannot be found, then to attach his credits and effects in the hands of the garnishees named therein.

It is insisted that the foreign attachment clause authorized by this rule is not required to contain also a summons or notice to the garnishee to appear, and that accordingly, no such citation need be made. The argument would, however, equally prove that it is not necessary to cite or summon the defendant himself; for as he is absent and cannot be arrested, if no citation is to be served upon the holder of his property, the libellant might seize the property and take a final decree and dispose of it, without notification of his proceedings to any person. This, manifestly, would be a violation of the first principles of personal rights and rights of property. Rule 37 of the supreme court, instead of favoring that interpretation, on the contrary expressly provides that the attachment clause shall summon the garnishee to appear and answer before the court, as in ordinary cases in invitum. He is also required to answer upon oath as to the debts or effects of the debtor in his hands, and to such interrogatories as may be propounded by the libellant; and if he refuse or neglect to do so, the court may award compulsory process in personam against him. Sup. Ct. Rule 37.

A party will not, upon general principles, be subjected to an attachment except for disobeying or contemning some process or mandate of court; and the principle imports that he has been brought within the jurisdiction of the court by service of proper process upon him.

In any view to be taken of the subject, I am of opinion that the proceedings on the part of the libellant in this cause against the garnishee, are void for irregularity, and they must accordingly be set aside with costs. Order accordingly.

Case No. 13,082.

SMITH v. MILWAUKEE & S. R. CO.

[9 Am. Law Reg. 655; 3 West. Law Month. 355.]

District Court, D. Wisconsin. June Term, 1861.

RAILROAD COMPANIES—MUNICIPAL AID—LIENS—MORTGAGE.

1. An act of a state legislature, authorizing a city to issue its bonds in aid of railroad companies incorporated and organized, does not extend to companies afterwards incorporated.

2. Where a city issues its bonds in aid of a railroad company without authority of law, and receives therefor the bonds of the company, secured with other bonds by a mortgage upon its road, the city is not such a lien creditor for a valuable consideration as to entitle it to claim a share of the proceeds of the sale of the mortgaged premises made in satisfaction of the mortgage. But the city having received securities collateral to the company's bonds, a judgment creditor of the company cannot, by bill in equity, require the city to surrender these securities until its rights are determined by judicial proceeding, or it be released.

In equity.

MILLER, District Judge. This is a bill in equity. The complainant obtained a judgment in this court against the railroad company, defendant, and issued a fieri facias, which was returned unsatisfied. The bill charges that the city has in its possession, or under its control, notes and mortgages upon real estate to the amount of fifty thousand dollars, made and executed by divers persons to the company, which the company transferred to the city without consideration, and that should be applied to the debts of the company. The company made no defence.

The answer of the city and John H. Tesch, the treasurer, sets forth the acts of the legislature, under which, it is alleged, the city had lawful authority for issuing its bonds to the amount of one hundred thousand dollars to the company in aid of its work, and also the ordinances of the city council ordering the issue of the bonds; and, in consideration thereof, the company gave the city its own bonds, with the said notes and farm mortgages as collateral security. It is alleged that the company is insolvent; that the bonds of the city were issued, payable to the company or bearer, with negotiable coupons annexed; that the company negotiated these bonds for a valuable consideration to persons unknown; that the bonds are not yet payable, and there are coupons unpaid; that the road of the company has been sold in satisfaction of a mortgage; and that the operations of the company have ceased. These facts are not controverted.

The bonds of the city bear date the first day of January, eighteen hundred and fifty-seven, are payable to the Milwaukee and Superior Railroad Company, or bearer, and recite that they are "issued in pursuance of an ordinance of the common council of the city of Milwaukee, entitled 'An ordinance authorizing an issue of city bonds to the Milwaukee and Superior Railroad,' passed June 16, 1856, and approved by the legal voters of said city of Milwaukee, at an election for that purpose, on the 4th day of August, 1856; and of an act of the legislature of the state of Wisconsin, entitled 'An act authorizing the city of Milwaukee to loan its credit in aid of certain railroads,' approved April 2, A. D. 1853 [Laws 1853, p. 571]; and of the several acts amendatory thereto." The act described in the bonds authorizing the common council of the city of Milwaukee to loan the credit of the city by "issuing its bonds to aid in the construction of certain railroads leading from the said city, and particularly the Green Bay, Milwaukee and Chicago Railroad Company, the Milwaukee and Fond du Lac Railroad Company, and the La Crosse and Milwaukee Railroad Company—companies duly incorporated and organized: Provided, that there shall be loaned to either of said companies an amount not exceeding two hundred thousand dollars, nor, in the aggregate, an amount exceeding six hundred thousand dollars. And no bonds shall be delivered to any railroad company until at least ten miles of that portion of road mortgaged to the city by such company, to secure the payment of such bonds, shall have been constructed by such company; nor, thereafter, shall they be delivered faster than the work of construction of such portion of said road shall progress, nor shall there, at any time, be delivered to such company more than five thousand dollars in value of bonds for every mile of such portion of road constructed; but such bonds may issue, provided other equivalent securities shall be furnished in lieu thereof." An act in addition to an act, authorizing the city of Milwaukee to loan its credit in aid of certain railroads, approved July 12, 1853 [Laws 1853, p. 844], provided the first-named act shall include the Milwaukee and Watertown Railroad Company, and other railroad companies duly incorporated and organized for the purpose of constructing railroads leading from the city of Milwaukee into the interior of the state, which, in the opinion of the common council, are entitled to aid from the city. The amount of bonds allowed to be issued to each company is limited, in this act, to two hundred thousand dollars, and the aggregate amount is limited to one million; and the question of issuing the bonds is to be first submitted to a vote of the voters of the city.

The Milwaukee and Watertown Railroad Company was incorporated by an act approved March 11, 1851 [Laws 1851, p. 180], and was organized before the date of the last act. The Milwaukee and Superior Railroad Company was incorporated by an act approved March 4, 1856 [Laws 1856, p. 126]. This company was incorporated for the purpose of constructing a road north from Milwaukee to Green Bay; and, by section twenty-six of the charter, "all the powers, rights, privileges, and franchises heretofore granted and conferred upon the Green Bay, Milwaukee and Chicago Railroad Company by an act incorporating that company, approved March, 1851 [Laws 1851, p. 256], and the several acts in addition thereto or amendatory of the same, so far as the same relate to or authorize the location or construction of a railroad north of the depot of the Green Bay, Milwaukee and Chicago Railroad Company in the city of Milwaukee, are, with the consent of the last-mentioned company, taken from it and transferred to the company then incorporated."

The city claiming a portion of the proceeds of the sale made under the mortgage of the company to the Farmers' Loan and Trust Company of New York, I delivered the following opinion, disallowing the claim: "By reference to the ordinance of the common council of the city of Milwaukee, it appears that by an ordinance passed April 30, 1853, and adopted by the legal voters May 19, 1853, city bonds were authorized to be issued to the Green Bay, Milwaukee and Chicago Railroad Company, not exceeding in amount two hundred thousand dollars. By an ordinance passed the same day, a similar amount of bonds were authorized to be issued to the La Crosse and Milwaukee Railroad Company. And by another ordinance, passed on the same day, a similar amount to the Milwaukee and Fond du Lac Railroad Company. These several ordinances authorize bonds to be issued on the terms and conditions specified in an act authorizing the city of Milwaukee to loan its credit in aid of certain railroads, approved April 2, 1853, and on the terms and conditions therein provided. These appropriations to the three companies mentioned in

the act amount to six hundred thousand dollars, the extent of the sum authorized by the act; and they exhausted the power granted by the act to the common council. And from this, it may be inferred that the act was not so construed as to include any other companies than those expressed. The act of July 12, 1853, included the Milwaukee and Watertown Railroad Company, (which had been incorporated and organized previous to the act of April 2, 1853,) and any other railroad company duly incorporated and organized for the purpose of constructing railroads leading from the city of Milwaukee. This is the only act supplementary to the act of April, 1853, referred to in the city bonds. The only company mentioned in this act is the Milwaukee and Watertown Railroad Company. Whether there were any other companies of the description then incorporated and organized, I need not inquire. The Milwaukee and Superior Railroad Company was not then incorporated and organized; and it could not have been contemplated by the legislature, as a company was then incorporated for constructing a road to Green Bay, and which was specially mentioned in the act of April, 1853. Grants of power are to be construed literally; and legislative grants are not to be so construed as to include subjects not in existence, nor not created in the grant, nor specially provided for, if created in future. This act must necessarily relate to companies incorporated and organized at the date of its approval. There is not the least reference in the act to companies thereafter incorporated and organized, but the letter of the act grants the power expressly to issue bonds to companies then incorporated and organized. There is no room for construing the act so as to include companies to be thereafter incorporated and organized. It is well understood that a legislative grant of authority to the common council to issue the bonds was necessary to their validity. For this reason the acts are recited in the bonds under which the common council issued them. These acts are public, and it is the duty of every person dealing in those bonds to refer to them. They form the basis of the contract, and the purchaser of the bonds is charged with knowledge of them. The bonds were issued to the railroad company, and receipted for, in two parcels of fifty thousand dollars each, in the month of March, 1857. In this respect the common council did not comply with the expressed directions of the act of April, 1853, to issue the bonds in proportion as the building of the road progressed; but they accepted the bonds of the company included in the mortgage, in return for the city bonds. If there are any purchasers for a valuable consideration of the city bonds, they are justly to be deemed equally as reckless of their own interests as the common council were of those of the inhabitants of the city. By the acts under which these bonds purport to be issued, the inhabitants of the city are subjected to taxation for the payment of principal and interest. For this reason it is right that the legality of the bonds should be ascertained and settled; for the people will not consent to be taxed for the payment of an unauthorized and illegal debt, particularly when they have cause to feel that the city authorities have not been guardians of their interests."

In that case, I considered that the bonds of the city had been issued without lawful authority, and that the property of the people could not be lawfully taxed for their payment, upon failure of the company to indemnify or release the city. And it was thought that, by granting the application of the city, the matter might become more complicated and more embarrassing to the city and its inhabitants. I thought that the city had not an equal right with the bondholders to receive upon the mortgage, as a lien, a portion of the proceeds of sale. But this case is an adverse suit, instituted by a creditor of the company, to compel the city to surrender up to him the securities specially deposited with it for its indemnity. As it respects those securities in the possession of the city, this complainant stands on no better footing than the railroad company. This proceeding, which is an attachment in equity, does not give complainant any right to a decree against the city for the surrender of the securities, if the company has no right to demand their return.

The company became insolvent, after negotiating for a large sum of money the bonds of the city advanced for its benefit. The city stands as surety of the company; and by the receipt of the securities in the character of a trustee in equity so far as to entitle the bondholders to claim them. Although the city bonds are issued without an existing statute expressly authorizing it, yet they were issued in pursuance of an ordinance of the city, which may be legalized upon application of the city authorities, or be confirmed by acts of the inhabitants. They may consent to be taxed for the payment of the bonds; but it is not very probable that they will. We cannot tell what may happen before the bonds become payable. The city is liable to be sued, and put to expense in defending suits upon coupons, and upon the bonds after they become payable. The court cannot deprive the city of its indemnity against these expenses; nor can the court say to the city authorities that they shall take advantage of the defect of authority for issuing the bonds. The city is not here in this case, in such a position as to authorize the court in passing judgment against it, to that extent. The court can make no order in this case, affecting the rights of holders of the city bonds, or preventing them from setting up an equitable claim to the securities. The holders of these bonds having, for a valuable consideration paid the company for them, would, in equity, be entitled to follow the securities, if the city

should not be damnified. They would have a superior equity to that claimed by complainant. Equity would reimburse them out of those securities, for the money they actually paid the company for the city bonds with interest, although the bonds may have been issued without lawful authority. At all events, the city has a right to retain the securities until its liabilities and rights are judicially determined upon some proceeding on the part of the bondholders, and until then judgment creditors of the company cannot interfere.

The case of Parker v. Rochester, 4 Johns. Ch. 329, is similar in principle to this one. The endorser of negotiable notes received a judgment of indemnity from the maker; and, the notes being negotiated with the Utica Insurance Company, the endorsement was void, as the company was prohibited by a law of the state of New York from doing that kind of business. The complainant, as a judgment creditor of the maker of the notes, filed the bill to remove the lien of the judgment in favor of the indorser, upon the alleged ground of want of consideration, the plaintiff in the judgment not being legally liable to loss or injury in consequence of his endorsement. The chancellor did not consider that a third person, although a creditor, had any equitable right to interfere in the contract between a debtor and his surety; or to remove the surety's indemnity even when he was not legally bound, nor legally liable to loss. Also, in cases upon contracts void for usury, the surety is not legally subject to loss, but his indemnity cannot be taken from him until his liability is judicially determined. See, also, 1 Vern. 190; 2 Johns. Ch. 561; Ross v. McKinny, 2 Rawle, 229.

Being satisfied that complainant is not entitled to the decree prayed for in his bill, it must be dismissed as to the city of Milwaukee and John H. Tesch, the treasurer.

SMITH (MINTURN v.). See Case No. 9,647.

Case No. 13,083.

SMITH v. MISSOURI VAL. LIFE INS. CO.

[4 Dill. 353;[1] 3 Cent. Law J. 386.]

Circuit Court, D. Kansas. 1876.

INSURANCE—PARTIES—POLICY TO MARRIED WOMAN ON LIFE OF HUSBAND—MISSOURI LEGISLATION CONSTRUED.

1. The plaintiff, a married woman, domiciled in Missouri, through her husband, applied for and received from a Kansas life insurance company, doing business in Missouri, a policy of insurance on the life of her husband, of which the annual premium exceeded $300; the policy, by its terms, was payable, on the death of her husband, to the plaintiff: *Held*, that, under the Missouri statute (2 Wag. St. p. 936, § 15), the policy was not void because the annual premium exceeded $300.

2. The right of action was in the plaintiff, and not in the administrator of the husband.

3. The company cannot set up, to defeat the right of action in the plaintiff, that all or some part of the recovery money, under the statute of Missouri, would be held in trust for the estate or creditors of her husband.

The court finds, from the evidence, the facts to be as follows: 1. That the defendant is a corporation existing under the laws of the state of Kansas; that on June 30th, 1861, the plaintiff made an application at St. Louis, in the state of Missouri, to the defendant, for a policy of insurance on the life of her husband, Henry Smith, for the benefit of herself; such application, signed Augusta S. Smith, by Henry Smith, was soon after delivered to the defendant, and on July 3d, 1861, accepted by it, and the policy of insurance in suit was written, and signed by the president and secretary of the defendant, and the corporate seal affixed, at its home office, in Leavenworth, state of Kansas, and was afterwards countersigned and delivered by the defendant's agent in St. Louis, state of Missouri. All premiums paid were paid in St. Louis, and all premium receipts were there countersigned and delivered. The policy, by its terms, is payable, on the death of the husband, "to Augusta S. Smith" (the plaintiff). 2. At the time of making such application, and delivery of such policy, the plaintiff and said Henry Smith were residents of St. Louis, in the state of Missouri, and citizens thereof, and the plaintiff has ever since continued to be such resident, and said Henry Smith continued to be such resident and citizen until his decease, in 1874. 3. That the insured, Henry Smith, died in St. Louis on the 6th day of October, 1874, and the plaintiff soon after gave notice of death, and served the proofs of the loss required by the said policy. 4. That said Henry Smith left a last will and testament, appointing the plaintiff executrix thereof, which will and testament was, on the 24th day of October, 1874, proved and admitted to probate by the probate court of St. Louis county, and state of Missouri, in which county St. Louis is situate. That the plaintiff, after citation by such probate court, refused to take letters testamentary or administer said will, and thereupon, and on the 18th day of November, 1874, said probate court granted letters of administration, with the will of Henry Smith, deceased, to George E. Leighton and Lewis B. Parsons, then and still residents of the city of St. Louis, and citizens of Missouri, and said Leighton and Parsons qualified as such administrators on the 18th day of November, 1874, and have ever since been such administrators, and now claim, but not as parties to this suit, to be the owners of the policy of insurance sued on, and as such administrators to be entitled to recover the money due under the said policy of insurance. 5. That said Henry Smith was insolvent at the time of his death, and his estate is insolvent, but was not insolvent when the policy was issued, and for a long time afterwards. It does not appear

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

whether the premiums were paid out of the husband's or the wife's estate. 6. That, at the time the policy sued on was issued, the life of said Henry Smith was insured in the sum of $21,000 in other insurance companies, in which the plaintiff was the beneficiary, which policies were in force at the time of his decease, and the plaintiff has commenced suits in New Jersey and Connecticut for the recovery of the amount of each of them, which suits are now pending, and are contested by the companies. 7. That the annual premium paid on the policy in suit exceeds the sum of three hundred dollars. 8. That chapter 115 of the statutes of the state of Missouri (being chapter 94, Wag. St.), entitled "Married Women," section 15 of which is in the words following: "Sec. 15. It shall be lawful for any married woman, by herself and in her name, or in the name of any third person, with his assent, as her trustee, to cause to be insured, for her sole use, the life of her husband, for any definite period, or for the term of his natural life; and in case of her surviving her husband, the sum or net amount of the insurance becoming due and payable by the terms of the insurance shall be payable to her, and for her use, free from the claims of her husband, or any of his creditors; but such exemption shall not apply when the amount of premium annually paid shall exceed the sum of three hundred dollars," was, at the time of making such application and delivery of such policy of insurance sued on, and still is, in full force and effect. And that section 18 of the same chapter, in the words following: "Sec. 18. Any policy of insurance, heretofore or hereafter made by any insurance company upon the life of any person, expressed to be for the benefit of any married woman, whether the same be effected by herself or by her husband, or by any third person in her behalf, shall enure to her separate use and benefit, and that of her children, if any, independently of her husband and of his creditors and representatives, and also independently of such third person effecting the same in her behalf, his creditors and representatives; and a trustee may be appointed by the circuit court for the county in which such married woman resides, to hold and manage the interest of any married woman in any such policy, or the proceeds thereof," was, at the time of making such application for insurance and issue and delivery of such policy, and still is, in force. 9. It is admitted that, if the laws of Kansas apply to and govern the case, the plaintiff is entitled to recover.

J. C. Douglas, for plaintiff.
Mr. Hurd and Mr. Monroe, for defendant.

DILLON, Circuit Judge. The defence is, that this is a Missouri transaction; that, under the statute of that state (2 Wag. St. p. 936, § 15), the policy is void in toto, as the annual premium exceeded $300; or if this be not so, the right of action is in the administrators of the husband, and not in the plaintiff; and that the plaintiff is neither the legal owner of the right of action, nor "the real party in interest," and hence cannot maintain this suit.

I concede without inquiry, for the purposes of this case, that the Missouri statute applies, and will govern in determining the validity and effect of the contract. The entire chapter in which this provision occurs is one expressly designed to enlarge the rights of married women, and should be construed to carry out its purpose. A married woman always had an insurable interest in the life of her husband, and if she paid the premiums for the risk out of her own estate, she could insure his life for any sum upon which she and the insurer might agree. And a husband who is free from debt may insure his own life for his wife's benefit for any sum he may choose. It is a mode, and a favorite mode, for making provision for wife and children. The statute of Missouri (section 15, supra, et seq.) is not entirely free from obscurity, but the construction placed upon it by Judge Treat, of the United States district court, seems reasonable, viz.: that under its provisions an insolvent husband may withdraw from his estate for this purpose not exceeding $300 annually, where the beneficial interest in the policy is in the wife. If the insolvent husband pays more, the policy is not void, but the wife, if she recover, might hold in part in trust for the creditors as represented by her husband's administrator, or assignee in bankruptcy. In re Yeager, 8 West. Ins. Rev. 378; Charter Oak Life Ins. Co. v. Brant, 47 Mo. 419; McComas v. Covenant Mut. Life Ins. Co., 56 Mo. 573.

The case before the court, in any view of the Missouri statute as to the respective rights of the plaintiff and the creditors of the husband, is easy of solution. The agreement of the defendant in the policy is, "to pay the amount assured to Augusta S. Smith." This gives her the right to sue upon the policy in her own name. If she recovers, it is a different question whether she may not hold the proceeds of the recovery, or some part thereof, for the benefit of the estate of her husband, if necessary to pay debts. The company cannot set up such supposed rights in others, to defeat an action on the policy. The plaintiff, having the legal title, may maintain the action, and this will protect the company from another suit, and in the event of a recovery by her, the equities of others, if any exist, which I do not decide, can be adjusted in an action between them and the plaintiff. The administrators of the husband are not here insisting upon their rights, if they have any, and the company cannot set up rights for them, and, on its motion, introduce into this suit matters with which it has no concern. I am of opinion the plaintiff is entitled to recover. Judgment for plaintiff.

SMITH v. The MONITOR. See Cases Nos. 9,708–9,710.

SMITH (MORTON v.). See Case No. 9,867.

SMITH (MOTT v.). See Case No. 9,882.

SMITH v. The NELLIE D. See Case No. 10,-097.

Case No. 13,084.

SMITH v. NICHOLS.

[Holmes, 172; 6 Fish. Pat. Cas. 61; 2 O. G. 649.] [1]

Circuit Court, D. Massachusetts. Oct. 18, 1872. [2]

PATENTS — BETTER ARTICLE — HOW PRODUCED— NOVELTY—ELASTIC FABRICS.

1. The fact that an article is better and more useful in the trade than those previously in use is evidence of novelty; but if the superiority is attained by the application of known means, in a known way, to produce a known result, though a better one, the novelty required by the patent law is wanting.

[Cited in Boykin v. Baker, 9 Fed. 704.]

2. Woven elastic fabrics of various degrees of elasticity being old; and the way to increase or diminish the elasticity, by increasing or diminishing the relative proportion of elastic strands to the other threads, being known; a fabric differing from those previously used only in being more tightly woven, and more elastic by reason of having a greater proportion of elastic strands, is not patentable as a new article of manufacture.

[Cited in Cone v. Morgan Envelope Co., Case No. 3,096.]

[Final hearing on pleading and proofs. Suit brought [by William Smith against Nathan Nichols] upon letters patent [No. 9,653] for "improvement in corded elastic fabrics," granted to William Smith, April 5, 1853, and reissued June 30, 1868 [No. 3,014]. A suit upon the same patent is reported in the case of Smith v. Elliott [Case No. 13,041]. The patent was subsequently modified by a disclaimer filed May, 1872.] [3]

T. A. Jenckes, for complainant.

B. R. Curtis and Benjamin Dean, for defendant.

LOWELL, District Judge. The complainant took out a patent in 1853, in which the claim was for a process of weaving by the combination of central stationary warps with movable warps, and with weft threads passed simultaneously through the two sheds by means of two shuttles. The specification described a loom, and the mode of using it, and declared that the process was specially useful where the stationary warps were elastic. Whether the patent was for a loom or a process is not important in this case. The evidence tends to show that a fabric was produced by the complainant which was highly elastic and remarkably well adapted to gores for boots and shoes, and that it has taken the place of all other cloths for this purpose. It is further shown that a cloth of like quality in most respects may be made on looms which have not the distinguishing features of the plaintiff's loom. The complainant, however, maintains that he not only improved the process of weaving a known fabric, but invented a new fabric; and his patent, after having been extended in 1867, was reissued in 1868, in three parts,—one for the loom, one for the fabric, and one for the process. The bill is founded on an alleged infringement of the second of these parts,—division B, reissue No. 3,014, dated June 30, 1868, for the fabric; and it is alleged that the defendant makes and sells this fabric. It is not contended that he uses the loom or the process, and it is not denied that he does sell the fabric. The specification of division B describes the loom substantially as in the original patent, and the fabric much more minutely as a corded fabric, in which the central cords or cord warps are griped firmly between two weft threads, each passing half way round the cord, one above and the other below, and the cords are separated from each other by the interweaving of warp threads and weft threads in strips of cloth between the cords only, and not over and under the cords, so that the cords are covered by weft threads only. The claim is for the corded fabric, substantially as described, in which the cords are elastic, and are held between the upper and under weft threads, and are separated from each other by the interweaving of the upper and under weft threads with the warp threads in the spaces between the cords, and only there, substantially as above shown.

The bill was filed November 19, 1868. In January, 1870, the patentee filed a disclaimer of any fabric in which the warp and weft threads are so interwoven between the elastic cords as to form strips of shirred cloth between and by the contraction of the elastic cords, declaring that in his fabric the warp threads are interwoven with the weft threads only for the purpose of binding the latter tightly about the elastic cords. In May, 1872, the complainant filed a second disclaimer of any fabric in which the weft threads are so interwoven with the warp threads which lie between the elastic cords that the former are not brought half way round each of said cords so as to gripe them in such a way as not to permit said elastic cords to slip through between said weft threads in case said cords are cut crosswise or bias. The defendants maintain that the reissue is for a different invention from that originally described, and so is void; and that the fabric is not new. The evidence certainly tends to show, that, until about the time of the reissue, the patentee said to several persons, at different times, that his patent was for the union web, which is faced on both sides, or for the mode of making it; and this is confirmed by the language of his

[1] [Reported by Jabez S. Holmes, Esq., and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from Holmes, 172, and the statement is from 6 Fish. Pat. Cas. 61.]

[2] [Affirmed in 21 Wall. (88 U. S.) 112.]

[3] [From 6 Fish. Pat. Cas. 61.]

first patent, in which he says that the object of his invention is to furnish means for weaving fabrics formed by a centre warp which is enclosed by a fabric formed on each side of it by filling from two shuttles, one passing above and the other below the centre warp. But if we assume that after making his loom he discovered that the cloth made by it was really a new article, we are not prepared to say that he might not by a reissue enlarge his claim to cover the new article. On this point we give no opinion.

Upon the question of novelty the evidence is that an elastic fabric had been well known for many years before the date of the patent, in which strands or cords of India-rubber were used to give elasticity, and cotton was woven between these strands in such a way that the latter were covered by weft threads only. This article was used in making suspenders, and kept the market for a long time. In 1844 Mr. Hotchkiss, a manufacturer of suspenders, in making application for a patent, described as his invention a fabric made with cords of India rubber from one-eighth to one-half an inch apart, connected with a filling of cotton, and he distinguished this cloth from others before known by the cords being larger and farther apart in his fabric. The description does not show that the cords were covered by weft threads only; but Hotchkiss swears that the fact was so, and a sample of the cloth is produced from the patent office which confirms it; and, if further confirmation is needed, it is found in the testimony of other witnesses concerning the suspender-webbing generally, and the plaintiff's first disclaimer, which was filed soon after these things were put in proof, is of itself enough for the purposes of this case. This application of Hotchkiss was very properly rejected by the patent office, because increasing the size and distance apart of the India-rubber cords was not considered to be invention in the sense of the law. This evidence, and that of other witnesses, establishes that cloth for suspenders was made with cords of India-rubber, covered with weft threads only, the cords being of variable sizes, and placed at variable distances apart, according to the degree of elasticity and other properties that were desired.

Taking this evidence and the plaintiff's disclaimers into consideration, he appears now to claim that his fabric differs from others, known before, by being more tightly woven, so that it can be cut crosswise without danger of the cords slipping back or withdrawing; and by having the cords so near together that they form a greater part of the bulk of the cloth. Now it does not appear to us that these differences make up a patentable improvement. The fact that an article is better and more useful in the trade is evidence of novelty; but if the superiority is attained by the application of known means, in a known way, and to produce a known result, though a better one, the novelty required by the patent law is wanting. Looking to the evidence, we find a large number of witnesses called to prove that the old webbing used for suspenders would not be suitable for shoe-goring; but when we analyze their testimony, we find, besides mere difference of color and style of finish, that the real objection is the want of sufficient elasticity. Many of the dealers give this as the only defect, and most of the others say that it is wrong in color, width, and elasticity. It is plain that color and width are merely questions of contention, and we think it not less so that the greater elasticity of the complainant's fabric will not support his claim. The old fabrics were of various degrees of elasticity, and the way to increase or diminish the elasticity was perfectly well known; namely, by increasing or diminishing the proportion of the elastic cords. Any manufacturer could have produced an article with greater or less elasticity, as the needs of the trade might require, up to the maximum which was possible to be attained with native India-rubber, the article then in use for the elastic strands. Beyond that maximum it is now easy to go by using vulcanized India-rubber; but this article was discovered and its uses were made known by Goodyear several years before the date of the plaintiff's first patent, and had become a well-known substitute for the native India-rubber in many combinations, so that if the plaintiff had described or claimed the use of the vulcanized gum for his elastic cords, which he does not, it is not probable that he could have supported a claim to invention by that substitution.

The other ground on which the second disclaimer distinguishes the old from the new article is, that in the latter the cords are so firmly grasped by the weft threads, each of which passes half way round them, that the cords can be cut crosswise without injury to the fabric by the withdrawing of the cords. I have read the depositions of all the witnesses who speak of the unsuitableness of the old webbing to the use of the shoe trade, and have found only one of them, William A. Brown, who is asked a question on this point; and he is of opinion that the old fabric would not be imperfect in this particular. "Int. 5. If those goods were sufficiently elastic, but made after the construction of these exhibits, where they were to be cut bias, as for gores to congress boots, would they not be of too loose a texture to hold the stitching when inserted in a boot?" "Ans. If things were different to what they are, it would be very difficult to tell what they would be. To that question I would answer, no." The fair result of the whole evidence is very strongly to prove that the old webbing was wanting only in elasticity, and that the amount of that quality was variable, and could be increased or diminished by the manufacturer. But granting

that the old cloth was not so tightly woven that it could be cut crosswise without injury (which we do not think the evidence warrants us in granting), that result, too, would seem to be within the knowledge of the manufacturer. Corded elastic fabrics were made in which the same mode of weaving was employed as in the plaintiff's, and making a closer texture by the old means,—that is, by drawing the weft threads tighter round the cords,—must surely be a matter of construction only. Especially is this seen to be true when we remember that the cords were of various sizes, since the firmness with which they would be griped by the weft threads would depend much on the relative size of the cords and weft threads.

For my own part, when it is admitted by the first disclaimer that elastic corded fabrics like the complainant's, excepting that they had strips of shirred cloth between the cords, were known before his invention, I should wish to be instructed in what is understood by a strip of cloth,—how much interlocking or interweaving is necessary to remove it from mere binding, and bring it up to a strip. On inspection, I would say that the complainant's fabric has strips of cloth between the cords, as he describes it in his specification; but if not, then it remains to inquire what essential difference there is between fabrics with strips of various sizes, according to the degree of elasticity required, and one which, being woven in a similar way, can be properly said to have something less than a strip between each pair of cords. The evidence is silent on this point. It only goes to show, as we have said, that the closer the cords the greater the elasticity; but that was known before: it does not show that any difference in kind exists at the point where strips end and interlocking begins. The whole argument on this point seems to depend on a supposed distinction between interlocking and interweaving, which is not pointed out in the patent, and is not proved to exist. If it be intended to disclaim only strips of shirred cloth, as distinguished from strips of plain cloth, the like difficulty occurs in distinguishing, without evidence, that the shir or pucker of the strips is of any essential importance in the construction of the fabric.

Upon the whole, we feel constrained to agree with the opinion of the learned circuit judge of the Second circuit, that the old webbing was a fabric of like kind with the complainant's, and that the improvement, important though it is, must be held to be due to the skill and sagacity with which the mode of operation by which that webbing was made has been adapted and applied by the complainant, by the use of better materials and a more careful weaving; but not by the invention requisite to enable him to claim the product as a fabric before unknown. We have not examined any of the questions of fact or law which exclusively concern the other divisions of the reissued patent. Bill dismissed.

[On appeal to the supreme court, the decree of this court was affirmed. 21 Wall. (88 U. S.) 112.

[For other cases involving this patent, see Smith v. Glendale Elastic Fabrics Co., Case No. 13,050.]

Case No. 13,085.

SMITH v. ONTARIO.

[15 Blatchf. 267.][1]

Circuit Court, N. D. New York. Sept. 17, 1878.

TOWNS — BONDS — COMMISSIONERS — CONSENT OF TAX PAYERS.

Section 2 of the act of the legislature of New York, passed April 19, 1869 (Laws N. Y. 1869, c. 241, § 2), provided, that commissioners to be appointed might borrow money on the faith and credit of a town, and issue bonds therefor, but that no debt should be contracted, or bonds issued, until consent in writing should be obtained of a majority of the tax payers owning more than half the taxable property of the town, which fact should be proved by the affidavit of the assessors, which should be filed in the county and town clerks' offices, and should be evidence of the facts therein contained and certified, in the courts and before the judges of the state. In a suit against the town, on coupons attached to negotiable bonds, issued by commissioners professing to act in behalf of the town, the plaintiff being a bona fide holder of the coupons, before maturity, the only evidence of such consent was an affidavit of the assessors, stating that the consent of the requisite majority had been obtained, according to the provisions of the statute, that the commissioners of the town, appointed to carry into effect the purposes of the act, "are now authorized by the terms of" the act, to borrow on the faith and credit of the town, a specified sum of money, without anything more about bonds or issuing bonds, and without stating to what the consent had been obtained: *Held*, that the plaintiff could not recover.

[Distinguished in Irwin v. Ontario, 3 Fed. 60.]

[This was an action on certain coupons, by Andrew J. Smith against the town of Ontario. Heard on motion for a new trial.]

C. T. Richardson, for plaintiff.

W. F. Cogswell and J. B. Perkins, for defendant.

WHEELER, District Judge. This cause has been heard on the motion of the plaintiff for a new trial, after a verdict directed by the court for the defendant at the June term, 1877. The action is upon coupons attached to negotiable bonds issued by commissioners professing to act in behalf of the defendant under special laws of the state of New York. The plaintiff appears to be a bona fide holder, for value, of the coupons, before maturity, and entitled to recover upon them, if such a holder of the bonds could recover upon them. These commissioners had no authority in this behalf, except under the provisions of these laws. The laws provided, that the commissioners might borrow money on the faith and

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

credit of the town, and execute bonds therefor, but that no debt should be contracted or bonds issued, until consent in writing should be obtained of a majority of the tax payers owning more than half the taxable property of the town, which fact should be proved by the affidavit of the assessors, which should be filed in the county and town clerks' offices, and should be evidence of the facts therein contained and certified, in the courts and before the judges of the state. It does not appear, from any proof offered outside of the affidavit, that any consent of the requisite majority was obtained. An affidavit of the assessors was made and filed, stating that the consent of the requisite majority had been obtained, according to the provisions of these laws, "that the commissioners of the town of Ontario, appointed to carry into effect the purposes of 'the acts,' are now authorized by the terms of 'the acts' to borrow, on the faith and credit of said town of Ontario, the sum of one hundred and seven thousand dollars," without anything more about bonds, or issuing bonds. The bonds recite that they are issued by virtue of the acts, and that, "these acts authorize" the town "to subscribe for the stock of the Lake Ontario Shore Railroad, and to issue town, village, or city bonds in payment therefor." There is no proof about the origin of the bonds, further than the conceded genuineness of the signatures of the commissioners, and that the plaintiff bought these bonds and coupons, before maturity, of Irwin & Sloan. What the commissioners did with them, or how Irwin & Sloan got them, does not appear.

The plaintiff, although he is a bona fide holder for value, before maturity, of the bonds, cannot recover unless they are genuine bonds of the town. They are executed by agents of the town. If the agents had actual authority, or were held out to have by those having authority to do that, the plaintiff should recover; otherwise, not. Mechanics' Bank v. New York & N. H. R. Co., 3 Kern. [13 N. Y.] 599; The Floyd Acceptances, 7 Wall. [74 U. S.] 666; Marsh v. Fulton Co., 10 Wall. [77 U. S.] 676. The town, as such, in its corporate capacity, had nothing to do about creating the agents, or conferring their authority. Whatever their authority was, it was wholly given by the law. The bonds referred to the law as their source, and all persons dealing in them would be bound to take notice of its provisions. McClure v. Oxford Tp., 94 U. S. 429. The law provided and made known all limitations upon the power to act, and all persons would be as well bound to take notice of those as of the parts giving authority. Persons dealing with the agents, or with their acts, would not be situated at all like those dealing with general agents having private instructions, without notice of the instructions. Here was nothing private. All was as open and known as any part.

There have been a great many cases where the law provided for the appointment of agents for such corporations to issue bonds, when certain steps should be taken or things done, and either provided that they should determine, or left it wholly for them to determine, when the steps had been taken or things done; and it has been held, that, if they issued the bonds with a statement in or upon them that the steps had been taken or the things done, or, in some cases, without, it would be, where stated, an express, and, where not, an implied, statement, which they were authorized by the law to make, that the facts existed which would give them authority, and that the corporations for which they acted would be bound, although the facts did not actually exist. Warren Co. v. Marcy, 97 U. S. 96; Knox v. Aspinwall, 21 How. [62 U. S.] 539; St. Joseph v. Rogers, 16 Wall. [83 U. S.] 644; Town of Colomo v. Eaves, 92 U. S. 484; Venice v. Murdock, Id. 494; Johnson Co. Com'rs v. January, 94 U. S. 202. This case is not like those. It was not provided that these commissioners should determine when the consent had been obtained, nor left for them to act when it had been obtained, without provision for other determination of the fact. The plain meaning of the law is, that the assessors were to determine when the consent was obtained, and that the commissioners were to issue the bonds after their determination, shown by their affidavit. In the cases referred to, the commissioners, or other agents executing the bonds, had authority to represent that they had authority, and did so. In this case, the assessors had authority to declare, by their affidavit, that the commissioners had authority to issue the bonds, but it was not left to the commissioners thus to hold out that they had such authority. So, the act of the commissioners issuing the bonds did not actually show authority to do it, neither was it an authorized holding out of authority not existing.

It is sometimes said, that, if a law authorizes such corporations to issue bonds, and bonds are issued certifying that they are issued under the law, they are to be protected as commercial paper. It would seem to be more correct now to say, that, if they are issued certifying expressly or impliedly that they are issued under the law, by those authorized to determine that they could properly be issued, they are to be so protected. Warren Co. v. Marcy, ubi supra; Town of Colomo v. Eaves, 92 U. S. 484. Here, the only authorized representation is that contained in the affidavit; and that the plaintiff and all others were bound to notice. If that showed authority, it is enough; if not, none is shown.

It is said, in argument, and in the briefs in behalf of the plaintiff, that like affidavits have been before the courts of the state, in several proceedings upon writs of certiorari, and sustained, but not for what purpose they have been sustained. The affidavits are evidence of a sort of judgments. The enquiry upon certiorari would be likely to be, whether the judgments were correct, as shown by the affidavits, and not what the extent of the

judgments was. The question here is not but that this affidavit is correct and conclusive so far at it goes, but is whether it goes far enough to include authority to issue these bonds. If the question of its extent was involved in the proceedings cited, and the affidavits appeared to be what the brief states they were, they would not be like this one. One referred to is stated to have appeared in the proceedings as stating that consent had been obtained "to bonding said town." There is no such expression in this one. The others referred to in this connection are mentioned as being similar to the one quoted from.

It is also said, that Judges Woodruff, Johnson and Wallace have several times ruled at the circuit, in actions on bonds or coupons, that affidavits like this were sufficient, and several such cases have been mentioned, among them, Bullen v. Yates [Case No. 2,123], and Phelps v. Yates [Id. 11,081]. The affidavits in these cases have not been furnished, but, in Bullen v. Yates, it is stated, that there was offered in evidence "the affidavit of the assessors, that the consents and roll have been examined by them, and that the consents are a majority in number and amount of the persons and property appearing on the rolls." If that statement is correct, that affidavit was very different in language and effect from this one. If the rest were like that, which, from the statement, is as likely as that they are like this, those cases were all different from this. And it is understood, that the courts, in those cases, made the rulings expecting to review them on motions for new trials, which have not been heard, or, if heard, not decided. The deliberate judgments of those judges would, of course, on the same question, have great and controlling weight.

As the cases are made to appear, the question as to the extent and effect of this affidavit seems to be fairly open. According to the statute, the fact was to be proved by the affidavit. The affidavit states, as a fact, that consent had been obtained, but not what to. It states, as a conclusion of law, that the commissioners were then authorized to borrow money on the faith and credit of the town, but not that consent that they might had been obtained. Nor does it refer to the consents or to the laws, or anything outside of itself, to help out its meaning. It is argued, that some phrase or word was left out by mistake, which may properly be supplied, but it reads as if the writer wrote what he intended to write. Perhaps he intended to make an instrument of different effect, and was mistaken as to the effect of what he wrote; but that does not appear but by conjecture. As it was framed, its meaning seems plain. that consent had been given and the commissioners had been authorized to borrow money. Here is no fact showing authority, apart from the conclusion. If the fact and conclusion can be brought together and held to amount to a statement that consent had been given according to the conclusion, then it would prove an authority to borrow money on the faith and credit of the town merely. If so, then the enquiry arises, whether that would include issuing negotiable bonds. The difference between borrowing money, where the liability would be to the lender for the amount actually borrowed and received, with interest, and issuing negotiable bonds on long time, which might go into the hands of an innocent holder, and create liability, whether any money or other value had been received for them or not, would be very great. Authority to do the former might be readily granted, when that to do the latter would be carefully withheld. Tabor v. Cannon, 8 Metc. (Mass.) 456. The statute (Laws 1869, c. 241, § 2) recognizes this difference. It provides, that the commissioners may borrow money and issue bonds therefor, but declares, that "no such debt shall be contracted, or bonds issued," until consent shall have been obtained as provided. This signifies that the consent to do both shall be obtained before both shall be done, if not before either shall be done.

The consents shown include both borrowing money and issuing bonds for it, but it does not appear that they were ever executed by a majority. If that appeared in a proper mode, the authority in fact to do both would exist. But, the plaintiff does not stand upon the ground that such consent by a majority was ever actually given. His ground is, that it must be taken that the consent by the requisite majority was given, because the affidavit states that it was given, whether the statement is true or not. In this he is correct, for the law so provides. But, while such force must be given to what is in the affidavit, it must stop short where the affidavit stops. The affidavit operates as an estoppel which shuts out all inquiry into the truth of what it covers, but it is not favored in the law towards shutting out truth as to what it does not cover. By the most strained construction it seems capable of, it covers authority to borrow money only. This conclusive effect of it grows out of the presumption that there were consents like those mentioned in it executed by a majority, as stated in it, and not out of any presumption that a majority executed any others. No majority executed any other consent, but it cannot be disputed but that such consent as that described was properly executed.

The plaintiff's action is not for money borrowed by the commissioners. It is upon negotiable bonds. They were apparently issued without authority, and are not the genuine bonds of the defendant town, in the sense of the law governing such subjects.

The motion is overruled, and let judgment be entered on the verdict.

[A motion was subsequently made for leave to reargue the above motion for a new trial. The motion was denied. Case No. 13,086.]

Case No. 13,086.

SMITH v. ONTARIO.

[17 Blatchf. 240.][1]

Circuit Court, N. D. New York. Oct. 23, 1879.

NEW TRIAL—REARGUMENT.

1. After the court has heard and denied a motion for a new trial, in a suit at law, and a judgment has been rendered and paid and satisfied, it has no power to grant leave to re-argue the motion for a new trial.

2. The decision in Smith v. Ontario [Case No. 13,085] commented on.

[This was an action on certain coupons by Andrew J. Smith against the town of Ontario. Heard on motion for leave to re-argue a motion for a new trial.]

Albertus Perry, for plaintiff.

William F. Cogswell, for defendant.

WHEELER, District Judge. This is a motion for leave to re-argue a motion for a new trial made after a verdict for the defendant at June term, 1877, and heard and denied as of June term, 1878 [Case No. 13,085]. The principal grounds upon which this motion is made are, as alleged, that there were material differences between the case as drawn up and printed, on which the former motion was heard, and the case as actually tried, and that the decision upon the former motion, while professing to follow, was contrary to, the decisions of this court upon the same questions, when held by resident judges. It is opposed upon the ground that it is made out of time, and upon its merits.

The action was brought upon coupons to the amount of $525, from bonds issued in aid of the Lake Ontario Shore Railroad, under a special law of the state of New York, passed April 19th, 1869 (Laws N. Y. 1869, c. 241). The case was made to turn upon the sufficiency of the affidavit of the assessors to prove consent to issuing the bonds, required by the act before the bonds should be issued. By the printed case on which the motion for a new trial was heard, it appeared that some of the consents were filed in the county clerk's office on different days from others in December. 1870, and the affidavit in that month, without showing on what day of the month; and, in the decision of the case, stress was laid upon this diversity of filing, as showing that the affidavit was not so connected with the consents as to be helped out by their contents. On production now of the papers used at the trial, it appears that the affidavit and consents were each filed separately, and then all together as one roll, on the 23d day of that December, and that at some time they were all tied together. This does not seem to vary the case much from what it appeared to be before. The point was, that, although the affidavit showed that consent to something had been given, it did not show to what; and that, not referring or being attached to any consent, it could not be gathered that the affidavit meant that consent had been given to what was contained in the consents. The fact that the affidavit and consents were filed together as one roll, and attached together, would, standing alone, have some tendency to show that the affidavit, made after the consents, was made with reference to them, as was held by Blatchford, J., in Phelps v. Lewiston [Case No. 11,076]. But, when it appears that each paper was before filed separately, as if it came from different sources from the others, this tendency is done away with. If any other facts existed, tending to show that the affidavit was made with reference to the consents produced, they were not shown.

It is true, that the court professedly intended to follow the former decisions of the court, all of which had been made by resident judges, so far as appeared, in like cases. But, up to the time when the decision upon the motion for a new trial was made, no former case was produced, which, in its facts, appeared to be like this. It was not expected that this case would be decided for the plaintiff because all actions upon such bonds or coupons had been so decided, nor because all actions upon such bonds or coupons in aid of the same road, or issued by the same town, had been; nor was it expected that an ambulatory decision, which would follow such as might thereafter be made, was to be rendered. It now appears, that cases like this upon their essential facts have been decided in favor of the plaintiffs, but no opinion has yet been produced in which any judge has discussed the sufficiency of any affidavit like this standing by itself, nor holding that the production of an affidavit is not necessary in order to recover upon such bonds or coupons. Such affidavits have been held to be sufficient, but upon what grounds they have been so held, and whether those grounds would be applicable to this case as it was in fact presented at the trial, has not yet been made clearly to appear. The motion was considered upon what was in fact proved, and not upon what might have been proved at the trial.

But, the motion was denied, judgment for the defendant, to recover its costs, was rendered on the verdict, and the costs appear to have been paid and the judgment satisfied, before this motion was filed. So, there is no motion to be re-argued, pending anywhere, in this case. The question might be re-argued, but there would be nothing to be decided thereupon, if this motion for leave to re-argue should be granted. After the decision was made, the court might at any time during the same term have, for good cause, changed it. And this might have been done at any time afterwards, while the matter was still depending in court. Harris v. Hardeman, 14 How. [55 U. S.] 334. But, here, the term had ended and another intervened,

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

and the whole matter had ceased to be depending anywhere long before this motion was filed. It was not filed in any cause, for there was no such cause depending; and granting it would be wholly unavailing. Courts frequently, or sometimes, overrule former decisions upon the same question, and decide it differently in new cases; but the former judgments, nevertheless, stand. Hepburn v. Griswold, 8 Wall. [75 U. S.] 603; Legal-Tender Cases, 12 Wall. [79 U. S.] 457. It would not be practicable, nor tolerable, for courts to go back and change all judgments, to make them conform to every change of opinion of the court, held by different or even the same judges. There is no doubt but that courts have power, after cases therein have been ended, on direct application for that purpose by one party and service upon the other, to bring forward causes and correct the judgments therein; but, when so done, the corrected judgments are entered as of the time when the corrections are made, and in causes brought forward and made to be again pending between the parties. Here, no attempt is made to bring forward the cause. The application is not at all for that purpose, nor adequate to that end. It is based upon the supposition, that now the court can take up the motion for a new trial, and decide it over again. If now, then it might for a long time hereafter, and the judgments of courts, instead of ending litigation absolutely with reference to matters litigated, would end it only at the satisfaction of all parties, or the pleasure of the judges.

The cause was tried as the parties chose to present it, was heard on a motion for a new trial, in due course, and decided upon grounds satisfactory to the court as then constituted. This proceeding does not appear to be adequate to disturb the judgment. The motion is denied.

SMITH (O'REILLY v.). See Case No. 10,566.

Case No. 13,087.

SMITH v. PARKER.

[3 Cranch, C. C. 654.] [1]

Circuit Court, District of Columbia. Dec., 1829.

SLAVERY—NOTE TO FORMER MASTER BY EMANCIPATED SLAVE.

A promissory note of an emancipated slave given to his master, after emancipation and in consideration of his emancipation, is valid.

Appeal from the judgment of a justice of the peace, for $50, upon a note given by the appellant [negro William Smith] to the appellee [Daniel Parker] in consideration of his emancipation by the latter. The note was given immediately upon the execution and delivery of the deed of emancipation, and bears date the same day.

Mr. Worthington, for appellant, contended that the note was nudum pactum. The consideration was entirely past when the note was given. The slave, while a slave, was incompetent to contract, and after emancipation there was no consideration for the note. The case of Contee v. Garner [Case No. 3,139], in this court at December term, 1818, was debt upon a bond given by a slave to his master for the price of his emancipation. The suit was brought after he was emancipated. The defendant pleaded a special non est factum, namely, that when he signed, sealed, and delivered the instrument, he was a slave; and so it was not his deed. Issue being joined upon that plea, and the court being of opinion that a slave could not bind himself at law to pay money to his master, even for his freedom, the plaintiff became non pros.

Z. C. Lee, contrà, cited 1 Bl. Comm. 127, 425; Williams v. Brown, 3 Bos. & P. 72, in which Heath, J., said, "In all countries where slavery is tolerated, agreements between the master and the slave respecting the manumission of the latter, are enforced by the law. Suppose the slave, after having obtained his manumission, should refuse to perform his part of the contract, there is no country where such conduct would be endured. He is competent to enter into a contract for the purpose of his manumission, and therefore such contract may be put in force against him." And Chambre, J., said, "But I do not know that a slave is precluded from entering into a contract. He may do so, provided his contract do not affect the rights of his master. Though he cannot deprive his master of his services, yet with the consent of his master, he may engage to do service for another."

Mr. Worthington, in reply, cited Com. v. Clements, 6 Bin. 211, Pow. Cont. 348, and Wennall v. Adney, 3 Bos. & P. 249, note.

THE COURT affirmed the judgment, with costs, CRANCH, Chief Judge, doubting.

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

SMITH (PARTRIDGE v.). See Case No. 10,787.

Case No. 13,088.

SMITH et al. v. PATTON.

[3 Pa. Law J. Rep. 508; 6 Pa. Law J. 189.]

Circuit Court, E. D. Pennsylvania. 1847.

CONTEMPT—VIOLATION OF INJUNCTION—PATENT—RELEASE.

An injunction having issued restraining the defendant from constructing or using a machine, in which complainants, as joint owners, had exclusive property, and the defendant having, simultaneously with the issuing of the injunction, leased the machine to one of the complainants, and subsequently to the assignee of that complainant's interest, each of whom had since used it, it never having been in the lega possession of the defendant since he was enjoined. *Held*, that such act, on the part of the

said complainant, was for all the purposes of the question an equitable release, acquitting the defendant from liability arising from the continued use of the machine, and that in such case an application for an attachment would be refused.

[This was an application for attachment by Smith and Sloat against James M. Patton for an alleged violation of an injunction issued against the defendant.]

G. W. Biddle and Wm. M. Meredith, for complainants.

John H. Markland, for defendant.

KANE, District Judge. In this case, an injunction issued on the 18th of August, to restrain the defendant from constructing, using or vending a certain machine, in which the complainants, as joint owners, have exclusive property under letters patent. The machine being still in use, notwithstanding the injunction, an attachment was asked. The defendant resisted the application, and denied that the machine has been used by him since the injunction was awarded. The affidavits before the court sustained this denial of the defendant, and showed that on the 18th of August he leased the machine to one of the complainants, and subsequently to the assignee of that complainant's interest. Each of these had since used it, but it had never been in the legal possession of the defendant since he was enjoined.

At law, a tenant in common may release, even to the prejudice of his cotenant, if there be no fraud; and that, after suit brought and continuance had. And equity will not in general interfere to prevent it, but will leave the parties to their remedy against each other: Austin v. Hall, 13 Johns. 286; Decker v. Livingston, 15 Johns. 482; Eisenhart v. Slaymaker, 14 Serg. & R. 157. As between these complainants and the defendant, a release by one of the cotenants of the patent right would be pleadable in bar. There has been no formal release here; but the act now complained of is, that one of the cotenants and the defendant might meritoriously claim of him indemnity if he were made answerable for the consequence of it. It is for all the purposes of the question an equitable release, and bears a close analogy to the modification of a covenant by a joint covenantee, which has been held equivalent to a release of liabilities under so much of the covenant as was modified. 14 Johns. 192. If then the act of the defendant's assignee of the machine is to be imputed to the defendant as an infraction of the complainants' rights, the same act being that of a complainant, must be regarded as acquitting the defendant from liability in consequence. The defendant therefore cannot be regarded as in contempt, and the application for an attachment against him must be refused.

SMITH v. PATTON. See Case No. 13,078.

Case No. 13,089.

SMITH v. PEARCE et al.

[2 McLean, 176;[1] 2 Robb, Pat. Cas. 13.]

Circuit Court, D. Ohio. July, 1840.

PATENTS—REISSUE—IMPROVEMENT IN PATENTED MACHINE—ALTERATION—PRINCIPLE IN MACHINE.

1. Where the specifications of a patent are defective, under the late act of congress [5 Stat. 353] a new patent may be obtained with corrected specifications, which relates back to the date of the original patent.

[Cited in Hussey v. Bradley, Case No. 6,946; House v. Young, Id. 6,738.]

2. A patent for an improvement in a machine, which had been previously patented to another person, can not protect the right of the patentee, unless the improvement be substantially different in principle from the original invention.

3. An alteration merely formal, or a slight improvement, will give no right.

[Cited in brief in Tillotson v. Ramsay, 51 Vt. 311.]

4. The jury will determine, from the models exhibited, and the other evidence, whether there is a difference in principle between the two machines. That is called principle in a machine which applies, modifies, or combines mechanical powers to produce a certain result.

[This was an action by Jesse C. Smith against John Pearce and H. Pearce for the infringement of letters patent granted to plaintiff January 29, 1830.]

Mr. Fox, for plaintiff.

Mr. Green, for defendants.

OPINION OF THE COURT. This action is brought for the infringement of a patent right, by the defendants, claimed by the plaintiff. The plaintiff's patent is dated 25th September, 1837, and, under the late act of congress, relates back to the 29th of January, 1830, the date of his first patent, for the same invention, which was invalid by reason of a defective specification. In the specification, or schedule, the plaintiff claimed to have invented a "new improved mode of grinding, holding, and accommodating millstones," for grinding grain, &c. "The nature of the invention consists in the peculiar construction of the husk or frame, to be used for the purpose of accommodating and securing millstones for grinding grain into meal or flour, or any other business calculated to be done under the operation of grinding. The husk or frame is made of iron, compact and firmly secured together by bolts. The mills are calculated to be transported with safety, all finished in a perfect and workmanlike manner ready for grinding. They are to be put in motion either by straps or cog-gearing, whichever the purchaser shall choose." A drawing with a particular description accompanied the application for a patent.

The defendants pleaded not guilty, and

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

gave in evidence a patent to Henry Pearce, one of the defendants, for an improvement upon the plaintiff's patent. In the specification the improvement is stated to "consist in the manner in which the patentee constructs the part which he denominates the pressure rod, which is intended to elevate the bridgetree, and, consequently, the running stone, and to regulate the action of the mill in that particular part." This specification was, also, accompanied by a drawing.

Several machinists, and other witnesses, testified that the invention of the plaintiff was of great utility. That each run of stones would make thirteen barrels of flour in twenty four hours, and that the flour is of a better quality than that which is manufactured in the ordinary way, and sells higher. That a steam engine of fourteen horse power, which will consume a small amount of fuel, will be sufficient to turn five pairs of stone. The plaintiff, also, proved that for some years the defendants had been engaged in making mills on the same principle as the plaintiff's patent, for sale; and that he had sent great numbers of them to Mississippi and Louisiana; also, some evidence as to the profit on the mills thus constructed and sold.

The principal question in the case is, whether Pearce's improvement on the plaintiff's patent is such as protects him in the right which he has exercised. That part of the plaintiff's patent which he claims to be new, and of his own invention, is "connecting the bridgetree with the top part of the frame, or whatever may be used as a substitute, in the manner herein described, or any other manner embracing the same principles and producing the same effect. And the mode or manner of depressing, as well as elevating, the running stone by application of the screw to the bridgetree, in the manner here described, or any other producing the same effect." A slight alteration in the structure of a machine, or in the improvement of it, will not entitle an individual to a patent. There must be a substantial difference in the principle, and the application of it, to constitute such an improvement as the law will protect. The principle here spoken of is not a new mechanical power. For centuries no new power in mechanics has been discovered. But the powers known have been so modified and combined as to produce results the most extraordinary. Results which have distinguished the present age. The principle consists in the mode of applying or combining mechanical powers which produce a certain result. The law which secures to the inventor the exclusive benefit of disposing of his invention, for a term of years, is founded upon considerations of sound policy. And the right, thus secured, is not to be destroyed by open infraction, or a mere colorable improvement. The jury are to judge by an inspection of the models and from the evidence, whether the two machines differ in principle.

Nothing is more common than for persons, skilled in the structure of machines, to disagree in regard to the principles of them. As it respects their form there can be but little difference of opinion among those who examine the machines. In this case machinists, who have been sworn as witnesses, do not agree, but the greater number seem to think that there is no substantial difference, in principle, between the two structures. In their form the machines are alike. Indeed, it would seem to require a nice observer to point out the difference. The principle of elevating and lowering the upper stone seems to be that which is new, and which gives value to the machine. And it will be for the jury to say, whether the rod with screws at both ends of it, by which the bridgetree, and, consequently, the upper stone is elevated or lowered, is not in principle the same, whether it rests by a shoulder on the middle or lower part of the frame, or whether, in fact, there be one rod or two.

The main question is, whether the principle, by which the upper stone is elevated and lowered, is substantially the same in both machines. If this be the case, your verdict must be for the plaintiff, with such damages as you shall think him entitled to. There are some cases of violation of patent rights more aggravated than others. And the court would remark to the jury, that, in the present case, there do not seem to be any circumstances which should much, if any, increase the damages beyond what may be supposed the reasonable profit of the defendants in manufacturing and selling the machine in question. The defendants may have supposed they were protected under their patent. But if the jury shall think, on a full view of the case, that there is not a mere formal difference, but a substantial one, in the principles of the machines, they will find for the defendants. Treadwell v. Bladen [Case No. 14,154]; Phil. Pat. 372; Davis v. Palmer [Case No. 3,645]; Evans v. Eaton [Id. 4,560]; 3 Car. & P. 502; Evans v. Eaton [Case No. 4,559]; Gray v. James [Id. 5,719]; Whittemore v. Cutter [Id. 17,600].

The jury found for the plaintiff, and assessed his damages at $2,150, on which judgment was entered.

Case No. 13,090.

SMITH v. The PEKIN.

[Gilp. 203.] [1]

District Court, E. D. Pennsylvania. Jan. 28, 1831.

ADMIRALTY — JURISDICTION — VOYAGE ON INLAND WATERS—SEAMEN'S WAGES.

A contract for wages on a voyage between ports of adjoining states and on the tide water of a river or bay, is within the jurisdiction of

[1] [Reported by Henry D. Gilpin, Esq.]

the district court, and may be enforced by a suit in rem in the admiralty.

[Cited in Thackarey v. The Farmer, Case No. 13,852; Packard v. The Louisa, Id. 10,652; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 390; The Canton, Case No. 2,388; The Mary, Id. 9,190; The May Queen, Id. 9,360.]

[Cited in Holt v. Cummings, 102 Pa. St. 215.]

In the month of March, 1829, Gabriel Smith shipped as steward on board the sloop Pekin [David David, master], to perform a voyage from the port of Smyrna in the state of Delaware, to Brandywine, Wilmington, and Philadelphia, and thence to run to and fro at the wages of eight dollars and fifty cents a month. Under this contract he continued performing the voyage referred to, until the month of December following. At that time being at the port of Smyrna, where the sloop was moored, and the cargo unladen, Gabriel Smith was discharged from the vessel by the master, without payment of the wages then due to him. On the 22d December, 1830, the vessel being in the port of Philadelphia, Gabriel Smith filed his libel in this court against her, in order to recover the wages thus due; praying process of attachment, and also for the condemnation and sale of the vessel, her tackle, apparel, and furniture. On the 7th January, 1831, Jacob Raymond, owner of the sloop, for plea to the said libel set forth, "that the said sloop at the time when the libellant shipped on board of her, was not destined or bound for, nor has ever proceeded on any voyage on the high seas or within the jurisdiction of this court, but then was and ever had been employed as a river craft, in plying to and fro between Smyrna, in the state of Delaware, Brandywine in the same state, and Philadelphia, in the state of Pennsylvania, being an adjoining state, and that the sloop is of less than fifty tons burthen; that by the laws of the United States it doth not pertain to this honourable court, nor is it within their cognisance to interfere or hold plea respecting the claim of the said libellant."

On the 28th January, 1831, the case came on to be heard before Judge HOPKINSON on these pleadings.

I. Norris, for libellant. The question is, whether a vessel running on tide waters, from a port in one state to a port in another state, is subject to the admiralty jurisdiction. The ninth section of the act of congress of 24th September, 1789, gives jurisdiction to this court, "of all civil causes of admiralty and maritime jurisdiction." A suit for a seaman's wages is such a civil cause. Shipwrights are entitled to admiralty process; and so are seamen for services even if not done at sea. This cause of action, therefore, is one coming within the jurisdiction of this court. So also is the place where it occurred. Admiralty jurisdiction extends over all places where the tide ebbs and flows; and this gives jurisdiction rather than the nature of the contract. Navigable rivers, where the tide ebbs and flows, fall within these limits. A coasting voyage from one port to another of the same country is also within them, as much as if it had been on the high seas. All coasting voyages must be excluded from this jurisdiction or all admitted; it is impossible to draw any line between those that are in the tide rivers and bays, and those that are along the open coast. 1 Story, Laws, 56, 105 [1 Stat. 76, 133]; Abb. Shipp. 108, 476; 1 Holt, Shipp. 463; U. S. v. The Sally, 2 Cranch [6 U. S.] 406; U. S. v. The Betsey, 4 Cranch [8 U. S.] 443; Gibbons v. Ogden, 9 Wheat. [22 U. S.] 195; The Thomas Jefferson, 10 Wheat. [23 U. S.] 428; The Jerusalem [Case No. 7,294]; De Lovio v. Boit, [Id. 3,776]; Stevens v. The Sandwich [Id. 13,409]; Shuster v. Ash, 11 Serg. & R. 90; Hook v. Moreton, 1 Ld. Raym. 397; Mills v. Gregory, Sayer, 127.

Mr. Lowber, for respondent. The jurisdiction claimed is larger than was ever before pretended for an admiralty court. In its practical effects, it will, if sustained, lead to great inconvenience and manifest absurdities. It will embrace all ferry boats, plying across the Delaware between Pennsylvania and New Jersey; it will include the coal boats, and other craft of that sort, navigating the Schuylkill. The real question is, whether or not this contract is a maritime contract. It is not such a one as maritime courts have hitherto claimed control over. No court of admiralty has ever yet assumed a jurisdiction over wages for a voyage from one port to another in the same country, unless, in performing the voyage, the vessel went to sea, or passed along the coast out at sea. A voyage from Philadelphia to the state of Delaware, is certainly not a foreign voyage; it is not so as to matters of commerce and its regulations; nor is it so as to the contracts necessarily made for its prosecution. Serg. Const. Law, 199; Abb. Shipp. 476, 542; 1 Holt, Shipp. 438; Parry v. The Peggy, 2 Brown, Civ. & Adm. Law, 533; De Lovio v. Boit [supra]; Plummer v. Webb [Case No. 11,233].

I. Norris, for libellant, in reply. A service performed in a bay or navigable tide river is a maritime service, and certainly in England it has been decided that seamen may sue for wages for such service, in the admiralty courts, especially when the voyage is a coasting voyage. The act of congress of 20th July, 1790 [1 Stat. 131], is not applicable to coasters; it alludes only to foreign voyages, or those from one state to another, other than adjoining states. The district courts of the United States possess the jurisdiction of admiralty courts to the fullest extent; and if this case would fall within it as exercised by them abroad, it is within it as authorised here. The reference to ferry boats does not apply, because they are not engaged in a maritime service; theirs is not a maritime contract. Coasting vessels pay hospital money by the act of 16th July, 1798 [1 Stat. 605];

and seamen on such voyages are in all respects on a footing with those engaged in foreign voyages; they should, therefore, enjoy all the same privileges. 1 Story's Laws, 554 [1 Stat. 605]; Jennings v. Carson [Case No. 7,281]; Gardner v. The New Jersey [Id. 5,233].

HOPKINSON, District Judge, overruled the plea to the jurisdiction.

Case No. 13,090a.

SMITH v. PENDERGAST.[1]

District Court, S. D. New York. Nov. 1, 1882.

SEAMEN—WAGES—ADVANCE SECURITY—LIABILITY OF OWNER—VOLUNTARY DISCHARGE OF SEAMEN.

[1. A draft for advance wages, drawn by the master on the owner, and discounted by a third person, all according to the provisions of Rev. St. §§ 4533, 4534, creates an obligation enforcible in admiralty against the owner, without any acceptance by him.]

[2. An advance security, made and discounted according to the statute, requested the owner to pay certain sums of money to the seamen three days after the sailing of the vessel from St. Mary's, provided the seamen should go to sea in the vessel from St. Mary's according to the shipping articles. *Held*, that the owner was bound to pay the security, although the seamen never went to sea in the vessel from St. Mary's, for the reason that they were voluntarily discharged by the master before reaching that port.]

[This was a libel for wages by Henry Smith against James F. Pendergast.]

Henry Heath, for libelant.

Beebe, Wilcox & Hobbs, for respondent.

BENEDICT, District Judge. This is an action, brought against the owner of the bark Thomas Fletcher, to recover the amount of the advance wages of the crew of that vessel shipped in New York for a voyage thence to Rio Janeiro, for which advance an order on the owner was given by the master of the vessel, and the same thereafter discounted by the libelant. The defendant has never accepted the order drawn by the master, and his liability therefore depends upon the statute. If the instrument executed by the master and discounted by the libelant is an advance security, made and discounted as the statute requires, then, by virtue of the statute, the defendant is liable; not otherwise. Rev. St. U. S. § 4534. The statutory requirements of an advance security are that it shall be a written agreement made by the master or owner, or his authorized agent, and given to the seamen in presence of the shipping commissioner, whereby the master, or owner, as the case may be, promises to pay in advance a certain amount of wages stipulated in the shipping agreement to be so advanced. Sections 4533, 4534. And by section 4534 the discounting of an advance security is valid to create a right of action in the person discounting the same, provided the seamen sign a receipt, indorsed on the security, stating the sum actually paid or accounted for to the seamen by such person.

The instrument here sued on is in form a draft on the owner, signed by the master of the vessel, wherein the owner is requested to pay certain sums of money to the seamen named therein, three days after the sailing of the bark from St. Mary's, provided the seamen so named go to sea in the bark from St. Mary's, according to the shipping articles. This draft, whether accepted by the owner or not, created an obligation on the part of the master of the vessel to pay the sums therein named, and, being signed by him, constitutes a written promise on the part of the master to pay the sums named therein. It is therefore an advance security, within the requirements of the statute, provided the shipping agreement contained a stipulation for such advance. The shipping agreement was not put in evidence, but no point was made upon the absence of a stipulation for such advance in the shipping agreement, and the words of the draft, "according to the articles," point to the existence of such a stipulation in the shipping agreement.

The testimony shows that this advance security was given the seamen in presence of the authorized deputy of the shipping commissioner. The instrument must, therefore, be held to be valid advance security for the sums therein mentioned. That it was discounted by the libelant is proved, and it bears on the back a receipt stating the sum actually paid or accounted for to each of the seamen named therein by the libelant, which receipt is signed by each of the seamen as the statute requires. The libelant testifies that he actually paid or accounted for, to each seaman named in the receipt, the sum receipted for by such seaman, and the correctness of his statement is not disputed. The security was therefore lawfully discounted by the libelant, as required by the statute. It appears, however, that none of the seamen named in the security went to sea in the bark from St. Mary's, but that they were all discharged from the vessel at Savannah, with the consent of the master. There is no dispute as to the fact that the discharge of the crew at Savannah was with the consent of the master. Indeed, the master himself testifies to that fact. Under such circumstances, the statutory liability of the owner to the libelant for the amounts named in the security became complete 10 days after the departure of the ship for St. Mary's, notwithstanding the nonperformance of the conditions the agreement contained. Such is the express provision of the statute.

The contract sued on is a maritime contract. It was discounted by the libelant in accordance with the statute. The jurisdiction of a court of admiralty to enforce it, in behalf of the libelant, as against the owner of the vessel, is not doubtful. The libelant is therefore entitled to a decree for the amount of the ad-

[1] [Not previously reported.]

vance wages stated in the advance security, namely, $141, with interest from the commencement of this action, and costs.

SMITH (PEOPLE v.). See Case No. 16,342.

Case No. 13,091.

SMITH v. PERKINS et al.

[8 Biss. 73; 10 Chi. Leg. News, 49; 4 Law & Eq. Rep. 659.] [1]

Circuit Court, N. D. Illinois. Oct. Term, 1877.[2]

MORTGAGES — TRUSTEES — NEGOTIABLE PAPER—EQUITIES BETWEEN PRIOR PLEDGEE AND SUBSEQUENT LIENORS — CONSTRUCTIVE NOTICE OF RECORD—DUE DILIGENCE.

Where A., a trustee under a deed of trust upon real estate to secure a promissory note, was entrusted with the note for collection, the holder indorsing it in blank, and fraudulently pledged the note before maturity, indorsing it in blank, for a debt of his own to B., who acted in good faith; and subsequently, through mesne conveyances of record which recited the deed of trust, A. took title to the property, assuming the debt secured by the deed of trust, and afterwards obtained loans on the faith of his title, representing the trust note to have been paid, and then exhibiting and recording a release from himself as trustee, purporting to operate before he took title: *Held*, as between B. and the other lienors the former had a better equity, and that the acts and conduct of A., after he became the owner of the land, were not entitled to be considered as those of a trustee.

In equity. This was a bill filed by the complainant [Janet Smith, administratrix, against Norman C. Perkins and others] to enforce an alleged lien upon lots 15 and 16 in block 111, of the school section addition to Chicago, arising under a mortgage or deed of trust, executed by George N. Williams, to Obadiah Jackson, on the 1st of October, 1868, to secure a note of $30,000, given by Williams to Charles C. Waite. The facts in the case, so far as they are material to a decision of this controversy, were substantially as follows: Charles C. Waite, then a resident of the city of New York, was the owner of the property on the 1st of October, 1868, and Obadiah Jackson, one of the defendants, was then an attorney-at-law and resident of the city of Chicago, and the agent of Waite to dispose of it. Accordingly, Jackson, having informed Waite that he had obtained a purchaser, transmitted to Waite, for his signature, a deed to George N. Williams, the alleged purchaser, and Waite duly executed on the 1st of October, 1868, a deed conveying the property to Williams. $10,000 were paid in cash, and two notes were given purporting to have been signed by Williams, one for $6,000, payable in one year, and the other for $30,000, payable in four years, which last note is the one in controversy, the $6,000 note having been paid; and to secure these two notes, Williams on the same day executed a deed of trust to Jackson. These notes were transmitted to Waite, and the note in controversy was by him assigned to his brother, S. M. Waite, then a resident of Vermont. The latter transmitted the note to Jackson, for collection, (the interest being payable semi-annually,) having indorsed it in blank, thus clothing Jackson with authority over the notes, as apparent owner and holder thereof. On the 5th day of October, 1868, Williams, by a warranty deed, conveyed the land to Mary P. Moody, and on the 17th of May, 1871, Mrs. Moody conveyed the land to Dr. C. V. Dyer, by a deed of warranty. On the 1st of June, 1872, Dr. Dyer conveyed the land to Jackson, the trustee in the deed of 1st of October, 1868. All these conveyances, it is admitted, were made subject to the deed of trust already referred to, and stated that the respective grantees assumed and agreed to pay the debt to secure which the deed of trust was given. And in the deed to Jackson, it is recited that the conveyance was made subject to the trust deed, on which was due $30,000 and interest, the payment of which was assumed by Jackson. On the 18th of April, 1871, Jackson being indebted by note for $31,500 to the complainant's intestate, as collateral security for the same, transferred to him the $30,000 note secured by the deed of trust, having written over the blank indorsement of S. M. Waite, "Pay to Obadiah Jackson or order;" and thereupon Jackson indorsed the note in blank, by writing his own name thereon, he acting throughout as the absolute owner of the note. Long after this arrangement was made by Jackson with Smith, Jackson pretended still to hold the $30,000 note, as agent and attorney of Waite, and occasionally made remittances to him to keep up the deception, he having no knowledge or even suspicion that the note had been pledged to Smith. He also continued to pay, till October, 1876, the interest on his note to him. Subsequently, Jackson, claiming to be the owner of the property, and being then considered responsible, though since insolvent, desired to raise money on it, and obtained a loan from the Messrs. Swift, of Philadelphia, alleging that the $30,000 note had been paid, and had been destroyed by the fire of 1871, although it had not yet become due and payable, and he produced to their agent and attorney, in August, 1872, when this negotiation took place, a deed of release from himself, as trustee, to Dr. C. V. Dyer, dated October 2, 1871. This deed of release was not acknowledged or recorded until August, 1872, and was undoubtedly executed about that time, although purporting to bear date on the 2d of October, 1871. All the other deeds were executed at or about the time they bear date, and were within a short time of their date duly recorded. Jackson afterwards attempted to raise an additional sum of money upon the security of this property, and gave a second mortgage or deed of

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 4 Law & Eq. Rep. 659, contains only a partial report.]

[2] [Affirmed in 102 U. S. 412.]

trust, under which some of the defendants claim a lien.

Van H. Higgins and W. T. Burgess, for complainant.

W. C. Goudy and Orrin Skinner, for defendants.

DRUMMOND, Circuit Judge. The main question in the case is whether the $30,000 note is a valid lien upon the property under the deed of trust of the 1st of October, 1868, given by Williams to Jackson, as against Messrs. Swift and others, defendants, claiming also liens upon the property. I think it is.

Some question has been made whether Williams, the grantee in the deea given by Waite, was a real person. There is no satisfactory evidence in the record that he was a fictitious person; the testimony of Mr. Hoffman who took the acknowledgment of the deed of trust, rather indicates that he was a real person, as he says he never took an acknowledgment unless he knew the grantor, or he was introduced to him as the grantor by some person of his acquaintance. But I apprehend it would make no difference even if Williams were a fictitious person. Waite, through whom the parties claim title, would be estopped from setting up any right to the property after what has taken place.

It is conceded that Jackson perpetrated a fraud in pretending to be the owner of the note, and in transferring it to Smith, when, in fact, he simply held it as agent and attorney; this being so, the question is, who is to suffer by the fraud of Jackson, Smith, or these other defendants who confessedly have advanced their money in good faith, relying upon the security which was given to them by Jackson? I think, under the facts, Smith must be considered a bona fide holder of the $30,000 note for value, and therefore entitled to all the protection which the law gives to the holders of mercantile paper purchased for value before maturity. Goodman v. Simonds, 20 How. [61 U. S.] 343. His lien was prior in point of time to that of the defendants. It was created by deed of trust which was on record and notice to all the world, and in addition to this all the parties, from Williams to Jackson, who received a conveyance of the property, took it with an express recital in each deed that it was subject to the debt secured by the deed of trust; and further, the respective grantees agreed to become responsible for the debt, and pay it; in other words, they took the property subject to the incumbrance, and understanding that, before they could obtain a good title to it, the deed of trust was to be canceled and discharged by the payment of the debt.

Every person taking title to property is bound by the recitals of his title deeds, so, therefore, were all these grantees, and Jackson among the others. But it is said that admitting the Swifts had no right to take the statements of Jackson as to what had become of the $30,000 note, as the evidence shows that their counsel did, even before its maturity, still when the other defendants advanced money upon the property, there was on record a release, purporting to bear date on the 2d of October, 1871, from Jackson to Dyer, and therefore, that their lien at least was valid, however it might be with that of the Swifts.

As to the lien of the Swifts, objection was made at the time, that there was no release of the deed of trust, and before the money was advanced a release was required, and accordingly it was produced and was acknowledged and recorded in August, 1872, but at the time this was produced and at the time it was undoubtedly executed, Jackson had become clothed with the apparent title to the property —he had ceased to be a mere trustee, and had no claim to the immunities or privileges of a trustee; and neither was his conduct or actions entitled to the same legal presumptions in his favor as if he had been a mere trustee. Therefore, under the circumstances, parties advancing money on the faith of such title had no right to take the declarations of Jackson, or to assume that the release necessarily operated on the 2d of October, 1871, to clothe Dyer with the absolute title to the property, discharged from the operation of the deed of trust. And as to the lien of the other defendants, (and the same rule is applicable to all of the defendants,) there was on the face of the title, upon the faith of which they advanced their money, enough to show that it was their duty to ascertain whether or not the debt, which the deed of trust had been given to secure, was paid.

Jackson took the title on the 1st day of June, 1872, subject to the $30,000 note, and agreed to pay it or to hold his title subject to it. There was, therefore, on the record and on the face of his title at that time, something which contradicted the apparent effect of the deed of release purporting to be made on the 2d of October, 1871, and therefore, the fact that the deed of release was not acknowledged and recorded till August, 1872, was of special significance, because if there had been a deed of release executed on the 2d of October, 1871, the property would have been entirely discharged from the operation of the deed of trust, and the recital in the deed of June 1, 1872, could not be true. So that there was, on the face of the title and the record, enough to rouse suspicion and to show that it was the duty of any person who advanced money upon the title to ascertain whether or not the deed of trust of the 1st of October, 1868, had been in fact discharged. If, then, it be admitted that under ordinary circumstances full effect is to be given to the acts of a trustee as to property which he holds as such, still in this case, Jackson, from the new relation which he assumed, having become clothed with the title, ceased to be a mere trustee, and the rule does not apply, and all parties were required to exercise legal diligence to see that the title was valid and the property released from the lien of the deed of trust by the payment of the debt.

The plaintiff is, therefore, entitled to a decree

to enforce her lien against the property as the prior equity.

This opinion of the circuit court was afterwards affirmed by the supreme court in Swift v. Smith, 102 U. S. 412.

SMITH (PETER v.). See Case No. 11,020.

SMITH (PHARO v.). See Cases Nos. 11,062 and 11,063.

SMITH v. PLYMPTON. See Case No. 13,-078.

Case No. 13,092.

SMITH et al. v. POMEROY.

[2 Dill. 414;[1] 5 Chi. Leg. News, 158.]

Circuit Court, D. Minnesota. Dec. Term, 1872.

PARTIES — ABSENT DEFENDANTS — PUBLICATION — JURISDICTION — TITLES UNDER DECREES.

1. Decrees and judgments of courts of general jurisdiction are presumptively regular.

2. If the court pronouncing a decree had jurisdiction to render it, such decree can not be collaterally impeached.

[Cited in brief in Adams v. Cowles, 95 Mo. 501, 8 S. W. 711.]

3. What is requisite to confer jurisdiction over the property of absent mortgagors in bills to foreclose, considered, and the statute of the territory of Minnesota on that subject, construed.

4. Titles acquired under sales upon decrees of foreclosure, where the court rendering the decree had jurisdiction, can not be collaterally impeached for errors or irregularities in the proceedings in the cause in which the decree was rendered.

This was an action of ejectment tried to a jury. It was one of numerous cases brought to test the title to the property in "Lambert & Co.'s addition" to St. Paul.

E. C. Palmer and Officer & Chittenden, for plaintiffs.

Gilfillan & Williams, H. J. Horn, Geo. L. Otis, and M. Lamprey, for defendant.

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

DILLON, Circuit Judge. This is an action of ejectment for lots 1, 2, and 3, in block 1, in Lambert & Co.'s addition to St. Paul. Both parties claim title under Charles K. Smith, who died intestate on the 28th day of September, 1866. The plaintiffs have been admitted on the trial to be his heirs at law, and upon the documentary evidence introduced are entitled to recover unless the title of their ancestor has been divested by the foreclosure proceedings of one Vetal Guerin against the said Charles K. Smith, set up in the answer. It is under these proceedings that the defendant claims title to the lots in controversy; and the question in the case is whether the right of the said Smith was foreclosed by a valid decree, and the title to the premises vested in the purchaser by a valid sale under such decree.

Record evidence has been introduced, showing that on the 25th day of February, 1851, Vetal Guerin, being the owner of ten acres of land, now in the city of St. Paul, and since platted under the name of "Lambert & Co.'s Addition" to the city, conveyed the same to Charles K. Smith, above named (the ancestor of the plaintiffs), and that Charles K. Smith on the same day executed a mortgage to Guerin, dated February 25th, 1851, to secure the sum of $200, due May 12th, 1851, which mortgage was duly recorded.

It is this mortgage which the defendant avers was subsequently foreclosed, and under which, it is claimed, the mortgaged property was sold by virtue of the foreclosure decree. These foreclosure proceedings are asserted to have taken place in the district court of the territory of Minnesota, for the county of Ramsey, in which the land in controversy is situate; and to show the fact of the foreclosure the defendant has introduced certain record evidence of proceedings in that court in 1851 and 1852 in a suit entitled Guerin v. Smith [unreported], and certain oral evidence to show the loss of other portions of the records in said cause, and a deed purporting to have been made by a master under the decree rendered therein.

By the statute then in force that court was a court of general chancery jurisdiction. Rev. St. Minn. 1851, c. 94. This statute prescribed in detail the mode of exercising chancery jurisdiction generally, and contained special provisions respecting the "powers and proceedings of the court of chancery touching the foreclosure of mortgages."

It prescribed, among other things, the mode of proceeding against absent defendants, in substance that "In case of a bill filed against any defendant, against whom a subpœna or process to appear shall issue, who shall fail to enter his appearance, and it shall be made to appear, by affidavit or otherwise, to the satisfaction of the judge, that the defendant is out of the territory, the judge may by order direct such defendant to appear, plead, answer, or demur to the bill at a day to be fixed, not less than three nor more than six months from the date of the order, which order may be published in a newspaper for six weeks; and in case the defendant shall fail to appear and plead within the time limited, on proof of the publication of the order to the satisfaction of the judge, the judge may order the bill to be taken as confessed, and render a decree as therein provided." Rev. St. 1861, p. 463, § 15; Id. p. 468, § 57.

The statute then in force contained this provision: "The clerk must keep among the records of the court a register of actions; he must enter therein the title of the action, with brief notes under it, from time to time, of all papers filed, and proceedings had therein." Rev. St. 1861, p. 421, § 40.

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

It also contained a provision that "It shall not be necessary to enroll any decree in a court of chancery, but immediately after any decree shall have been pronounced, the bill, answer, and all other proceedings in the cause shall be attached together by the clerk and filed in his office," &c. Rev. St. 1861, p. 465, § 32.

On this trial the original book called the "Register of Actions" has been introduced in evidence, and in relation to the suit of Guerin v. Smith, contains entries showing that the bill of foreclosure was filed November 8th, 1851; that two subpœnas were returned by the sheriff that Charles K. Smith was not found, the one November 15th, 1851, the other December 15th, 1851; that an affidavit for an order for publication was filed as follows: Ordered that "Charles K. Smith appear, plead, answer, or demur to the complainant's bill filed in this cause by the 1st day of April next," and that "this order be published in the Minnesotian six weeks successively, at least once each week. Dated, St. Paul, December 22d, 1851. Jerome Fuller, Chief Justice." It has been proved by the production of the original files of the Minnesotian from the state historical society that this order was published for the required length of time.

The register of actions also contains the entry of an order of the chief justice, filed April 3d, 1852, that the bill be taken as confessed, and an order of reference by the clerk as master; that the master made his report, which was filed May 10th, 1852, finding the sum of $213.92 due the complainant. It also contains the following entries: "Decree filed May 20th, 1852; report of sale filed August 10th, 1852; final decree confirming sale and ordering distribution of surplus filed September 3d, 1852."

The clerk and deputy clerk who made the entries in this register are both alive and have been examined as witnesses before you on this trial, and testify that after thorough search they cannot find the original files or papers in this foreclosure suit; that the orders and decrees of the court were never entered of record in any book, but were filed away at the time as the statute directs.

The clerk has testified that he recollects that the bill in the said suit was to foreclose the mortgage from Smith to Guerin, before mentioned; and that he knew a decree of foreclosure was rendered and signed ordering a sale of the mortgaged premises by the clerk as master; that Lambert was the purchaser; that the sale was reported, and that an order was made and signed by the judge confirming the sale. A deed by the master to Lambert, dated August 10th, 1852, reciting the decree and sale and conveying the property, is also in evidence.

Now, if you believe from the evidence that the bill in the said suit of Guerin v. Smith was one to foreclose the said mortgage of February 25th, 1851, embracing the lots in controversy; that an order for publication was directed by the chief justice of the court; that the order appearing in the files of the Minnesotian was published for six weeks, respecting which last fact there is, indeed, no controversy; that subsequently a decree of foreclosure was rendered by the judge ordering a sale of the mortgaged premises by the clerk as master; that the clerk sold the premises, though he failed to publish notice of said sale in more than one newspaper; and that the sale was reported to the court and a final decree ordered, confirming the sale and ordering a distribution of the surplus; and that the master made the deed of August 10th, 1852, introduced in evidence,—then we instruct you that the effect of this foreclosure proceeding, sale, and deed was to divest the said Charles K. Smith of title to the mortgaged premises, and consequently the plaintiff, as his heir-at-law, cannot recover in this action.

The court in which these proceedings were had was a court of original and general jurisdiction in chancery, and if it rendered a decree of foreclosure of the said mortgage the presumption is both that it had jurisdiction to render such a decree, and that its proceedings were regular.

The presumption of jurisdiction arising from the fact that a decree was rendered is not conclusive, but may be rebutted; and if it appears that it had no jurisdiction of the subject matter or the party defendant, its decree and all acts under it would be void.

Where a decree of foreclosure is rendered, and a sale of property has been made thereunder, it can not be attacked collaterally, and the title thus acquired overthrown, except on the ground that the court rendering the decree had no jurisdiction. If it had jurisdiction, no irregularity and no error in the exercise of such jurisdiction can affect the title of a purchaser under the decree, even though the error or irregularity may be such that a revisory court on appeal would have reversed the decree.

The district court of the territory of Minnesota confessedly had jurisdiction of suits to foreclose mortgages upon lands within the county where the court was being held.

What would confer jurisdiction upon the court to render a decree of foreclosure? Under the statute in force at the time, and before referred to (Rev. St. 1851, c. 94), we answer this question as follows:—

First. There must be filed in the court a bill of complaint, describing the mortgage sought to be foreclosed, the mortgaged premises, and making the mortgagor a defendant. This is necessary to call the judicial power into exercise.

Second. A subpœna or process must issue against the defendant, and be served upon him; or, if he was out of the territory or could not be found therein, the judge must make an order requiring the absent defendant to appear therein, which order must be

served personally on the defendant, or be published in one or more newspapers in the territory, as required by statute, and the order of the judge (Rev. St. 1861, p. 453, § 14), but if such personal service or publication be made, and proof thereof be made to the proper judge or court, such court or judge has jurisdiction to render a decree thereon.

The court, or under this statute the judge, was authorized to determine whether the service or publication had been made, and its sufficiency and such determination, though erroneous, can not be revised in a collateral proceeding by another court, but such determination must stand and be respected until it is reversed or set aside in some direct proceeding.

A distinction must be borne in mind between a case where there is no service or no publication, and one which is defective, but which the proper court has adjudged to be sufficient, and upon such an adjudication rendered a final decree in the case.

These principles, so essential to the stability of judicial titles, have had the sanction of the supreme court of the United States, and have been vindicated and enforced with great clearness and strength of reasoning in several of its published judgments. Voorhees v. Bank, 10 Pet. [35 U. S.] 449, and cases cited; Cooper v. Reynolds, 10 Wall. [77 U. S.] 308.

Views not in harmony with these have, we are aware, been sometimes held; but their undoubted effect is to encourage the picking of flaws in deeds and judicial proceedings in which confidence has been long reposed, thereby promoting litigation and precipitating upon the community all of the manifold evils of insecure titles. It is, in our judgment, a misfortune to any state where these views receive judicial sanction, and especially in the new states where property is rapidly advancing in value, as exemplified by the case in hand, in which ten acres of unimproved land, worth in 1852 about $700, is soon after platted into lots, which are now covered with valuable improvements, made by purchasers in good faith, and worth fifty or perhaps an hundred times that amount.

There was a verdict and judgment for the defendant.

As to jurisdiction and collateral attacks on decrees and judgments, see Salisbury v. Sands [Case No. 12,251]; Isaacs v. Price [Id. 7,097].

Case No. 13,093.

SMITH v. POOR et al.

[3 Ware, 148.][1]

District Court, D. Maine. April, 1858.

CORPORATIONS — DIRECTORS—PERSONAL LIABILITY —ACTS—ULTRA VIRES—MISUSE AND ABUSE OF OFFICIAL POWERS—SUIT BY STOCKHOLDER.

1. The acts of the directors of a corporation in the transaction of its business, are the acts of the corporation. They bind the corporate body, but not themselves personally.

2. This is when they act within the limits and scope of the powers granted to the corporation. If they exceed these limits, their acts are their own and they are personally responsible, and not the corporation.

3. Generally a stockholder can maintain no action against the directors or other agents of the corporation for a misuse or abuse of their official powers, by which the corporate property is wasted. The injury in such a case is a single and indivisible injury to the corporation and not a several injury to each stockholder, and the remedy must be sought in a single suit by the corporation.

4. An exception is allowed when the acting directors fraudulently and by collusion refuse to institute a suit, or when they are the wrong doers. Then a suit in equity may be maintained against the directors by any of the stockholders suing for themselves and all the other stockholders.

5. It seems that a stockholder is not debarred from maintaining an action either against the directors or the corporation for a private and personal wrong to himself, and not a wrong to him as a stockholder, which can be maintained by a stranger.

This is a suit by [F. O. J. Smith] a stockholder of the York & Cumberland Railroad Company against the defendants [J. A. Poor and others], ten in number, seeking to charge them personally for certain alleged misdoings in the management of the business of the corporation as directors. The declaration sets forth that on the 12th of August, 1848, the company entered into a contract with John G. Myers and others to make part of the road; that on the 3d of January, 1850, this contract was modified by a supplemental agreement, and on the 5th of August, 1851, all the previous contracts were consolidated into one duly made and binding on the corporation; that four of these defendants afterwards, they being directors and constituting a majority of the board, well knowing these contracts and that they were obligatory on the corporation, disregarded and violated them, and particularly on the 15th of May, 1851, removed from office and from the employment of the company one Robinson, who by the terms of the contract was agreed upon and was entitled rightfully to act as chief engineer in the construction of the road, on the pretense that he made false estimates of the amount of work done by the contractors and refused to pay for the same, in consequence of which the work was stopped, the road left unfinished, and the company involved in expensive and ruinous litigation, so that the stock of the road was greatly depreciated and rendered wholly worthless, and the stockholders became liable for the debts of the company; and that afterwards on the 11th of November, 1851, the other defendants, claiming to be directors and acting as such in their official capacity, ratified and confirmed all these misdoings and thus made themselves jointly responsible with the others. To this declaration there was a general demurrer.

[1] [Reported by George E. Emery, Esq.]

Mr. Smith, pro se.
Mr. Evans, for defendants.

WARE, District Judge. The demurrer for the purposes of this hearing admits the truth of the facts alleged, but denies their sufficiency to maintain the action. This is an action by a stockholder against the directors for negligence and misconduct in the management of the affairs of the corporation. The general rule is that the acts done by the officers of a corporation are the acts of the corporation itself. A corporation aggregate is merely an artificial person without any natural organs of action and can act only through the instrumentality of natural persons. The old and primitive rule of the common law was that it could only speak and act by its common seal, but even this must be affixed to the paper or parchment by a natural person acting as its agent. 2 Kent, Comm. 222; 2 Bl. Comm. 472. The law or charter from which it derives its existence, points out who these agents shall be, usually as in this case, a board of directors. It is only through these that it can exercise the powers and faculties with which it is clothed by the law. One of these faculties is that of acquiring rights and coming under obligations by means of contracts. But these contracts are made through the instrumentality of the directors or other authorized agents, though when made they are the contracts of the corporation; all the rights and obligations which result from them accrue to the corporation and not to the instruments by which they are made. The agent is the mere conduit-pipe or the electric wire by which the corporate sanction passes into the contract. These contracts thus made are also performed or violated through the instrumentality of agents. The violation or breach of the contract is just as much an act of the corporation as the making of it or carrying it into execution. All the rights acquired by the contract inure to the benefit of the corporation, and all the liabilities resulting from its breach rest upon it. The agents by which these are effected are equally strangers to the rights and responsibilities. Such is the familiar and well-established doctrine of the law.

On principle, then, it is not easy to see how the directors can be liable to this action. They are the mere instruments of the corporation both in making and breaking the contracts. And the decisions of the courts are in conformity with this theory. Ang. & A. Corp. c. 9, §§ 311, 312. Nor, as I understand the plaintiff's argument, does he controvert the general doctrine. He relies on a distinction to take his case out of it. While the directors act within the scope and limits of the powers granted to the corporation, it is not denied that as its general agents, their acts bind the corporate body, but do not bind themselves personally. But when they go beyond those powers and do acts not authorized by the charter, then their acts bind themselves and do not bind the corporation. And on this distinction the plaintiff seeks to hold the directors personally responsible in this action. Id. c. 9.

The question then arises, whether the case comes within the distinction. The act complained of is a breach on the part of the directors of a contract binding on the corporation, and damages are sought for the loss and injury resulting from it. But this was an act done under color of official authority; for the directors act officially as much in violating a contract as in making and carrying it into execution. They were not, therefore, acting beyond the scope of their power, but only exercising it wrongfully; it may be from an error of judgment, or it may be wantonly and maliciously. It was at most an abuse of their authority, and not a usurpation of ungranted power. Such an abuse of power may be a wrong done to their principal, and if wantonly done they will be answerable for every loss or damage resulting to the corporation. But it is not the less the act of the corporation and binding upon it in relation to third persons. The injury done to such parties is an injury done by the corporation, and the corporate body is alone responsible. See Ang. & A. Corp. c. 9, §§ 311, 312, and the authorities therein cited. This would be an answer to the action if it were by a stranger. But in this case the plaintiff sues as a stockholder for an injury not peculiar to himself but common to all the stockholders; that is, an injury or damage to the common corporate property. The case is unlike that put at the argument of the directors using a patented article, of which a stockholder is the patentee. The injury in such a case is not done to him as a stockholder but as a patentee. It is an illegal and fraudulent appropriation of his private property. It may be admitted that for such a wrong a stockholder would not be debarred of any remedy either against the company or directors; that would be open to a stranger, for it is as such that he sues, and nothing is more common in law than for a person to have a right of action in one character which he cannot maintain in another, as a trustee, executor, or administrator. The plaintiff's right of action in such a case does not grow out of his relations to the company. But in the case at bar the wrong complained of is peculiarly a wrong to the corporation. It is the common corporate property that has been depreciated. The injury to the plaintiff is derivative and secondary, and affects him so far only as he is entitled to a share of that property. In such a case a suit for any neglect or misfeasance of the directors or other officers of the corporation must be against the company and not against the individual wrong doers. Smith v. Hurd, 12 Metc. [Mass.] 371; Smith v. Poor, 40 Me.

415. A stockholder cannot maintain an action against the treasurer of the company for wrongfully withholding from him a dividend, for the treasurer acting under color of office, his act is the act of his principal. The rule of law in such a case is respondeat superior. French v. Fuller, 23 Pick. 108. To prevent a failure of justice, and for that cause only, an exception is made to the general rule when the directors, by collusion, refuse to prosecute, or when they are themselves the persons charged with the neglect or misfeasance. Then any of the stockholders may file a bill in equity against them, in their own behalf and in behalf of all the other stockholders, and in this case the corporation as the party having the legal and direct interest, must be brought before the court as a party defendant. Robinson v. Smith, 3 Paige, 233, per Walworth, Ch. But this is a suit at law and if it can be maintained every stockholder may, for the same reason, have his separate action, and a door be opened to an indefinite multiplicity of suits.

The case of Smith v. Poor, recently decided by the supreme court of this state, in one of its aspects bears a very close analogy to the case at bar. There the plaintiff sued the directors as a contractor for a breach of contract; and also for loss and damage sustained by him as a stockholder, for alleged fraudulent acts done by them under color of official authority. The court ruled that in neither aspect could the action be maintained; that for official misconduct of the directors the company was alone responsible to a stranger. And that an individual corporator, who has suffered damage, even in a private contract, by the misconduct or fraud of the director acting colore officii can maintain no action personally against them, but his only remedy is against the corporation. The present case is even stronger against the plaintiff than that. In that the injury set forth was substantially personal and private to himself. Here it is primarily and peculiarly an injury to the artificial or ideal person of the corporation. In strict and technical law the corporation is the only party injured, and the plaintiff and other stockholders suffer wrong and damage only as component parts and members of this ideal personality. Technically, also, the injury is simple and entire, a unity, and not several to the members and component parts, and as the injury is an entirety the remedy cannot be apportioned, but must be by a single suit; and in the excepted cases where the stockholders may maintain an action personally against the directors, all must unite, either actually or virtually, in the suit.

This demurrer is filed by one of the defendants, and it was contended at the argument that it may be sustained on grounds that are peculiar to himself. I have not thought it necessary to consider these, as my opinion is that it is good, on grounds equally applicable to all. The demurrer adjudged good.

Case No. 13,094.

SMITH v. POTTS.

[1 Cranch, C. C. 123.] [1]

Circuit Court, District of Columbia. June, 1803.

CONTINUANCE—INABILITY TO FIND WITNESS.

The court will not continue a cause because the plaintiff cannot find out the place of residence of his witness.

Continuance on the ground that the plaintiff could not find out the residence of his witness—refused.

Case No. 13,095.

SMITH v. PRIOR.

SAME v. O'CONNOR.

[2 Sawy. 461; 4 Fish. Pat. Cas. 469; 4 O. G. 633.] [2]

Circuit Court, D. California. Sept. 1, 1873.

PATENTS—CONSTRUCTION OF CLAIM—STATE OF THE ART—USEFULNESS—FIRST INVENTOR—APPLICATION FOR PATENT.

1. The claim in a patent is to be construed liberally in favor of the patentee, and in connection with the specifications and accompanying drawings.

2. The claim must, also, be considered in connection with the state of the art at the time it is made.

3. The fact that the patented article has superseded all others before in use, and that the party charged with infringing has adopted it in the place of those before made and sold by him, constitutes strong evidence of usefulness.

4. The party who first invents and perfects the invention by producing a practical working machine, is entitled to a patent, even though another may have first conceived the general idea, and made some progress in its development short of constructing a practical machine.

5. The Culpin closet patented in England is not an anticipation of Smith's invention.

6. An application for a patent made within the two years required by the statute was rejected, the claim being defective and not covering the real invention. Another application was made within a reasonable time but not within the two years, upon the same specifications and drawings, with a corrected claim covering the invention, upon which a patent issued: *Held*, that under the circumstances the two applications, for the purposes of the two years, will be regarded as one continuous proceeding dating from the filing of the first application.

[Cited in Weston v. White, Case No. 17,459.]

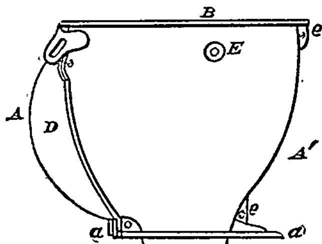
[7. Cited in Buerk v. Imhauser, Case No. 2,107, to the point that damages in patent cases must be confined to the direct and immediate consequences of the infringement, and should not embrace those which are both remote and conjectural.]

[Final hearing on pleadings and proofs.

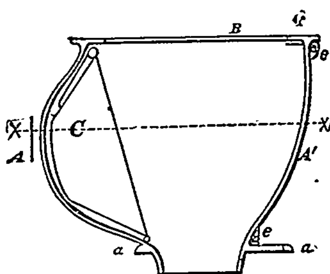
[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by L. S. B. Sawyer, Esq., and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 2 Sawy. 461, and the statement is from 4 Fish. Pat. Cas. 469.]

[Suit brought upon letters patent [No. 106,-089] for "improvement in water-closet receivers," issued to William Smith, August 2, 1870. The claim and material parts of the specification are recited in the opinion.



No. 1.



No. 2.

[In the above engravings, Fig. 1 represents a front view of complainant's device, as shown in his patent. Fig. 2 represents a vertical section of the same. These are referred to and described by letters of reference in the portions of the specification quoted by the court.] [2]

M. A. Wheaton, for plaintiff.
Alfred Rix, for defendant.

SAWYER, Circuit Judge. I have had some difficulty in reaching a satisfactory conclusion in these cases, and in rendering my decision, I shall very briefly mention some of the principal points involved.

One of the main points relied on by defendants is, that the specifications in the patent are insufficient to cover the claim of the plaintiff as now presented. It is insisted that the patent is for mere conformity, not for the form of the vessel, not for the change in the construction of the receiver of the water-closet. The language literally construed and the claim taken by itself may perhaps look so; but after considering the entire specifications and allegations, I think that this position is not tenable. The claim, it is true, might have been much better expressed, and it probably would be if the parties were to draw the specifications after this criticism. I recollect trying but few cases where similar objections have not been made to the patent, showing the difficulty of making specifications which shall cover exactly what the party designs they shall cover, and no more, so as to render the patent free from criticism in that respect. In the description here, it is said: "The nature of my said invention consists in constructing the receivers of water-closets, so that I am able to make the side where the pan is hung correspond to the shape of the pan, and thereby save the waste space which is left behind the pan in ordinary or common receivers. Heretofore the receivers or containers of pan-closets have been constructed of an oval bowl-shaped hopper, with a covering plate, having an enlargement on one side, into which the pan swings when emptying. This construction forms a large space inside the receiver, behind the pan, which is not utilized, but, on the contrary, is detrimental to the closet in allowing obstructions to collect and impede the working of the pan."

Then there is a drawing given of the receiver as he claims his receiver to be, specifying each particular point, and, among others, he says: "AA represent the two parts of the receiver bolted together, with the pan hanging in it as open. It will be noticed that there is no waste space behind the pan; but that the receiver conforms to its shape," going on and giving the particular description of each part of the instrument; and he further says: "By this mode of construction I am able to make a much more perfect article in form."

Then he claims, "a receiver for pan water-closets, formed and constructed so that the side AD, into which the pan C swings for emptying, will conform to the shape of the pan, and avoid the waste space behind the pan, as in ordinary or common receivers, substantially as and for the purpose set forth."

It is true that he claims conformity in these parts, but that conformity is produced in the manner which he before described, wherein he gives a drawing, and gives each specific portion, and states the objects to be accomplished by his invention.

And then this space is to be saved substantially as and for the purposes indicated; that is to say, by means of the instrument in the form, and containing the parts before particularly described.

I think, therefore, it is a claim not merely for conformity, but conformity attained by the particular means which are here in the specifications set out, and shown in the implement of which he has given a drawing.

As I said before, that might have been more distinctly specified than it is, but taken together, and construed liberally in favor of the patentee, I think it substantially covers the case.

It is insisted, also, that the claim is too broad—that it covers the lower part as well as the upper part. I think that defect may be obviated by considering the entire application, although there is some difficulty in the description upon that point also. It is difficult to describe a matter of that kind dis-

[2] [From 4 Fish. Pat. Cas. 469.]

tinctly in language, but the patentee has given, generally, the description of the closets before used, and the particular difficulties to be overcome. He has also given a drawing of his own implement. All definitions must pre-suppose some knowledge of the subject matter, or knowledge of the matters referred to in giving the definition, and, of course, a reference is made to the state of the art as it before existed here. Any one having to deal with these matters must be supposed to have some acquaintance with the subject matter, and the state of the art. A person, then, having a knowledge of the state of the art at the time, and taking the description together, would find the description sufficient, although it doubtless might have been better. From the construction which I have before indicated, I am inclined to think it is sufficient in that particular.

The next point is, as to whether the invention is useful or not—whether it attains any useful result. The testimony shows, and the claim is, that it is useful in several particulars. One is, that it dispenses with the space which in former closets existed behind and above the pan, and which was liable to clog up—fragments of paper getting behind and remaining there, and afterwards clogging the outlet. Some witnesses, it is true, say that they have never heard any such objection, while several witnesses on the other hand testify that that objection did exist; that it was a serious one; and that this change obviated it. The testimony is, also, that it takes less iron; that it reduces the size, and makes a saving in the matter of transportation; that it takes up less room; and all these, it is claimed, are useful results. Well, if all this is true, undoubtedly there is a useful result, and I think the testimony upon the whole shows it.

Besides that, there is the testimony that these closets have superseded all others. That of itself is very strong evidence that there is some useful result attained. More than that, parties are here contesting the use of this invention. The defendants here are using this form. If there were no useful result in it, there would be no occasion for them to be here contesting this invention. They can make and vend the closets they made before, if they are just as good. I think there is—that there must be—some useful result, and that these facts, in addition to the other testimony, ought to establish the point. I think there is a useful result, and that it is patentable in that particular.

The next objection is, that the defendants themselves first made a model in 1864, which is prior to the making of the machine by the plaintiff. There is testimony here tending to show that they did make some progress toward making the model, but the testimony also shows that they never reduced it to a practical working machine for some time afterward, after making the model and laying it aside; the party having gone to Europe in the meantime and returned. It was afterward taken up, but the plaintiff had in the meantime perfected his implement, and had made a practical working machine. I think on that score he is in advance of the defendants, and entitled to the patent as between him and them. With the defendants it was merely an undeveloped idea, so far as making a machine and putting it in practice is concerned.

It is contended that the Culpin patent in England is an anticipation. There is only one point on which it was contended that it is an anticipation, and that is, conformity in the pan, etc. I do not think that the Culpin machine is any anticipation of this. It is a different machine altogether, a machine of different form or make, and it does not appear that it was a practical working machine. At all events, it is a very different working machine from this, and I do not think it is an anticipation of this closet.

The next point presented is, that more than two years elapsed after the making and selling of this machine by the plaintiff before he made his application for the patent. If that is true—if the final application on which the patent was issued is to be taken as the date of the application—this point must be held good. He first made his machine in 1866. In 1866 he presented an application for a patent, but his claim in that application is different from the claim here; that is to say, the form of the claim. That application was rejected. The claim there is "constructing the receiver of a water-closet of two pieces, which are joined together, making a vertical joint, whereby I am enabled to make the receiver conform to the shape of the pan substantially, as herein shown and described." Now, that was rejected on the ground that the claim was for casting in two pieces, and the casting of a machine in two pieces was not new. But the machine for which the claim was made was precisely the implement as finally patented. His descriptions were mainly the same, and his drawing was precisely the same as the one he now has, while the object to be accomplished was evidently the same as he desires to accomplish now. The description, among other things, says: "My invention consists in constructing the receiver in two pieces and bolting them together, whereby I am able to do away with the waste space behind the pan, and to save much expense in casting." Now, one of the objects to be obtained, as is alleged, is to dispense with that waste space. His machine and drawings are the same. Then he says: "By this mode of construction I am able to make a much more perfect article in form, besides saving an important item in the weight of the casting and consequently of transportation." Again. His claim is "constructing the receiver of a water-closet of two pieces, which are joined together, making a vertical joint, whereby I am enabled to make the receiver conform to the shape of the pan substantially, as herein shown and described." The same ultimate object was to be accom-

plished by dispensing with the useless space. The same objects were to be accomplished then as now, but he stated his claim in a different form. It was the same machine he was seeking to patent.

Now, if the view which the patent office took is correct, that this claim was simply for casting in two pieces, and he had obtained a patent for that, it would not have covered the object covered by the present patent. The law in such cases prescribes what may be done where the patentee has failed to cover the points of his invention. He can surrender his patent and obtain another. It is the same invention, the same patent, the same drawings, but he has made an error in the presentation of his claim. He cannot only surrender once, but more than once; until his reissued patent covers his invention. It is manifest that the plaintiff here endeavored in all his applications to cover this invention—the same invention. He did not stop upon the rejection on the ground stated, but after some correspondence with his attorney, and some little delay in which he does not appear to be at fault, he presents his claim again in another form, and it covers, as he supposes, the same invention as that sought in his first application; and the commissioner of the patent office must have considered that he was presenting his claim for the same invention, but that he had made an error in his prior claim; otherwise he would not, under the circumstances, have granted his patent upon the second application.

I think it is the same machine, the same invention; a claim for the same thing that he sought originally—which is presented in the last claim; and that the different applications therefore connect themselves together for the purposes of the two years. That is to say, he made his application within the two years after he began to make and sell the machine; and although he failed to get his patent on his first application, for the reason given that the machine was not patentable, in the form in which he put it, he still renews his efforts, and files a new application for the same machine—the same invention—putting in his claim in a different form, and finally obtains the patent for the thing which he really invented, and under the decisions cited—one from the supreme court of the United States, and one from one of the circuit courts—I think his claims connect themselves together; that is, his application for his patent—the thing which he desired to obtain, which he conceived he had invented, when first made—is for the same machine as that for which he has finally obtained his patent upon a corrected application; and he sought to cover the same points in both applications. And he has followed it up, and the interval which elapsed between the rejection of the first and the filing of the later application, does not make a material delay in view of the explanation in the testimony relating to it. His counsel resided in New York at that time. The communication was by steamer. He began to correspond with his counsel immediately, and he followed the matter up, and finally succeeded in obtaining his patent. I think he has made the connection. The application for this invention is to be regarded as dating from the filing of the first application, he only changing the form of his claim.

These are the main points. There are one or two points I have some hesitation about, but I have concluded to give judgment for the plaintiff.

It only remains to consider the question of damages. That is always a difficult point in patent cases. I have taken into consideration the facts in relation to this class of closets and the prices which the plaintiff sold at before the defendants came into the market as competitors, together with the fact of the reduction of prices caused by competition, and the nearest I can come at it is to allow four dollars a closet; I think that is not extravagant. In the case of Smith v. Prior, the damages are $600; and in the case of Smith v. O'Connor, $632. I shall not, however, double or treble these damages in view of the fact that there is reasonable ground of contest between these parties.

Case No. 13,096.

SMITH v. QUEEN.

[1 Cranch, C. C. 483.] [1]

Circuit Court, District of Columbia. June, 1808.

COURTS—JURISDICTIONAL AMOUNT—JUDGMENT—PAYMENTS.

In an action of debt on a sealed note, if the verdict be reduced below twenty dollars by payments proved at the trial, judgment of non pros. must be entered.

[Cited in Hellrigle v. Dulany, Case No. 6,343.]

Debt [by Smith, for the use of Higden, against Nicholas L. Queen], on a note under seal. There were payments proved which reduced the amount due to seventeen dollars and thirty cents.

The verdict is, "We find for the plaintiff and find the sum due on the note to be seventeen dollars and thirty cents."

Mr. Van Horne, for defendant, moved for judgment of non pros., under Act Md. 1796, c. 68, § 9.

Mr. Caldwell. The courts in Maryland are expressly limited. The jurisdiction of this court is general. See Act Cong. Feb. 27, 1801, § 5 (2 Stat. 106), and May 3, 1802, § 4 (2 Stat. 194). If the defendant can defeat the plaintiff before a justice of the peace, by not pleading discount, &c., and can defeat the plaintiff in this court by pleading discount, the plaintiff would be totally defeated. The plaintiff cannot always ascertain what sum he ought to credit. The defendant may refuse to settle accounts, &c.

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

Curia advisari vult. December term, 1808, judgment of non pros. was entered. See Woolley v. Cloutman, 1 Doug. 244; Wase v. Wyburd, Id. 246; Ailway v. Burrows, Id. 263; Wiltshire v. Lloyd, Id. 381, 382; Pitts v. Carpenter, 2 Strange, 1191.

Case No. 13,097.

SMITH et al. v. REYNOLDS et al.

[10 Blatchf. 85; 3 O. G. 213; Cox, Manual Trade-Mark Cas. 225; 6 Am. Law T. 38.] [1]

Circuit Court, S. D. New York. June 20, 1872.

TRADE-MARK — DECLARATION UNDER OATH — CERTIFICATE BY COMMISSIONER OF PATENTS.

Section 77 of the act of July 8th, 1870 (16 Stat. 210), provides, as a requirement for obtaining a trade-mark, the filing, in the patent office, of a declaration, under oath, as to the right to the trade-mark. A certificate by the commissioner of patents, of the deposit, for registration, of a trade-mark, of which a copy is given, and of the filing of a statement, of which a copy is annexed to the certificate, (but which statement does not contain any such declaration,) and that the party depositing the trade-mark has otherwise complied with the act, and that the trade-mark has been registered and recorded, and will remain in force for a period named in the certificate, is not evidence of the filing of such declaration.

[2] [This was a motion for an injunction in a suit brought by J. Lee Smith & Co. against Robert Reynolds and Samuel Jacobs, doing business as Reynolds & Jacobs, to restrain the defendants from the further alleged infringement of a trade-mark, which the complainants claimed to have registered in accordance with the provisions of the act of congress of July 8, 1870. The only question that appears to have been considered upon the hearing of the motion was the sufficiency of the complainants' proofs as to the regularity of the registration upon which they relied. For proof upon this point they produced a certificate signed by the commissioner of patents, and under the seal of the patent office, said certificate being to this effect, viz., that "J. Lee Smith & Co., of New York, did, on the 30th day of December, 1870, deposit in the United States patent office, for registration, a certain trade-mark for paints, whereof a copy is hereto annexed; that they filed therewith the annexed statement; and having paid into the treasury of the United States the sum of twenty-five dollars, and otherwise complied with the act of congress in such case made and provided, the said trade-mark has been duly registered and recorded in the said patent office, and will remain in force for thirty years from the twenty-first day of February, one thousand eight hundred and seventy-one."

[The statement accompanying this certificate was as follows: "To all whom it may concern: Be it known that we, J. Lee Smith & Co., of the city of New York, of the county and state of New York, use a trade-mark for paints, of which the following, together with a fac-simile hereto attached, is a correct description. The said trade-mark consists of the illustration of a crown, as is clearly shown in the fac-simile. It is applied as a brand, by stencil-plate or die, to the casks, cases, or vessels containing the said paint, printed upon labels or wrappers which are applied to said cases or vessels, or upon the business cards, notices, or placards advertising the paints to the public."] [2]

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. Cox, Manual Trade-Mark Cas. 225, contains only a partial report.]

[2] [From 3. O. G. 213.]

John Hough, for plaintiffs.

Frederic S. Blount, for defendants.

BLATCHFORD, District Judge. This bill is founded on a statutory right to a trade-mark, claimed under the provisions of sections 77 to 84 of the act of July 8th, 1870 (16 Stat. 210–212). Section 77 provides, that any firm domiciled in the United States, "and who are entitled to the exclusive use of any lawful trade-mark, or who intend to adopt and use any trade-mark for exclusive use within the United States, may obtain protection for such lawful trade-mark, by complying with the following requirements." One of those requirements is, "the filing," in the patent office, "of a declaration, under the oath of * * * some member of the firm, to the effect, that the party claiming protection for the trade-mark has a right to the use of the same, and that no other person, firm or corporation has the right to such use, either in the identical form, or having such near resemblance thereto as might be calculated to deceive, and that the description and fac-similes presented for record are true copies of the trade-mark sought to be protected." On complying with these requirements, the trade-mark is to remain in force for thirty years from the date of the registration. The bill avers the filing of such declaration. The defendants, in their answer, put in issue this allegation, among others, and require proof of the same. No proof is given that such declaration was filed. A certificate is produced, signed by the commissioner of patents and under the seal of the patent office, setting forth, that "J. Lee Smith & Co.," of New York, (which is a firm composed of the plaintiffs,) did, on the 30th of December, 1870, deposit in the patent office, for registration, "a certain trade-mark for paints, of which a copy is hereto annexed; that they filed therewith the annexed statement, and, having paid into the treasury of the United States the sum of twenty-five dollars, and otherwise complied with the act of congress in such case made and provided, the said trade-mark has been duly registered and recorded in the said patent office, and will remain in

[2] [From 3. O. G. 213.]

force for thirty years from the 21st day of February, 1871." The statement annexed to the certificate does not contain any such declaration as that referred to. The declaration is required to be "filed." The only thing certified to have been "filed" is the "annexed statement."

It is urged, that the certificate that the parties have "otherwise complied with the act of congress in such case made and provided," and that the trade-mark "will remain in force for thirty years" from the day named, covers the point; and that, in analogy to letters patent for an invention, the certificate is evidence of a compliance with the requisite preliminary steps. But, I do not think this position is a sound one. A patent, being authorized to be granted on evidence on which the commissioner of patents is to decide, the fact that he grants the patent is held to be primâ facie evidence that the proper proofs were laid before him and were satisfactory, he being made, by the statute, the proper judge of the sufficiency and competency of the proofs. Philadelphia & T. R. Co. v. Stimpson, 14 Pet. [39 U. S.] 448, 458; Seymour v. Osborne, 11 Wall. [78 U. S.] 516, 540. But, in respect to a trade-mark, the statute does not authorize the commissioner of patents to issue any letters patent therefor, or to issue any certificate containing a grant thereof. The only certificate he is authorized to issue in reference to the original registration of a trade-mark is that provided for by section 80, which enacts as follows: "The time of the receipt of any trade-mark at the patent office for registration shall be noted and recorded, and copies of the trade-mark, and of the date of the receipt thereof, and of the statement filed therewith, under the seal of the patent office, certified by the commissioner, shall be evidence in any suit in which such trade-mark shall be brought in controversy." A certified copy of the trade-mark, of the date of its receipt, and of the statement filed therewith, (that is, a copy of everything filed and recorded, and of the memorandum of the date of the receipt thereof,) is made evidence. But, such copy is evidence only that what is shown by it to have been filed was filed. It is not evidence that anything required by the statute to be filed, and not shown by the certificate, or by the statement annexed to it, to have been filed, was filed. The certificate of the commissioner, that the parties "otherwise complied" with the act, cannot be substituted for the judgment which a court must pass as to whether there was a declaration filed, and one under oath, and complying, as to its contents, with the statute. The court is to judge, from the "statement," whether the requirement of recording "the class of merchandise and the particular description of goods comprised in such class, by which the trade-mark has been or is intended to be appropriated," was complied with, and whether the requirement of recording a description of the mode in which the trade-mark "has been or is intended to be applied and used," was complied with. So, it is equally for the court to judge whether the requirement as to the filing of the proper declaration was complied with. The general certificate of the commissioner cannot be taken as evidence on the subject.

The certificate, that the trade-mark has been duly registered and recorded in the patent office, and will remain in force for thirty years from the day specified, adds no force to the effect of the certificate. The statute says, that the thirty years shall run from the date of the registration, that the time of the receipt for registration shall be recorded, and that the certificate shall cover a copy of the date of the receipt. The date given in the certificate, as the date from which the thirty years is to run, is to be regarded as intended for the date of registration; and the date previously named in the certificate is the date of the receipt for registration. In this view, the certificate intends to show when the trade-mark will expire; and the certificate that it has been registered and recorded, and will remain in force for thirty years from the day named, is only equivalent to saying that such day is to be taken as the date of the registration. The date given in the certificate as the date of deposit for registration is not regarded by the certificate as the date of registration and recording.

On these grounds alone, the motion for an injunction, now made, must be denied, without considering any of the other points raised.

[NOTE. Full proofs were taken for final hearing, and a motion made for an injunction to restrain the use by defendants of plaintiffs' trade-mark. The motion was denied. Case No. 13,098. The cause then came on for final hearing, when the bill was dismissed. Id. 13,099.]

Case No. 13,098.

SMITH et al. v. REYNOLDS et al.

[10 Blatchf. 100; 3 O. G. 214; 6 Am. Law T. 41; Cox, Manual Trade-Mark Cas. 225.] [1]

Circuit Court, S. D. New York. July 27, 1872.

TRADE-MARK—PARTIES OWNING—FIRM NAME—DEVICE—REGISTRATION.

1. The firm of J. & Co., in registering a trademark for paints in the patent office, under sections 77, &c., of the act of July 8th, 1870 (16 Stat. 210), recorded, as the names of the parties desiring the protection of the trade-mark, and their residences and places of business, "J. & Co., of No. 276 Pearl street, in the city of New York, county and state of New York, and engaged in the manufacture and sale of paints at said New York," and nothing further: *Held*, that it was not necessary to record the name of each of the individual partners of the firm, and his place of residence, and that the

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. Cox, Manual Trade-Mark Cas. 225, contains only a partial report.]

residence and place of business of the firm, as the party desiring the protection, were sufficiently stated.

2. The act requiring that "the class of merchandise, and the particular description of goods comprised in such class, by which the trade-mark has been or is intended to be appropriated," shall be recorded, it is sufficient, where a trade-mark is claimed for paints generally, merely to specify paints as the class of merchandise, without specifying any description of paints.

3. The illustration of a crown, applied as a brand, by stencil plate or die, to vessels containing paints, or printed on labels or wrappers applied to such vessels, or on notices advertising such paints, may be a lawful trade-mark, under said act, because, when used in connection with paints, it may designate, by association in the minds of purchasers of and dealers in paints, the origin or ownership of such paints, as being in a particular manufacturer.

4. The illustration of a crown being claimed by J. & Co., as a trade-mark for paints generally, under said act, and it being alleged that R. had infringed such right, and it appearing that a brand of a crown had been used by B., for white lead alone, of a particular quality and description, made by him continuously, from a period prior to the use, and the registration, of such brand as a trade-mark by J. & Co., and until R. purchased from B. his paints, materials and labels, and the right to use them, including the labels embodying the device of a crown, and that R., from the time of his purchase, which was prior to such registration, had continuously used the device of a crown on some description of paints: *Held*, that, at the time of registering the trade-mark, J. & Co. had no right to the use of it for paints generally, because R. then had a right to use it for the class of paints for which B., as well as R., had previously used it.

5. A registration, under the act, must stand or fall, as a whole, for that to which the registration declares it is intended to appropriate it, there being no provision for maintaining a suit on it, where the grant is valid as to a part, but not as to the whole.

[This was a bill in equity by J. Lee Smith and others against Robert Reynolds and Samuel Jacobs to restrain the infringement of a trade-mark. A motion for an injunction was denied. Case No. 13,097. Proofs were taken for final hearing, and a motion again made for an injunction restraining the use by defendant of plaintiffs' trade-mark.]

John Hough, for plaintiffs.

Frederic S. Blount, for defendants.

BLATCHFORD, District Judge. The 77th section of the act of July 8th, 1870 (16 Stat. 210), provides, "that any person or firm domiciled in the United States, * * * and who are entitled to the exclusive use of any lawful trade-mark, or who intend to adopt and use any trade-mark for exclusive use within the United States, may obtain protection for such lawful trade-mark, by complying with the following requirements, to wit: First. By causing to be recorded in the patent office the names of the parties, and their residences, and place of business, who desire the protection of the trade-mark. Second. The class of merchandise, and the particular description of goods comprised in such class, by which the trade-mark has been or is intended to be appropriated. Third. A description of the trade-mark itself, with fac-similes thereof, and the mode in which it has been or is intended to be applied and used. Fourth. The length of time, if any, during which the trade-mark has been used. Fifth. The payment of a fee of twenty-five dollars, in the same manner and for the same purpose as the fee required for patents. Sixth. The compliance with such regulations as may be prescribed by the commissioner of patents. Seventh. The filing of a declaration, under the oath of the person, or of some member of the firm, * * * to the effect, that the party claiming protection for the trade-mark has the right to the use of the same, and that no other person, firm or corporation has the right to such use, either in the identical form, or having such near resemblance thereto as might be calculated to deceive, and that the description and fac-similes presented for record are true copies of the trade-mark sought to be protected." By section 78, such trade-mark is to remain in force for thirty years from the date of such registration; "and, during the period that it remains in force, it shall entitle the person, firm or corporation registering the same to the exclusive use thereof, so far as regards the description of goods to which it is appropriated in the statement filed under oath as aforesaid, and no other person shall lawfully use the same trade-mark, or substantially the same, or so nearly resembling it as to be calculated to deceive, upon substantially the same description of goods." Section 79 provides, that, if any person or corporation "shall reproduce, counterfeit, copy or imitate any such recorded trade-mark, and affix the same to goods of substantially the same descriptive properties and qualities as those referred to in the registration," the party aggrieved shall "have his remedy according to the course of equity, to enjoin the wrongful use of his trade-mark, and to recover compensation therefor, in any court having jurisdiction over the person guilty of such wrongful use;" and that, "the commissioner of patents shall not receive and record any proposed trade-mark which is not and cannot become a lawful trade-mark, * * * or which is identical with a trade-mark appropriate to the same class of merchandise, and belonging to a different owner, and already registered or received for registration, or which so nearly resembles such last mentioned trade-mark as to be likely to deceive the public."

On the 30th of December, 1870, the firm of J. Lee Smith & Co. filed in the patent office a petition, signed by themselves, in which they are described as of "No. 276 Pearl street, in the city of New York, county and state of New York, and engaged in the manufacture and sale of paints at said New York," and in which they represent, "that they have used for fifteen months last past, are now using, and have the right to use, a trade-mark for

said paints, which is correctly represented and set forth in the annexed fac-simile and statement," and pray "that said trade-mark may be registered and recorded in the patent office according to law." The "statement" thus referred to was in these words: "To all whom it may concern: Be it known, that we, J. Lee Smith & Co. of the city of New York, in the county and state of New York, use a trade-mark for paints, of which the following, together with the fac-simile hereto attached, is a correct description. The said trade-mark consists of the illustration of a crown, as is clearly shown in the fac-simile. The crown may be of the shape and style shown, or of any other suitable form. It is applied as a brand, by stencil plate or die, to the casks, cases, or vessels containing the said paint, printed upon labels or wrappers which are applied to said cases or vessels, or upon the business cards, notices or placards advertising the paints to the public." Accompanying these papers was an oath, made by a person described therein as "a member of the firm of J. Lee Smith & Co., and representing the firm of J. Lee Smith & Co., the above named petitioner," and setting forth, "that, according to the best of his knowledge and belief, the description and fac-simile herewith presented for record are true copies of the trade-mark sought to be protected, that they have a right to the use of the said trade-mark, and that no other person, firm or corporation has the right to such use, either in the identical form or having such near resemblance thereto as might be calculated to deceive." The patent office required the applicants to strike out from the "statement" these words: "The crown may be of the shape and style shown, or of any other suitable form;" and they were stricken out by them. As thus amended, the trade-mark was registered on the 21st of February, 1871. Thereupon, under that date, the patent office issued a certificate, certifying, "that J. Lee Smith & Co. of New York, New York, did, on the thirtieth day of December, 1870, deposit in the United States patent office, for registration, a certain trade-mark for paints, whereof a copy is hereto annexed, that they filed therewith the annexed statement, and, having paid into the treasury of the United States the sum of twenty-five dollars, and otherwise complied with the act of congress in such case made and provided, the said trade-mark has been duly registered and recorded in the said patent office, and will remain in force for thirty years from the twenty-first day of February, one thousand eight hundred and seventy-one." The "statement" and fac-simile are annexed to the certificate. The fac-simile shows one drawing of a crown.

The bill in this case is founded upon the statutory right thus claimed to have been acquired to such trade-mark, and is filed by the members of the said firm of J. Lee Smith & Co., and alleges, that the defendants are selling paint contained in casks, cases or vessels, upon which said trade-mark, or an imitation thereof, bearing such near resemblance thereto as is calculated to deceive, is applied as a brand, by stencil plate or die, or by labels or wrappers upon which said trade-mark, or said imitation thereof, has been printed, and have also used the said trade-mark, or said imitation thereof, upon the business cards, notices and placards advertising the defendants' paints to the public. The plaintiffs move for an injunction to restrain such use of such trade-mark. Full proofs have been taken for final hearing, on both sides, and on them the motion is made.

It is objected to the validity of the registration in this case, that the names of the parties and their residences and places of business were not caused to be recorded in the patent office by the parties desiring the protection of the trade-mark. It is insisted, that the name of each of the individual partners composing the firm, and his place of residence, should have been set forth. But, it is to be noted, that the statute gives the privilege to any "firm domiciled in the United States," as well as to any person domiciled therein. In this view, in the case of a firm, it is sufficient if the name of the firm is given, provided the trade-mark is claimed by the firm, as a firm. Giving the name of the firm is giving the name of the party desiring the protection. The statute requires the declaration, under the oath of some member of the firm, to be to the effect, that "the party claiming protection," that is, the firm, has a right to the use of the same, &c. So, also, setting forth that the firm is "of No. 276 Pearl street, in the city of New York, county and state of New York, and engaged in the manufacture and sale of paints at said New York," is a sufficient statement of the residence and place of business of the firm, as the party desiring the protection.

It is also objected, that, although the registration papers specify "paints" as the class of merchandise, yet there is no designation of the particular description of goods comprised in such class, to which the trade-mark is or is to be appropriated. But the parties describe themselves as engaged in the manufacture and sale of paints generally, and it is a trade-mark for paints generally which they state they use and have a right to use, and desire to have protected. They cover the whole class of merchandise called "paints," and every description of goods comprised in such class. That being clearly stated by them, any further specification was unnecessary.

It is insisted, by the defendants, that the illustration of a crown, applied as set forth in the "statement," is not the subject of a lawful trade-mark, because it does not indicate the true origin or ownership of the paint. The statute protects only that which is or can become a lawful trade-mark. It declares, that the mere name of a person, firm or corporation cannot be a lawful trade-mark, but that

such name, accompanied by a mark sufficient to distinguish it from the same name when used by other persons, may be a lawful trade-mark. A fortiori, a mark or device distinguishable from other marks, when used in connection with a particular article, may designate, by association in the minds of purchasers of and dealers in such article, the origin or ownership of such article, as being in a particular manufacturer, and thus be a lawful trade-mark. Delaware & H. Canal Co. v. Clark, 13 Wall. [80 U. S.] 311. The practice of the patent office, in registering trade-marks, under the act of 1870, has been in accordance with this view, and properly so. It has, on discussion, authorized, as lawful trade-marks, the letter X, applied to brooms, and the letter D, encompassed by the figure of a lozenge, applied to loom temples. Com'rs Dec. 1870, p. 142, and Id. 1871, p. 248. In the case of Morrison v. Case [Case No. 9,845], it was held, that, under the act of 1870, the words, "The Star Shirt," and those words with the device of a six-pointed star used in connection therewith, and the device and words, "The * Shirt," used as a trade-mark in connection with the manufacture and sale of men's and boys' shirts, and taken by dealers as designating the shirts made by a particular manufacturer, are a lawful trade-mark. There can be no doubt, that a simple illustration of a crown, to be applied in use as designated in this case, in connection with paints, to indicate their origin and ownership, is a lawful trade-mark, under the statute.

The principal defence set up in the answer of the defendants is, that, in October, 1868, the Bridgewater Paint and Color Works Company, then doing business in the city of New York, made a label, brand or trade-mark of a crown, which was used for white lead alone, of a particular quality and description, manufactured by said company for J. J. Vogt & Co., of Cleveland, Ohio, the same being an imprint on paper, consisting of the words, "Golden Crown," with the illustration of a crown underneath them, and, underneath the crown, an illustration of a heraldic coat of arms, and, on the left of the coat of arms, the words, "manufactured expressly for J. J. Vogt & Co.," and, on the right of the coat of arms, the words, "No. 32 Public Square, Cleveland, Ohio," and, underneath the whole, the words, "White Lead;" that the said company, of which the defendant Reynolds was one of the copartners, having been dissolved, its business in the manufacture of paints was continued by the defendant Reynolds and one Jacob Israel, under the name of Reynolds & Co., and the same quality of white lead was continued to be manufactured by them, and was distinguished by a brand, label or die, consisting of an inner circle, within which, at the top, was the illustration of a crown, and underneath that the letters "XX," and underneath those letters the words, "Reynolds & Co.," and outside of such circle a second circle, and in the ring between the two circles, the words, circumferentially, "Pure English White Lead;" that, the copartnership of Reynolds & Co. having expired January 1st, 1872, the defendants, under the firm of Reynolds & Jacobs, continue the manufacture of the same quality of white lead, using the same brand, die or label which had been used by Reynolds & Co. since February, 1870, as a trade-mark; and that, in February, 1870, the defendant Reynolds procured the brand to be made of such trade-mark for Reynolds & Co., which they and the defendants have ever since constantly and uninterruptedly used, to designate a particular quality of white lead manufactured by them.

The defendants have used the illustration of a crown, as a device, and as part of a brand or label, on packages containing white lead ground in oil, and on packages containing blanc de zinc, or zinc ground in oil. Although the device of a crown was adopted and used by the defendant Reynolds, in the shape in which the defendants now use it, in February, 1870, and the plaintiffs did not file their first statutory papers in the patent office until December, 1870, yet the plaintiffs show that they adopted and used their device of a crown as early as December, 1869. In reply to this, the defendants show the use, by the Bridgewater Paint and Color Works Company, in 1868, and from that time until its dissolution, of the device of a crown on three different forms of label, put upon packages containing paints made by them. One is the form hereinbefore referred to as set forth in the answer. Another contained the simple device of a crown, and the words, "Pure English White Lead, J. J. V. & Co." The other contained an illustration of a heraldic coat of arms, resembling very much the coat of arms of the crown of Great Britain, embodying the device of a crown as an integral part of it, and the words, "Pure English White Lead, ground expressly for J. J. Vogt & Co., 32 Public Square, Cleveland, Ohio." They also show, that, in November, 1869, the defendant Reynolds purchased from the Bridgewater Paint and Color Works Company, their paints, materials and labels, and the right to use them, including the labels embodying the device of a crown. The defendant Reynolds has, since that time, continuously, in his firms, used the device of a crown on some description of paints. The brand or label of the form used by the defendant Reynolds, in his firms, since February, 1870, is as near a resemblance to one at least of the three forms of label used by the Bridgewater Paint and Color Works Company, as it is to the device shown in the plaintiffs' registration, and the latter is as near a resemblance to such Bridgewater label as it is to the brand or label of the defendants. It is manifest, therefore, that the plaintiffs had, at the time they registered the illustration of a crown as a trade-mark for paints generally, no right to the broad use of it for paints generally, the defendant Reynolds and his

then firm having the right to the use of it for, at least, the classes of paints for which it had been used as a label or trade-mark by the Bridgewater Paint and Color Works Company, and by the defendant Reynolds, and his firm of Reynolds & Co., prior to the time of such registration. The plaintiffs registered it, and claimed the right to use it, as a trade-mark for paints generally, for all descriptions of paints, without reservation or exception. Whatever grant there is of it, by reason of the registration made by the plaintiffs, is of the right to use it for paints of all kinds—for the class of merchandise called "paints." The plaintiffs have not restricted themselves to any particular descriptions of goods comprised in such class. Their registration must stand or fall as a whole, for that to which they declare, in their registration, they intend to appropriate it. There is no provision in regard to trade-marks, such as there has been and is in regard to patents for inventions, that a suit may be maintained where the grant is valid as to a part, but not as to the whole. It follows, therefore, that the registration of this trade-mark, in the form in which it was made, conferred no right on the plaintiffs, in respect to any thing purporting to be covered by it.

The motion for an injunction must, for these reasons, be denied.

[The cause came on for final hearing, when the bill was dismissed. Case No. 13,099.]

Case No. 13,099.

SMITH et al. v. REYNOLDS et al.

[13 Blatchf. 458; Cox, Manual Trade-Mark Cas. 285.] [1]

Circuit Court, S. D. New York. July 19, 1876.

TRADE-MARK—PARTICULAR USE—REGISTRATION.

The registration of a trade-mark for "paints" by A., who had previously acquired the exclusive use of such trade-mark for particular kinds of paints only, does not enable A. to restrain B. from using such trade-mark upon another kind of paint, to which B. had been in the habit of affixing such trade-mark prior to such registration.

[This was a bill in equity by J. Lee Smith & Co., against Robert Reynolds and Samuel Jacobs.]

Alexander H. H. Dawson, for plaintiffs.
Hugh L. Cole, for defendants.

SHIPMAN, District Judge. This is a bill in equity to restrain the defendants from the use of a trade-mark for "paints," which was registered in the patent office on February 21st, 1871. After full proofs had been taken for final hearing, a motion for a preliminary injunction was heard before Judge Blatchford, whose opinion (Smith v. Reynolds [Case No. 13,098]) recites the allegations of the bill and answer, and the facts which he found to have been proved. No question has been made before me as to the correctness of the decision of the learned judge upon the points of law which are considered in his opinion. The controversy has turned upon the questions of fact. While I concur with Judge Blatchford in the result which he reached, I deem it desirable to state somewhat more in detail than he did, some of the facts which seem to me to be important.

The plaintiffs, who have been for many years importers of paints, in September, 1869, opened negotiations with a new firm of English manufacturers, for the purpose of introducing their goods into the market in this country. Recognizing the importance of having a trade-mark by which these goods should be known, and under which they should attain a reputation, the plaintiffs adopted the crown as such mark, and instructed the English firm to place that mark upon all goods of their manufacture which were sent to the plaintiffs. This was done, and the crown brand soon became well known and was largely sold. It was applied on "Paris white, Venetian red, drop black, Indian reds, Tuscan reds, patent drier, oak stain, dry ochres, ochres in oil," and various other colors. It does not appear to have been applied to white lead of blanc de zinc. The white lead which the plaintiffs sold was the manufacture of other English firms, whose goods had their own peculiar and well known trade-mark. No white lead of English manufacture, having a crown trade-mark, has been known in the markets of this country. A number of years ago, another firm in the city of New York imported blanc de zinc which was branded with the English coat of arms. Their business was transferred to a corporation in Boston, which continues the sale of this article under the same brand.

At the time of the registration of the crown trade-mark, the plaintiffs had acquired, at common law, a right to the use of this mark upon the particular class of paints to which it had been applied, but had not used the mark upon all paints which they sold, and especially had not adopted its use upon white lead or zinc. On December 30th, 1870, they filed a petition in the patent office, representing that they were using, and had the right to use, a trade-mark for "paints," which trade-mark consisted of the illustration of a crown. On February 21st, 1871, the patent office issued a certificate, to the effect that said trade-mark had been duly registered and recorded, and would remain in force for thirty years from that date. Since said date, it does not appear that the plaintiffs have used this trade-mark upon white lead or zinc, but they have continued to use it upon the same kinds of paint which have been mentioned, and the public has understood that the mark belonged to this particular manufacture, and distinguished it from like goods.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. Cox, Manual Trade-Mark Cas. 285, contains only a partial report.]

of other manufacturers or vendors. In February, 1870, the firm of Reynolds & Co., which consisted of Robert Reynolds and Jacob Israel, who were manufacturers of paints, commenced to use a label and brand upon the white lead which they manufactured. This label consisted of an inner circle, within which, at the top, was the illustration of a crown, and underneath that the letters "XX," and underneath these letters the words "Reynolds & Co.," and outside of such circle a second circle, and in the ring between the two circles the words, circumferentially, "Pure English White Lead." The copartnership of Reynolds & Co. expired January 1st, 1872, and the defendants, under the firm of Reynolds & Jacobs, have continued to use the same brand upon their white lead ground in oil, and also upon packages of blanc de zinc ground in oil.

The question which arises upon this state of facts is—does the registration of a trademark for "paints," by a plaintiff who had previously acquired the exclusive use of such mark for particular kinds of paints only, enable the plaintiff to restrain a defendant from its use upon another kind of paints, to which kind he had been in the habit of affixing the same mark prior to the registration? The doctrine of the common law in regard to trade-marks is, that "every manufacturer, and every merchant for whom goods are manufactured, has an unquestionable right to distinguish the goods that he manufactures or sells, by a peculiar mark or device, in order that they may be known as his in the market for which he intends them, and that he may thus secure the profits that their superior repute, as his, may be the means of gaining. His trade-mark is an assurance to the public of the quality of his goods, and a pledge of his own integrity in their manufacture and sale." Amoskeag Manuf'g Co. v. Spear, 2 Sandf. 599. The Paris white, Venetian red, drop black, and other goods which were sold by the plaintiffs, had acquired a distinctive character and reputation in the market, under the name of the "crown" brand, which name indicated to the public the origin or ownership of the goods. But the white lead or the zinc which the plaintiffs sold had not acquired a distinctive character under the name of the "crown" brand, because they had not applied that name to either of these articles. Previously to the time of the registration, the plaintiffs had not, therefore, become entitled to the exclusive use of the representation of a crown upon all paints; but their right to the exclusive use of the mark was limited to the articles to which it had been appropriated. By registering this mark in the patent office, and appropriating it to all paints, they cannot, in my opinion, prevent the defendants from the use of the mark upon a class of goods to which they had applied the mark prior to the registration, especially as the plaintiffs have not, since the registration, extended actual use of their mark to that class. If a manufacturer of cotton tickings, who had acquired the right to the use of a trade-mark upon his tickings, should register his mark, and declare that it was intended to be appropriated to all manufactures of cotton, he would not be thereby enabled to restrain a manufacturer of shirtings who had previously placed the same mark upon his own manufactured article. The plaintiffs had acquired a valid right, at common law, to the use of the mark upon those kinds of paints to which it had been appropriated prior to the registration. The statutory right which they acquired by the registration (and which statutory right is the foundation of this bill) did not enable them to extend their exclusive right to the use of the mark upon all paints, as against a manufacturer who had previously used the same mark upon a particular class of paints, to which kind or class the plaintiffs had not appropriated the mark.

The bill should be dismissed.

Case No. 13,100.

SMITH v. RINES et al.

[2 Sumn. 338.] [1]

Circuit Court, D. Massachusetts. May, 1836.

REMOVAL OF CAUSES—SEVERAL DEFENDANTS—PETITION OF ONE TO REMOVE—ACTION ON TORT—JOINDER—SEVERANCE.

1. The language of the judiciary act of 1789, c. 20, § 12 [1 Stat. 79], though in its terms it applies only to the case of a single defendant, must be applied to the party defendant, whether one or many, so as to embrace cases, where several aliens, or several citizens of another state, are jointly sued as defendants.

[Cited in Field v. Lownsdale, Case No. 4,769; Fields v. Lamb, Id. 4,775; Sands v. Smith, Id. 12,305; Florence Sewing Mach. Co. v. Grover & Baker Sewing Mach. Co., Id. 4,883; Petterson v. Chapman, Id. 11,042; Fisk v. Henarie, 32 Fed. 422.]

[Cited in Bryant v. Rich, 106 Mass. 192; Gordon v. Green, 113 Mass. 261; Mutual Life Ins. Co. v. Allen, 134 Mass. 390; Washington, A. & G. R. Co. v. Alexandria & W. R. Co., 19 Grat. 592.]

2. According to the section above-cited, such cases only are liable to removal from the state to the circuit court, as might, under the law or constitution of the United States, have been brought before the circuit court by original process.

[Cited in Sifford v. Beaty, 12 Ohio St. 196.]

3. Semble. An action on the case, in the nature of an action for a conspiracy, may be maintained, as in the case of a common tort, against all, or any one, or more of the tort-feasors.

[Cited in Murray v. Lovejoy, Case No. 9,963; Lightner v. Brooks, Id. 8,344; Kaitel v. Wylie, 38 Fed. 867; Thomas Huston Electric Co. v. Sperry Electric Co., 46 Fed. 75.]

[Cited in Bryant v. Rich, 106 Mass. 192.]

4. In cases of tort, the plaintiff may elect to make his action joint, or several: and no defendant can take away this election.

[Cited in Pirie v. Tvedt, 115 U. S. 43, 5 Sup. Ct. 1035; Little v. Giles, 118 U. S. 601, 7 Sup. Ct. 35.]

[Cited in Zeller v. Martin, 84 Wis. 6, 54 N. W. 330.]

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

5. In order to remove a cause from the state to the circuit court, under the judiciary act of 1789, c. 20, § 12, all the defendants must join in the petition for the removal. And a cause cannot be removed as to some defendants, and left depending in the state court as to others.

[Cited in Gard v. Durant, Case No. 5,216; Smith v. M'Kay, 4 Fed. 354.]

6. A severance of a suit, so as to make two several suits out of one joint suit, is not allowed at the common law as to parties defendant.

7. Quære—as to the remedy, where the provisions of the act above cited are evaded, by a fraudulent joinder of nominal defendants, in order to prevent a removal of the suit.

[8. Quoted in U. S. v. Hammond, Case No. 15,294, and in Hobbs v. McLean, 117 U. S. 580, 6 Sup. Ct. 876, to the effect that it is not for courts of justice proprio marte to provide for all the defects or mischiefs of imperfect legislation.]

[Cited in State v. Noble, 118 Ind. 371, 21 N. E. 244; State v. Simon (Or.) 26 Pac. 173.]

This was an action of trespass on the case, in the nature of a conspiracy to defraud, and for actually defrauding the plaintiff, James Smith, in the purchase of certain lands, situate in Maine. The damages were laid at $65,000. The action was originally brought in the court of common pleas of the county of Worcester, in the state of Massachusetts; returnable to the last March term of that court, by James Smith, citizen of Massachusetts, against four persons, specially named in the writ, as inhabitants of the county of Worcester (upon whom the process was duly served); against Stover Rines, described in the suit, as of Orono, in the state of Maine, and commorant in Boston, in the county of Suffolk (upon whom also the process was served,) and against three other persons, described as inhabitants of the state of Maine, upon whom the process was not served. All the parties, upon whom the process was served, regularly appeared at the return term. And the defendant, Rines, then filed his separate petition, praying for a removal of the cause into the circuit court, at the present May term, according to the provisions of the 12th section of the judiciary act of 1789, c. 20. The plaintiff entered a protest against the removal; which was ordered and allowed by the court, with a stay of all further proceedings in that court. A motion was now made by the plaintiff, to remand the cause to the state court, upon the ground, that it did not fall within the provisions of the 12th section of the act of 1789, and, therefore, that it was incompetent for the court to maintain jurisdiction over it.

Emory Washburn, for plaintiff.

This court has no jurisdiction over the present parties, under the judiciary act of 1789, c. 20. If any thing gives it jurisdiction, it is the parties; for the subject-matter of the suit does not give it. The process is not a new one; it is the same cause, which was commenced in the state court, and is brought here, with all its incidents. The words of the statute are, "the cause shall proceed in the same manner as if it had been brought (in the circuit court) by original process." 1st. One of several defendants cannot, against the consent and without the cooperation of the other defendants, remove a cause into the circuit court. Under the terms, "citizen" and "defendant," which are used in the singular number in the statute, all the parties defendant must be considered as one party. Ward v. Arredondo [Case No. 17,148]. If this be so, one defendant cannot remove a cause into the circuit court, when the others elect to have it remain in the state court. 2d. But this cause is not within the jurisdiction of this court, even if all the defendants elect to be tried here, because the plaintiff, and part of the defendants are citizens of Massachusetts. The constitution of the United States extends the jurisdiction of the courts under it to "controversies between citizens of different states." The statute of 1789, c. 20, § 11, limits this power to cases "where the suit is between a citizen of the state where the suit is brought, and a citizen of another state." And in determining the question of jurisdiction, when it depends upon the character of the parties, the court are governed by the record alone. The cases are numerous, where this point has been discussed in various forms. Brigham v. Cabot, 3 Dall. [3 U. S.] 382; Wood v. Wagnon, 2 Cranch [6 U. S.] 9; Winchester v. Jackson, 3 Cranch [7 U. S.] 515; Montalet v. Murray, 4 Cranch [8 U. S.] 46; Hodgsdon v. Bowerbank, 5 Cranch [9 U. S.] 303; Sullivan v. Fulton Co., 6 Wheat. [19 U. S.] 450; Breithaupt v. Bank of Georgia, 1 Pet. [26 U. S.] 238; Brown v. Keene, 8 Pet. [33 U. S.] 116; White v. Fenner [Case No. 17,547]. By inspecting the record here, it will be found that four of the defendants are not citizens of another state than that in which the action was brought. It is the plaintiff's common-law right to join these defendants in this action. 1 Chit. Pl. 74; Skinner v. Gunton, 1 Saund. 228. The cause, then, is one in which all the defendants are jointly interested, for it is now the same cause that it was in the state court. And where the defendants in a cause are jointly interested, and not merely nominal, if either is a citizen of the same state as the plaintiff, the court has no jurisdiction. The authorities seem to be conclusive on this point. Strawbridge v. Curtis, 3 Cranch [7 U. S.] 267; Corporation of New Orleans v. Winter, 1 Wheat. [14 U. S.] 91; Cameron v. McRoberts, 3 Wheat. [16 U. S.] 591; Wormly v. Wormly, 8 Wheat. [21 U. S.] 451; Banks v. Carneal, 10 Wheat. [23 U. S.] 182; Kirkpatrick v. White [Case No. 7,850]; Beardsley v. Torrey [Id. 1,190]; West v. Randall [Id. 17,424]; Ward v. Arredondo [supra]. The same doctrine has been recognized by state courts. Miller v. Lynde, 2 Root, 444; Bissell v. Horton [Case No. 1,448]. It may be contended, that, as in the trial of the ac-

tion, all but Rines may be discharged, and a verdict against him alone would be good, he may be tried separately. But this cannot be done against the plaintiff's consent. If it was his right to join Rines, the latter cannot be severed without doing the plaintiff a wrong. It would make the other defendants witnesses for Rines. Rosc. Ev. 84; Gibbs v. Bryant, 1 Pick. 128. It would also prevent the plaintiff from having a joint judgment, and compel him to accept from Rines the amount found, when, by common law, he has a right to a judgment against all the defendants found guilty, de melioribus damnis. If this court undertakes to proceed against Rines alone, it can only do so by dividing the original action into two, leaving half in the state court, and half in this. But this would be expressly against the language of the statute, which declares, that the state court, after the removal, "shall proceed no farther in the cause." The whole record must come up; and when does the division take place, and which court makes it? Is the division made in the state court, or is a part of the cause remanded?

Peleg Sprague, for defendants.

The plaintiff being a citizen of Massachusetts, the defendant, Rines, a citizen of Maine, claims the right to a trial in this court, by virtue of the constitution of the United States, art. 3, § 2, and the judiciary act of 1789, §§ 11, 12, which were intended to secure the citizens of each state against being compelled to have their controversies with citizens of another state decided by the local tribunals of the state of their adversary. This right the defendant may waive, either by submitting to the state jurisdiction, or voluntarily incurring liabilities by joint contracts with citizens of another state. But such waiver must result from his own voluntary act, and not from the will or act of his adversary. If this action were founded on contract, it could not be maintained against Rines alone, it would be necessary to prove a joint contract by the defendants with the plaintiff, and in such case Rines, by thus voluntarily associating himself with the defendants, citizens of Massachusetts, in making engagements to the plaintiff, might be held to have subjected himself to the same jurisdiction as his associates, as the remedy in actions ex contractu must be joint, and the plaintiff could not sue the other defendants in the courts of the United States. But this is an action of tort brought against Rines, and other persons with whom he has never had any connexion or association, and with whom he is now coupled, without any agency of his own, and against his will, by the mere adversary act of the plaintiff. If there could be no judgment against him unless the other defendants were also found guilty, he would have the benefit of their cooperation in the defence, and that security for the impartiality of the court, which arises from the necessity of their giving judgment against their own citizens at the same time and for the same cause as against a stranger. But in this case, a verdict and judgment might be rendered against Rines alone, and he would have no right to contribution. The interest of the other defendants may be adverse to him, for if they have done wrong, it may suit their purposes to throw the whole burthen upon a stranger. This is not mere theory. Should this case proceed to trial, it will be seen, that such adverse interest is matter of fact. Ought then Rines, a citizen of Maine, to be deprived of the benefit of having a trial in the courts of the United States, and compelled to submit to a final decision in the state court of an adversary, merely because that adversary has seen fit to bring in other persons, all of whom are hostile in interest to Rines. Could such have been the intention of the judiciary act? If this were a new question, would any one doubt that this defendant comes within both the letter and the spirit of the 12th section of that act? But we contend, that no case has decided the present question, and that it is competent for this court to allow this defendant to transfer his case into the circuit court, even if the effect should be to leave the action to proceed in the state courts as against the other defendants. No adjudication has gone further than to prohibit a severance in case of joint contracts, and there are several cases, especially in equity, in which the right to sever is recognized for the purpose of sustaining jurisdiction, where it would not otherwise be allowed. In answer to the objection, that the plaintiff, by the common law, has a right to proceed against the defendants, either jointly or severally, at his election, and that he has elected to proceed jointly, we answer, that, without pausing to discuss what the right may be at common law, it is undoubtedly competent for the legislature to change it. The common law, therefore, cannot be interposed, to resist the legitimate operation of the judiciary act. The counsel commented on authorities cited on the other side, and referred to the following: Skinner v. Gunton, 1 Saund. 228c, 229, 230, note 4; Govett v. Radnidge, 3 East, 67; 1 Chit. Pl. 75; Strawbridge v. Curtis, 3 Cranch [7 U. S.] 267; Carneal v. Banks, 10 Wheat. [23 U. S.] 181; Cameron v. Roberts, 3 Wheat. [16 U. S.] 571; Gordon v. Coldcheagh, 3 Cranch [7 U. S.] 269; Brown v. Strode, 5 Cranch [9 U. S.] 303; Wormley v. Wormley, 8 Wheat. [21 U. S.] 421; Craig v. Cummings [Case No. 3,331]; Browne v. Browne [Id. 2,035].

Jeremiah Mason, in reply, was stopped by the court.

STORY, Circuit Justice. The motion has been very ably and elaborately discussed at the bar; and I should have heard the further argument, which was proposed to be

made in support of it, if, upon hearing all, that has been so ingeniously said on the other side, I could bring my mind to doubt, that the motion ought to be granted. The 12th section of the judiciary act of 1789, c. 20, provides: "That if a suit be commenced in any state court against an alien, or by a citizen of a state, in which the suit is brought, against a citizen of another state, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court, and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court to be held in the district, where the suit is pending, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall be the duty of the state court to accept the surety, and proceed no further in the cause, &c.; and the said copies being entered in such court of the United States, the cause shall there proceed in the same manner, as if it had been brought there by original process."

Now, the first remark, that occurs upon the language of this section, is, that in its terms it applies only to the case of a single defendant. But, in its true interpretation, it cannot admit of a rational doubt, that it means the party defendant, whether one or many, and that it must apply to cases, where several aliens, or several citizens of another state, are jointly sued as defendants; for in such a case, each of them is in the very predicament presumed by the act.

In the next place, it is apparent from the language of the closing passage of the section above quoted, that it contemplates such cases, and such cases only, to be liable to removal, as might, under the law, or at all events under the constitution, have been brought before the circuit court by original process. And this consideration, upon the actual state of the authorities, is most important. The case of Strawbridge v. Curtis, 3 Cranch [7 U. S.] 267, the earliest on the subject, was a bill in equity, originally brought in the circuit court of this district; and some of the plaintiffs were alleged to be citizens of Massachusetts. The defendants were all stated to be citizens of Massachusetts, excepting Curtis, who was alleged to be a citizen of Vermont, and upon whom the process was served in Massachusetts. The question made at the bar under these circumstances was, whether the circuit court had jurisdiction of the cause, under the judiciary act of 1789, c. 20, § 11, which provides, that "the circuit courts shall have original cognizance, concurrent with the courts of the states, of all suits of a civil nature, at common law and in equity, where the matter in dispute exceeds the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners; or an alien is a party; or the suit is between a citizen of the state, where the suit is brought, and a citizen of another state." The supreme court decided against the jurisdiction. Upon that occasion, the late chief justice said: "The court understands these expressions to mean,—that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued in the federal courts. That is, where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued in those courts. But the court does not mean to give an opinion in the case, where several parties represent several distinct interests, and some of these pasties are, and others are not, competent to sue, or liable to be sued in the courts of the United States." This language, it is true, was applied to a case, where the suit was originally brought in the circuit court. But it has always been understood as equally applicable to all cases of suits removed from a state court. And, looking to the words used in the 11th and 12th sections of the act, as to this point, it seems absolutely impracticable to make any solid distinction between them. My Brother, the late Mr. Justice Washington, so thought in the case of Beardsley v. Torrey [Case No. 1,190]. "If," said he, "this suit could not have been maintained against S. under the 11th section of the judiciary act, if it had originated in this court, it cannot be removed into this court under the 12th section, so as to subject that party to the jurisdiction of this court." This reasoning is certainly correct, in the sense in which he used it, that is, as requiring all the parties on each side to be citizens of different states, though certainly there is a distinction in other respects; for, under the 11th section, the plaintiff need not be a citizen of the state, where the suit is brought, as he must be under the 12th section. The case of Strawbridge v. Curtis [supra], has never been departed from; but has constantly been recognised as the basis of the subsequent decisions of the supreme court upon this branch of jurisdiction. It was expressly confirmed in Corporation of New Orleans v. Winter, 1 Wheat. [14 U. S.] 91, and Cameron v. Roberts, 3 Wheat. [16 U. S.] 596. And Mr. Justice Thompson, in his able opinion in Ward v. Arredondo [supra], applied it, as Mr. Justice Washington did in Beardsley v. Torrey [supra], to the exposition of the jurisdiction of the court in cases of removal of suits, equally with those of original suits. "It is," said he, "a well-settled rule, and indeed has not been denied by the defendant's counsel, that when the jurisdiction of this court depends on the character of the parties, and such party, either plaintiff or defendant, consists of a number of individuals, each must be competent to sue in the courts of the United States, or jurisdiction cannot be entertained." He then applied the doctrine to the very case before him, which was that of a plaintiff, a citizen of New York, suing a bill in equity, in a state court, against

certain aliens, and also against Thomas, a citizen of New York, the alien seeking to remove it into the circuit court. After putting the point, whether, as the plaintiff, and Thomas, one of the defendants, were both citizens of New York, the cause could be removed into the circuit court, he said: "It is very evident, that Ward (the plaintiff) could not originally have filed his bill in this court against Thomas, as one of the defendants; and it would seem to follow as a necessary consequence, that if jurisdiction could not be entertained directly, it ought not to be acquired indirectly."

But the argument which has been addressed to the court upon the present occasion is, that in the suit now before us the defendant has a separate and distinct interest from his co-defendants, and, therefore, it falls within the reasoning of the court in the case of Strawbridge v. Curtis, as a suit, not only within the original jurisdiction of the circuit court, but within the jurisdiction founded on the removal from the state court. It is certainly true, that actions, founded in tort, may be maintained against all, or any one or more of the tort-feasors; for every tort is joint, as well as several; and the case of Skinner v. Gunton, 1 Saund. 228, is relied on to show, that an action on the case, in the nature of an action for a conspiracy, falls within the limits of the doctrine. That case, it must be admitted, is directly in point, though at first view, the objection taken by Sergeant Saunders seems to be well founded; viz. that where a conspiracy is alleged by several, and all the defendants are acquitted, but one, the action must fail; for one cannot conspire alone. This is true in a criminal accusation. But the true answer to the objection civiliter is that given by the court, that the conspiracy is but inducement, and not the substance of the action, which was there the undue arresting of the plaintiff; and here it is the fraud actually perpetrated upon the plaintiff, to his grievous injury.

But, assuming it to be true, that the tort, stated in this action, is several, as well as joint, still it does not advance the argument at all, unless it can be established, that the defendant has a right to elect to consider it as several, and also that the defendant has no joint interest in this suit. Now, at the common law, which is the law of Massachusetts, and which this court, equally with the state court, is bound to administer, nothing is more clear, than the right of the plaintiff to bring an action of this sort against all the wrong-doers, or against any one or more of them, at his election. There is no principle, upon which the defendant has a right, in any courts of justice, to say, that the action shall be several, and not joint; and thus to take away the right of election, which the plaintiff has by law, to make it joint. If the defendant has no such right, upon what pretence can this court, in virtue of the removal of the suit from the state court, confer upon him any such privilege. We must administer the lex loci here, and not the law which the defendant may assume to make for his case. And then again, if the tort is several, it is also joint; and when the plaintiff has joined all the wrong-doers, it is clear, that they have a joint interest in the event of such suit. They are jointly liable for the damages, which may be assessed against them by the jury; and if they sever in their pleadings, or the jury assess different damages against them severally, the plaintiff has a right to a joint judgment de melioribus damnis. 2 Tidd, Prac. 804, 805; Heydon's Case, 11 Coke, 7; Sabin v. Long, 1 Wils. 30; Johns v. Dodsworth, Cro. Car. 192, 193. So, that it is difficult to maintain the position, that in this case the defendant has a separate and distinct interest from the other defendants throughout. On the contrary, for the general purposes of the suit, he has a joint and common interest with them.

The distinct and separate interest referred to in Strawbridge v. Curtis, is one, which constitutes the sole interest in the cause, all the other parties being merely nominal; or a distinct and separate interest, in no sense and under no circumstances connected with that of other persons. If a party has a distinct and separate interest, and also a joint interest, as where he is sued upon his joint and several bond, it has never been supposed. that the general rule laid down in that case did not apply. Thus, for example, in the case of Cameron v. McRoberts, 3 Wheat. [16 U. S.] 591, where the suit was a bill in equity against Cameron and two others, whose citizenship was not stated, the court said: "If a joint interest vested in Cameron and the other defendants, the court had no jurisdiction of the cause. If a distinct interest vested in Cameron, so that substantial justice, so far as he was interested, could be done without affecting the other defendants, the jurisdiction might be exercised as to him alone." And it is most material to remark, that this case and all the others, in which a separate and distinct interest, or a nominal interest, is spoken of, were bills in equity, capable in their own nature of separate and distinct decrees upon separate and distinct interests, where there was, or might be, no community of interest, and where the general question was presented as to the proper parties necessary to be made in a suit in equity. Very different considerations do, or at least may apply, to suits at common law, where the nonjoinder or misjoinder of parties has a very different effect upon the character of the suit, and very different rules apply to it. This is abundantly evident from what is stated in Wormley v. Wormley, 8 Wheat. [21 U. S.] 451; Carneal v. Banks, 10 Wheat. [23 U. S.] 181; Dunn v. Clarke, 8 Pet. [33 U. S.] 1, and Boone's Heirs v. Chiles, 8 Pet. [33 U. S.] 532. In Corporation of New Orleans v. Winter, 1 Wheat. [14 U. S.] 91, where a citizen of a state and a citizen of a territory sued as joint plaintiffs, the jurisdiction was held to be gone. The court said:

"In this case it has been doubted, whether the parties might elect to sue jointly or severally. However this may be, having elected to sue severally, the court is incapable of distinguishing their case, so far as respects jurisdiction from one, in which they were compelled to unite." So here, upon like grounds, it may be said, that being united compulsively by the plaintiff, the defendants are to be treated throughout as being joint and proper parties in the suit.

But if these difficulties in the case could be overcome, there are others, which, upon the construction of the 12th section of the act, seem absolutely insuperable. In the first place, the act contemplates, that the removal of the cause is to be with the joint assent of all the parties defendant; for it can scarcely be treated as a privilege of one defendant, exclusive of the others. Suppose the present suit were brought against several aliens, or several citizens of another state, and some of the defendants were in favor of a removal of the suit from the state tribunals, and others against it, which of them are to prevail? The act seems intended to give an option to the party defendant, which may be exercised or not, at the pleasure of all standing in the same predicament. But if one may remove without the consent of the others, then, the option may be defeated at the pleasure of one only. My Brother, Mr. Justice Thompson, has put the case strongly, in delivering the opinion of the court in the case of Ward v. Arredondo. "Can," (said he) "then one of the alien defendants compel his co-defendant to follow him into this court against his will? We put the case thus strongly in order to test the principle. And we cannot discover any satisfactory ground, upon which such a doctrine can be sustained. The judiciary act considers the removal of the cause as the voluntary act of the party on his petition. By the word party, as here used, must necessarily be understood, the defendant, embracing all the individuals, be they more or less, constituting such party." This reasoning upon the face and purport of the act appears to me to be unanswerable in the case put. It equally, in my judgment, applies to every other case, where all the defendants have not (as they have not in the present case) petitioned for the removal. The application must be joint, for the benefit of all, and with the consent of all. Indeed there is a more urgent ground for its application, if the suggestions, already made, are well founded; for the defendants in this case, who are citizens of Massachusetts, are per se, incapable of removing the suit. Can they be placed in a better predicament, than if they had united in the petition with one, who was a citizen of another state, and therefore capable?

And this leads me, in the next place, to the consideration, which has been so strongly urged at the bar, as to the right of removal of a cause in part from a state court, leaving it still, as to other parties, depending therein. It appears to me, that the very terms of the act prohibit any such partial removal of a suit. It declares, that when the petition and surety are properly offered and given, "it shall then be the duty of the state court to accept the surety, and proceed no farther in the cause," which language necessarily supposes an entire removal of the cause, and not a removal of it as to some parties only. The circuit court, too, is to proceed therein in the same manner, as in original suits commenced in that court. So that in all cases, where the local law would govern in the decision upon the forms or merits of the proceeding in an original suit, it must in like manner govern in those forms and proceedings in the removed suit. It is plain, that there can be nothing in the nature of a summons and severance in the suit; for that supposes that some parties have a right to proceed to establish their claim as plaintiffs, there being other parties necessary to be joined in point of form as plaintiffs, who are unwilling to proceed at all. Such a proceeding is never allowed as a severance of a suit at the common law, as to the parties defendant, so as to make two several suits out of one joint suit.

But independent of the language of the act, how would it be possible, upon any acknowledged principles of law, to proceed in this suit in the state court, as to some parties, and in this court as to other parties, treating it (as it certainly must be treated) as a joint suit, upon which there may be a joint, as well as a several judgment? Consider, for a moment, the posture of the case, if the suit is removed as to Rines, and is still proceeded in in the state court, as to all the other defendants, upon whom process has been served. Both courts must render such a final judgment upon the whole cause of action, as the local law (which in this case is the common law) requires, upon the whole record. The final judgment must be just such a judgment as would be warranted by law, if all the parties were before either court, and there had been a final trial as to all the defendants, upon joint or separate pleadings. Now, the first difficulty, which occurs is, how, after the removal of a part of the cause from the state court to the circuit court, either court can, judicially, know what is finally done as to the residue by the other court. The further proceedings in either court, after such a removal, constitute no part of the record of the proceedings of the other court; and no process of certiorari lies to bring them before the other. Suppose, that all the defendants in the state court should be convicted on trial, and damages of one thousand dollars be jointly assessed against them by a jury; and suppose, that damages should, in like manner upon trial, be rendered against Rines in the circuit court, more or less than the damages assessed in the state court, what judgment is to be rendered? The plaintiff, in such a case, would by law be entitled to a joint judg-

ment against all the defendants, de melioribus damnis. Where on the record of either court could be found the materials for such a judgment? Nay more; where could be found the materials to show, that any verdict at all had been rendered in the other court? Suppose, some of the defendants in the state court should be acquitted, and others convicted, and damages assessed against the latter in the state court, and damages also assessed against Rines in the circuit court to the same amount, or to a greater or less amount, what judgment is to be rendered in either court? It is plain, that the plaintiff would be entitled to a joint judgment against all the defendants, who were connected, and against execution. But in what manner can either court proceed to enter such a judgment, there being on its own records no proof of the proceedings in the other court? Suppose, Rines, upon a trial here, should be acquitted, and some of the defendants in the state court should also be acquitted, and others convicted, what is to be done? We all know, that if the final judgment in the cause were wholly in either court, it would be a general judgment, that all the defendants acquitted should go without day; and that the plaintiff should recover his damages against the others. A several judgment as to some of the defendants, without disposing of the others, would, upon the clearest principles of the common law, be bad and unwarrantable. In the case supposed, in what manner is either court to render such a general judgment as to all the parties?

I have stated these difficulties, because they are the very difficulties, which, in the farther progress of the cause here, if we could maintain jurisdiction over it, may, nay, must arise. I know not, how they are to be overcome. Indeed, the only possible manner, in which a removal by one defendant to this court could be sustained, either in an action of contract, or of tort, would be by considering such a removal as ending the suit as to all the other parties, and taking from the plaintiff his right to a joint action. There is certainly no authority for that; and I know no principle to justify it. My Brother Washington, in Beardsley v. Torrey [Case No. 1,190], held; that a suit, if removable at all, must be entirely removed. It cannot be severed, and a part only removed. "Not only," said he, "would such a doctrine be attended with absurdity and inconvenience; but it would be repugnant to the language and to the clear meaning of the 12th section" of the act of congress. Notwithstanding the criticism bestowed at the bar upon this case, it appears to me directly in point. And that most learned and pains-taking judge added (what is equally in point in this suit), that there was another reason, why the circuit court could not take cognizance of the cause, as a removed cause, which was, "that S. (one of the defendants) did not join in the petition for the removal; and it is not competent for one defendant to remove the cause, without the consent of all the defendants."

But it has been said, that if one defendant alone cannot, under the act of congress, remove a suit into the circuit court, the constitutional provision may be evaded at pleasure, as to suits between citizens of different states being cognizable in the courts of the United States; for persons may fraudulently be made nominal defendants for the very purpose of preventing a removal of the suit. If such a case should arise (for in this case it is not pretended) of a fraudulent joinder of parties for such a purpose, it would deserve consideration, whether the jurisdiction of this court could be so evaded; and whether, in furtherance of justice, under such circumstances, the injured defendant might not have some remedy at law or in equity (by way of injunction or otherwise), to reach the mischief. But if the mischief in such a case should be admitted to be irremediable, that is a consideration properly addressing itself to the national legislature to provide suitable means of redress for it. It is not for courts of justice proprio marte to provide for all the defects or mischiefs of imperfect legislation.

Upon the whole, my opinion is, that this suit must be remanded to the state court. If I entertained any doubt upon the subject the deliberate opinions of my Brothers Washington and Thompson would be decisive with me. But I confess, that as an original question, I should have entertained the same view of the matter; and the weight of their authority ought, under these circumstances, to be quite conclusive with me.

Suit remanded to the state court.

Case No. 13,101.

SMITH v. RINGGOLD.

[4 Cranch, C. C. 124.][1]

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

PERSONAL PROPERTY—FRAUDULENT DEED—POSSESSION—CREDITORS.

If, by the terms and nature of a deed, the possession of the property is to accompany and follow the deed, and it does not, but remains with the grantor, such deed is fraudulent in law, and void as to the creditors of the grantor, although the deed should be acknowledged and recorded, according to the Maryland law of 1729, c. 8, § 5. But such deed is void, only against creditors of the grantor who thus retains the possession inconsistently with the terms and nature of the deed.

Replevin [by Richard Smith against Tench Ringgold] for goods and chattels taken in execution by the defendant, the marshal of the District of Columbia, at the suit of Van Ness v. Gales [unreported], on a judgment rendered May 28, 1828. The execution was delivered to the marshal, and by him levied upon the

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

property, then in the possession of the said Gales, on the 26th of June, 1829. The plaintiff claimed the goods under a deed of trust from H. T. Weightman and the said Gales, dated June 4, 1829, to the plaintiff. The said H. T. Weightman held under a deed of trust from the said Gales to him, dated July 28, 1828. From the date of this deed until the levying of the execution, the goods remained in the possession of the said Gales. These deeds were both acknowledged and recorded according to the Maryland law of 1729, c. 8, § 5, which is in force in the county of Washington, D. C.

Mr. R. S. Coxe, for defendant, contended, that these deeds were fraudulent in law, and void as to the creditors of Mr. Gales, because the possession did not accompany and follow the deeds.

Mr. Lear, for plaintiff, e contrà, contended, (1) That by the terms and nature of these deeds, the possession was not to accompany them, but was to follow them only in a certain event, so that, at the time of making them, they were not fraudulent in law; and could not afterwards become fraudulent by reason of the trustee's not taking possession of the goods, as he might have done. (2) That the possession by the grantor, even if it were inconsistent with the terms and nature of the deeds, did not make them void as to creditors, because they were duly acknowledged and recorded according to the act of 1729, c. 8, § 5. Hudson v. Warner, 2 Har. & G. 415.

THE COURT (THRUSTON, Circuit Judge, absent) instructed the jury, at the prayer of the defendant's counsel, "that if they should be satisfied by the evidence, that at the time of the execution and delivery of the said deed of the 4th of June, 1829, from the said H. T. Weightman and the said Joseph Gales, Jr., to the said Richard Smith, the said Joseph Gales, Jr., was in actual possession of the property intended to be transferred and assigned by the said deed, and continued and remained in the actual possession thereof after the execution and delivery of the said deed, until the writ of fieri facias aforesaid was levied upon the same, or upon a part thereof, as aforesaid, then the said deed is, in law, fraudulent and void as to the said John P. Van Ness, the creditor in the same writ mentioned.

Verdict for the defendant, and bill of exceptions.

Mr. Lear, for plaintiff, moved for a new trial, because the court erred in the instruction given to the jury. The first deed from Gales to Weightman did not require that the possession should accompany it; and the deed from Weightman and Gales to Smith, the plaintiff, could not alter the trust. If this second deed is fraudulent and void, still the deed of trust from Gales to Weightman remains valid, and Weightman holds the property in trust for the security of the bank; so that the legal title was out of Gales at the time of the levying of the execution. The first deed of 28th July, 1828, from Gales to Weightman, was in trust to secure the payment of a bill for $2,000, dated 23d July, 1828, at ninety days; and that if G. & S. "should fail to pay," &c., "when payment shall be required," then "the said H. T. Weightman, his executors," &c., "shall take possession of the said goods," &c., "and sell the same," &c., "and pay," &c. The deed of 4th June, 1829, was by H. T. Weightman of the first part, J. Gales, Jr., of the second part, and R. Smith, cashier, &c., of the third part; and after referring to the deed of the 28th of July, 1828, and stating the desire of Gales & Seaton to retire certain bills, &c., and to obtain a continuance of accommodation for a part thereof by a note for $5,000, dated 2d June, 1829, at sixty days, &c., it says: "Now this indenture witnesseth, that the said H. T. Weightman, in consideration of the premises, and of five dollars to him paid by the said Richard Smith," &c., "at the request, and with the consent and approbation of the said Joseph Gales, Jr., testified by his becoming party hereto," &c., "has bargained and sold," &c., "upon the trusts hereinafter mentioned." "And this indenture further witnesseth, that the said Joseph Gales, Jr., in consideration of the premises and of five dollars to him paid by the said R. Smith, has granted, bargained, and sold to the said R. Smith," &c., "all his, the said J. Gales, Jr.'s goods, chattels," and personal estate, &c., "upon the trusts hereinafter mentioned," that is to say, "in trust to raise forthwith, by a sale of so much of the property hereby conveyed, or intended so to be, as may be necessary, the sum of two thousand dollars, over and above all expenses of said sale, and other expenses of this trust, and apply the same to the payment of the said note;" "and upon this further trust, in case of any default in the payment of the said note, or any other notes which may be, at any time or times hereafter given in lieu, or by way of renewal thereof, or of any part of the amount thereof, to sell the residue of the said property, or so much thereof as may be necessary," &c.

After argument upon the motion for a new trial, THE COURT (THRUSTON, Circuit Judge, absent) was divided in opinion; the new trial, therefore, was not granted, and the plaintiff sued out his writ of error to the supreme court, where it was finally dismissed by consent of the parties.

CRANCH, Chief Judge, delivered the following opinion:

The issue, I suppose, was, whether the property was in Joseph Gales, Jr. at the time of levying the fieri facias of Van Ness against him, under which the defendant justifies the taking; or, perhaps, whether the legal title was then in R. Smith, the plaintiff. The deed to H. T. Weightman was good against all the world; and transferred the legal title, so that it was no longer in Gales. That deed was not fraudulent at common law; because the pos-

session remaining in Gales was consistent with the terms of the deed; and it was not void under the act of 1729, c. 8, § 5, because it was acknowledged and recorded agreeably to the provisions of that act. And if it had not been so acknowledged and recorded, it would have been good between the parties. It could only have been defeated by a creditor of Gales. When Weightman and Gales made the deed to the plaintiff, R. Smith (4th June, 1829), Gales had no legal title in the goods. He had only an equity of redemption. The legal title passed from Weightman to Smith, and the possession of Gales did not make the deed void as to Weightman; it could only be void so far as it attempted to transfer the rights of Gales, to the injury of his creditors. As a deed from Weightman, it could only be avoided by Weightman's creditors. But, even supposing that the instruction of the court was correct, and that the deed from Weightman to Smith was fraudulent as to Van Ness, by reason of the possession of Gales, yet, the legal title, and the equitable title, too, so far as the interests of the Bank of the United States were covered by the deed from Gales to Weightman, were in Weightman, and the goods were not the property of Gales at the time of levying the fieri facias. But I am inclined to think that the instruction of the court was wrong, in directing the jury that the deed was void as between Weightman and Smith. It did not purport to be a joint conveyance from Weightman and Gales; but each severally conveys his own interest. The whole legal estate was in Weightman. Gales could only convey his equity of redemption; and that would have been barred by a sale under the deed of trust from him to Weightman, without any further conveyance from Gales; so that the deed from Gales (of the 4th of June, 1829), was of no use but as evidence of his assent to the transfer of the trust from Weightman to Smith; and such assent was not necessary to bar the rights of his creditors to the property thus conveyed in trust to Weightman, and by him assigned to Smith. Therefore, as the possession of Gales could only avoid his act, and not that of Weightman, I think the court erred in instructing the jury that the whole deed was void. If it had been a deed from Gales alone to Smith, and the possession had remained with Gales, and such possession was inconsistent with the deed, I think the instruction would have been right; because I do not think that the legislature of Maryland, in passing the act of 1729, c. 8, § 5, intended to give validity to any deed which would have been fraudulent as to creditors, either by the common law, or by any previous statute.

For a period of more than one hundred years before the act of 1729, the law was settled (as appears in the case of Stone v. Grubham, 2 Bulst. 218), that, "if it was an absolute conveyance, and a continuance in possession afterwards, this will be adjudged in law to be fraudulent, for this hath the face of fraud." And Buller, J., in the case of Edwards v. Harben, 2 Term R. 596, says, "That case has been universally followed by all the cases since." The preamble of the fifth section of the act of 1729, does not intimate an intention of making good any deed which would have been before void; but the statute makes deeds void, unless acknowledged and recorded, which would have been good before, to wit, deeds where the possession, remaining with the vendor, is consistent with the deeds; for it makes absolutely void, as against creditors, all sales, mortgages, and gifts of goods and chattels, whereof the vendor, mortgagor, or donor, shall remain in possession, unless the same be by writing acknowledged and recorded. But the case of Hambleton v. Hayward, 4 Har. & J. 443, decided by the court of appeals in Maryland, in 1819, is said to be conclusive as to the construction and effect of the act of Maryland, 1729, c. 8, § 5. Although we have the highest respect for the decisions of that very learned and respectable court, especially in regard to the construction of the statutes of that state, yet we cannot consider ourselves bound by such decisions made subsequently to the separation of this county from that state. Congress adopted the laws of Maryland as they existed on the 27th of February, 1801. At that time no such construction had been given to that statute by the courts of Maryland. We were, therefore, left to judge for ourselves of its meaning. In the case of Hambleton v. Hayward, the county court, consisting of Earle, C. J., and Worrell, J., was of opinion that the deed was void as to creditors, because the possession remained with the vendor. This opinion was reversed in the court of appeals by Chase, C. J., and Johnson and Dorsey, JJ., against the opinion of Martin, J., so that there were three judges on one side and three on the other. It seems, therefore, to be a point fairly open for decision upon general principles. The opinion of the court of appeals in that case is briefly stated by the chief justice. He says that "at the time when the act of 1729, passed, it was in the power of debtors to make secret conveyances of property and retain the possession; and although such possession presented grounds of suspicion against them, yet, of itself, it was not sufficient to authorize decisions against them as fraudulent." This was true as between the parties themselves; but if Lord Coke was right in the case of Stone v. Grubham, 2 Bulst. 218, and Mr. Justice Buller, in Edwards v. Harben, 2 Term R. 595, 596, it was not true as between the vendee and the creditor of the vendor; and had not been for more than one hundred years before 1729; which the chief justice seems to admit when he says, "The act of 1729, c. 8, was intended that speedy information should be given to every person, of any transfer of personal property when the person, transferring the right, retained the possession; such possession, unless the deed was acknowledged and recorded, of itself, as to creditors and subsequent purchasers, de-

feated the first conveyance." But he proceeds to say, "The execution of the bill of sale, its acknowledgment, and recording, vests in the party the same interest he would have obtained if the possession had accompanied the transfer of the right;" and he concludes, "The court are therefore of opinion, that if the bill of sale, in the bill of exceptions mentioned, was bonâ fide executed, the possession of the property contained in it by the vendor, of itself, under the act of 1729, c. 8, will not render it fraudulent and void."

The conclusion is undoubtedly correct. The retaining of the possession, when the deed is acknowledged and recorded, will not, of itself, render the deed void under the statute; but the question is, does the statute make valid a deed which would be void by the common law? It has no affirmative words to that effect; and there is sufficient ground for the statute to operate upon without giving it that effect. The legislature might have doubted whether absolute bills of sale, unaccompanied by possession, were absolutely void as to creditors, and they knew that conditional bills of sale certainly were not; they therefore made them all void as to creditors, unless acknowledged and recorded; for a conditional bill of sale, where the possession was, by the common law, permitted to remain with the vendor, was as injurious to creditors as an absolute bill. To permit a debtor to make an absolute bill of sale, and yet retain the possession and use of all his property, merely by acknowledging and recording the deed, would be to give him the most certain means of effecting and protecting his fraud. We think, therefore, that it was not the intention of the legislature to give validity to any bill of sale or deed which would otherwise be, in law, fraudulent and void. But, being of opinion that the court erred in instructing the jury that the deed from Weightman and Gales to R. Smith, was entirely void by reason of the possession of Gales, I think a new trial ought to be granted.

MORSELL, Circuit Judge, however, did not agree to grant the plaintiff a new trial; and THRUSTON, Circuit Judge, being absent, and the plaintiff having taken his bill of exceptions to the instruction given to the jury, the motion for a new trial was overruled. A writ of error was taken out, but not prosecuted; and was dismissed at January term, 1832.

Case No. 13,102.

SMITH v. The ROYAL GEORGE.

[1 Woods, 290.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1873.

MARITIME LIENS—GOODS DEPOSITED WITH CAPTAIN—SHIP CARPENTER.

1. A ship carpenter who deposits, for safe keeping, money and other valuables with the captain of a steamboat on which he is employed, has no lien upon the boat therefor.

2. The owner of an old and decayed boat employed libellant, who was a ship carpenter, to assist in building for him the hull of a new boat, and after it was completed, dismantled the old boat and used some of its materials in fitting up the new one. *Held*, that libellant had no lien on the new boat for his wages.

[Cited in Hartupee v. The Coal Bluff, No. 2, Case No. 6,172; The J. C. Rich, 46 Fed. 137.]

[Cited in The Victorian (Or.) 32 Pac. 1042.]

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

In admiralty.

R. De Gray, for libellant.

F. W. Huntington, for respondent.

WOODS, Circuit Judge. The libel alleges in substance that on September 15, 1870, at Shreveport, Louisiana, the libellant was hired to go to Hind's Landing, Arkansas, on Little river, to assist in building a new hull for the steamboat Royal George, and when completed, to run on her as carpenter at the rate of $150 per month. That he was engaged in work upon said hull for the period of eight months, and until about the 13th day of May, 1872, about which latter date the Royal George left Hind's Landing for Shreveport, Louisiana, with the libellant on board in the capacity of carpenter, and while making said voyage, libellant was driven off the boat by the officers without payment of his wages. That when he went to work at Hind's Landing he deposited with James Crooks, the captain and owner of said steamboat, $350 in cash, and his watch worth $80. That Crooks refused to return him his money and watch, and also detained and refused to deliver the libellant's clothing of the value of $100, and his tools, also of the value of $100.

The libel asks a decree for $1,200 for wages, and for $630; that sum being equal to the value of his clothing, tools and watch, and the money deposited with the captain and owner. The claimant, James Crooks, filed an exception to the libel, alleging that the court had no jurisdiction of the matters set out in the libel, the same not being matter of admiralty and maritime jurisdiction. By consent of both parties, this exception was set down for hearing when the case should come up for trial upon its merits. The answer of Crooks, claimant, admits that there is due the libellant on account of his wages, the sum of $560.69, which it avers has been tendered to him and refused. It admits the deposit of the $350, which claimant says he is ready to pay over on demand, but denies that he ever had possession of the clothes, watch or tools of libellant, and denies that libellant was ever driven from the Royal George by her officers, and avers that he left the boat of his own free will. The district court dismissed, for want of jurisdiction, the

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

claim of libellant for money deposited, and for the value of his clothing and tools, alleged to be detained by claimant, and rendered a decree for wages for the sum of $901, with interest from date of judicial demand.

It is conceded by the claimant's counsel that the decree for wages is for the correct amount, but he denies the jurisdiction of the court to render such a decree upon the facts of the case as presented by the evidence. The proof does not sustain, in all respects, the case as made by the libel. The proof shows that libellant was employed by James Crooks, who was the master and owner of a steamer named the George, to go from Shreveport, in Louisiana, to Hind's Landing on White river in Arkansas, and there build the hull of a boat. That libellant went to said landing and worked, getting out timber and building a new hull. That when the hull was completed, the boilers of the George were put into it, her pilot house and roof were removed to and put up on the new hull. A new steamboat was thus completed, some of the materials of the George being used in the construction of the new boat. The new boat was called the Royal George, and was owned by Crooks, who was also her master. There is no evidence that libellant was shipped on the Royal George as carpenter, nor that he ever did any work on her as carpenter after she left the landing where she was constructed.

The claimant insists that the facts do not show a maritime contract. The point is, does a contract made with a shipwright to assist in the building of a new boat, on which some of the materials from an old dismantled boat are to be used, fall within the maritime law and give the laborer a lien upon the boat for his wages? The admiralty jurisdiction in cases of contract depends primarily upon the nature of the contract, and is limited to contracts, claims and services purely maritime, and touching rights and duties appertaining to commerce and navigation. 1 Conk. Adm. 19. In the case of People's Ferry v. Beers, 20 How. [61 U. S.] 393, the libel was filed by the builders against a new steam ferry boat for a balance due the builders on account of work done and materials employed in constructing the hull of the vessel. In passing upon this case the supreme court say: "The only matter in controversy is, whether the district courts of the United States have jurisdiction to proceed in admiralty to enforce liens for labor and materials furnished in constructing vessels to be employed in the navigation of waters to which the admiralty jurisdiction extends. The contract is simply for building the hull of a ship and delivering it upon the water. The vessel was constructed and delivered according to the contract, and was in the possession of the party for whom it was built when the libel was filed. It must be borne in mind that liens on vessels encumber commerce and are discouraged, so that when the owner is present no lien is acquired by the material man, nor is any when the vessel is supplied or repaired in the home port. The lien attaches to foreign ships and vessels only in favor of the carpenter who repairs in a case of necessity and in the absence of the owner. It would be a strange doctrine to hold the ship bound in a case where the owner made the contract in writing, charging himself to pay by installments for building the vessel at a time when she was neither registered nor licensed as a sea going ship. So far from the contract being purely maritime, and touching rights and duties appertaining to navigation on the ocean or elsewhere, it was a contract made on land, to be performed on land." So in Roach v. Chapman, 22 How. [63 U. S.] 129, the supreme court held that a contract for building a ship or supplying engines, timber or other materials for her construction, is clearly not a maritime contract. Any former dicta or decision which seemed to favor a contrary doctrine were overruled by this court in the case of the People's Ferry Co. v. Beers, 20 How. [61 U. S.] 393. In The Coernine [Case No. 2,944], it was held that a contract made in a port of the United States to construct a vessel in a port of another state by actually building her, or by supplying materials for such construction, is not a maritime contract, creating a lien upon the vessel for the value of the materials, supplies or labor, which is enforceable in admiralty.

These decisions seem to establish very clearly that the claim of libellant in this case for work done is not a lien upon the steamboat. It is claimed, however, by libellant, that the rule laid down in Roach v. Chapman, supra, has since been modified, and we were cited in support of this view to the case of The Grapeshot, 9 Wall. [76 U. S.] 129. Neither the case of The Grapeshot, nor any other case to which we have been cited, changes the law laid down in Roach v. Chapman, to the effect that a contract for labor or materials to build a vessel is not a maritime contract, and that neither the shipwright nor material man has a lien therefor on the vessel. I am of opinion, therefore, that this court has no jurisdiction to render a decree for the wages due libellant. That we have no jurisdiction to render a decree for the money deposited, and for the value of the watch, clothing, and tools of libellant, is too clear to need argument.

The libel must be dismissed at the costs of libellant.

SMITH (SANDS v.). See Case No. 12,305.
SMITH (SCHMIDT v.). See Case No. 12,466.

Case No. 13,103.

SMITH v. SCHROEDER.

[Brunner, Col. Cas. 672;[1] 21 Law Rep. 739.]

Circuit Court, D. Massachusetts. 1858.

ESTOPPEL—MATTER IN PAIS—SALE.

Where a defendant conveyed to plaintiff certain mills, together with all machinery, apparatus, etc., "now on said premises or removed for the purpose of being repaired"; if the defendant led the plaintiff to believe that certain machinery was on the premises, and having induced him to contract for the same, secretly removed it to prevent its passing by the deed, he would be estopped from claiming that it did not so pass, in an action of trover by the plaintiff.

This was an action of trover for a quantity of print rolls, tried before PITMAN, District Judge, at the last November term. The plaintiff [Joseph Smith] claimed title under a deed from the defendant [Theodore Schroeder], which conveyed to him certain lands and mills, particularly described in the deed, "together with all the machinery and parts of machinery, apparatus, tools, implements, and utensils of every description, now on said premises or removed for the purpose of being repaired." The plaintiff offered evidence tending to show that the defendant represented to the plaintiff, as part of the inducement to the purchase, that the rolls were a part of the machinery of the print works formerly standing on the premises described by the deed which had been consumed by fire, and that in point of fact they were actually a part thereof, and necessary to the operation of print works; but it appeared that a short time before the deed was executed the defendant, without the knowledge of the plaintiff, removed them from the premises conveyed by that deed to a barn standing on land simultaneously conveyed by the defendant to the plaintiff by another deed, though embraced in the same contract by which the premises first mentioned were purchased.

The judge instructed the jury as follows: "In this case the plaintiff seeks to recover of the defendant, the value of certain copper rolls, which he says were purchased by him of the defendant, in June, 1855, and the evidence of which is contained in a deed of the lot and water privilege on which the Manchester Print Works stood, together with all the machinery, etc. (using words broad enough to cover these rolls), but after language very comprehensive, and which was well calculated to make the plaintiff suppose that they conveyed everything in the shape of tools and machinery which had belonged to the print works, and which had been saved from the fire which had consumed the building, there followed this description—'now remaining on the premises, or removed elsewhere for the purpose of repairing.' It is contended by the defendant that at the date of this deed these copper rolls were not on the premises; but had been removed from the same, but not for repairing, being in the barn of the defendant, in the neighborhood of the premises, for no such purpose.

"From the evidence which has been admitted in this case, though objected to by the defendant, it appears that certain copper rolls, after the fire, were put in a house standing on these premises, where they remained for some time. The fire was in December, 1854; the rolls remained there until the last of February or the 1st of March, 1855. That at the time of this fire, the plaintiff having had previous dealings with the defendant, and having furnished him with lumber and coal, there was a balance due from the defendant to the plaintiff of seven thousand dollars. That the defendant being unable to rebuild the print works without assistance, there had been negotiations between the plaintiff and the defendant to induce the plaintiff to advance a sum sufficient for the purpose, or to rebuild them himself, upon such consideration as was agreed upon between him and the plaintiff. One of the plaintiff's witnesses, Oliver Allen, swears that he was in the employment of Mr. Smith, the plaintiff, in February, 1855, and June, 1856; that in the spring of 1855, at the time when Smith meant to rebuild the Manchester Print Works, he wanted an inventory of the property remaining at the works, that he might know how he should be secured; that he applied to Mr. McCabe, since dead, the clerk of the defendant, for this information; that Mr. Schroeder was not with plaintiff at this time; that afterwards Mr. McCabe brought a schedule to the plaintiff which was headed 'Inventory of the Property at the Manchester Print Works after the Fire, and Now Remaining.' That in this inventory was 17,150 lbs. of copper rolls, valued at $4,802; and handkerchief rolls, valued at $111.32; in all, $4.913.-32. That Mr. McCabe requested the witness to copy the same, leaving out the valuation, which the witness did, and handed the copy to Mr. McCabe; the original the witness put into the plaintiff's desk; it was not in the handwriting of Mr. McCabe, or of the defendant, and the witness did not know in whose handwriting it was. There is other evidence in the cause to show that Mr. McCabe was the principal clerk and bookkeeper of the defendant at this time, and that he had been in the habit of transacting out of door business for the defendant, and gave written orders to teamsters for goods for the works, signed with his own name for the defendant.

"From these facts, it is for you to infer whether Mr. McCabe in giving this information to the plaintiff acted as the agent of the defendant; and whether it is likely that Mr. McCabe would have furnished this in-

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

ventory without communicating with the defendant. If you believe that the defendant had no knowledge of this communication to the plaintiff, then he is not accountable for the same. But you must exercise your common sense in this matter, and if you think it very improbable that in a transaction of this nature, McCabe acted without the knowledge of the defendants, at the time or immediately afterwards, and that without such knowledge on the part of the defendant it is not probable he would have given this paper to the plaintiff, which was not in his own handwriting, then you are warranted in drawing the inference that McCabe in so doing acted as the agent, and with the knowledge of the defendant, and then the defendant is bound in the same manner as if he had made the communication to the plaintiff himself. The plaintiff had every right to suppose, from the character of McCabe, and the nature of the transaction, that it came from the defendant to him, and from the evidence of other persons, who testified that in the spring of 1855, this inventory or a similar one was shown them by the plaintiff, who wished them to see if the valuation of the articles contained therein was correct; it would appear that the plaintiff considered it a paper of more consequence than it would have been if it had been the mere representation of McCabe. But as the representation of McCabe as the clerk of the defendant, the plaintiff was authorized to believe that it was a true representation, and therefore if it was not true it was well calculated to deceive him.

"By the testimony of persons employed by the defendant it appears that a large number of copper rolls in February or March, 1855, were taken by them and carried from the house on the premises conveyed by the deed of the defendant to the plaintiff to the barn of the defendant, not far from the print works. And there is the testimony of two witnesses, who swear that the defendant told them that he had removed these rolls that they might not be included in the deed from him to the plaintiff. Was it necessary that he should do this to prevent them from being included in this deed? It took a part of two days in very bad wheeling (as the witnesses say) to remove these rolls from the premises, when a very few words would have accomplished the purpose if the defendant had raised no expectation in the plaintiff that they were to be conveyed to him. The deed might have said all the machinery, tools, and other apparatus, etc., except the copper rolls. But if the defendant knew that the plaintiff expected that everything contained in this inventory was to have been conveyed to him, and considering the object which the defendant had in view to induce the plaintiff to rebuild these works, and the danger of preventing him from doing so if he was informed that these rolls would not be conveyed to him, it would be necessary that the rolls should not be excluded from the deed by words which the plaintiff could read and readily understand, but by acts of which the plaintiff should be kept in ignorance, and by words not calculated to excite, but rather to lull suspicion; and with a limitation connected with what the defendant knew he had done, he hoped to exclude them from the deed, whilst the plaintiff supposed they were included within it. Thus very large expressions are used in reference to machinery, tools, etc., though limited by the description, 'on the premises or removed for repairing.' If Mr. Smith had been induced to search, and did not find them on the premises, of which there is no evidence that he did, he might still believe them as included within the description of 'removed elsewhere for repairing.' Now if the defendant removed these rolls for the purpose of thus deceiving the plaintiff, he shall not be suffered to take advantage of his own wrong; but as it is a rule of law, that in case of any ambiguity, a deed is to be taken most strongly against the grantor, more especially where the difficulty arises from the act of the grantor, by which he induces the grantee to believe that the property in dispute was conveyed by the deed, and was in the situation described by the deed, then it shall be so construed, and the contract shall be executed in the sense in which it was understood by the grantee, and in which the grantor believed the grantee understood it. It is true that the grantee may avoid such fraudulent contract, and sue for damages. But if the grantor is not able to respond in damages, or the grantee having carried the contract into effect on his part, has no other remedy but to claim the property which he thus purchased, he may sue upon the contract which is thus proved, and the fraud of the defendant shall not and ought not to avail him in his defense. The testimony is, that after the works were built, and leased by the plaintiff to the defendant, one hundred and ten copper rolls were brought by the defendant to the works, which from their appearance had been in use before; and after the defendant failed, he took them away on the 17th of September last, as the witness understood. Mr. Patterson, the witness, was an engraver there; he went to dinner, and when he returned he found no rolls there; he says he made inquiry, and was informed they were in the defendant's cellar. If you believe these were the rolls in the controversy, and that they belonged to the plaintiff, then this was a wrongful taking, and needed no demand to prove a conversion, and you can give interest if you find for the plaintiff, upon the value of these rolls from the 17th of September last."

The verdict being for the plaintiff, the defendant moved for a new trial for causes mentioned in the opinion of the court.

Mr. Jenckes, for plaintiff.
Cozzens & Bradley, contra.

CURTIS, Circuit Justice. The first and most comprehensive objection made to the rulings of the judge at the trial is, that the title of the plaintiff depends upon the deed which was put in evidence; that this limits him to such machinery as was actually on the premises at the date of the deed, or had then been removed therefrom for repairs; and that instead of leaving to the jury the question whether the rolls were then on the premises, or had then been removed for repairs, the judge left it to them, in substance, to inquire whether the defendant led the plaintiff to believe the rolls were on the premises, and having induced him to contract for them with the other property, secretly removed them in order to prevent them from passing by the deed; and that if this was so they were to be deemed to be included in the deed. I am of opinion this instruction was correct. The law is settled certainly in this court by the cases of Philadelphia, W. & B. R. Co. v. Howard, 13 How. [54 U. S.] 307, and Hawes v. Marchant [Case No. 6,240], as it previously was in England by the cases of Pickard v. Sears, 6 Adol. & E. 469; Coles v. Bank of England, 10 Adol. & E. 437; Freeman v. Cooke, 2 Exch. 654; and it has been held in several state courts of the highest respectability that if a party wilfully misrepresents a state of things, and induces another to act on a belief in the truth of his representation, and that person does so act upon it to his prejudice, the party who makes the misrepresentation is precluded from showing it to be a misrepresentation, as against him it is in judgment of law true. This case falls under that rule; for though when the defendant originally represented the rolls to be on the premises they were there, this representation not having been withdrawn must be taken as a continuing representation, and operative at the very time of the contract, when the defendant knew it to be false, and must have designed to mislead the plaintiff, because he himself had previously removed the rolls.

This disposes not only of the objections to the instructions of the court to the jury on this part of the case, but also the exceptions taken to the admission of evidence respecting it; and among others, of the exception on account of the admission of other deeds made by the defendant to the plaintiff, simultaneously with the deed in question. These, in connection with the other evidence, had a legitimate tendency to satisfy the jury of the fraudulent purpose of the defendant; the argument being, that he resorted to three deeds of conveyance, instead of one, so that he could avail himself of the limitation in the description of the machinery conveyed, requiring it to be on the premises described in that deed. The other deeds were therefore proper to be known to the jury, who might consider them part of the defendant's scheme of fraud.

The other ground relied on was, that the evidence of the authority of McCabe to exhibit the schedule to the plaintiff was not competent. It appeared in evidence that McCabe was not only the principal clerk and bookkeeper of the defendant, and also conducted some of his out-door business, but that he actually conducted, on the part of the defendant, the negotiations which resulted in the sale in question. And so far as appeared, he alone conducted them, without the intervention of the defendant. It was therefore proper to leave it to the jury to find whether, when McCabe, in the course of the negotiations, furnished a schedule of the property, he did so with the knowledge and consent of the defendant. It was not incompetent for the jury to infer from the circumstances that the principal was actually cognizant of the act of his clerk in taking so important a step in the negotiations as to furnish a schedule of the property to be sold, the clerk himself being dead at the time of the trial, the defendant and his principal clerk being, from their relation, in daily communication with each other while the negotiations were going on, and the defendant having acted on the result of the clerk's negotiations, of which this schedule formed an essential part.

The motion for a new trial is overruled, and judgment must be rendered on the verdict.

Case No. 13,104.

SMITH v. SELDEN et al.

[1 Blatchf. 475;[1] 1 Fish. Pat. Rep. 298.]

Circuit Court, N. D. New York. Oct. Term, 1849.

PATENTS—LICENSE—CONTRACT—RESERVATION—OBSCURITY IN GRANT.

1. The terms of a contract examined, with a view to its proper construction, on a motion for a provisional injunction.

2. The words of a granting clause in the contract interpreted, both by themselves and with reference to their subject matter.

3. The question of assigning a limit to the extent of the grant, discussed.

4. The effect of a reservation in the grant considered, as bearing upon the extent of the rights granted.

5. Even in a case of well-founded doubt as to the extent of the grant, perhaps the conclusion should be against the grantor, as being chargeable with any obscurity in that respect in the contract.

This was an application for a provisional injunction. The bill was filed to restrain the defendants [Henry R. Selden and others,] from the use of Morse's electro-magnetic telegraph, as secured by two patents granted to Samuel F. B. Morse, and to compel an account of profits derived from the use of the same, in violation, as was alleged, of the patents, on a line of telegraph constructed and operated by the defendants, extending from Buffalo, N. Y., to Erie, Pa. The plaintiff

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

[Francis O. J. Smith] claimed to be the assignee of the exclusive right to use Morse's patents on a line of telegraph between those two places. The defendants resisted the application, on affidavits. They admitted the construction by them of the line from Buffalo to Erie, and that they were working it by means of Morse's inventions as patented; but they insisted upon their right to do so under and by virtue of a contract entered into on the 13th of June, 1845, between Henry O'Reilly, (one of the defendants,) and Morse, (the patentee,) Leonard D. Gale, Alfred Vail, and Smith, (the plaintiff,) the last four being then the proprietors of Morse's patents.

William H. Seward and Samuel Blatchford, for plaintiff.
Henry R. Selden, for defendants.

NELSON, Circuit Justice. The material question in this case, so far as the motion for a preliminary injunction is concerned, is as to the effect of the contract of the 13th of June, 1845, and whether, upon a proper construction, it embraces the line in dispute.

There are several other questions presented in the bill, and in the affidavits read in opposition to the motion; but they are not subjects of examination or settlement at this time, and will therefore not now be noticed. They can be fitly disposed of, only after the proofs shall have been taken, and on the final hearing. They involve the performance of the contract generally, and the consequences attending a partial failure; also, the validity of the patents under which the plaintiff claims an exclusive right to construct telegraphic lines; and whether or not the defendants are estopped, by reason of the contract, from disputing the plaintiff's title.

The contract provides, among other things, that O'Reilly shall, at his own expense, "use his best endeavors to raise capital for the construction of a line of Morse's electro magnetic telegraph, to connect the great seaboard line at Philadelphia, or at such other convenient point on said line as may approach nearest to Harrisburgh, in Pennsylvania, and from thence, through Harrisburgh, and other intermediate towns, to Pittsburgh, and thence, through Wheeling and Cincinnati, and such other towns and cities as the said O'Reilly and his associates may elect, to St. Louis, and also to the principal towns on the lakes."

Another provision bearing upon the question is as follows: "No preference is to be given to the party of the first part," O'Reilly, "and his associates, in the construction of connecting lines, nor shall any thing herein be construed to prevent an extension by the parties of the second part," who are represented by the plaintiff, "of a line from Buffalo to connect with the lake towns at Erie; nor to prevent the construction of a line from New-Orleans to connect the Western towns directly with that city; but such lines shall not be used to connect any Western cities or towns with each other, which may have been already connected by said O'Reilly."

It is not to be denied, that the territorial extent of line intended to be granted to O'Reilly and his associates under this contract, is somewhat indefinite and doubtful, in consequence of the very general terms used in the description. There are but five towns or cities specifically named, to or through which the line may be run, namely, Harrisburgh, Pittsburgh, Wheeling, Cincinnati, and St. Louis. This may be called, not inappropriately, the base line, extending from the point of starting, through these several towns to St. Louis, and thence to the principal towns on the lakes. Whether it was intended by this last clause to grant the privilege of connecting these towns on the lakes with any of the points on the base line, or only with St. Louis, the last place designated, is matter of doubt. My impression is rather in favor of the former construction; and that the parties intended to embrace within the grant the whole of the territory north of this line, extending to the lakes. Indeed, in any aspect, this would seem to be the effect of the grant; for, by connecting the lake towns with any point upon the line, specifically named, a telegraphic communication would be secured between every part of it and the lake towns. This would be true, whether the connection was at St. Louis, Cincinnati, Pittsburgh, or Harrisburgh; and would be as effectual as if made with each of those places directly. The communication would be more circuitous in the one instance than in the other, but practically about the same. The only or chief object of a direct communication between the lake towns and the several points on the main line, would be to reach intermediate places, if there were any such to justify the expense.

My impression, therefore, is, that the whole of the territory north of the line given, extending to the towns on the lakes, was intended to be included in the grant, and that, under the circumstances, it cannot be implied that any part of it was intended to be reserved. I am now speaking of the granting clause in the contract.

What lakes then were in the contemplation of the parties? Erie? Huron? Michigan? or Lake Superior? or each and all of them? It seems to me, looking upon the map, and at the line given from which a telegraphic communication was to be extended to the towns upon the lakes, that it is quite difficult, in view of the terms used, to assign any satisfactory reason for excluding either of those lakes, or any one of them rather than another. And, if we look out of the contract, and construe it with reference to the subject matter, the conclusion will be the same. The value of the main trunk or line, it was doubtless known, would be much enhanced by connecting it with the principal business towns upon these lakes, all of which are more or less engaged in the vast commerce of the West.

That Erie is one of the lakes referred to, was not denied on the argument; and, if so, I do not see where the limit is to be drawn, or what towns shall be embraced within the words of the grant and what excluded. Any such limit, for aught to be found in the agreement, would be altogether arbitrary and conjectural. It was said on the argument, that unless some limit was found in the construction of this clause, it might comprehend Lake Ontario. The answer, I think, is, that the line specifically named, and the lakes in connection therewith, fairly enough exclude it. The difficulty lies in excluding towns lying upon a lake which it is conceded is embraced within the grant.

The only doubt I entertain upon the case arises out of the other clause in the contract, before referred to as bearing upon the question. Looking at the reservation in that clause as to a line from Buffalo to Erie, in connection with the reservation relating to the line from New-Orleans to connect the Western towns with that city, there is some ground for supposing that the parties contemplated Erie as being the easternmost town upon the lakes, within the grant. And yet there is nothing in the terms themselves of the reservation, necessarily or by fair implication leading to that conclusion. Indeed, those terms seem to lead to a contrary result; for, why reserve a right to the grantors to extend a line from Buffalo to Erie, if such a right was not embraced in the grant to O'Reilly? It may be said, that assuming the town of Erie to have been the most easterly town embraced within the contract, it might be necessary to reserve to the grantors the right specified, in order to connect the town of Erie with their eastern line, as otherwise it would have been in the power of O'Reilly to prohibit their doing so. But, if this had been the only object, why not have expressed it in a way not to be misunderstood? The reservation is, simply, of a right by the parties of the second part, to extend a line from Buffalo to connect with the lake towns at Erie—not an exclusive right; and, is therefore, entirely consistent with a grant to O'Reilly, embracing the several towns upon the lakes, provided such be the true construction of the agreement. I do not say that this reserving clause is not calculated to raise some doubt as to the right claimed by the defendants; but, from all the consideration I have been able to give to the case, I am best satisfied, as at present advised, with the conclusion that they possess it, upon a fair interpretation of the words used by the parties to express their intent and meaning. Even in a case of well founded doubt, perhaps the conclusion should be against the parties who have made the grant, as they are chargeable with any obscurity in this respect in the agreement. But, independently of that consideration, this case is one in which it would not be proper to grant a preliminary injunction.

Motion denied.

Case No. 13,105.

SMITH v. SHANE et al.

[1 McLean, 22.][1]

Circuit Court, D. Ohio. July Term, 1829.[2]

PUBLIC LANDS—MILITARY BOUNTIES—CONTRACT OF SALE—NOTICE—PLEADING IN EQUITY—WEIGHT OF ANSWER.

1. Notice reaches the conscience of the party, and he acquires no better title than the person of whom he purchased.

2. If denied by the answer, the notice must be proved by two witnesses, or by one witness and strong circumstances.

3. The 7th section of the act of congress respecting military bounties, passed March 1, 1800 [2 Stat. 15], which provides that no location shall be made or patents issued for lands, except to persons who performed the service, or their heirs; and that the patentee shall hold the same, free from any contract of sale, is limited to the patentee named in the section.

4. The policy was to protect a meritorious class of persons from contracts entered into under the influence of necessity or fraud. But where the patentee has conveyed, the grantee cannot shelter himself from his contracts under the above act.

5. As in this case, Buford, the patentee, was not made a party, nor any reason assigned in the bill why he was not, and as he stands in the same relation to the complainant, as Garrison stood to Hinde v. Findlay [1 Pet. (26 U. S.) 241], and as in that case, the decree was reversed, because Garrison was not made a party, that decision is considered conclusive in this case.

[Cited in Pratt v. Vattier, Case No. 11,117; Chester v. Chester, 7 Fed. 4.]

[This was a bill by James E. Smith against Shane and Meigs.]

Mr. Swan, for plaintiff.

Mr. Goodenow, for defendants.

OPINION OF THE COURT. This controversy arises respecting a tract of 500 acres of land in the United States' military district. The complainant represents, that in the year 1799, he entered into a co-partnership with one James Johnson, for the purchase and location of military warrants in the above district. That, in the year 1800, Johnson purchased a warrant, issued in the name of Colonel Abraham Buford, from John S. Wills, who had purchased the same. That, under the direction of the complainant, the warrant was located, and a patent, in the name of Buford, obtained in August, 1801. After the location of the warrant, the purchase money was paid by Wills to Buford, and the complainant and Johnson remained in possession of the land, paying the taxes, until the year 1817. That, in 1820, Johnson quit claimed to the complainant, their partnership being dissolved. That the respondent, Shane, by gross misrepresentation and fraud, with a full knowledge of complainant's equity, in 1815 obtained a conveyance of the legal estate from Buford to himself and Meigs. The com-

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

[2] [Affirmed by supreme court (unreported).]

plainant prays that a conveyance of the land may be decreed to him.

The respondents deny the material statements in the bill, and rest their claim to the land on a bona fide purchase of the equitable interest of Wills, in 1815, and the conveyance from Buford; which, they allege, was fairly obtained. The partnership between the complainant and Johnson is shown by Joseph S. Randall and others, that it was dissolved, and a quit-claim executed for the land, as stated in the bill.

To prove the purchase of the warrant, the depositions of Johnson and Wills are relied on. Johnson states that he purchased the warrant about the beginning of the year 1800, from John S. Wills, for thirty-three dollars per hundred acres; and that he regularly paid the taxes on the land until the year 1817. In his deposition, Wills states that, many years before, Col. Thomas Gibson, then of Cincinnati, put into his hands, with or without transfer, he cannot remember, the warrant granted to Buford. That soon afterwards he went to Philadelphia, and took with him this, with other warrants of the same kind; and that, while in Philadelphia, he believes he sold some of them, and perhaps all, though he is not certain.

The location of the warrant, under the direction of the complainant, is satisfactorily proved by the depositions of Dekraft, Johnson and others. Buford acknowledges the payment of the consideration for the purchase of the warrant by Wills, and states that the warrant was placed by him in Gibson's hand to sell or locate: was informed afterwards that he had sold it; and, at the request of Wills, deponent sent a power of attorney to Gibson to make the conveyance. The possession of the complainant and Johnson, and the payment of taxes on the land, from the date of the patent to the year 1817, are proved.

To establish fraud in the purchase of the defendants, the depositions of Johnson, Kisely, Wills, Buford, and Canfield, are referred to. Johnson states that, in the year 1813, Shane applied to him, in Chillicothe, to purchase the land, and that deponent informed him he could not convey the tract, as it was held in partnership. That, a few days afterwards, Wills offered him twelve or fifteen hundred dollars for the land in behalf of Shane, but the sale was declined. Wills states that, some years after his journey to Philadelphia, where the warrant was sold, Shane applied to him to purchase the land; that the answer he gave is not recollected, but that repeated applications were made to him by Shane in different years, who stated that he had seen Col. Buford, who refused to sell on account of the claim of the witness. That at last, on Shane's showing a deed from Buford for the land, he agreed, for a certain sum of money, to give a bond, conditional that neither he, nor his heirs, executors, or administrators, would set up a claim against Shane's. He denies ever having authorized Buford to convey the land to Shane; and he states that, in giving the bond to Shane, it was not his intention to sanction such conveyance. He states, that if he had been conscious of having an equitable right when he made the agreement with Shane, he would not have hesitated to convey it. Shane, he states, was well apprised of his claim, and paid him eleven hundred dollars when the bond was executed.

Buford states, that some time after the sale of the warrant to Wills, he received a letter from Shane respecting the land, which he answered, by saying that he had passed away his right through Col. Gibson. That some time afterwards, Shane called on him in Kentucky, exhibited evidences of claim to the land, among others, a direction from John S. Wills to make the deed to both of the defendants; and having some knowledge of Meigs, and high confidence in his character, he was induced to execute the deed. At the time informed Shane that the consideration money had been paid or secured. Col. Buford, in a letter to Shane, dated 20th August, 1812, states that he does not own any land in the United States' military district; that Col. Gibson undertook to locate lands for him there, which he afterwards sold, a part to him, and a part to his son-in-law, John S. Wills, to whom Col. Buford referred Shane for the information he desired. Another letter from Col. Buford to Shane is exhibited, dated June 28th, 1814, in which he states: "It would give me pleasure, was it in my power, to give you any satisfactory information respecting the lands you mention in your letter to me of the 18th instant. I apprehend, from your letter, that Col. J. Johnson is an inhabitant of the state of Ohio; if so, I have no knowledge of him. My recollection of those lands is very faint. I believe those lands, or a part of them, were located in my name, but I know not who they were granted to. I sold them to Col. Gibson, but I do not recollect who I made the assignments to; perhaps to John S. Wills, as he was made paymaster to me for them, but the price not yet received: I believe I have no claim to any of those lands, or can I say any thing as to their value. By searching the different offices, I suppose you might trace the title." George W. Canfield states, that, some time in the fall of the year, 1820, he heard a conversation between the complainant and Shane, at New Philadelphia, respecting the land which, at that time, Shane had purchased of Buford; in which conversation Shane said, that previous to his purchase, he called on complainant, and inquired if he had not some Western lands that he wished to dispose of? to which said complainant replied that he had some lands in the state of Ohio, and that if he, Shane, would call at his office the next day, he would attend to his inquiries. That, on calling the next day, a canvas bag, containing

a quantity of patents, deeds, &c., was handed to him, which he perused to his satisfaction, and then asked the complainant if he had any other titles? to which there was an answer in the negative, or an evasive one.

The respondents exhibit the deed from Buford, bearing date the 15th May, 1815; prove the payment of eleven hundred dollars to Wills, and show the bond he executed at the time. In this bond he binds himself, his heirs, executors, and administrators, in the sum of one thousand dollars, dated 2d October, 1815, "that he, nor his heirs, executors, or administrators, shall, at any time thereafter, commence suit, either in law or equity, against the said Shane, his heirs, or any person purchasing under him, for the tract of land in controversy." By the deposition of Gen. Herrick, they prove that about the month of January, 1815, he heard Wills, in a conversation with Shane, say to him that he had not, at any time, sold or disposed of any land warrant which had issued in the name of one Buford, to Col. James Johnson, or made any contract with him, or received any consideration for such purpose. And that, if Col. Johnson had at any time the possession of said warrant, he had obtained it at some imprudent moment; referring, as witness supposes, to a time when he was intoxicated.

The respondents prove by James Clark that Johnson sold a tract or two of land, to which he was not able to make titles; and that, in consequence, the witness did not believe that he had any title to the land in dispute. Reliance is placed upon this fact, and the impression which seems to have been made, that Johnson claimed lands to which he had no title; and, also, on the circumstance of the complainant not stating to Shane his title, when the patents and deeds were examined by him. The purchase of the warrant from Wills by Johnson is satisfactorily proved by the oath of Johnson, the equivocal admission of Wills, the fact of having possession of the warrant, the circumstance of its being located under the direction of the complainant, the patent having been obtained by him, and the possession of the premises. Payment of the consideration is sworn to by Johnson as having been made when the warrant was purchased.

Under this statement of the case, three points are presented for investigation. (1) The notice to Shane. (2) The contract, under the act of congress. (3) The parties to the suit.

The doctrine of notice is discussed by every elementary writer on the equitable jurisdiction of a court of chancery, and it is illustrated by numberless adjudicated cases. Notice reaches the conscience of the party, and, though he be a purchaser for a valuable consideration, yet, in equity, his rights are the same as were those of the person from whom he purchased. As the respondents deny the notice charged, it will be incumbent on the complainant to prove it by more than one witness. The statement of one witness, corroborated by strong circumstances, is sufficient. Johnson states, that in 1813, Shane applied to him to purchase the land, and afterwards sent Wills to him on the same errand. The circumstances going to show presumptive evidence, are, the possession of the land by the complainant and Johnson, the possession of the original patent to Buford, stating that he had no claim to the land, having sold it, through Col. Gibson, to Wills, to whom Shane was referred, and the statement of Buford when the deed was executed, the purchase from Wills, who denies ever having stated to Shane that he had never sold his interest in the land, and the conditions of the bond given by Wills at the time the eleven hundred dollars were paid to him by Shane.

When the deed was obtained from Buford by Shane, the complainant and Johnson had been in possession of the land thirteen or fourteen years. This of itself, was calculated to awaken inquiry as to the title, and it seems to have had this effect upon Shane. He asks the complainant for his title papers, and they are exhibited to him; among them was Buford's patent for this land. No special inquiry is made respecting it, but the general question asked whether he had any other titles, to which it is uncertain whether an evasive reply was made, or an answer in the negative. There seems to have been nothing said by Shane, from which the complainant could infer that he wished to know whether he had any title or claim to the Buford tract; and yet this circumstance is strongly relied on by Shane as going to show a want of title in the complainant, or a wilful suppression of it. Had the object of Shane's examination been fairly stated, and the complainant failed to apprise him of the claim he held to the land, the inference drawn would be just; but, under the circumstances, no such conclusion is authorized. The possession of the patent, connected with the possession of the land, was calculated to fix the presumption of title in the complainant. No man is bound to proclaim his titles to every inquirer, and, unless the object of the inquiry be specially stated, he can never sustain injury from a refusal to answer. The conduct of Shane seems to have been guarded, if not designed to gain some advantage. He was, no doubt, desirous of purchasing the land, and was unwilling to awaken the suspicions of the complainant. The letters from Buford, stating that he had sold the land, and his refusal to receive any consideration when he made the conveyance, could not fail to convince Shane that the equity was to be found in some one else; and that the deed, without consideration, could give but the shadow of title.

The purchase from Wills, and the payment made to him after the execution of the deed, forms the ground on which the defendant's

equity must rest. In his deposition, Wills states that he should not have hesitated to convey the equity to Shane, if he had been conscious that it was in him. The form of the bond executed goes strongly to show that both Wills and Shane had a knowledge that the equity had been transferred. If this had not been the case, why was not a conveyance executed in the usual form? And why would Shane consent to receive, not a transfer of the equitable title, but a bond, in a less penalty than the consideration paid, that neither Wills, nor his heirs, executors, or administrators, would set up a claim for the land? In this bond, Wills is cautious to incur no responsibility from a prior conveyance; and this must have been well understood by Shane.

These facts and circumstances, going to show a notice to Shane, are not rebutted by the declaration made by Wills to Shane, in the hearing of Gen. Herrick, nor by the paper referred to in the amended answer, in the hand-writing of Wills, stating the reasons why a mere contract for the sale of a warrant could not be enforced. It is of no importance what the general opinion may be, or the belief of any individual, respecting a title. If enough be made known in the negotiation for the purchase, to put the purchaser on inquiry, and lead him to a full knowledge of the title, it is all that equity requires. I cannot doubt that at the time Shane received the deed from Buford, he had notice of the complainant's claim, and must consequently be considered as a purchaser with notice.

Whether the contract set up by the complainant can be carried into effect, is the second point for investigation. The seventh section of the act of congress respecting United States military bounties, passed March 1, 1800, it is contended, makes void the contract. The words of the act are: "But no location shall be allowed, nor shall any patent be issued, for any lot or lots of one hundred acres, except in the name of the person originally entitled to such warrant, or the heir or heirs of the person so entitled; nor shall any land, so located and patented, to a person originally entitled to such warrant, be considered as in trust for any purchaser, or be subject to any contract, made before the date of such patent; and the title to lands acquired in consequence of patents issued as aforesaid, shall and may be alienated," &c. A part of this section is directory to the officers of the government in prohibiting any location, or the issuing of any patent, except in the name of the person originally entitled to it, or to his heirs. It is then provided, that lands thus located and patented shall not be considered as in trust for any purchaser, or be subject to any contract made before the date of the patent. The policy of the law is obvious. It was designed to protect the rights of a most meritorious class of citizens, who achieved the independence and glory of their country. It invests them and their heirs with the legal title to their lands, free from all incumbrances arising from previous contracts. Such contracts cannot be enforced against them. This is the plain import and meaning of the act. The patentee is the only person who can claim the benefit of this statute, for it was designed exclusively for his protection. There was nothing in the condition of the country when this statute was passed, or in the circumstances of the persons for whose benefit it was enacted, to render this construction doubtful.

The complainant sets up a contract with Wills, and not with Buford, the patentee. Between these parties, the law cannot affect the contract. If Buford had conveyed to Wills, against him a court of chancery could decree a conveyance of the premises, though against Buford it could not. It seems Buford has not availed himself of the provisions of this statute. In pursuance, as he considered, on a contract for the sale of the warrant made long before the emanation of the patent with Wills, he conveyed the land to the respondents. If he has conveyed it incorrectly, the powers of a court of chancery cannot compel him to correct the error; but a court of chancery may give relief against the grantee, who had notice of the prior equity. In this case the defendants, with the notice, must be considered as invested with the equity of Wills, and no more; and if the act of congress could not affect the contract with Wills, it cannot prevent a recourse against the respondents. They must be considered as holding the land in trust for the complainant, in the same manner as Wills would have held it had the deed been made to him.

The objection that Buford is not made a party to the suit, remains to be considered. To sustain this objection, a decision lately made in the supreme court of the United States is relied on, in a case where Findlay and others are appellants, against Hinde and wife (1 Pet. [26 U. S.] 241). The title set up in that case by Hinde and wife, was derived from Garrison, and was evidenced by the following receipt: "Received, Cincinnati, 10th September, 1799, of Wm. and Michael Jones, fifty pounds thirteen shillings and three pence, in part of a lot opposite W. Carr's, in Cincinnati, for two hundred and fifty dollars, which I will make them a warrantee deed for, for the same, on or before the 20th day of this instant." Signed, Abraham Garrison. Some evidence was given of a deed executed to Wm. and Michael Jones by Garrison, but it was lost, and there was a failure of proof to establish it. The bill charged the defendants with having fraudulently, and with notice of the above title, obtained a conveyance from Garrison for the lot. In this case, the court held that Garrison should have been made a party, although it was in proof that he had conveyed to the defendants, against whom Hinde and wife sought a decree; and on this ground, the de-

cree of the circuit court was reversed. There is no difference, in principle, between that case and the one under consideration. The court say that "no decree can be made for the complainants, without first deciding that the contract of Garrison ought to be specifically decreed. He might insist the purchase money had not been paid, or make other various defences. It is not true, if he be made a party, no decree could be made against him. It might not be necessary to do any act, but it would be indispensable to decide against him the invalidity of his obligation to convey, and overrule such defence as he might make; and if the purchase money had not been paid, to provide by the decree for its payment, before any decree could be made against the defendants holding the title." In [Simms v. Guthrie] 9 Cranch [13 U. S.] 25, and in [Thornton v. Wynn] 12 Wheat. [25 U. S.] 193-196, the same principle is recognized. The court seem to have been unanimous in these decisions and the authority must be considered binding upon this court.

The bill must, therefore, be dismissed.

This case was appealed to the supreme court, and on the question of parties that court were divided in opinion. On the other points there was no difference of opinion. The decree of the circuit court was affirmed [unreported].

Case No. 13,106.

SMITH et al. v. SHARP'S RIFLE MANUF'G CO.

[3 Blatchf. 545.] [1]

Circuit Court, D. Connecticut. Feb. 25, 1857.

PATENTS—INFRINGEMENT ACKNOWLEDGED—OFFER TO PAY—INJUNCTION.

1. Where, on an application for an injunction to restrain the infringement of a patent, the defendant did not dispute the validity of the patent or the infringement, and offered to pay a reasonable sum for the use of the invention, or the profits of the use when ascertained, and it appeared that the defendant was engaged in fulfilling a contract for the manufacture of articles containing the invention, which contract had been entered into on the understanding on the part of the defendant that the question between him and the plaintiff was one of compensation, *held*, that no injunction ought to issue restraining the defendant from completing the contract.

2. As the defendant had been using the invention without legal right, but with the understanding that an arrangement would be made with the plaintiff for the price for the use, and the plaintiff had, for five years, known of the use, *held*, that the defendant ought to be enjoined from using the invention, (except as respected such contract), without first paying the plaintiff for the use, or obtaining his consent, and from disputing the patent, and from withdrawing such offer.

This was an application for a provisional injunction, founded on letters patent granted to Edward Maynard, September 22, 1845, for an "improvement in percussion locks and primers." The plaintiffs [Thomas L. Smith and others] were assignees of the patent. The bill averred, among other things, that the defendants were making for the British government, under a contract, 6,000 of Sharp's rifles, with the Maynard lock and primer, and had delivered some of them. It prayed, among other things, for an injunction restraining the defendants from executing the contract with the British government, without first paying the plaintiffs for the right to apply the Maynard lock and primer to the 6,000 rifles. The defendants did not deny the validity of the patent, or the plaintiffs' title to it, or their use of the patented invention; nor did they set up any strictly legal right to use it. They averred that they had been attaching the Maynard lock to their rifles, with the understanding that some arrangement would be made with the plaintiffs for the price to be paid for the use; that the plaintiffs had, for at least five years, had knowledge of such use; that the defendants had a contract with the British government to make for it 6,000 rifles, which contract was now nearly completed; that, after it was made, the officers of the British government ordered the defendants to apply the Maynard lock to said rifles; that, under such order, the defendants, without any additional compensation therefor, had constructed the greater part of the locks for said rifles; that the defendants were now ready to pay the plaintiffs at the rate of twenty-five cents for each lock made by them, (excepting those made for the government of the United States, which had a right to the use of the lock), or to render an account of the profits made by them in the manufacture of the locks, and to pay the same to the plaintiffs whenever they could be ascertained by a master of this court, or otherwise.

Roger S. Baldwin and D. W. Pardee, for plaintiffs.

William D. Shipman and Edward N. Dickerson, for defendants.

INGERSOLL, District Judge. As respects the contract for delivering to the British government 6,000 rifles, with the Maynard lock attached, how does the case stand? The plaintiffs ask an injunction to restrain the defendants from delivering these rifles, unless they first pay to the plaintiffs a reasonable sum for the right to apply the Maynard lock and primer. The defendants in their answer say—we will pay this reasonable sum which you demand as a condition to our right to put the locks upon the rifles; and we now offer twenty-five cents for each lock used, as such reasonable sum, and, if you are not satisfied with that, we will render an account of the profits made by us in the manufacture of the locks, and pay over to you the whole of such profits, whenever the same can be ascertained by a master of this court, or otherwise. Mr. Palmer, the treasurer of the defendants, says, in his affidavit, that the defendants always considered, while using the Maynard lock and primer, that the only question between them and

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

the plaintiffs was a question of compensation for the use of the patent; that, after some correspondence on this subject, he expressly proposed to one of the plaintiffs, that the whole subject of compensation should remain open until time enough had elapsed to settle the question of the value of the lock to the defendants; that to this proposition no answer was ever made; that he construed so long a silence as an acquiescence in the proposition made; and that, with this understanding, the contract with the British government was made. Under these circumstances, no absolute injunction ought to issue, to restrain the defendants from completing that contract. As it respects the primers, the defendants say they have never manufactured any, and have only used such as they have purchased from a licensee of the plaintiffs.

The decision is, that the defendants be restrained from making any of the locks without first paying the plaintiffs for the same, or otherwise obtaining their consent; but this decision shall not be held to restrain them from manufacturing such locks as may be necessary to enable them to complete the contract with the British government, or to interfere in any way with their right to execute such contract. And it is ordered that the defendants be enjoined from disputing any right granted by the patent, or the right of the plaintiffs to the same; and that they be not permitted to withdraw their offer to pay, set forth in the affidavit of Mr. Palmer.

Case No. 13,107.

SMITH v. SHAW.

[2 Wash. C. C. 167.] [1]

Circuit Court, D. Pennsylvania. April Term, 1808.

INTEREST—PARTIAL PAYMENTS—ESTOPPEL—EXCHANGE.

1. The correct general rule is to calculate interest up to the period when a payment is made, to which the payment should be first applied; and if it exceed the interest due, the balance is to be applied to diminish the principal; but if it is not sufficient to discharge the interest, the principal is not to be increased, by adding to it the balance of interest which may remain due, so as to produce interest upon interest.

[Cited in Story v. Livingston, 13 Pet. (38 U. S.) 371.]

[Cited in Hart v. Dorman, 2 Fla. 445; McFadden v. Fortier. 20 Ill. 516; Mills v. Saunders, 4 Neb. 193.]

2. Where the plaintiff has stated an account upon a principle unfavourable to himself, as to the charge of interest, he ought to be bound by it.

3. There is no difference as to the application of the general rule, relative to calculating interest, to debts legally carrying interest, and to those where interest is given in the name of damages.

[Cited in Story v. Livingston, 13 Pet. (38 U. S.) 371.]

4. Exchange should be calculated according to the rate prevailing at the time of the trial.

[Cited in Grant v. Healey, Case No. 5,696; Jelison v. Lee, Id. 7,256; Reiser v. Parker, Id. 11,685; Hargrave v. Creighton, Id. 6,064.]

[Cited in brief in Lodge v. Spooner, 8 Gray, 170. Cited in Marburg v. Marburg, 26 Md. 17.]

This action was brought by an English merchant, upon an account of goods shipped to the testator; and the only question was, as to the proper mode of calculating the interest.

Mr. Rawle, for plaintiff, insisted that the interest should be calculated whenever a payment is made, to which the payment should, in the first instance, be applied; and if it exceed the interest then due, the balance to be applied to diminish the principal; if it fall short of the interest, the balance of interest should not be added to the principal, so as to carry interest.

Mr. Ingersoll, for defendant, contended that the interest should be calculated upon the principal, up to the time of its final discharge; and be credited by the payments made, with interest calculated on them, from the time the payments were made, to the same period. But if this be not the correct rule in general, still, in this case, it should be adopted; as the plaintiff had so stated the interest in his account forwarded to the defendant. As to the general rule also, he contended, that although Mr. Rawle's mode might be correct as to bond debts, it was not so as to all open accounts.

BY THE COURT. There is no difference, as to the application of the general rule, between these debts, whose interest is of course to be charged, and those where the jury may allow it by way of damages; and in both, the rule mentioned by the plaintiff's counsel is the right one. But as the plaintiff has stated it otherwise, we think he ought to be bound by it. Another question was, whether this being a sterling debt, should be turned into currency at the par of exchange, or at the present rate. The court stated that it ought to be at the present rate, to which Mr. Ingersoll assented.

Verdict for plaintiff.

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

Case No. 13,108.

SMITH v. SHRIVER.

[3 Wall. Jr. 219; [1] 14 Leg. Int. 172.]

Circuit Court, D. Pennsylvania. April Term, 1857.

WILLS—DEVISE—FEE SIMPLE—RESPECT DUE TO STATE COURTS BY THE FEDERAL COURTS.

The disposition of the federal courts on questions relating to real estate, to follow the law

[1] [Reported by John William Wallace, Esq., and here reprinted by permission.]

of the states as settled by their courts of final jurisdiction, is so strong, that it will not enter into any consideration of the conflicts that have existed from time to time, or all the time, between the court under different organizations or different sets of judges; nor go into any comparison of the respect which is due to a majority of the court, who by a bare majority carried a decision in one way, with the respect due to a very able minority who have constantly and strongly dissented. If the decisions are not in equilibrio, this court, on such questions, will take the law as it appears to be settled by the last decision, without entering upon the question whether on true principles it was rightly or wrongly decided.

Meyer made his will in these words: "As to such worldly estate wherewith it has pleased God to bless me in this life, I give and dispose of the same in the following manner, to wit: I give, devise and bequeath unto my beloved wife Elizabeth, eighty-five acres and allowance of land of my dwelling plantation whereon I now live, she to have the choice of the same wherever she thinks proper; and further, I do give and bequeath unto my said wife all my movable property or personal estate, of what kind or nature the same may be, together with all the moneys do me, by bond, note, or book account, to and for her only proper use and behoof whatever. Item, it is further my will, that my brother and sisters divide the residue of my said plantation amongst themselves, share and share alike. And lastly, I nominate and appoint," &c. The question meant to be raised by this suit—an ejectment—was that often litigated question, "did the widow, devisee, take a fee in the estate devised to her, or only a life estate?" though the question, as regarded by this court, was, rather, is this court at liberty, in view of certain decisions already made upon the point by the supreme court of Pennsylvania, to entertain that question as an open one at all?

The history of the Pennsylvania decisions on the point,—that is to say, whether a devise of real estate to a person, no mention being made whether the estate was meant to be for life or in fee,—does or does not carry the fee, is as follows: The first case which arose on it in Pennsylvania, was French v. McIlhenny (1809) 2 Bin. 13, in which Tilghman, C. J.. adhering to the English precedents, held in a hard case, that no fee passed. But his associates, Breckenridge and Yeates, doubting his correctness on the special case, could not agree with him, and in fact overruled him, establishing the law that such devises do, in this country, carry a fee simple. In 1811 came Clayton v. Clayton, 3 Bin. 476, which—the same court being on the bench—does, without overruling French v. McIlhenny, certainly impair its authority. In 1826 came Steele v. Thompson, 14 Serg. & R. 84, Tilghman, C. J., being still on the bench, but Judges Gibson and Duncan having come into the places of Breckenridge and Yeates, who with Tilghman, C. J., composed the court when the last two cases were decided. Gibson, J., being of Tilghman, C. J.'s, way of thinking on this point, the judgment in French v. McIlhenny, was overruled, in favor of Tilghman, C. J.'s, original minority opinion there; and the law was now settled that a fee would not pass. Judge Duncan, however, dissenting strongly against this view of Tilghman and Gibson. In this way, with some dicta and decisions, which occasionally looked a little the other way, the law remained unquestioned on the circuits, and in inferior courts, until about the year 1850, when in the court of common pleas of York county, the Hon. Ellis Lewis, president of that court, held that these kinds of words do pass a fee simple. His opinion coming in Weidman v. Maish, 16 Pa. St. 511, before the supreme court, in which Gibson had now for many years been chief justice, was overruled; by a bare majority, however, whose opinion was given in a short and somewhat decided style by that very able and very amiable, but (when speaking of pretenders of any sort) not always very bland or ceremonious chief justice. So things remained for two years; during which two years, however, the constitution of the state was changed, and the composition of the court had changed with it; Gibson, who had been chief justice in 1850, being now only an associate, and the only member of the late court now on the bench; and Lewis, whose opinion had been overruled, as just now stated, having risen, by popular election, from his subordinate position where he was overruled, to be a judge of the supreme court, which had the power of overruling not only others, but itself also. Accordingly, the question was again raised on the very will on which the judgment had once been given while Gibson was chief justice, in Weidman v. Maish; and now in Schriver v. Meyer (decided in 1852) 19 Pa. St. 87, a majority of the court (Lewis, Lowrie, and Woodward, JJ., in the face of powerful dissenting opinions from Black, C. J., and Gibson, J.) overruled Weidman v. Maish, and settled as the law of Pennsylvania what had been decided on this same will by Lewis when president judge of York; Justice Woodward, who finally turned the scale by his casting voice to that side, having afterwards declared that finding in Weidman v. Maish, "an opinion from a judge (Gibson) who was entitled to his profoundest deference that the will there created only a life estate, he had paused long before he consented to Judge Lowrie's opinion that it created a fee;" though on reflection he was well satisfied that he had done so. Schriver v. Meyer was affirmed in the same year in Wood v. Hills, 19 Pa. St. 513, by the same divided court just mentioned, st. Lewis, Lowrie and Woodward, JJ., against Black, C. J., and Gibson, J.; and also in 1854, two years afterwards, in Shinn v. Holmes, 25 Pa. St. 142, unanimously, so far as appears by the opinion of Lewis, J., who gave the opinion of the court; Gibson.

Ex Chief Justice, having now departed this life

In this melancholy condition of judicial discord in the supreme court of the state, parties interested now brought this same will, which had been the subject of the discordant decisions in Weidman v. Maish and Schriver v. Meyer, into this court, arguing that the law of Pennsylvania could not be regarded as settled under such a state of circumstances as those above given; that the later decisions had been barely carried; and that even if the majorities which settled them had been much larger than they were, the strong, steady, and long continued dissents of three such men as Tilghman, C. J., Gibson, C. J., Black, C. J.,—the first of them the most cautious and safe, and the other two the most vigorous and able of all the judges who ever sat in judgment in this state, would, in the professional mind everywhere, and in all courts not bound to obey, as a technical authority, the last decision of the supreme court of Pennsylvania, carry a weight of influence which would overcome the mere weight of adjudication. In the case of this special will, it was said, there was decision exactly balancing decision, Schriver v. Meyer, 19 Pa. St. 87, overruling Weidman v. Maish, 16 Pa. St. 510, and leaving the law upon this will just where it was. It was said to be vain to talk about the obligation of precedents on such a point as this, and especially to talk about Schriver v. Meyer as being a binding precedent for anything. That case had "murdered" precedent. It went on the ignoring and abnegation of all precedent as its fundamental principle, as was thought to be apparent on its face. "But it is demanded," says Lowrie, J., giving the opinion there, "that we shall follow the decision in Weidman v. Maish, where this very devise has received a construction. And why must we follow it? Because we or our predecessors have wronged one man by our blunders, must we therefore wrong others for the sake of our consistency? Does the doctrine of stare decisis hold us to conform to that decision? I trust that this doctrine shall never be held to mean that the last decision of a point is to be taken as the law of all future points, right or wrong." These principles taken from the opinion in Schriver v. Meyer, the counsel arguing that the will gave but a life estate, held as the light by which that case, considered as a precedent, was to be read.

GRIER, Circuit Justice. There are two great rules in the construction of wills, which often come into conflict, and have been fruitful in litigation. One is, that the intention of the testator must prevail; the other, that the heir-at-law shall not be disinherited without express word or necessary implication.

That the application of the latter rule has had the effect of defeating the intention of a testator in ninety-nine cases out of a hundred, has often been a subject of complaint. "I verily believe," says Lord Mansfield (Mitchell v. Sidebotham, 2 Doug. 759), "that in almost every case where, by law, a general devise of lands is reduced to an estate for life, the intent of the testator is thwarted. For ordinary people do not distinguish between real and personal property." So also, Mr. Justice Buller, in Palmer v. Richards, 3 Term R. 359, says, "There is hardly any rule of this sort where only an estate for life is held to pass, but that it counteracts the testator's intention." Courts, thus feeling compelled to enforce this arbitrary rule, even when conscious that they were perverting the will of the testator, have been astute in searching through the corpus of the will for some expression from which to draw an inference of an intention to grant a fee, where words of inheritance, or technical language, expressing such interest, could not be found. For this purpose, the word "estate," among others, has been laid hold of as one which described the whole interest of the testator, when not used as a term of description.

The devise to the wife in this case contains no words of limitation, and taken by itself would convey only a life estate according to the established rule. Yet no man untrammelled by technical rules of construction, adopted by the courts can read this will without feeling a conviction that the testator intended to give to each of his devisees his whole estate in the premises respectively devised to them. The great difficulty in this and similar cases is, to find some other words or phrase in the will to justify the court in giving effect to the apparent intention without disregarding the stringent rule of construction altogether, and subjecting themselves to the imputation of conjectural emendation. For this purpose the introductory words of the will have often been referred to, as showing an intention to devise the testator's whole estate. In this case the words are—"As to such worldly estate wherewith it has pleased God to bless me in this life, I give and dispose of the same as follows."

Whether this language in the introduction can be carried down to the dividing clause, so as to make a part thereof, and enlarge the devise to a fee, is the question in the case.

If this question were to be decided entirely on English precedents, it must be admitted, that the rule established there is, "that the word 'estate,' merely used in the introductory clause of a will, when the testator professes in the usual manner of his intention to dispose of all his worldly estate, will not have the effect of enlarging the subsequent devises in the will to fee."

Rules of construction of wills become rules of property, and the stability of titles greatly depends on adherence to them when once established. Hence the question in this case is one of Pennsylvania law, as settled by her own courts. How far they have adopted the policy of England in enforcing a rule of con-

struction favorable to the heir-at-law, is a question to be decided by them. Their former decisions cannot be reconciled. Some one of them must be overruled and the others established; and if their own tribunals have done this, it is not for this court to criticise or doubt the correctness of their decision. The legislature of this state in 1833 have cut the knot as to all wills made since that time, by abolishing the rule altogether, and declaring that "all devises of real estate shall pass the whole estate of the testator in the premises, although there be no word of inheritance, unless it appear by a devise over or other words of limitation, that the testator intended to devise a less estate."

This will was made before the passage of this act, and has been twice before the supreme court of Pennsylvania. In the argument of the case of Weidman v. Maish, 16 Pa. St. 510, the introductory clause in the will does not appear to have been relied on, there being other expressions in it which, it was contended, justified the construction that an estate in fee was intended. The opinion of the court considers those arguments, disposing of the introductory clause in a single sentence. In the case of Schriver v. Meyer, 19 Pa. St. 88, the case turned entirely on the effect to be given to this introductory clause. A solemn decision of the supreme court supported either view of the question,—the case of French v. McIlhenny, 2 Bin. 13, on one side, and Steele v. Thompson, 14 Serg. & R. 89, on the other: but each decided by a divided court; Judges Yeates, Breckenridge and Duncan on one side, and Chief Justices Tilghman and Gibson on the other. In such a contest who is to decide? Not the courts of the United States. "Non nostrum est tantas componere lites." The supreme court of the state have met the question and have decided it. After the able opinion delivered on the occasion of Schriver v. Meyer, by Mr. Justice Lowrie for the court, and Mr. Justice Gibson dissenting, further discussion of the merits of the question would be superfluous—all has been said that can be said on either side.

Instead, therefore, of again discussing this moot question, this court feel that it is their duty to follow what now appears at last to be the settled doctrine on the subject. In addition to the early case of French v. McIlhenny (1809) 2 Bin. 13, we have now Schriver v. Meyer, 19 Pa. St. 87, Wood v. Hills, Id. 513, and Shinn v. Holmes, 25 Pa. St. 142, all concurring. The authorities are no longer in equilibrio. The question is settled, and should not be again disturbed. It will soon become obsolete under the wise legislation abolishing the old common law rule, which subverted the intention of the testator to subserve the policy of English institutions. The courts of Pennsylvania will of course adhere to the rule, as settled by their own highest tribunal.

We are not disposed to encourage cases like the present. It is an easy thing under the transparent contrivance of a transfer to John Doe or John Smith (supposed to reside in another state), to bring every question of title to real property before the courts of the United States. This is the last of many cases, and I hope will continue to be the last, where titles decided in the state courts, after years of exhausting litigation, have been thus transferred and the litigation renewed, in the vain hope that the courts of the United States will assume to reverse the supposed errors of the state tribunals in questions of real property in dispute between their own citizens.

In such cases it is our duty to pronounce the law of Pennsylvania, as defined by her own legislature and judiciary, and not to assume the position of umpire and pronounce the opinion of even the ablest minority of her judges entitled to more respect than that of the majority, and thus add to the confusion and uncertainty of titles. It would be a humiliating spectacle if this court should, under one rule of construction, deliver the land to the heir-at-law, who would probably be turned out of possession immediately by the devisee, in an action brought in another forum. Such would, I doubt not, be the result of a judgment for plaintiff in this case; and such a collision of judicial authority can only be avoided by the course now pursued.

Pease v. Peck (Sup. Ct. U. S.) 18 How. [59 U. S.] 598, which enumerates certain instances as exceptions to the rule of adhering to state decisions, does not apply to the present.

Judgment accordingly.

SMITH (SLACUM v.). See Case No. 12,936.

Case No. 13,109.

SMITH v. SMITH.

[Cited in Carr v. Gale, Case No. 2,435. Nowhere reported; opinion not now accessible.]

SMITH v. The SOUTHWEST. See Case No. 13,191.

SMITH (SPEED v.). See Case No. 13,226.

SMITH (STEWART v.). See Case No. 13,436.

SMITH (STOKELY v.). See Case No. 13,473.

Case No. 13,110.

SMITH v. STOOPS.

[1 Cranch, C. C. 238.][1]

Circuit Court, District of Columbia. June Term, 1805.

PLEADING AT LAW—WHEN STATUTE OF LIMITATIONS MAY BE PLEADED.

After office judgment the court will not receive a plea of the statuate of limitations.

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

Mr. Edward J. Lee moved to set aside the office judgment by pleading the statute of limitations. Refused; the court saying that it had always been refused. See Hooff v. Herbert (November, 1803 [Case No. 6,670]).

In the case of Carne v. McLean [Case No. 2,416], at this term, THE COURT ordered the plea of limitations to be struck out, it having been filed after office judgment.

FITZHUGH, Circuit Judge, contra.

SMITH (STRONG v.). See Case No. 13,544.

Case No. 13,111.

SMITH et al. v. STURGIS et al.

[3 Ben. 330.] [1]

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

COLLISION—STALE CLAIM.

Where a libel was filed on March 31st, 1866, against the owners of a steam-tug, to recover damages for the sinking of a schooner by her, on December 28th, 1859, the tug having been for more than a year after the collision within the district, and her owners having been residents of the district, or carrying on business therein, and no excuse having been shown for the delay of six years and a quarter in commencing the suit: *held*, that the claim was barred by its staleness.

[Cited in Southard v. Brady, 36 Fed. 561.]

[This was a libel by Jonas Smith and others, owners of the Yankee, against Russell Sturgis and others, owners of the Colonel Satterly, to recover damages for injury to the Yankee, resulting from a collision between the two vessels.]

Beebe, Donohue & Cooke, for libellants.

William Allen Butler, for claimants.

BLATCHFORD, District Judge. This is a libel, sworn to on the 29th of June, 1865, and filed on the 31st of March, 1866, against six respondents, as owners of the steam-tug Yankee, to recover the sum of $19,000, as the damages sustained by the libellants, owners of the schooner Colonel Satterly, by a collision, which occurred between the two vessels on the 28th of December, 1859, in the lower bay of New York. Only three of the respondents were served with process, and one of them, Sturgis, has answered for himself and the others. One of the defences set up in the answer is, that the cause of action did not accrue within six years before its commencement, and that, by reason of the neglect of the libellants to prosecute the action, the demand has become stale, and ought not in equity to be enforced against the respondents, many of them having lived and been almost daily within the jurisdiction of this court since the time of the collision. One or more of the respondents had ceased to live when the libel was filed. The Yankee, for more than a year after the collision. was daily in the port of New York, employed in the service of the respondents. In 1861, she went into the employ of the United States, under a charter, and she was afterwards sold to the United States. All of the respondents, while they owned her and lived, either resided in the city of New York, and carried on business there, or frequented it in the way of business. The delay on the part of the libellants in bringing suit seems to have been without any plausible excuse. The written and verbal communications set up by the libellants as having passed between their legal adviser and Sturgis, on the subject, proved abortive, and were suspended, long before the libel was filed. The case is one of deliberate and inexcusable laches and staleness. It is shown that two or three of those who were on board the Yankee at the time had disappeared, beyond recall, before the libel was filed. The testimony of those witnesses who have been produced on the part of the Yankee is so in conflict with the testimony of the witnesses for the libellants, as to make it incumbent on the court to give no advantage to the libellants which they may have secured to themselves by the delay in bringing their suit. The six years and a quarter which elapsed before the libel was filed, not being excused, I must hold the claim to be barred by its staleness. The Sarah Ann [Case No. 12,342]; Joy v. Allen [Id. 7,552]; Jay v. Allen [Id. 7,235]. The libel is dismissed, with costs.

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

Case No. 13,112.

SMITH et al. v. SWORMSTEDT et al.

[5 McLean, 369.] [1]

Circuit Court, D. Ohio. Oct. Term, 1852. [2]

RELIGIOUS SOCIETIES — CHURCH DIVISION — BOOK CONCERN—BENEFICIARIES—LAPSED CHARITY.

1. The general conference of the Methodist Episcopal Church is a delegated or representative body, with limited constitutional powers; and possesses no authority, directly or indirectly, to divide the Church.

[See Bascom v. Lane, Case No. 1,089.]

2. In the adoption of the "Plan of Separation" in 1844, there was no claim to, or exercise of, such a power.

3. As the general conference is prohibited from any application of the produce of the Book Concern, except for a specified purpose, and in a specified manner; and as the annual conferences have refused to remove this prohibition, by changing or modifying the sixth restrictive rule, the general conference has no power to apportion or divide the concern, or its produce, except as provided for by said rule.

4. Said Book Concern is a charity, devoted expressly to the use and benefit of the traveling, supernumerary, and superannuated preachers of the Methodist Episcopal Church, their wives, widows, and children, continuing in it as an organized Church; and any individual, or

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

[2] [Reversed in 16 How. (57 U. S.) 288.]

any number of individuals, withdrawing from, and ceasing to be members of the Church, as an organized body, cease to be beneficiaries of the charity.

5. It is the undoubted right of any individual preacher or member of said Church, or any number of preachers, or members; or any sectional portions or divisions thereof, to withdraw from it, at pleasure; but in withdrawing, they take with them none of the rights of property pertaining to them while in the Church; and, the withdrawal of the Southern and South-Western conferences in 1845, being voluntary, and not induced by any positive necessity, is within the principle here stated.

[Cited in Watson v. Garvin, 54 Mo. 370.]

6. The defendants, as trustees or agents of the Book Concern at Cincinnati, being corporators under a law of Ohio, and required, by such law, "to conduct the business of the Book Concern in conformity with the rules and regulations of the general conference," in withholding from the Church South, any part of the property or proceeds of said Book Concern, have been guilty of no breach of trust, or any improper use or application of the property or funds in their keeping.

7. This is not a case of a lapsed charity, justifying a court of equity in constructing a new scheme for its application and administration; and the complainants, and those they represent, have no such personal claim to, or interest in, the property and funds in controversy, as will authorize a decree in their favor, on the basis of individual right.

In equity.

H. Stanbery, Mr. Brien, and R. M. Corwine, for complainants.

Ewing, Lane & Riddle, for defendants.

LEAVITT, District Judge. This bill is prosecuted in the names of [William R.] Smith, Green, and Parsons, appointed as they aver, commissioners by the authority of the Methodist Episcopal Church South, and of John Kelly and James W. Allen, supernumerary preachers, and John Tevis, a superannuated preacher, all belonging to the traveling connection of said Church, and having, as they allege, in common with the whole body of preachers in such connection, a personal interest in all the property held by the Methodist Episcopal Church. They aver that they act by the authority of the general conference and the annual conferences of the Church South, and file their bill for the benefit and in behalf of said Church, and of themselves, and all other traveling preachers, and other persons interested in its funds and property. The defendants are Leroy Swormstedt and John H. Power, agents of the Book Concern at Cincinnati, and, as such, having, as averred in the bill, in law, the custody and control of the property and effects of said Book Concern, and James B. Finley, all being in the traveling connection of the Methodist Episcopal Church, and interested in its funds and property. After asserting the claim of the Church South to the property in question, growing out of the alleged division of the Methodist Episcopal Church, in 1845, the bill alleges that the said commissioners have made unavailing efforts to effect an amicable adjustment of the matters in controversy; and they now resort to this court, asking a decree for an account and an equitable apportionment and division of the property and effects set out in the bill. The property directly involved in this suit is the Methodist Book Concern at Cincinnati, consisting, as the bill alleges, of houses, lots, machinery, printing-presses, books, paper, debts, cash, and other effects, amounting to about the sum of two hundred thousand dollars. It may be well here to notice, that this Book Concern had its origin at an early period of the Methodist Episcopal Church, in this country. Its primary object seems not to have been, the founding of a charity for the future benefit of the traveling clergy, but to furnish, at a cheap rate, books and periodicals under the sanction and auspices of the Church, suited to the wants and improvement of the Methodist communion, in science, morals, and religion; thus serving as an auxiliary agency in the consummation of the great end, early avowed by that Church, of "spreading scriptural holiness through these lands." The pecuniary means by which it was enabled to commence its operations, were made up by the donations of preachers and other persons, who favored the laudable purpose of its institution. For a time, all the traveling preachers in the connection were required to contribute annually a fixed sum, in aid of its funds. Its first location was at Philadelphia, from whence, however, it was removed, in 1804, to the city of New York. Through the active efforts of the traveling ministry, who were required to act as agents for the sale of the books and publications of the Concern, they were extensively disseminated and sold. Its means and resources had become greatly increased, and the sphere of its usefulness was fast extending, when, in 1836, it was destroyed by fire. Soon after this calamitous event, as the result of active efforts made in its behalf, it was again placed on a basis of efficiency and prosperity by the liberal contributions, not only of those in the Church, but of others not belonging to the connection. In 1820, a branch of the Concern was established in Cincinnati, connected with and subordinate to the institution in New York. In 1839, by an act of the legislature of the state of Ohio, the branch at Cincinnati was incorporated, and the agents then in office, or who should subsequently be appointed by the general conference of the Methodist Episcopal Church, were created a body politic and corporate by the name of the "Methodist Book Concern;" and it was declared, by the act of incorporation, that the agents "shall hold their agency, and conduct the business of the Concern in conformity with the rules and regulations of the said general conference." Under the able and faithful administration of the agents intrusted with its management, this Book Concern has greatly prospered, and its capital

and resources have rapidly increased. Previous to the year 1796, the profits arising from the sales of books were applied exclusively to pious and charitable objects, but principally to the support of traveling preachers and their families. The conference of that year determined that those profits should be applied wholly to the relief of traveling preachers, including such as were superannuated, and the widows and orphans of those who were deceased. From that period, this fund has been regarded as pledged to this charitable use; and by the sixth restrictive article of the constitution of 1808, which will be more fully noticed hereafter, it is placed out of the power of the general conference to divert this fund to any other purpose, except by "the concurrent recommendation of three-fourths of all the members of the several annual conferences, who shall be present and vote on such recommendation," and the approving vote of two-thirds of the succeeding general conference. It may be proper here to state that, by the discipline of the Church, the annual conferences are the distributers of this fund to those entitled to its benefit. They report to the general conference the names and number of persons who are entitled as beneficiaries to receive it, and the sum to be paid to each, and the amount is then apportioned to the several annual conferences, and paid to them for distribution. But this fund is only to be used to make up deficiencies in the amounts requisite for the support of its beneficiaries. All are not entitled, as a matter of course, to share its benefits; but such only as are deficient, from the failure of the quarterly and annual conferences to raise the requisite sums, by collections and contributions, for their support. Such, then, is briefly the origin, history, and purpose of this charity, and the principle on which, and the machinery by which, it is to be administered to its beneficiaries.

These remarks have prepared the way for the consideration of the claim, set up by the complainants, to the property in controversy. And, in stating the conclusions of the court on the points presented in this case, it is not regarded as necessary to refer, with great minuteness, to the allegations of the parties, as set forth in the bill and answer; nor to the great mass of documentary proofs read, and analyzed, and largely and ably discussed by counsel on the hearing. There is, in truth, very little conflict between the parties as to the facts involved in the controversy. The questions arising in the case are mainly those of legal inference and construction. These, though not numerically formidable, open a wide field for investigation, and are exceedingly important in their bearing upon the unfortunate controversy pending between the two portions of the great and respectable Methodist community in the United States. And no one, having a just comprehension of the character of the issues in this case, will allege that there was any waste of time or of mental effort in the protracted and able arguments of counsel, in the presentation of their points, on the hearing.

It is distinctly assumed by the complainants, in their bill, and strenuously urged by their counsel, as the basis of a decree of this court, for the apportionment and division of the property and funds in dispute, that the Methodist Episcopal Church in the United States, as it existed prior to and at the time of the action of the general conference of 1844, and the proceedings that were the sequences of that action, is no longer one church, but two churches; which, though alike in faith, doctrine, and discipline, are entirely separate and distinct in their organization. After stating, at length, the resolutions adopted by the general conference on the 8th of June, in the year just named, designated as the "Plan of Separation;" also, the proceedings of the convention of delegates, held at Louisville, on the 1st of May, 1845, and the resolutions of the council of bishops at New York, on the 2d of July, in the same year, the bill alleges, "that by and in virtue of the foregoing proceedings, the Methodist Episcopal Church in the United States, as it existed before the year 1844, became and was divided into two distinct Methodist Episcopal Churches, with distinct and independent powers and authority, composed of the several annual conferences, charges, stations, and societies, lying and being north and south of the aforesaid line of division."

As the proceedings referred to present one of the most important questions arising in this case, it will be proper to notice them here with some particularity. The first of the resolutions embodied in the so-called "Plan of Separation" is in these words: "Resolved, by the delegates of the several annual conferences, in general conference assembled, 1. That should the annual conferences in the slaveholding states find is necessary to unite in a distinct ecclesiastical connection, the following rule shall be observed with regard to the northern boundary of such connection: All the societies, stations, and conferences, adhering to the Church in the South by a vote of the majority of the members of said societies, stations, and conferences, shall remain under the unmolested pastoral care of the Southern Church; and the ministers of the Methodist Episcopal Church shall in no wise attempt to organize churches or societies, within the limits of the Church South; nor shall they attempt to exercise any pastoral oversight therein, it being understood that the ministry of the South reciprocally observe the same rule in relation to stations, societies, and conferences, adhering, by a vote of the majority, to the Methodist Episcopal Church; provided, also, that this rule shall apply only to societies, stations, and conferences, bordering on the line of division, and not to interior charges, which shall, in all

cases, be left to the care of that Church within whose territory they are situated. 2. That ministers, local and traveling, of every grade and office in the Methodist Episcopal Church, may, as they prefer, remain in that Church, or, without blame, attach themselves to the Church South. 3. Resolved, by the delegates of all the annual conferences, in general conference assembled, that we recommend to all the annual conferences, at their first approaching sessions, to authorize a change in the sixth restrictive article, so tnat the first clause shall read thus: 'They shall not appropriate the produce of the Book Concern, nor of the chartered fund, to any other purpose other than for the benefit of the traveling, supernumerary, superannuated, and worn-out preachers, their wives, widows, and children, and to such other purposes as may be determined upon by a vote of two-thirds of the members of the general conference.'" 4. Provides, that when the general conference shall have voted to concur in the proposed change of the sixth restrictive rule, the agents at New York and Cincinnati shall, and they are hereby authorized and directed to deliver over to any authorized agent or appointee of the Church South—should one be organized—all notes and book accounts against the ministers, church members, or citizens within its boundaries, with authority to collect the same for the sole use of the Southern Church; and the said agents shall also convey to the aforesaid agent or appointee of the South all the real estate, and assign to him all the property, including presses, stock, and all right and interest connected with the printing establishments at Charleston, Richmond, and Nashville, which now belong to the Methodist Episcopal Church. 5. Provides, that when the change in the sixth restrictive rule shall be made, there shall be transferred to the agent of the Southern Church, so much of the produce and capital of the Methodist Book Concern, as will, with the notes, book accounts, presses, etc., mentioned in the last resolution, bear the same proportion to the whole property of said Concern, that the traveling preachers in the Southern Church shall bear to all the traveling ministers of the Methodist Episcopal Church; the divisions to be made on the basis of the number of preachers in the forthcoming minutes. 6. Directs the manner in which the payments and transfer shall be made. 7. Appoints commissioners to carry into effect the arrangements, etc. 8. Directs the agents at New York to act in concert with Southern agents, in carrying out the resolutions, etc. "9. That all the property of the Methodist Episcopal Church, in meeting-houses, parsonages, colleges, schools, conference funds, cemeteries, and of every kind, within the limits of the Southern organization, shall be forever free from any claim set up on the part of the Methodist Episcopal Church, so far as this resolution can be of force in the premises." The tenth, eleventh, and twelfth resolutions are not important.

The first resolution of the Louisville convention is the only one necessary to be set forth. It is as follows: "Be it resolved by the delegates of the several annual conferences of the Methodist Episcopal Church, in the slaveholding states, in general convention assembled, that it is right, expedient, and proper, to erect the annual conferences represented in this convention, into a distinct ecclesiastical connection, separate from the jurisdiction of the general conference of the Methodist Episcopal Church, as at present constituted; and accordingly, we, the delegates of said annual conferences, acting under the provisional 'Plan of Separation,' adopted by the general conference of 1844, do solemnly declare the jurisdiction hitherto exercised over said annual conferences, by the general conference of the Methodist Episcopal Church, entirely dissolved; and that the said annual conferences shall be, and they hereby are constituted, a separate ecclesiastical connection, under the provisional 'Plan of Separation' aforesaid, and based upon the discipline of the Methodist Episcopal Church; comprehending the doctrines and entire moral, ecclesiastical, and economical rules and regulations of said discipline, except only in so far as verbal alterations may be necessary to a distinct organization, and to be known by the style and title of the Methodist Episcopal Church South."

These, then, are the proceedings by force of which, it is insisted, a division of the Methodist Episcopal Church has been legally and constitutionally effected; and that, as a necessary result, all rights of property pertaining to the complainants, and those they represent, as traveling preachers of that Church, belong to them in their connection with the Church South. I may be permitted here to remark, that, in the investigation of this subject, I am impressively reminded of the responsibility of my position, and readily concede that, however satisfactory to my own mind, may be the conclusions to which I am conducted, other minds, of equal candor and greater strength, may reach a very different result. In dealing with the proposition now to be considered, as well as others involved in this controversy, it has been my aim studiously to exclude all merely extrinsic considerations, and to ascertain the true standing of these parties in a court of equity, as connected with a question of property. In this pursuit I am not at liberty to obey the mere promptings of sympathy, and thereby disparage well-settled principles; or, under the pressure of any supposed exigency, so to pervert or misapply established maxims of construction as to turn away the stream of justice from its wonted channel. It is an error too prevalent, especially out of the legal profession, to suppose that a chancellor, for the purpose of reaching a seeming equity, may yield himself to the guidance of an unregulated and latitudinous discretion, without examining too closely or scanning

too severely, the legal posture of the parties before him. Such, however, is clearly a perverted view of the powers and duties of a court of equity. In practice, it cannot fail to work disastrously; putting afloat, on the sea of uncertainty, the most valued civil and social rights.

It is obvious that the question of the power of the general conference to adopt the "Plan of Separation"—assuming that it was intended to divide and dismember the Methodist Episcopal Church, and that it has legitimately resulted in division and dismemberment—is decisive of the rights of the parties, as involved in this suit. If the complainants, and those they represent, have placed themselves on the basis of the authoritative and constitutional action of the general conference, they have the same rights which pertained to them before the severance of the Church; but, if the conference has, in this act, transcended its just constitutional powers, to that extent, its acts are void: and the complainants occupy the position of those who, voluntarily and without sufficient warrant, have placed themselves out of the pale of the Methodist Episcopal Church, and are no longer of that class of persons, who are the designated beneficiaries of the charity in question. In other words, they must show a present, existing right to a participation in the benefits of that charity, to justify the decree which they ask for, at the hands of this court. The views of counsel are widely variant, as to the nature and effect of the "Plan of Separation." On the part of the complainants, it is urged with great earnestness, that the division, as contemplated and provided for, by this plan, involves a mere change in the organization of the Methodist Episcopal Church; not destructive of its unity and integrity; because the dissevered parts are of the same faith, and under the same form and constitution of government, and in the pursuit of the same great purposes. It is contended, that the power to change, so far as mere organization is concerned, has always been recognized and acted upon by the Methodist Church; that, from the very genius of Methodism, it must change its organization, whenever it is necessary to promote its efficiency, and subserve the great purpose which it avows, of promulgating the Gospel to all men, and "spreading Scriptural holiness through these lands;" and that this power to change, not being prohibited expressly by the constitution, necessarily vests in, and pertains to the general conference, as the supreme power of the Church. On the other hand, it is insisted, with equal zeal, that unity of organization, as well as of faith and doctrine, is an essential element of all associations of men in church relations, and that the overthrow and destruction of such an organization, imports the overthrow and destruction of the church itself. It is contended, therefore, that the "Plan of Separation," in the sense in which it is claimed to be operative by the complainants, as effecting a division of the church, is equivalent to its destruction; and that the general conference, as a delegate or representative body, acting under a constitution with express limitations of powers, and subject, moreover, to restrictions deducible by necessary implication, transcended its jurisdiction in the adoption of the "Plan of Separation;" and that, as a necessary consequence, the act is a mere nullity.

The question presented, it may be remarked, is not, whether there does or does not exist in the Methodist Episcopal Church, a power to destroy its organization, and entirely to reconstruct, not only its government and discipline, but to change its standards of faith and doctrine; but whether this power rightfully exists in the general conference. The power of change—of destruction itself—doubtless exists somewhere; but, if it has not been expressly delegated, it remains with those who are the original depositaries of all power. The inquiry is now presented, and it is certainly one of great materiality in this case: What are the constitutional powers of the general conference of the Methodist Episcopal Church, since the change of government, which took place in 1808? It is not necessary here to inquire, what were the powers of the body called the general conference, which existed in the church from the year 1792 till 1808. It may perhaps be conceded, that previous to the last-named year, the general conference, composed as it was of the entire body of preachers in the traveling connection, in the absence of any constitutional limitations, was invested with the supreme power of the Church. They possessed in themselves, all the elements of sovereignty, and were amenable to no power but that of the Most High. From my examination of the history and polity of the Church, I can not perceive that the laity, whatever may have been their indirect influence in its government, have ever been recognized as one of its constituent elements; and if the general conferences subsequent to 1808 can be regarded as the rightful successors of the prior conferences, in the sense of being transferees of all their powers, it would result that these bodies possessed, and still possess, plenary power to divide, or otherwise disorganize and destroy the Church. And the general conference of 1844, instead of creating two Churches, as the complainants insist they have done, could have multiplied them without limit, and have placed each portion of the divided unit on the basis of a distinct and independent Church. It is undeniable, that the power of division, imports a power to divide indefinitely; and as a necessary consequence, division carries with it the destruction of the being and identity of the original Church.

The inquiry into the powers of the general conference, under the constitution of 1808, requires a brief reference to some facts con-

nected with the early history of the Methodist Episcopal Church in this country. The introduction of Methodism here dates back to the year 1766. For the seven years which succeeded, the affairs of the Church were conducted by quarterly conferences. No conference, composed of all the traveling preachers, was held till the year 1773. From this period, till the year 1783, there was no assembly of all the traveling preachers, but local conferences, at different places, were held, as might suit the convenience of the ministers. Till the year 1783, no rule had been adopted making it the duty of the traveling preachers to attend the conferences; such an order was passed at the conference held that year. It was not, however, till the year 1784, that the Church was fully organized as an independent Church. This measure was adopted pursuant to the advice and recommendation of John Wesley, in his letter to Doctor Coke and others, of Sept. 10, 1784. At a meeting of preachers, held on the 15th November of that year, at which the superintendents — Asbury and Coke — were present, this letter was submitted to, and approved of by those in attendance. They accordingly called a conference, which met at Baltimore, on the 25th of December, 1784; and hence is called the Christmas conference. The call embraced all the traveling preachers; and at the time appointed, sixty of the eighty-three preachers then in the connection, attended. They organized the Church and adopted a form of government, with a system of discipline, and a standard of doctrine and faith, and elected Asbury and Coke, bishops, or superintendents. From this time, Wesley ceased to claim or exercise any authority over the Church, and the supreme power vested exclusively in the whole body of the traveling preachers. The first general conference after the organization of the Church, in 1784, was held on the 1st of November, 1792, and was composed of all the traveling preachers, who had been received into full connection. This is considered as the first regular general conference. Similar conferences were held in the years 1800, 1804, and 1808. In 1806 Bishop Asbury submitted a paper to the annual conferences, recommending the calling of a conference at Baltimore, in the month of May, 1807, to be composed of seven delegates from each of the seven annual conferences. According to the statement of Doctor Bangs—2d vol. History of the Methodist Episcopal Church, page 177 —among the reasons set forth by the bishop in favor of this measure, were the following: "To provide for a more permanent mode of Church government;" and, also, "to provide for a future delegated general conference, whose powers should be defined and limited by constitutional restrictions;" "for hitherto," says the historian, "the general conference possessed unlimited powers over our entire economy." This proposition for a change in the form of government, received the assent of all the annual conferences, except that of Virginia. Its defeat there, led to the abandonment of the plan for a time. The project was revived in 1808, by a memorial from the conference of New York, urging its adoption; and the conference of 1808 agreed to the proposed change, and adopted a constitution, providing in future for a delegated or representative general conference. The first article of this constitution provides that the general conference shall be composed of one member for every five members of each annual conference, to be appointed by seniority or choice, at the discretion of such annual conference; yet so that such representative shall have traveled four full calendar years, etc. By the 2d article it was provided that. "The general conference shall meet on the first day of May, 1812, in the city of New York, and thenceforward once in four years perpetually; in such place or places as shall be fixed by the general conference from time to time," etc. The 3d article requires, "that it shall take two-thirds of the representatives of all the annual conferences to make a quorum for the transaction of business." The grant of power to the general conference is in these words,

"The general conference shall have full power to make rules and regulations for our Church, under the following limitations and restrictions," namely, (1) The general conference shall not revoke, alter, or change, our articles of religion, nor establish any new standards or rules of doctrine, contrary to our present existing and established standards of doctrine. (2) They shall not allow of more than one representative for every five members of the annual conference, nor allow of a less number than one for every seven. (3) They shall not change, or alter, any part or rule of our government so as to do away episcopacy, or to destroy the plan of our itinerant general superintendency. (4) They shall not revoke or change the general rules of the united societies. (5) They shall not do away the privileges of our ministers or preachers of a trial by a committee, and of an appeal; neither shall they do away the privileges of our members of a trial before the society, or by a select number, or of an appeal. (6) They shall not appropriate the produce of the Book Concern, or of the charter fund, to any purpose other than for the benefit of the traveling, supernumerary, superannuated, and worn-out preachers, their wives, widows, and children. (7) Provided, nevertheless, that upon the joint recommendation of all the annual conferences, then a majority of two-thirds of the general conference succeeding, shall suffice to alter any of the above restrictions.

From this hasty sketch, the conclusion seems to follow, that in 1808 an important change took place in the government of the Methodist Episcopal Church. Before that time, the supreme power of the Church was vested, undeniably, in the whole body of trav-

eling ministers belonging to the connection. All the general conferences, from that held in 1784 to that of 1808, were composed of these ministers; not in the character of delegates, but each one in his primary capacity, and as a depositary of a portion of the sovereign power. They were called general conferences, because all traveling preachers, who had been in the connection for the requisite time, were invited to attend, and were members of those bodies in virtue of their offices as preachers. They were thus designated in contradistinction to the irregular local conferences, which had been previously held between the meetings of the general conferences. This body of traveling preachers, met, in a conventional capacity in the conference of 1808, created a new organism, before unknown to the Church—a representative or delegate general conference—and invested it, not with all power, but so much only as they deemed necessary to the ends of its creation. They provided for its permanency, by declaring that it shall meet, thenceforward, "once in four years perpetually." Prior to this change, the government of the Church, so far, at least, as the structure and powers of the general conference were concerned, was essentially a democracy, in which the masses met together for the transaction of their business. But, under the constitution of 1808, this body was elective; its members being chosen by the annual conferences, according to a prescribed ratio of representation. Under the old system, the members of the general conference represented no body but themselves, and were amenable to no earthly power for their conduct; under the new system, they had constituents, to whom they were answerable; and they were limited in their powers by express constitutional restrictions. And it is nowhere expressly declared, nor is it fairly inferable from the facts of the case, that the general conferences subsequent to, 1808, were the successors of those which had previously existed, or the transferees of the powers with which they were invested. Indeed, there are good grounds for the conclusion, that it was one of the main objects of the change, to provide for suitable limitations on the powers of the general conferences. True, the great accession of numbers to the Church—one of the cheering results of the faithful labors of the ministry—and her greatly-increased and rapidly-expanding territorial limits, rendered it highly expedient to constitute a delegated conference. It was injurious to the interests of religion, as well as inconvenient and burdensome to the ministry, that the whole body of laborers should be called frem their respective fields, to attend the meetings of the general conference. Besides, at the period of the change, several new states had been added to the Union, the great western valley was fast filling up with settlers, and every thing betokened the vast extension of our limits, since so fully realized. Methodism had kept pace with the steadily-advancing wave of population; and the indications were clear, that the affairs of the Church could not be safely intrusted to the general conference, as constituted prior to 1808. But the intention of the framers of the constitution of 1808, is not left to mere inference or construction. It is most apparent, from the terms of the instrument itself, that it was not intended to invest the general conference with absolute or supreme power. In the six articles, which have been before quoted, and to which some attention will be given hereafter, the powers of the general conference are expressly restricted; and these restrictions are wholly inconsistent with the assumption of unlimited power in that body. The general grant of power, as already noticed, is, "to make rules and regulations for our Church," subject to the restrictive articles. It is not pretended that there is any express grant of power to divide the Church, or otherwise interfere with its organization, so as to destroy, or in any way affect, its unity or perpetuity. If such a power exists, it must be deduced from the general grant, "to make rules and regulations." The general conference, in the exercise of its jurisdiction, can look only to the written charter of its creation; and I take it to be a settled canon of interpretation, in reference to all bodies possessing merely derived or delegated powers, and acting under a written constitution, that they can take none, not expressly granted, or clearly implied as necessary to the exercise of those that are granted. What, then, is the nature and the extent of the power vested in the general conference, by the clause of the constitution of 1808, granting "full powers to make rules and regulations for our Church?" Does it fairly imply a right to divide or dismember the Church? This is clearly a very important inquiry in this case; for, if this power existed, and was actually exercised by the conference of 1844, it results, that the complainants are clearly entitled to the relief prayed for in their bill. On the other hand, if the power of severance is not vested in that body, the Methodist Episcopal Church still remains in its integrity and unity; and the defendants, as its accredited agents, are rightfully in the possession of the charity in controversy, without a shadow of doubt as to who are its proper beneficiaries. And, upon this state of case, there would be no just ground for the interference of a court of equity, to withdraw it from their custody and control, and decree its distribution, cy-pres, or otherwise.

It may be remarked here, that this claim, urged by the complainants in behalf of the general conference, to the supreme and unlimited control over the Church, in all cases in which the exercise of their powers are not expressly restricted, is certainly one of a very imposing character. It is no less than the claim of a power to divide, or remodel, or otherwise destroy, the Church in its organization, at their own will and pleasure. Upon such a claim of power, nothing can rightfully be left to presumption in favor of its existence; it must be sustained by clear, affirmative rea-

sons. Under the influence of a proper jealousy of such a claim, a court will be inclined to act upon the rational intendment, that all power not granted, is reserved to those who were its original depositaries. In this age, and in the light of our republican institutions, this may be affirmed to be a safe rule of construction. The power "to make rules and regulations for our Church," must be construed as referring to the Church in its organization. It is impossible to conceive of the existence of a church, associating together through human agency or instrumentality, without connecting with it the idea of organization. It is this alone that makes it an entity—a thing cognizable by the senses—acting and capable of being acted on. It is true that theologians properly recognize a church on earth—universal, spiritual, and invisible—which is without organization. It embraces in its wide-spread arms, all human beings, in all the realms and climes of the earth, without respect to name, sect, or denomination, and whether included or not in any visible, external church relation, who yield their cordial assent to, and sincerely and obediently practice in their lives, the great fundamental, revealed truths of the Christian religion. Though without organization its members have "one Lord, one faith, one baptism," and are bound together "in the unity of the faith, and of the knowledge of the Son of God." In any other sense, there can be no church without an organization; it is the essential element of its being, and its destruction is necessarily the destruction of the being itself.

It is claimed, as a fair construction of the power granted to the general conference—a body vested only with a delegated authority—that the power "to make rules and regulations for our Church," implies the right to adopt any measure deemed expedient by that body, so far as organization is concerned. It may declare the Methodist Episcopal Church—it is insisted, now existing as a unit, bound and acting together in one compact organization—under the control of one regularly-appointed and constitutional general conference—to be two or more distinct and independent Churches, each having a general conference of its own, with no communion or fellowship, one with the other, except that which results from a common faith. Can it be that the constitution of 1808 vests, or intended to vest, in the general conference such a power? If it exists, the destinies of the Methodist Episcopal Church are completely at the disposal of any general conference; and that body may, at any time, at its own discretion and upon its own mere motion, on the occurrence of a sudden and unforeseen emergency, and without knowing or taking any measures to ascertain, the will of their constituents, take down and demolish their entire organization. This, it seems to the court, is a power inconsistent with the power "to make rules and regulations." The power granted is one designed to be exerted for the Church, in the adoption of such measures as shall best insure its efficiency and prosperity. The "rules and regulations" must, therefore, be adapted to the nature and purposes of the organism, committed to the care and guardianship of the conference. And any exercise of its authority, resulting in the overthrow and demolition of the Church, must be viewed as repugnant to, and in violation of, the granted power. Nor does it change the aspect of the question, that while there are specified restrictions in the exercise of the powers of the general conference, the right to change or destroy the existing organization of the Church is not enumerated as one of them. The founders of the constitution of 1808 may well be presumed to have given their assent to it, from the deep conviction that it was well adapted to secure and promote the well-being of the Church. To have inscribed in it, as among the restrictions of the constitution, that the general conference should at no time divide or destroy the Church, would have involved an absurdity. The implication of such a prohibition would necessarily result from the character and purposes of the constitution. Upon any other principle the power to govern may be held to imply a power to destroy. Such an implication is not admissible, even in the case of a civil ruler or sovereign, invested with the most absolute power. It is an acknowledged principle, that governments are instituted to promote the happiness and the welfare of the governed; and every investiture of power is made with the implied pledge, that it shall be exercised to that end. This doctrine applies as well to ecclesiastical as to civil governments. The grant of power to the general conference, under the constitution of 1808, must be construed in subordination to this great principle. That body is the mere depository of certain delegated powers; and, as it seems to the court, can not, upon any just principle, in the absence of an express grant of such a power, destroy the organization in virtue of which it has been brought into existence, by division, or otherwise. And, as already indicated, the fact that the general conference is not, by an express provision, inhibited from the exercise of the power to divide or destroy the Church, does not furnish a foundation for an inference in favor of its existence.

This view of the powers of the general conference of the Methodist Episcopal Church is not now, for the first time, asserted and maintained. There is evidence before the court, in this case, that it has been heretofore insisted on, with great ability, by some of the most distinguished individuals of that Church. The proof of this is found in various parts of the documentary evidence submitted to the court. Some of these will be briefly noticed. In the first place, it may be remarked, that the doctrine of the limited nature of the constitutional power of the general conference is strongly asserted and ably maintained in the protest of the minority in Bishop Andrew's case. In this paper it is

said, "The general conference is in no sense the Church, not even representatively. It is merely the representative organ of the Church, with limited powers to do its business in the discharge of a delegated trust." 1 Proofs, 108. And again, in the pastoral address of the Louisville convention, the same idea is reasserted in this language, "The general conference, or a majority thereof, is not the Church." 2 Proofs, 65. And the report of the committee of the annual conference of Alabama, which was adopted by that body, strongly and unqualifiedly asserts the same principle. After admitting the right of a conventional meeting of the whole Church to change or revolutionize it, either in doctrine or in organization, it is said in this paper: "But before the general conference can plead this right, (referring to the case of Bishop Andrew,) it must show when and where such plenary power was delegated to it by the only fountain of authority—the entire pastorate of the Church." 2 Proofs, 51. In the report of the committee on organization in the Louisville convention, in discussing the rights and powers of the episcopacy and the general conference, it is said, "It is confidently, although most unaccountably maintained, that the six short restrictive rules, which were adopted in 1808, and first became obligatory, as an amendment to the constitution, in 1812, are, in fact, the true and only constitution of the Church. This single position, should it become an established principle of action to the extent it found favor with the last general conference, must subvert the government of the Methodist Episcopal Church. It must be seen, at once, that the position leaves many of the organic laws and most important institutions of the Church entirely unprotected, and at the mercy of a mere and ever-fluctuating majority of the general conference." 1 Proofs, 86, 87. And, again: "This theory assumes the self-refuted absurdity, that the general conference is in fact the government of the Church, if not the Church itself." 1 Proofs, 87. Again: "With no other constitution than these mere restrictions upon the power and rights of the general conference, the government and discipline of the Methodist Episcopal Church, as a system of organized laws and well-adjusted instrumentalities for the spread of the Gospel and the diffusion of piety, and whose living principles of energy and action have so long commanded the admiration of the world, would soon cease even to exist." 1 Proofs, 87. This argument was directed against the asserted power of the general conference as exercised in the case of Bishop Andrew; but it is not less applicable, or forcible and conclusive in regard to the present question, than to the case so ably discussed by the committee. This committee, then, denounce as "wild and revolutionary" the claim "that the general conference may do, by right, whatever is not prohibited by the restrictive rules; and, with this single exception, possess power supreme and all-controlling, and this, in all possible forms of its manifestation—legislative, judicial, and executive—the same men claiming to be, at the same time, both the fountain and the functionaries of all the powers of government, which powers, thus mingled and concentrated into a common focus, may, at any time, be employed at the promptings of their own interests, caprice, or ambition." 2 Proofs, 88.

These references, for the purpose indicated, are deemed quite sufficient. They show that the greatest minds in the Church did not regard the constitution of 1808 as conferring absolute power on the general conference, limited only by the "six short restrictive rules." And they prove, by a power of argument not easily resisted or overcome, that there were implied restrictions on the power of that body, not less stringent and authoritative than those expressly declared; and, moreover, that the safety, efficiency, and perpetuity of the Church were directly involved in the recognition and rigid observance of these implied restrictions. That these arguments are applied to a case, differing in its aspects from that now under consideration, in no wise detracts from their force. But this asserted supremacy of the general conference of the Methodist Episcopal Church, and its consequent authority to break up and destroy its organization, at any time, according to its views of expediency, it is insisted by the complainants' counsel, has the sanction of precedent. It is said the power was exercised in the Canada case, and that this case was, in all respects, identical with that now under consideration. It is insisted, therefore, that, as affording a construction given by the general conference to its powers, it is to be viewed as a settlement of the question. It is not proposed to enter upon an inquiry as to the authority of precedent on a question of disputed and doubtful constitutional power, when presented for judicial determination. Without doubt, a power long exercised, and having become a settled usage of the body claiming and exercising it, will be viewed as rightfully pertaining to it; and a court will not be disposed to open the door of inquiry in relation thereto. But the exercise of a power in a single instance can scarcely be claimed as proof of its existence, if not explicitly granted, and can not, therefore, be viewed as entitled to the weight of an established precedent. What however, are the facts in the Canada case? The province of Lower Canada, previous to 1812, had been included in the Genesee conference. Afterward it was embraced partly in the New York conference, and partly in the New England conference; and later still the whole province was attached to the Genesee conference; but it never constituted a separate conference, under the authority of the general conference of the Methodist Episcopal Church in the United States. By reason of discords and painful collisions be-

tween the preachers laboring in that province belonging to the British conference, and those belonging to the general conference of the Church in this country, the latter, by an amicable arrangement, were wholly withdrawn from that field. This, however, in no way interfered with the existing organization of the Church, and involved the exercise of no doubtful power. The province of Upper Canada, at different periods intervening the years 1804 and 1820, had been included within several conferences of the Church in the United States. At the general conference of 1820, a resolution was adopted authorizing the establishment of a conference in this province. This was done in 1824; and the conference was designated as the Canada conference, embracing within its limits the whole province. The Canadian Methodists were still embarrassed; and at the general conference of 1828, they presented a memorial to that body, expressing a wish to be disconnected from the Church in the United States, and to organize a Canadian Church on an independent basis. The reasons set forth by the memorialists were mostly of a political character, growing out of the fact that they belonged to a civil jurisdiction foreign to that of the United States. The committee to which this memorial was first referred, reported that it was unconstitutional to grant its prayer without the assent and approbation of the annual conferences. A substitute was offered for this, containing a preamble and several resolutions. The first resolution declared, that the compact existing between the Canada annual conference and the Methodist Episcopal Church in the United States be and hereby is dissolved by mutual consent. This resolution was adopted by a large majority; and the other resolutions were referred to a special committee. The committee reported a preamble and several resolutions, which were adopted. In the preamble it is recited, that the Methodist Episcopal Church of the United States had extended its jurisdiction over the Canadian Methodists at their express desire, and that they, "under peculiar and pressing circumstances, do now desire to organize themselves into a distinct Methodist Episcopal Church, in friendly relations with the Methodist Episcopal Church in the United States." The first resolution provides, in substance, that if the Canadian conference shall definitely determine on this course, and elect a superintendent, he may be ordained by any one of the bishops of the Methodist Episcopal Church. The second expresses a desire that the missionaries in Upper Canada, laboring under the care of the Church in the United States, may be permitted to continue, etc. The third resolution declares, that ministers and others should be furnished with the publications of the Methodist Episcopal Church on the same terms as their agents in the United States; and, that, while the Canadian Church continued to patronize the Book Concern, it should be entitled to its annual proportion of the dividends. Upon the adoption of these resolutions, the resolution of the previous committee, which had passed, was rescinded. The whole action of the general conference is, therefore, embodied in the resolutions reported by the last committee. These do not assert or pretend to claim any power in the general conference to authorize the separation of the Canada conference, from the Church in the United States. There had been a decided opinion, in the report of the first committee, that the conference could not constitutionally sanction such separation. And it seems that it was only because of the peculiar circumstances under which the jurisdiction of the Methodist Episcopal Church had been extended over the province, and the annoyance and disabilities under which its preachers and members labored, for the reasons before stated, that the general conference was induced to take any action in the case. In their action they asserted no claim to any power to authorize the separation of the Canada conference, but simply declared certain friendly terms on which that conference might withdraw. It was upon the suggestion of Bishop Emory, that this conference had been recognized as a part of the Methodist Episcopal Church, on principles wholly variant from those which applied to the conferences in the United States, that the general conference assented to its withdrawal on the terms embraced in the resolutions which were adopted. 3 Bangs, Hist. 390, 391. Without enlarging on this point, it may be sufficient to remark, that the proceedings in the Canada case furnish no parallel to the action of the general conference of 1844, in so far as the latter can be construed into an authorized division of the Church. So far from this, the general conference, in the Canada case, give a very intelligible negative to the possession or exercise of any such jurisdiction without first having obtained the assent of the annual conferences. The application of the Canada conference for an apportionment of the proceeds of the Book Concern, and the proceedings connected with it, will be noticed in another place.

There is another very important inquiry in this case, which may be stated thus: If the power of division properly belonged to the general conference, was it, in fact, exercised by that body? It has been before intimated, that there exists somewhere in the Church, a power to change, overturn, and destroy, not only its organization, but its system of doctrine and discipline. If it is not in the general conference, it is not, perhaps, material to inquire where it vests; though this court has no hesitancy in holding that such a power would belong to the body of the traveling ministry, assembled en masse, in a conventional capacity. It was precisely such a body that in 1784 gave the Church an organized existence in this country; and

such a body could, without doubt, change its entire polity. Perhaps, too, this power could be invested in a convention, constituted on the representative principle; but it would be necessary, in such a case, that the delegates should be elected with express reference to the question of a change of government, and should be clothed by their constituents with ample powers to perform that specific function. But clearly the existence of this power, either in a convention composed of all the traveling preachers, or of delegates elected by them to revise or remodel the government of the Church, strongly negatives its existence in the general conference under the constitution of 1808. If such a power existed, and was intended to be exerted by the general conference of 1844, it may be presumed, from the known intelligence of that body, that the object proposed would have been consummated by direct and straightforward action. Now, it is not pretended that the "Plan of Separation" is operative in itself to authorize a division of the Church; it is only as connected with the action of the Louisville convention that such effect can be claimed for it. In fact, the first resolution of the "Plan" refers the decision of the question of the necessity and expediency of a separation, to the conferences of the slaveholding states. Its language is, "Should the conferences of the slaveholding states find it necessary to unite in a distinct ecclesiastical connection." There is no requisition that their proceedings shall be reported to the general conference, or be submitted to all the annual conferences for ratification or approval; but the decision of the Southern conferences is made final. The power of the general conference, so far as it professed to exercise any in this matter, was clearly a legislative power. Indeed, if intended to work the division and dismemberment of the church, it is not easy to conceive of a higher function of legislation than that claimed for the conference. The grave inquiry is here presented, could it delegate to another body the exercise of such a power? Nothing is hazarded in the proposition, that such a power, from its very nature, is not transferable. In their report to the Louisville convention, the committee on organization place their right to act in the premises expressly on the ground of, authority derived from the general conference. They say "that all the right and power of the general conference, in any way connected with the important decision in question, were duly and formally transferred to the annual conferences in the slaveholding states, and exclusively invested in them." 2 Proofs, 69. The committee then proceed with an argument, based on this proposition, to prove that they have full power to act. Now, it is a common usage, in legislative bodies, to institute commissions to inquire into facts, and to report facts, as a basis of intelligent and wise legislation; but such a body cannot delegate to others its legislative discretion. The general conference could not, therefore, transfer to the Louisville convention the power to pass upon the very solemn question of a division and dismemberment of the Church. They could, with equal propriety, have conferred this power on the bishops of the slaveholding conferences, or the presiding elders, or any designated number of ministers or laymen. This no one will insist could have been done. This view may be applied in a two-fold aspect: First, as proving a lack of power in the Louisville convention to divide the Church, so far as they professed to act under the authority of the general conference; and, second, as raising a strong presumption that the general conference, by the action of 1844, did not divide the Church, and did not intend to do so. It would be doing injustice to that most respectable body, to suppose they intended to delegate to others the exercise of a high function, pertaining to them as a legislative body.

But the inquiry remains, do the acts of the general conference of 1844 justify the inference, that there was a serious purpose to divide the existing Church, and from its severed parts, to create two distinct and independent Churches? If this was intended, it is not unfair to suppose it would have been clearly and intelligently expressed. It was a subject of the most momentous interest; and in passing upon it, it would occur to every one that nothing should be left to doubtful inference or construction. But, in looking into the proceedings of the general conference, in connection with the debates, no evidence is afforded that the body either asserted or attempted to exercise such a power. That ever-fruitful source of agitation and excitement—the subject of slavery—in connection with the cases of Harding and Bishop Andrew, became a topic of discussion in the general conference of 1844. It is not, perhaps, uncharitable to suppose, that, even among the excellent and pious men composing this body, there was some excess of zeal and temper, and, consequently, some indiscretions, on both sides, during the long and animated debates which took place. There had been some previous causes of excitement and ill feeling, growing out of the alleged ultraism of some Northern preachers, in connection with the question of slavery. And it is not strange that, from the collisions of a warm discussion of the subject, in the conference, some sparks of unholy fire should have been thrown off. As usual under such circumstances, the minority supposed they were oppressed by an imperious majority. Of course, there would be some alienation of feeling—some disruption of the holy ties of Christian brotherhood. In this state of things, the idea of a separation of the seemingly discordant elements took possession of some of the leading men of the South and Southwestern portions of

the Church. This idea was at length bodied forth in the form of a specific proposition, by Dr. Capers—now a bishop in the South, justly distinguished for his talents and his piety—who introduced a series of resolutions, the first two of which were as follows: "That we recommend to the annual conferences to suspend the constitutional restrictions which limit the powers of the general conference, so far, and so far only, as to allow the following alterations in the government of the Church; namely, that the Methodist Episcopal Church in these United States and territories, and the republic of Texas, shall constitute two general conferences, to meet quadrennially, the one at some place south and the other north of the line which now divides between the states commonly designated as free states, and those in which slavery exists. That each one of the two general conferences thus constituted shall have full power, under the limitations and restrictions which are now of force and binding on the general conference, to make rules and regulations for the Church within their territorial limits respectively, and to elect bishops for the same."

It is not necessary to refer specially to the other resolutions in the series offered by Dr. Capers. The whole were referred to a select committee of nine, who were not able to agree on a report; and they were not afterward brought to the notice of the conference. It will be seen that the resolutions cited contained the distinct proposition to refer the question of the division of the Church to the vote of the annual conferences; thus admitting a want of power in the general conference to authorize a division without a change in the constitution. As the matured opinion of a minister of the Church, of high standing and great experience, this proposition of Dr. Capers is entitled to consideration. But also, it deserves notice, that this proposal, looking to a division of the Church—clearly and explicitly stated—was allowed to drop without action; thus affording grounds for the conclusion, that, whatever other action it might be the purpose of the conference to take on this subject, they had no thought of a division of the Church on the plan proposed. And there is room for the further inference, that upon a proposal to refer the question of dividing the Church to the votes of the annual conferences, as the only constitutional mode by which it could be effected—if the power was understood to pertain to the general conference without such action—it is strange that no one was found to assert the power, and thus show the inutility of the proposed reference. But looking at the "Plan of Separation," as adopted by the general conference, does it fairly import anything more than a proposition intended to open a way for the peaceful withdrawal of the Southern and South-Western conferences, should they deem such a course expedient? The conference, it must be supposed, had in view the acknowledged right of any individual member, or any portion of the Methodist Episcopal Church to withdraw from its jurisdiction and government at their own pleasure. This right has been recognized from the earliest period of the Church. Mr. Wesley distinctly avowed that it was formed on the voluntary principle; and that as no one joined his societies on compulsion, so no one would be required to continue in the connection, except by his own choice and volition. It was the understood law of the Church, however, and the principle is clearly recognized in its discipline, especially in regard to ministers, that, while within the pale of its organization, strict obedience to her rules would be required. Ministers entered upon their solemn and self-denying duties with a knowledge of this principle, and also with a presumed reference to one of its sequences; namely, that if disconnected from the organized Church, either by discipline or voluntary retirement, they forfeited all the privileges and benefits pertaining to them while within its pale.

Keeping this principle in view, the court will briefly examine the "Plan of Separation." It has been inserted in a previous part of this opinion, and need not be here set out. And it is to be remarked, in the first place, that throughout the entire "Plan" there is no pretense or claim of power in the general conference to divide the Church, in the sense of creating from one Church, two distinct and independent Churches; nor is there any expression contained in it from which it is inferable that it was intended thus to divide it. And it cautiously guards against any admission of the necessity of a division. The first clause of the preamble refers to the declaration of the fifty-one delegates from the slaveholding conferences, representing that, for various reasons, "the objects and purposes of the Christian ministry and church organization cannot be successfully accomplished by them under the jurisdiction of this general conference as now constituted." The second clause declares, that, "whereas in the event of a separation, a contingency to which the declaration asks attention as not improbable, we esteem it the duty of this general conference to meet the emergency with Christian kindness and the strictest equity." Here, it will be noticed, the separation is referred to as a "contingency"—something that "may" happen—and when it does happen, as producing an "emergency" to be met with Christian kindness. The first resolution provides, "that should the annual conferences in the slaveholding states find it necessary to unite in a distinct ecclesiastical connection," etc. Here again the language is exceedingly guarded, asserting no power, or intention to divide the Church, and admitting no necessity for such division. It is perfectly intelligible without comment or exposition.

Should the conferences referred to "find it necessary," upon mature consideration, to withdraw from the existing organization, then the conditions are prescribed on which the withdrawal is to be consummated; and provision is made for the continuance of future friendly relations with the proposed new organization. This was a jurisdiction undoubtedly possessed by the general conference, and which had been previously exercised in the case of the Canada conference. It was merely saying to their brethren of the South, If you decide on leaving us, it is our desire that we may part in peace. And in the exercise of a power clearly belonging to the general conference, they fixed upon certain rules which should govern the border conferences and societies; they declared that all ministers might, at their pleasure, attach themselves to the Church South, if one should be formed, or remain in the Methodist Episcopal, without blame or censure; they agreed "that all the property of the Methodist Episcopal Church, in meeting-houses, parsonages, colleges, schools, conference funds, cemeteries, and of every kind, within the limits of the Southern organization, shall be forever free from any claim set up on the part of the Methodist Episcopal Church, so far as this resolution can be of force in the premises." To this extent the general conference supposed they had rightfully the power to act. There was one subject, however,—the charter fund and Book Concern,—which was not within their control, except for a specific purpose; namely, "the benefit of the traveling, supernumerary, superannuated, and worn-out preachers, their wives, widows, and children." This could not be appropriated in any way or for any purpose, other than that specified. In the fulfillment of the purpose declared, of meeting the "emergency" of a separation, should it happen, "with Christian kindness and the strictest equity," the general conference, therefore, referred it to the discretion and decision of the annual conferences, whether they would enlarge the power of the general conference, so as to enable it, by a vote of two-thirds of its members, to appropriate the charter fund and the Book Concern, as they might deem expedient; and they provided the terms on which the division of the Book Concern should take place, in the event that the annual conferences should vote in favor of the proposed alteration in the sixth restrictive rule. In all this there was certainly no claim of a power to divide the Church by the direct action of the general conference, or of any right to delegate such a power to the Southern conferences; it was merely a provisional arrangement, to meet a "contingency" which it was declared might happen. The debates in the general conference are clearly confirmatory of this view. I may here, without any intended discourtesy, refer to a speech of Doctor William A. Smith, one of the complainants in this case—a minister distinguished by his gentlemanly deportment, his piety, learning, and intellectual power—made in Bishop Andrew's case, in which he insists, if certain doctrines are persisted in, "a division of our ecclesiastical confederation would become a high and solemn duty"; and adds, "This conference, I am aware, has no authority directly to effect this separation. This subject must go back to the organic bodies we represent—and to the people—the membership of the Church—who must be consulted, and whose voice must be regarded as an authoritative decision, from which there is no appeal." In the debate on the "Plan," there seems to have been some diversity of view, in relation to its effect. Many of the speakers spoke, and, no doubt, voted, under a belief, that no part of the "Plan" could take effect, till the annual conferences had concurred in the proposed change of the sixth restrictive rule. Doctor Paine said, "The separation would not be effected by the passage of these resolutions through the general conference; they must pass the annual conferences, beginning at New York; and when they came round to the South, the preachers there would think and deliberate, and feel the pulse of public sentiment, and of the members of the Church, and act in the fear of God, and with a single desire for His glory." Again: "They should be one people still, till it was formally announced by a convention of the Southern churches, that they had resolved to ask an organization, in accordance with the provisions of the report." The same gentleman said, at another stage of the debate, "that the subject would go round, before it came to the South," etc. Doctor Luckey, in his remarks said, "He regarded the resolution as provisionary and preliminary, settling nothing at present, but providing, in an amicable and proper way, for such action as it might be necessary hereafter to take. He hoped such necessity would never arise, and that Southern brethren would not find it necessary to leave them." Doctor Bangs said, "The speakers who have opposed the report have taken entirely erroneous views of it. It did not speak of division; the word had been carefully avoided through the whole document; it only said, in the event of a separation taking place; throwing the responsibility from off the shoulders of the general conference, and upon those who should say such separation was necessary." Mr. Fillmore in his remarks said, "The resolutions do not say that the South must go, shall go, will go, or that anybody wants them to go; but simply makes provision for such a contingency." Mr. Finley said, "He could see in the report no proposition to divide the Church; if he saw such a proposal, he should stop at the threshold." Mr. Hamline argued against the necessity of referring all the resolutions embodied in the report of the committee, to the annual conferences, insisting that it was only necessary to refer

that relating to the sixth restrictive rule; and saying, "The Book Concern is chartered in behalf of the general Methodist Episcopal Church of the United States; and if they did separate till only one state remained, still Methodism would remain the same, and it would still be the Methodist Episcopal Church in the United States." Again: "If they sent out to the annual conferences to alter one restrictive rule (the sixth) it would be constitutional to divide the Book Concern, so that they might be honest men and ministers. The resolution goes on to make provision, if the annual conferences concur, for the security and efficiency of the Southern conferences." And, continuing, he said, "God forbid that they should go as an arm torn from the body, leaving the point of junction all gory and ghastly." The same speaker also said, remarking on the action of the committee, "They had carefully avoided presenting any resolution which should embrace the idea of separation or division." Mr Porter said, "The committee had presented that report as the best thing that could be done under the circumstances." Again: "If there were defects in the document, they could arrest it in the annual conferences. The South could take no action upon it, till the annual conferences had decided respecting the sixth rule; and if, when they got home and calmly and deliberately examined it, they found anything radically wrong, let them stop it in the annual conferences."

Without extending these quotations, it will be seen that, in the debate on the "Plan of Separation," the idea was promptly repelled, that in its adoption the general conference was giving its sanction to a division of the Church; and that, so far from showing such an intention, all expressions justifying the inference were cautiously avoided in the "Plan" itself. It seems also clear, that the conference designed to act expressly on the principle avowed by Doctor Bangs, of "throwing the responsibility from off the shoulders of the general conference, and upon those who should say such separation was necessary." It is equally clear, that the proceedings of the Louisville convention do not warrant the conclusion, that they supposed the Church was divided by the action of the general conference, or by the joint action of the latter body and the convention, as claimed by the bill in this case. The convention, it may be remarked, was not a body known to, or recognized by, the constitution of the Church. Neither had it been called under the sanction or authority of the general conference; nor was that conference in any wise responsible for its doings. The "Plan of Separation" prescribed no mode by which the conferences of the slaveholding states should decide the question of the necessity of their withdrawal. The general conference had no right to do this, and did not assume to do it. It was left wholly to the choice and discretion of the South. It was decided to call a convention at Louisville; and this body declared "that it is right, expedient, and necessary to erect the annual conferences represented in this convention into a distinct ecclesiastical connection, separate from the jurisdiction of the general conference, as at present constituted." It was also declared, "that the jurisdiction hitherto exercised over said annual conferences, by the general conference of the Methodist Episcopal Church, was entirely dissolved," and that such annual conferences should be formed into "a separate ecclesiastical connection, to be known by the style and title of the Methodist Episcopal Church South." Provision was also made for a general conference of the Southern Church, at Petersburg, on the 1st of May, 1846, and quadrennially thereafter. These proceedings perfected the act of separation, or withdrawal—a result not brought about by the act of the general conference of the Methodist Episcopal Church, but by the decision of the Louisville convention. There is no ground for the charge that there was any concealment or unfairness in the conduct of the general conference of 1844. There is no difficulty in comprehending their motives and their actions. The vivid representations of Southern ministers, that unhappy consequences would result in the South from the decisions of the general conference in some matters connected with slavery—evils not then experienced, but apprehended,—induced that body to adopt such measures as were within its constitutional competency, to meet the threatened emergency, and mitigate, as far as practicable, the painful results likely to ensue from the withdrawal of the Southern conferences. This result was, no doubt, deemed probable; and, when it should happen, the laudable desire was evinced that it should take place without the total disruption of the ties of Christian brotherhood. The right of withdrawal was unquestionable, and was distinctly admitted by the North. There was but one barrier that stood in the way of this movement; and that was the constitutional difficulty of a division of the chartered fund and the Book Concern. This the conference was willing to remove, in the only mode by which it could be constitutionally effected. That body was expressly prohibited, by the sixth restrictive rule, from making any apportionment or division of these funds and property, except as prescribed by that rule, without authority from the annual conferences. A proposition was, therefore, submitted to these conferences for a modification of this rule, with a view to enlarge the powers of the general conference. They refused to concur in the proposed change, and this negative upon that measure left the general conference without any power further to act in the matter, except upon some future proposition of compromise. The Southern members were fully apprised of the difficulty adverted to, and a portion of them, evidently, were of the opinion that the entire "Plan of Separation" depended on the action of the annual

conferences, on the question of changing the sixth restrictive rule. In their address to the Southern churches, the delegates from the South, in the general conference of 1844, instead of censuring that body for its action on the property question, bear honorable testimony to "the spirit of justice and liberality" of the North, and say, that "should a similar spirit be exhibited by the annual conferences in the North, when submitted to them, as provided for in the 'Plan' itself, there will remain no legal impediment to its peaceful consummation."

On this state of facts, the inquiry is presented, whether this court, in the exercise of its equity jurisdiction, can rightfully take charge of the property and funds of the Book Concern, as a charity, and apportion them ratably among the parties to this controversy. If the position were sustainable that the Methodist Episcopal Church has been legally and constitutionally divided into two separate and independent Churches, it would result necessarily that the old Church is annihilated; and, not being an existing organism, can have no capacity to hold or administer the charity in question; and, in that aspect, there can be no doubt that a court of chancery, on the doctrine of cy-pres, could rightfully take jurisdiction and dispose of the charity, as nearly as possible, in conformity with its original purpose. On this supposition, the beneficiaries within either of the two church organizations would be placed on the same footing. They would have precisely the same rights, and would be equally without any of the requisite means to enforce them; for the agencies by which alone the charity could be administered would be destroyed with the demolition of the original Church to which they pertained. But this hypothesis is clearly not admissible. It needs no process of reasoning to show that the Methodist Episcopal Church is not destroyed. It still exists in name and organization, as it did prior to 1844. From that time to the present, it has been going forward in the discharge of its accustomed duties and functions. It has had, and still has, its bishops, its preachers, its membership, and a regular succession of its general, annual, and quarterly conferences. In short, the entire machinery of its organization has been in full operation to this day. True, the withdrawal of the Southern conferences has lessened the number of its members, and curtailed its territorial jurisdiction; but it is undeniably the same Church—the Methodist Episcopal Church—having all the essential elements of identity with the Church prior to 1844. This great ecclesiastical organism, has not, since that time, wrought its own destruction; nor has it been destroyed by any power or influence, ab extra. As the keeper of the charity in question, it has now the same power to hold, and precisely the same agencies to administer it, that it ever had. It has also beneficiaries capable of receiving and entitled to its benefits. In a word, its machinery is perfect in all that is required to manage and distribute the charity, according to the purpose of its creation. What is the position of the complainants in reference to this charity? In so far as they may be understood, from the bill, to claim a decree on the ground of their individual interests in the Book Concern, as belonging to the traveling connection, or as supernumerary or superannuated preachers, an insuperable objection seems to present itself. The legal nature of their interests, as individuals belonging to the one or the other of these classes, is not such that it can form a basis for a decree in their favor. The beneficiaries of this charity, as individuals, have no legal right to or interest in the fund. They have an inchoate right; but not such a one as can be recognized in law or equity. It is not capable of transfer or alienation. It bears no similitude to a co-partnership, a retiring member of which may call upon his associates for an account, and claim his specific proportion of the partnership fund or property. It is not every one, falling within the class of traveling, supernumerary, or superannuated preachers, or the wife, child, or widow of such, that is necessarily a beneficiary of this church charity. It can only be available to them under certain circumstances. It is only when it is made to appear to the proper annual conference, that after applying the contributions required by the law of the Church, to be raised for the support of these persons, there is a deficiency for this purpose, that they are entitled to assistance from the proceeds of the charter fund or the Book Concern; and then only for the amount of such deficiency. If, therefore, in any conference, the liberality of the people or membership is such, that means sufficient for the support of the beneficiaries of the general charity are raised, nothing is, or can be, drawn from it for that purpose; and all the inquiries to ascertain the fact of deficiency and its amount are made through the agency of the several annual conferences, who, upon the direction of the general conference, are the distributers of the charity, and deal it out to the individual beneficiaries as they show themselves entitled to it.

But if these complainants, and those they represent—forming the entire class of the beneficiaries within the Southern Church—having, as the bill assumes, an interest in this great charity, and averring that they have presented their claim to their just apportionment of it, and that such claim has been rejected; or, if they can show that the fund has been diverted from its rightful object, or that those intrusted with its administration have conducted it dishonestly or in bad faith, a ground is afforded for the interposition of a court of equity, in virtue of its acknowledged jurisdiction over charitable uses. But it will be obvious, that it is necessary that the claimants of the charity should make it appear that they are within the class of its beneficiaries. Now, in the present case, as has been already

stated, the complainants, and those they represent, base their claim on the fact that they were once in connection with the Methodist Episcopal Church, as traveling, superannuated, or supernumerary preachers, and are now, by the means and proceedings stated, within the Methodist Episcopal Church South, and, that in virtue of that ecclesiastical connection, are rightful beneficiaries of the charity in question. In the view of this court, as the result of its best judgment upon the legal import of those measures and proceedings, these complainants, in the exercise of their undoubted right, have withdrawn from the Methodist Episcopal Church by their own act and volition, and now belong to another ecclesiastical organization—holding, indeed, the same faith, but in every other respect distinct from, and independent of, that from which they have retired. And this presents the question, whether they are now to be regarded as belonging to the class of beneficiaries, having a rightful claim to a participation in the charity under consideration. This question, of course, presupposes the fact, undeniable in this case, that the sixth restrictive article of the constitution of the Church is in full force; the annual conferences not having enlarged the power of the general conference so as to permit the appropriation of the proceeds of the Book Concern to any other purpose, or in any other way, than that prescribed by the organic law of the Church. The inquiry, then, reduced to its simplest elements, is, whether any one not within the pale of the organized Methodist Episcopal Church, can be a beneficiary of the charity referred to. It is not intended to enter on the wide field of investigation which this subject presents, but very briefly to state the conclusions to which the court has arrived. The origin and nature of this charity have been already set forth. That its benefits were designed exclusively for those who continue within the organized Methodist Episcopal Church, seems to be a conclusion inevitable from the polity of the Church, and also from its usages. It has been before noticed, that the voluntary principle, in its greatest latitude, both in regard to admissions into the Church, and retirement from it, has always been an acknowledged and favorite principle with this Church. Any one—preacher or private member—has the right to withdraw from the Church at any time; but upon such withdrawal he abandons all right to property which pertained to him as a preacher or member. No one controverts this principle, as applicable to an individual. Every year there are more or less of the traveling preachers who withdraw from the connection; and cases also occur of their expulsion for misconduct. In either case, they forfeit all claims to a participation in the charities of the Church. The same principle applies where large numbers go off in a body, or where a conference, or any number of conferences secede. It does not vary the principle, that those thus seceding attach themselves to another ecclesiastical organization, holding the same faith as the Church from which they retire. They are no longer in the Methodist Episcopal Church, of which the charity, known as the Book Concern, is an appendage, and for which it was created. Upon any other principle, in the case under consideration, there could have been no necessity for asking the annual conferences to modify the sixth restrictive rule. It would have been competent for the general conference to have appropriated the produce of the Book Concern to the preachers of the Church South without a change of that rule, if they could be viewed as beneficiaries after their withdrawal from the old organization. This view is strongly sustained by the fact before noticed, that the law of the Church affords no rule by which the charity can be dispensed to those not in connection with some annual conference. It is only through the agency of the annual conferences that the fund can reach its beneficiaries. This view does not, of course, preclude the general conference, in cases within its just constitutional power, from making provision, by compact or compromise, for securing the just rights of withdrawing members or sections of the Church. This was the doctrine distinctly avowed and acted on in the case of the Canada conference. After its withdrawal from the Methodist Episcopal Church, an application was made to the general conference by that conference, for its ratable proportion of the produce of the Book Concern. It was held by the general conference that there was no authority in that body to authorize such a use of this fund. The question was submitted to the vote of the annual conferences; and such was the prevailing sentiment of the Church, that the Canada conference, by its withdrawal, had forfeited all claim to this charity, that the vote was largely against their application.

It is, however, strenuously urged by the counsel for the complainants, that the withdrawal of the Southern conferences, is justified on the ground of necessity; and that they cannot be viewed as having voluntarily separated from the Methodist Episcopal Church. It is insisted that the previous agitation and discussion of the subject of slavery, and the state of feeling in the Northern portion of the church in relation to it, in connection with the proceedings of the general conference of 1844, in the cases of the Rev. Mr. Harding and Bishop Andrew, involved the necessity of a separation. In the report of the committee on organization, adopted by the Louisville convention, the committee, after claiming ample authority to organize a new Church in virtue of the power conferred by the general conference in the "Plan of Separation," assume that there exists "a high moral necessity for the measure." The complainants, in their bill, set forth the subject as follows: "That differences and disagreements having sprung up in the Church, between what was called the Northern and Southern members, upon the ad-

ministration of the Church government, with reference to the ownership of slaves by the ministers of the Church, of such a character, and attended with such consequences as threatened fearfully to impair the usefulness of the Church, as well as permanently to disturb its harmony; and it became, and was, with the members of the Church, a question of very grave and serious importance, whether a separation ought not to take place, with some geographical boundary with necessary and proper exceptions, so as that the Methodist Episcopal Church should constitute thereafter two separate and distinct Methodist Episcopal Churches." This is the only statement in the bill of the difficulties connected with the subject of slavery. There is no specific reference to the action of the general conference, in the two cases mentioned, as affording the ground of the alleged necessity of separation; nor does the bill ask for a decree on the basis of the unavoidable withdrawal of the South as induced by that action. It is, perhaps, questionable whether, if the court should be of opinion that there was a necessity for the separation, a decree in the case could properly be based on that fact.

But, without delaying to consider this point it may be asked, do the facts in proof make out a case establishing the necessity of the withdrawal of the South, in the sense of taking from them the character and designation of seceders? Of course, this question must be dealt with in its legal aspect and bearings, as affecting the rights of the parties to this suit. It is easy to conceive of a state of things which might, in the opinion of well-balanced and pious minds, render it expedient and morally proper that the South should withdraw, which, however, would not involve a positive or legal necessity. In the view entertained by the court, there will be no occasion, in disposing of the point under consideration, to give a construction to the various provisions of the discipline of the Methodist Episcopal Church on the subject of slavery, intended, as far as practicable, to disconnect the ministry from holding slaves. There is no question, that while the position of that Church, from its origin in this country, has been generally wise, rational, and conservative on the subject of the institution of slavery, it has never ceased to bear testimony against the owning of slaves by the ministry. The legislation in the slaveholding states,—especially the stringent laws passed in the most of them prohibiting emancipation,—led, in 1840, to the modification of the rule, so that the holding of slaves in states where such a law was in force, should not be a disqualification for any official station in the Church. This was, in substance, the law of the Church in 1844. The general conference of that year had before it the two cases before named. Mr. Harding, a traveling preacher in the Baltimore conference, had become the owner of slaves by marriage. He was cited to answer for a violation of the law of the Church for this act. The Baltimore conference, upon hearing the case, entered a judgment of suspension against him. He appealed to the general conference, and in that body the judgment of the annual conference was affirmed. Bishop Andrew, after his election, had also become the owner of slaves,—one by testamentary bequest, and one by marriage. In the Northern portion of the Church there was a decided feeling of dissatisfaction toward the bishop, arising solely from his connection with slavery; and a belief was prevalent that he had wounded the Church thereby, and violated the spirit, if not the letter of its law on this subject. By the discipline of the Church, a bishop is declared to be amenable to the general conference for improper conduct. The general conference of 1844 held, that under this clause in the discipline, it was competent to inquire into the fact alleged against the bishop. He was present at the conference, and made a full and candid statement of all the facts connected with his ownership of slaves. After a protracted discussion of the subject, the conference adopted the following preamble and resolution: "Whereas, the discipline of our Church forbids the doing any thing calculated to destroy our itinerant general superintendency; and whereas, Bishop Andrew has become connected with slavery by marriage and otherwise, and this act having drawn after it circumstances which, in the estimation of the general conference, will greatly embarrass the exercise of his office as an itinerant general superintendent, if not in some places entirely prevent it; therefore, Resolved, that it is the sense of this general conference that he desist from the exercise of his office, so long as this impediment remains." On a subsequent day of the session, the conference adopted the following resolutions explanatory of the foregoing: "Resolved, as the sense of this conference, that Bishop Andrew's name stand in the minutes, hymn-book, and discipline as formerly. Resolved, that the rule in relation to the support of a bishop and his family applies to Bishop Andrew. Resolved, that whether in any, and if in any, what work Bishop Andrew be employed, is to be determined by his own decision and action in relation to the previous action of this conference in this case." As before remarked, it is not designed to follow the counsel in their elaborate discussion of the question, whether the general conference, in the disposition made of these cases, have acted erroneously. I have not been able to perceive the materiality of this question as connected with the legal rights of the parties to this controversy. If it be admitted that the general conference of 1844 acted under a misapprehension of the law of the Church in relation to the holding of slaves by a minister or bishop, or misjudged as to its constitutional authority to take cognizance of the cases referred to, does it furnish a justifying reason for the secession of any

portion of the Church? This inquiry is not made with any view to the admitted right of voluntary withdrawal from the Church, whether with or without cause, but merely in reference to the ground assumed, that in this case it became a matter of necessity. It would seem that the Southern portion of the Church, claiming to be aggrieved by these proceedings, did not regard them as sufficient in themselves to justify secession on the ground of necessity; and hence, the proposition for a division was laid before the general conference for its consideration and sanction. But let us inquire if, upon any just principles, the withdrawal of the South admits of vindication, in the sense referred to. In the case of Mr. Harding, in a proceeding, understood to be judicial in its character, originating in the annual conference in which he was a traveling preacher, the general conference affirmed the judgment of that body, by which he had been suspended from the ministry. The case was clearly within the jurisdiction of the general conference, as the highest appellate judicatory of the Church; and there is no pretense for insisting that in this judgment that respectable body of ministers were governed by any corrupt or improper motives. If they erred in their conclusions upon the law or facts of the case, no other presumption is allowable than that it was an error of judgment; a species of error, it may be remarked, to which all human tribunals are liable, and of no uncommon occurrence.

The case of Bishop Andrew involved the exercise of the legislative power of the general conference. That body adopted a resolution, by a large majority, expressive of its opinion, that under the circumstances of the case, it was expedient that the bishop should cease to exercise the duties of his office, till relieved from the impediment which, in its judgment, his connection with slavery had created. This, it will be noticed, was not a judicial sentence, but a mere legislative declaration of the sense of the conference on a question of expediency, and subject to rescission by any succeeding conference. There is nothing, either in the preamble or resolution, imputing crime or immorality to the bishop, or in any way impeaching his standing or character as a Christian, except in the estimation of those who hold that the ownership or holding of slaves, under any conceivable circumstances, involves moral turpitude. It appears, as well from the preamble to the resolution as the debates on the occasion, that the majority were not influenced so much by a conviction of the positive wrong of the bishop's conduct, as the apprehension that, in the position in which he had placed himself, he could not usefully and acceptably perform the duties of his high office. The principle of itinerancy, as applicable to ministers and bishops, lies at the foundation of the Methodist polity; and from the days of Wesley has been regarded as indispensable to the accomplishment of the great purpose for which the church was instituted. The bishops are required by the discipline to travel through the entire territorial limits of the Church. The preamble to the resolutions adopted in Bishop Andrew's case refers to this, and expresses the apprehension that his connection with slavery "will greatly embarrass the exercise of his office as an itinerant general superintendent, if not, in some places, entirely prevent it." There seems to have been nothing in the proceedings evincive of personal unkindness to the bishop, or a want of confidence in his piety as a Christian minister. Nor can the resolution first adopted be fairly construed as importing a sentence of deposition against him. If there was room for a doubt as to the intention of the general conference in this respect, it is removed by the explanatory resolutions subsequently passed, declaring that he was still to be regarded as a bishop, with the full right, at his own option, to continue in the discharge of his usual official duties.

In this country there is no connection between church and state. As the result of this happy disseverance, it is the right of all men freely to choose such church association as they prefer; and when within the pale of a church organization, they can adopt such rules of discipline and government as may best suit their own views, subject to this limitation, that they are not in violation of the national or state laws. The civil government claims no right, and clearly possesses none, to interfere with or supervise the doings of any ecclesiastical body, except as they may be involved in a judicial case, in which rights of property are drawn in question. And it is only in this view that this court can take cognizance of, or adjudicate on, the matter now under consideration. There can be no doubt that an ecclesiastical judicatory may so clearly and palpably overleap its just constitutional limits, and so grossly infringe the rights of an individual or a minority, as to render it expedient and necessary that they should withdraw from its jurisdiction. And when such withdrawal is unavoidable, from the pressure of necessity, it would be unjust that those who are driven to this course, should be deprived of any of the rights of property to which they were entitled before secession. But to save such rights, seceders will be required to make out a clear case of necessity. And upon such an issue, involving the actions of a body of men who may well be supposed to be governed by the promptings of a pure benevolence, and to have adopted the teachings of the word of God as their rule of action, no unfavorable presumption as to motive can be entertained.

It is not proposed, in entering on the inquiry, whether the action of the general conference brings the withdrawing conferences of the South and South-West within the prin-

ciple before stated, to review minutely the facts, which, it is alleged, left them no other course but separation from the Methodist Episcopal Church. Prior to the year 1844, there had been some abolition movements in portions of the North, which were probably indiscreet and uncalled for. In 1842, a large body of Northern Methodists seceded, on the ground that the Methodist Episcopal Church was too lax in its discipline in regard to the ownership of slaves by ministers and members. It was not, however, till the meeting of the general conference of 1844, that any thing occurred, affording a specific ground of complaint to the South, and which threatened seriously to disturb the harmony so long existing between it and the North. In their public acts and declarations, the Southern members specify, as their grounds of complaint, the proceedings of the general conference in the cases of Harding and Bishop Andrew. It was not claimed that there had been any previous action of that high judicatory indicating a purpose of infringing or trampling upon the rights of the Southern portion of the Church, or foreshadowing the necessity of severance. The inquiry, then, may be narrowed down to this, namely: Did the action of the general conference, in the two cases noticed, afford such a necessity for secession as will save to those who leave, their previously-existing interest in and claim to, the charities or property pertaining to the Church? In deciding this point, the court, as before intimated, is not aware of the necessity of a critical examination of the law and the facts in the cases passed upon by the general conference, with a view to determine whether the proceedings were erroneous or otherwise; for it seems to the court quite immaterial whether, in the one case, that body erred in affirming the judgment of suspension against Mr. Harding entered in the lower court, or, whether, in Bishop Andrew's case, they improperly exercised their legislative power. Suppose they were wrong in both cases: was a crisis produced, calling for and requiring immediate measures for a secession on the basis of necessity? It is very far from the purpose of the court, to impeach the motives, or in any way to censure the eminent and pious men of the South who thought it to be their duty to encourage the measure of withdrawal. It is not intended to affirm or insinuate that they may not have had a deep-seated and earnest conviction of the truths they so eloquently and impressively made known to the world, as to the cause of the movement. There is no reason to doubt that they sincerely believed the best interests of religion demanded it; and they may stand acquitted of any wrong before him who is the Searcher of hearts. But this still does not make out the case of an involuntary or compulsory secession, in the sense already stated; nor does it establish the position that their rights had been willfully outraged and the constitution so palpably violated as to make it a necessity that the South should secede. It may have afforded, in their judgment, a fitting occasion for the exercise of their unquestioned right to withdraw from the Church at their pleasure; but it does not prove that the withdrawal took place under circumstances that justify the conclusion that they are out of the Church by an unavoidable necessity, caused by the wrong action of the general conference. This position must be made out, in order to place these complainants on the footing which they claim rightfully to occupy in this case. For this court is unwilling to give its sanction to the principle, that an error of judgment—if it be assumed that the general conference has erred—in a case where it had jurisdiction, and in the absence of any semblance of corrupt or improper motive, whether in the exercise of its judicial or legislative power, affords a just cause, a legal necessity, for secession by those supposing themselves to be aggrieved. I do not propose to attempt the discussion of the principle here involved; though it might be profitable, under other circumstances, to examine it. It is enough to say, that the practical recognition of the right of secession or revolution, on such a ground, whether applied to civil or ecclesiastical governments, must inevitably lead to a condition of anarchy, fatal to the existence of every thing like order and stability. Its baneful tendencies are too obvious to need illustration.

As the result of the views I have attempted to present, it follows:

1. That the general conference of the Methodist Episcopal Church is a delegated or representative body, with limited constitutional powers; and possesses no authority, directly or indirectly, to divide the Church.

2. That in the adoption of the "Plan of Separation" in 1844, there was no claim to, or exercise of, such a power.

3. That as the general conference is prohibited from any application of the produce of the Book Concern, except for a specified purpose, and in a specified manner; and as the annual conferences have refused to remove this prohibition, by changing or modifying the sixth restrictive rule, the general conference has no power to apportion or divide the Concern or its produce, except as provided for by said rule.

4. That said Book Concern is a charity, devoted expressly to the use and benefit of the traveling, supernumerary, and superannuated preachers of the Methodist Episcopal Church, their wives, widows, and children, continuing in it as an organized church; and, any individual, or any number of individuals, withdrawing from, and ceasing to be members of the Church, as an organized body, cease to be beneficiaries of the charity.

5. That it is the undoubted right of any individual preacher or member of said Church, or any number of preachers, or

members; or any sectional portions or divisions thereof, to withdraw from it, at pleasure; but in withdrawing, they take with them none of the rights of property pertaining to them, while in the Church; and, that the withdrawal of the Southern and South-Western conferences in 1845, being voluntary, and not induced by any positive necessity, is within the principle here stated.

6. That the defendants, as trustees or agents of the Book Concern, at Cincinnati, being corporators under a law of Ohio, and required, by such law, "to conduct the business of the Book Concern in conformity with the rules and regulations of the general conference," in withholding from the Church South, any part of the property or proceeds of said Book Concern, have been guilty of no breach of trust, or any improper use or application of the property or funds in their keeping.

7. That this is not a case of lapsed charity, justifying a court of equity in constructing a new scheme for its application and administration; and that the complainants, and those they represent, have no such personal claim to, or interest in, the property and funds in controversy, as will authorize a decree in their favor, on the basis of individual right.

There are some points made by counsel, which, not being regarded as material in the decision of the case, have not been specially noticed.

It now only remains for me to say, that it was with some reluctance and self distrust, that I entered upon the investigation of this controversy; and, although the conclusions to which I have arrived, have been satisfactory to myself, I experience the highest gratification from the reflection, that if I have misconceived the points arising in the case, and have been led to wrong results, my errors will be corrected by that high tribunal, to which the rights of these parties will, without doubt, be submitted for final adjudication.

The decree dismissing the bill was reversed on an appeal to the supreme court, December term, 1853 [16 How. (57 U. S.) 288].

Case No. 13,113.

SMITH v. TALLAPOOSA COUNTY.

[2 Woods, 574.] [1]

Circuit Court, N. D. Alabama. Nov. Term, 1874.

COUNTIES—COUPONS—PLACE OF PAYMENT—RAILROAD COMPANIES—COUNTY AID—LEGISLATIVE ACT.

1. Where a coupon is payable at a particular place, presentation for payment at that place is not a condition precedent to a recovery of judgment thereon by suit.

2. Authority given by a public act of the general assembly to a county to subscribe stock to a railroad company and issue bonds to pay for the same, need not be pleaded. The courts of the United States will take judicial notice of the public acts of the states within which they sit.

3. When a county issues bonds payable to bearer, and pledges for their payment the faith, credit and property of the county under authority of an act of the legislature referred to on the face of the bonds by title and date, and these bonds pass bona fide into the hands of the holders for value, the county is bound to pay them.

4. A county, under authority of an act of the legislature, issued its bonds, payable to bearer at a future day, and after their issue, and long before their maturity, the supreme court of the state declared the law authorizing the issue to be constitutional. *Held*, that all persons to whose hands the bonds might come might consider that question as conclusively settled; it could not be reopened to their damage.

[This was an action by Gilead A. Smith against Tallapoosa County.] Heard on demurrer to declaration.

Samuel F. Rice, for plaintiff.
Thomas H. Watts, for defendant.

WOODS, Circuit Judge. The action is brought to recover three thousand dollars, the amount due upon 222 coupons, of which the plaintiffs aver themselves to be the holders, which were attached to that number of bonds issued by the defendant county. A copy of one of the bonds is set out in full in the declaration, and it is averred that the others are similar, save in number and amount. The bonds purport on their face to be issued by the defendant in pursuance of authority granted by an act of the Alabama legislature, approved December 31, 1868, entitled "an act to authorize the several counties, towns and cities of Alabama to subscribe to the capital stock of such railroads throughout the state, as they may consider most conducive to their interests." A copy of one of the coupons is set out in the declaration, and the others are averred to be similar save in amount and date of payment. The coupons are made payable at the agency of the Savannah & Memphis Railroad Company in the city of Montgomery. It is averred that the plaintiffs are bona fide holders of the coupons, and of the bonds to which they were attached, and that the bonds and coupons were purchased by the plaintiffs for a valuable consideration, before the bonds or coupons on any of them fell due; that when the coupons sued on became due the defendant had no funds at the agency of the Savannah & Memphis Railroad Company in the city of Montgomery to pay the same, and that in fact at that time the railroad company had no agency in the city of Montgomery, and did not have, up to the time of bringing the suit.

The demurrer is based on three grounds: 1. That there is no averment that the coupons were presented for payment before suit brought. 2. There is no averment of the authority of the county to issue the bonds. 3.

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

Because the act of the general assembly authorizing the issue of the bonds is contrary to the provisions of the state constitution.

On the first ground of demurrer it is sufficient to say, that it is now the well settled doctrine of the courts of this country, that when a note is payable at a particular place, presentation for payment at that place is not a condition precedent to a suit against the maker. Wallace v. McConnell, 13 Pet. [38 U. S.] 148; Irvine v. Withers, 1 Stew. (Ala.) 234; Montgomery v. Elliott, 6 Ala. 701. This is the settled law, even where there is no excuse for the nonpresentation of the note. But the declaration avers a fact, which abundantly excuses the want of presentation, even if presentation were necessary, namely: that the Savannah & Memphis Railroad Company had no agency in the city of Montgomery, where, according to the tenor of the bonds, the coupons were to be presented for payment. The law does not require any one to do a vain or impossible thing.

The next objection to the declaration is that the authority of the county of Tallapoosa to issue the bonds is not averred. The authority of the county to issue bonds was conferred by a general and public act of the legislature of the state. An authority given by a general statute need not be pleaded. Toppen v. Railroad Co. [Case No. 14,099]. The courts of the United States take judicial notice of the public acts of the states. And what the court judicially knows need not be averred or proven. It did not therefore require a special averment that the county of Tallapoosa was authorized to issue the bonds. The court judicially knows that on certain conditions, the county of Tallapoosa, and every other county in the state of Alabama, was authorized to issue bonds in aid of the construction of railroads. The declaration avers that certain bonds were issued, which show upon their face that they were issued in pursuance of the authority conferred by a certain act of the legislature. We think that the facts of which the court takes judicial notice, taken in connection with the facts averred, sufficiently show the authority of the defendant county to issue the bonds in suit. Where a county issues its bonds payable to bearer, and pledges for their payment the faith, credit and property of the county, under the authority of an act of assembly referred to on the face of the bonds by date, and those bonds pass bona fide into the hands of holders for value, the county is bound to pay them. Mercer Co. v. Hackett, 1 Wall. [68 U. S.] 83; Gelpcke v. Dubuque, Id. 175; Meyer v. Muscatine, Id. 384; Van Hostrop v. Madison City, Id. 291. It seems clear that the averments of the declaration bring the case within the rule thus laid down, and make, so far as the objection under consideration goes, a prima facie case for recovery. I am of opinion, therefore, that the second ground of demurrer is not well taken.

But it is assigned lastly, as an objection to the declaration, that the act of the general assembly authorizing the issue of bonds by counties is unconstitutional. It is settled by authority, if indeed it requires authority to settle so plain a proposition, that a county or other municipal corporation has no inherent right of legislation, and cannot subscribe for stock in a railroad and issue bonds to pay for it, unless authorized to do so by the legislature. Thompson v. Lee Co., 3 Wall. [70 U. S.] 327. But the legislature of a state, unless restrained by the organic law, has the right to authorize a municipal corporation to take stock in a railroad or other work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan. Thompson v. Lee Co., supra. The question is therefore presented, Does the constitution of Alabama prohibit the general assembly from authorizing cities and counties to subscribe stock in railroads, and to borrow money and issue bonds to pay for it? This question has been decided by the supreme court of Alabama, in Ex parte Selma & Gulf R. Co., 45 Ala. 696. The court in that case has passed upon the constitutionality of the identical act, under authority of which the defendant county issued the bonds in this case, and sustained its constitutionality. And it is stated at the bar that this decision has been approved by a later one of the same court. Lockhart v. City of Troy [48 Ala. 579]. The bonds of the county of Tallapoosa, issued under authority of the act referred to, are protected by the decision, even though issued before it was made. These bonds are payable to bearer, and circulate by delivery as negotiable paper. They are the property of one holder to-day, and of another to-morrow. As soon then as a decision of the highest court of the state is made, affirming the constitutionality of the act under which the bonds were issued, all persons to whose hands the bonds may come are authorized to consider that question as conclusively settled. It cannot be opened to their damage. Even should the decision be reversed, the reversal cannot affect bonds already issued. Gelpcke v. Dubuque, 1 Wall. [68 U. S.] 175.

I have read with interest the argument submitted to prove the unconstitutionality of the act of the legislature under which the defendant county issued its bonds. But even if I were disposed to agree with its conclusions, it could not avail in this case. For the purposes of this suit, and so far as these bonds are concerned, the act under which they are issued must be considered as constitutional and valid, and the question of the power of the county to issue them foreclosed.

Demurrer overruled.

[See Case No. 13,114.]

Case No. 13,114.

SMITH et al. v. TALLAPOOSA COUNTY.

[2 Woods, 596.] [1]

Circuit Court, M. D. Alabama. May Term, 1875.

MANDAMUS—TO COMPEL COUNTY LEVY—COUNTY COMMISSIONERS—INJUNCTION.

1. Plaintiffs who had recover a judgment against the county of Tallapoosa on coupons detached from bonds, which the board of county commissioners were authorized to issue, and to pay which the law made it their duty to levy and collect a tax, are entitled to the writ of mandamus to compel said commissioners to levy and collect the tax notwithstanding the fact that in a proceeding in equity (to which said plaintiffs were not parties), the chancery court had, before the recovery of said judgment, issued an injunction restraining the county commissioners from the levy and collection of any tax to pay said indebtedness, and said injunction still remained in force.

2. The act of the law as well as the act of God can always be pleaded in a court of justice, as an excuse for performing or not performing any given act.

3. A court of county commissioners being vested by law with certain judicial functions, and also the ministerial function of levying and collecting taxes, the writ of mandamus to compel the levy of a tax by such body cannot be regarded as derogating from the judicial dignity with which they are ex officio invested.

This was an application for the peremptory writ of mandamus. On the 16th of November, 1874, the plaintiffs [Smith & Co.] recovered a judgment for $3,570, against the county of Tallapoosa, Alabama.[2] The judgment was based on certain coupons which had been detached from bonds issued by the county by authority of an act of the legislature of December 31, 1868, which authorized the court of county commissioners to levy and collect a tax to pay said coupons. On December 17, 1874, an execution was issued on the judgment and returned "No property found whereon to levy." The petition for the writ of mandamus alleged that the judgment remained unsatisfied, and that plaintiffs had no other remedy. The court of county commissioners is a body vested with certain quasi judicial, as well as ministerial powers. The persons composing the court of county commissioners admit in their answer the recovery of the judgment against the county. They say it is not true that they have refused to levy the tax, but allege that for the years 1869 and 1870, they did levy and collect the tax, and pay the coupons falling due in those years; that in 1871, the county collector was proceeding to collect the tax for that year, when the tax payers of the county filed a bill to enjoin him from collecting the tax, and the court of county commissioners from levying any other tax for the same purpose. In accordance with the prayer of the bill, a writ of injunction was issued and served upon the collector and commissioners, which they obeyed. In November, 1873, the bill was dismissed, but an appeal was taken to the supreme court of the state, which was allowed and bond given, the effect of which was to continue the injunction in force. The cause is still pending on appeal and undecided. The commissioners say they dare not violate the injunction, and they are advised by their counsel that they need not do so. To this answer the petitioners for the writ demurred, and upon this demurrer the cause was submitted to the court.

Samuel F. Rice, for petitioners, cited Riggs v. Johnson Co., 6 Wall. [73 U. S.] 198; U. S. v. Council of Keokuk, Id. 514; and Mayor v. Lord, 9 Wall. [76 U. S.] 409.

Thomas H. Watts, contra, cited Taylor v. Carryl, 20 How. [61 U. S.] 583.

BRADLEY, Circuit Justice. We have looked at the authorities referred to by counsel in this case, and do not see the inconveniences and conflict of jurisdiction which the counsel for the defendants apprehends. It is conceded that the plaintiffs who recovered judgment against the county of Tallapoosa, were not parties to the litigation in the chancery court for the said county; and, although in that suit as well as in the suit on which the said judgment was recovered, the validity of the bonds and coupons sued on was in question yet not being in question between the same parties, the two litigations were entirely independent of each other, and the action of the chancery court cannot be deemed a binding adjudication against the plaintiffs here. The court of county commissioners of Tallapoosa county is under injunction, it is true, not to do the very thing which a mandamus from this court would require them to do. But they cannot be embarrassed by this, because the act of the law as well as the act of God can always be pleaded in excuse of performing or not performing an act. The mandamus of this court would be an act of law which could thus be pleaded by the commissioners in excuse of not obeying the injunction; and such an excuse will undoubtedly be accepted by the chancery court. This is so, not because this court has any superiority over that court, but from the nature and circumstances of the case, and particularly from the fact that the plaintiffs in this case were not parties in that court. Had they been parties, and had they instituted suit and obtained judgment against the injunction of the chancery court, they would be guilty of contempt and answerable therefor to that court. But not being parties, they are not affected by the proceedings had therein, and cannot be deprived of the execution of their judgments. The court of county commissioners in this proceeding is not to be regarded as a court of judicature, but as the administrative authorities of the county, having the ministerial duty to perform of levying taxes when the law makes it their duty

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

[2] [See Case No. 13,113.]

to do so. Their duty in this regard is just as much a ministerial one as is that of the sheriff, when he has a writ in his hands commanding him to levy and make a sum of money out of the property of the defendant. As such ministerial officers, they have no interest, but simply to obey and carry out the law; and a mandamus cannot be regarded as derogating from any judicial dignity with which they are ex officio invested in relation to matters of judicature.

Under the authority of the cases decided by the supreme court of the United States, which were cited by the counsel of the plaintiffs, we think that a mandamus should be issued.

SMITH (TAPPAN v.). See Case No. 13,748.
SMITH (TAYLOR v.). See Case No. 13,806.

Case No. 13,115.

SMITH et al. v. TEUTONIA INS. CO.

[4 Chi. Leg. News, 130; 6 Am. Law Rev. 584.] [1]

District Court, W. D. Ohio. Jan., 1872.

BANKRUPTCY—GENERAL ASSIGNMENT—PAYMENTS.

An insurance company after its insolvency was known by making a general assignment of all its property for the benefit of all its creditors and paying its running expenses for the month previous including rent, was not guilty of an act of bankruptcy within the meaning of the bankrupt law [of 1867 (14 Stat. 517)].

[This was an action by A. W. Smith and others against the Teutonia Insurance Company of Cleveland. Heard on a petition for an adjudication of bankruptcy.]

SHERMAN, District Judge. This is a petition, seeking for causes alleged, to have an adjudication of bankruptcy rendered against this insurance company. There is no question as to the insurance company being subject to the provisions of the bankrupt law, nor is there any dispute as to the facts. It appears from the petitions, answer and evidence, that this insurance company has been in existence for a number of years, and in good credit and condition until the great fire at Chicago on Oct. 9th. That the company sustained a loss in that city of over one million dollars, while their capital and assets are but little over two hundred thousand dollars. That about the 1st of November, 1871, and after they had fully ascertained and knew the extent of their losses, and after paying their running expenses for the month of October previous including their rent, and the salaries of their officers, agents and solicitors, they made a deed of assignment under the laws of Ohio, of all their assets, to three of their stockholders, in trust, and for the equal benefit of their creditors.

This state of facts, unexplained and uncontrolled by other considerations, would in my opinion render them subject to an adjudication of bankruptcy and cause their assets to be administered under the provisions of the bankrupt law. But it is urged that the decision of Judge Swayne in the cases of Langley v. Perry [Case No. 8,067], and Farrin v. Crawford [Id. 4,686], renders such assignments valid. Those decisions establish the doctrine that for an insolvent debtor to make a general assignment of all his property for the benefit of all his creditors an act of bankruptcy, it must be made on his part with the intent thereby to defraud and hinder his creditors, or with intent to defeat or delay the operation of the bankrupt law. It becomes a question of fact. The innocence or guilt of the act depends upon the mind of him who did it, and it is not a fraud within the meaning of the bankrupt law, unless it was meant to be so. This being the recognized law in this circuit, I am obliged to say, that the making the assignment by this insurance company was not necessarily an act of bankruptcy. It appears plainly and decidedly from the evidence, that the officers and stockholders of this company when they ordered this assignment to be made were actuated with the most honest intentions, and with the laudable purpose of giving their creditors their entire assets. They meant no fraud; either legal or moral fraud.

But it is claimed by the petitioners that the payment of the rent of the premises occupied by them to Mr. Crittenden, and the permitting the secretary of the company and other agents of the company to pay their salaries out of money in their hands, were evidence of payment by way of preference to creditors, and therefore a fraud upon the bankrupt law. If the proof satisfied me that those payments were made with an intent to make a preference in favor of these persons, and against the interests of and to the injury of the rights of the creditors, then I must decide that they constituted an act of bankruptcy. But the proof is not satisfactory. I find that by the payment of the rent, the forfeiture of the lease and the consequent loss of their office furniture and other property were avoided, and by subsequent acts of the company and its assignees certain valuable privileges and a considerable sum of money over and above the amount paid for rent, were saved and added to the assets. A failing or insolvent debtor has undoubtedly the right to pay out money or make changes in his property, before an actual adjudication of bankruptcy, if he does it in good faith without injury to the rights of his creditors, and especially as in this case when he saves property and increases the assets.

Although there was no formal charge made in the petition, as to any other payment, except the payment of the rent, yet proof was admitted and considerable stress was laid upon the payment of the secretary's salary and that of other officers and agents. It is true that the salaries of the secretary and those of agents were paid at the close of the month of October, and after the insolvency of the company was

[1] [6 Am. Law Rev. 584, contains only a partial report.]

known, but they were paid in good faith, with no intent to prefer them, and in fact in every instance the sums paid were retained out of moneys in the hands of those agents, and on which they had a lien for their monthly salaries. The money received by Hessenmueller, the secretary, was for his own monthly salary, and that of the clerks in the office was paid by his own check as secretary and treasurer of the company, on the bank where the company account was kept, and he was the only person who could sign checks, and this was done by him with no proof that the officers approved or sanctioned the act.

Finding the law of the case thus settled and applying the facts proven to the law, I am satisfied that no act of bankruptcy, within the meaning of the bankrupt law, has been committed by the insurance company, and I must dismiss the petition with costs.

SMITH (THELUSSON v.). See Case No. 13,-878.

SMITH (THOMPSON v.). See Cases Nos. 13,-976 and 13,977.

SMITH (TOWNE v.). See Case No. 14,115.

Case No. 13,116.

SMITH v. TRABUE.

[1 McLean, 87.][1]

Circuit Court, D. Kentucky. May Term, 1830.

EJECTMENT — SUB-TENANTS — JUDGMENT — LIMITATIONS — NOTICE — RESTITUTION.

1. Tenants who enter under other tenants, on whom notice in an ejectment has been served, will be subject to the judgment. But this rule is not without limitation.

[Cited in Bruff v. Thompson, 31 W. Va. 31, 6 S. E. 360.]

2. The judgment in the ejectment does not suspend the operation of the statute of limitations. To do this there must be an actual change of possession, or an agreement by the tenant to hold under the lessors of the plaintiff.

[Cited in Mabary v. Dollarhide (Mo. Sup.) 11 S. W. 613.]

3. Where a judgment in an ejectment has been suffered to remain eleven years, before any step was taken to change the possession, a tenant of the defendants, though he entered subsequent to the commencement of the action, and before judgment, is not liable to be turned out of possession without notice. The limitation of the statute is seven years, and the tenant who has occupied eleven years, should have some opportunity of showing his right.

4. Where a tenant has been improperly turned out of possession, a writ of restitution is the proper mode of redress.

[This was an action of ejectment by the lessee of Samuel Smith against Trabue's heirs.]

Mr. Wickliffe, for plaintiff.
Mr. Haggin, for defendants.

OPINION OF THE COURT. The defendants represented to the court in writing, that the above action of ejectment was brought and a notice served on Hiram and William Bryant, the tenants of the defendants. That in May term, 1818, a judgment was entered, but no writ of habere facias possessionem was issued. That in November term, 1818, a judgment was entered against other tenants, and on the 17th November, 1829, a writ of possession was issued and John Evans, who lived on the place occupied by the Bryants when the suit was brought, was turned out of possession.

On this statement of facts a rule was entered on the lessor of the plaintiff, to show cause why a writ of restitution should not be awarded, to restore the possession to the tenants of the defendant, who had thus been turned out of possession. The rule in this case having been served on the attorney of the plaintiff who appeared in the case, the court will decide the motion. It is a well established rule, that all persons who enter into the possession of premises, under tenants on whom a notice had been served, in an action of ejectment for the same premises, no notice need be served on them, but they will be subject to be turned out of possession under the judgment. But this rule is not without limitation. A judgment in an action of ejectment against a defendant who holds adversely, does not of itself suspend the statute of limitations. To do this, there must be a change of possession. It is true, the judgment fixes the right of entry in the lessor of the plaintiff, if he can make an entry without force. But if he fail to make his entry, either with or without a writ of possession, the statute of limitations will continue to operate against the right. A mere entry, while the tenant remains in possession will not oust him, but he must be turned out of possession, or acknowledge the right of the lessor of the plaintiff, by consenting to hold under him. Nothing short of this will stop the statute.

In the present case, judgment was obtained in the ejectment at November term, 1818; and the writ of possession under which Evans was turned out of the possession, did not issue until the 17th November, 1829. Here was a lapse of eleven years, being four years more than the limitation fixed by the statute. The title and possession of Trabue's heirs were adverse to the right of the plaintiff, and unless the mere obtainment of a judgment in an ejectment, without any change in the possession, shall suspend the operation of the statutes, it is difficult to see how, in the present case, Evans' plea of the statute can be disregarded. And, as he has been turned out of possession without notice, and without having an opportunity of setting up a right under the statute or otherwise, we think the writ of possession must be quashed, and a writ of restitution awarded, to restore him to the possession.

This case was taken to the supreme court on a writ of error, but the writ was dismissed on

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

the ground that the decision of the court was not a judgment on which a writ of error will lie. 9 Pet. [34 U. S.] 4.

Case No. 13,117.

SMITH v. TREAT.

[2 Ware (Dav. 266) 270;[1] 4 N. Y. Leg. Obs. 13; 14 Hunt, Mer. Mag. 69.]

District Court, D. Maine. Nov. 4, 1845.

SEAMEN—JUSTIFICATION FOR DISCHARGE—ARREST IN FOREIGN PORT—WAGES.

1. The arrest and imprisonment of a seaman in a foreign port, and sending him home by the public authority as a prisoner charged with an indictable offense, does not necessarily constitute a bar to a claim for wages for the voyage. Such proceedings do not preclude the court from inquiring into the merits of the case, and making such a decree as the justice of the case requires.

[Cited in Tingle v. Tucker, Case No. 14,-057.]

2. The master is not ordinarily justified in dissolving the contract with a seaman, and discharging him for a single fault, unless it is of a high and aggravated character.

[Cited in The Cornelia Amsden, Case No. 3,-234.]

3. The causes for which a seaman may be discharged are ordinarily such as amount to a disqualification, and show him to be an unsafe or an unfit man to have on board the vessel.

This was a libel for wages [by William Smith against Hiram Treat]. The libellant shipped as a seaman, April 25, 1845, on board the brig Benjamin, at Frankfort, for a voyage to some port in the West Indies and back, for wages at the rate of $15 per month. The brig returned August 17th, and the libellant claimed wages for the whole time; the balance due being $42.50, one month's wages having been advanced to him at the time of shipping.

L. D'M. Sweat, for libellant.

A. Haines, for respondent.

WARE, District Judge. The libellant in this case went and returned in the brig, and it is not denied that full wages are due to the termination of the voyage, unless they were lost or forfeited by what took place at Point Petre, the port of discharge. The affair which is relied on as a forfeiture, or more properly as a bar to the claim for wages, took place on the 21st of May, while the crew were discharging the cargo. The captain being at that time on shore, the men, under the orders of the mate, were making up a raft of lumber to be floated ashore, when a difficulty arose between Tappan, the mate, and Hadley, one of the crew. While the mate was below making up his account of lumber discharged, he heard a noise on deck, and came up to put a stop to it. He found it was made by Hadley, who was on deck passing off lumber to make up the raft, Smith, the libellant, being at work with him. He ordered Hadley to stop his noise, or go below. Hadley, who had been drinking pretty freely but not so as to render him incapable of work, replied that he would not go below for him, nor for any other man. Tappan rejoined, that if he continued his noise he would put him below; and Hadley, again replied, that neither he nor any one else could put him below. Tappan then called to the second mate, who was on the raft, to come on deck and assist in putting Hadley below, whose noise had then attracted the attention of persons near the vessel. Smith, who was at work with Hadley, and to whom nothing had been said, then interposed and said to the mate, "If you put one below, you must put all hands below." The difficulty, however, subsided without any act of violence, and the men returned to their work, and continued quiet for an hour, or an hour and a half, when Hadley again became noisy. It is not easy, from the varying accounts of the witnesses, to determine the precise facts which took place after this time, or the exact order in which those occurred, in which the accounts of all the witnesses agree. The noise appears to have commenced between Hadley and Smith, who were at work together; Tappan, the mate, interposed to stop it, and an affray took place. Tappan knocked down Hadley with his fist; Smith interposed and gave a blow to Tappan and they clenched. While they were clenched, Hadley got up, and some of the witnesses say that he stood by and looked on, without taking a part. But Harriman, the second mate, who at this time came on deck, says that both Smith and Hadley were upon the mate, and had got him down on a barrel; that as he was going to his relief, Hadley left Tappan and came towards him; that he avoided and passed him, and that he, Hadley, followed him as much as twenty-five feet towards the pump; that he then took a pump-brake, and that Hadley then struck him with his fist, and he then gave him a blow on his head with the pump-brake, which brought him partly down, and then another, that brought him to the deck; that he then went to Tappan, whom Smith had down and was beating. He told Smith to let Tappan alone, but he refused and told Harriman not to strike him. Harriman then gave him three blows with the pump-brake, before he brought him down, and then turned to Hadley, who had got up, and fallen over the deck into the water. He then went on to the raft and got Hadley out of the water, and when he came on deck Tappan and Smith were again clenched. At this moment, the captain came on board and put an end to the affray. The blows given to Hadley proved mortal, and he died the following night. Smith was arrested that night and confined in prison, and sent home in irons by order of the American consul. He was indicted, at the adjourned term of the circuit court, on a charge of stirring up the crew to resist the officers of the vessel, and was acquitted of the charge by the jury.

Such are the most material facts, as nearly

[1] [Reported by Edward H. Daveis, Esq.]

as I can recollect them from the testimony, which, though not in all respects quite contradictory, is not, in all its parts, exactly reconcilable. One month's wages, covering the whole period of his service previous to his arrest and imprisonment, had been paid in advance, and the libellant now claims wages to the termination of the voyage. For the respondent, it is contended that the misconduct of Smith, followed by his arrest and imprisonment, and his being sent home by the public authority in chains, as a criminal, is a conclusive bar to any claim for wages beyond what have been paid.

This court, I hold, is not excluded by any of the proceedings at Point Petre, from inquiring into the merits of the case, and making such a decree as, on the whole, right and justice may require. The libellant was tried and acquitted on the charge, and even if he had been convicted, this would not have been a bar to the present suit. The Mentor [Case No. 9,427]. His claim stands entirely unprejudiced by any of the proceedings at Point Petre, and his misconduct, admitting it in all the aggravation that is alleged, cannot operate properly as a forfeiture of the wages now claimed. The wages forfeited under the marine law are properly the wages previously earned, and not those which are or may be earned subsequently. Both justice and policy require this limitation of the forfeiture. If it extended to future earnings for the remainder of the voyage, it would take from the seaman all the ordinary and most influential motives for good conduct. He would never willingly and cheerfully perform his duties, if he knew beforehand that, however diligent and faithful he might be, he could receive no compensation for his services. But a seaman may, by misconduct, not only forfeit all wages antecedently earned, but his misconduct may be such as will authorize the master to dissolve the contract, and discharge him from the vessel. The principal question presented in this case is, whether the conduct of the seaman was such as would, by the principles of the maritime law, authorize the master to discharge him from the vessel. By the old sea laws, which are the records of the early customs and usages of the sea, the master is authorized to discharge a seaman for drunkenness, for quarreling and fighting with the other men, for theft, for going on shore without leave, and for disobedience. Jugemens d'Oleron, arts. 6, 13; Consulat de la Mer, 125; Laws of Wisbury (Cleirac's Ed.) 18; Laws of the Hanse Towns, 29, 45. Some of these laws are curiously minute and particular on this as well as other subjects. The Consulate of the Sea authorizes the master to dismiss a seaman for three causes; for theft, quarreling, and disobedience to the orders of the master, and subjoins by way of amendment, perjury as a fourth cause, but adds, that he shall not be discharged for the first, but only for the fifth offense. Generally speaking, the causes which justify the master in discharging a seaman before the termination of the voyage, and especially in a foreign port, are such as amount to a disqualification and show him to be unfit for the service he has engaged for, or unfit to be trusted in the vessel. They are—mutinous and rebellious conduct, persevered in, gross dishonesty, or embezzlement, or theft, or habitual drunkenness, or where the seaman is habitually a stirrer-up of quarrels, to the destruction of the order of the vessel and the discipline of the crew. Thorne v. White [Case No. 13,989]; Black v. The Louisiana [Id. 1,461]; Drysdale v. The Ranger [Id. 4,097]; Sprague v. Kain [Id. 13,250]; Orne v. Townsend [Id. 10,583]; The Lady Campbell, 2 Hagg. Adm. 5; The Vibilia, Id. 228.

Ordinarily, the law will not justify the master in dismissing a seaman for a single offense, unless it be of a very high and aggravated character, implying a deep degree of moral turpitude, or a dangerous and ungovernable temper or disposition. It looks on occasional offenses and outbreaks of passion, not so frequent as to become habits, with indulgence, and by maritime courts it is administered with lenity and a due regard to the character and habits of the subjects to whom it applies. They are a race of men proverbially enterprising and brave, exposed by the nature of their employment to great personal dangers and hardships, contending with the elements in their most violent and tempestuous agitations, and encountering these dangers and hardships with the most persevering courage. But with all this, they are of a temperament hasty and choleric, quick to take offense, and ready, on the excitement of the moment, to avenge any supposed wrong or indignity. The law looks on the fairer traits of their character with kindness, and as making some compensation for defects and faults, which are perhaps not unnaturally, or at least are very frequently, associated with those qualities which render them so valuable to their country in peace as well as in war. And when these show themselves occasionally and are not habitual, it will not visit them with severity, but imposes its penalties with a sparing hand. From considerations of this kind, the court will seldom punish a single offense with a forfeiture of all the wages antecedently earned, much less will it be held as a justification of a discharge of a seaman from the vessel. But still there are causes which will justify the master in dismissing a seaman and putting an end to the contract. Was this such a case? The conduct of the libellant, up to the time when this affray took place, had been, if not entirely unexceptionable, such as had not exposed him to any special censure. But on this occasion, though, in the judgment of the jury, the part which he took did not amount to the offense charged in the indictment, it was highly censurable and approximating to mutiny. Hadley, under the excitement of liquor, had been turbulent and noisy, so much so as to attract

the attention of persons in the vicinity of the vessel. Both the mates, the master being on shore, had before by gentle means attempted, and for the time succeeded in quieting him. Tappan told him if he continued his noise he should put him below. This was certainly no harsh punishment, but a very proper act of discipline unless quiet and order were restored. The answer of Hadley was insolent, but no notice was taken of that, nor was there any attempt, by the mate, to put the threat into execution. It is apparent that he was satisfied with putting a stop to the noise. But Smith immediately interposed, and in a tone of defiance told the mate if he put one man below, he must put all below. Such language and conduct, under the circumstances of the case, if not amounting to the technical offense of stirring up the crew to resist the orders of the officers, was clearly of a mutinous tendency, and subversive of the discipline of the ship's company. Hadley became quiet and the difficulty subsided. But he soon again resumed his noise, and the disorder at this time arose from a difficulty between him and Smith. The mate again interposed to stop the noise. It is not easy, from the imperfect and somewhat conflicting account given by the witnesses, to determine how the quarrel now commenced. What is certain is that Smith interposed on the part of Hadley, a scuffle ensued, and blows were given on both sides. Smith and Hadley both being against the mate, they got him down and held him down until he was partially relieved by the second mate's coming to his aid. Even after Hadley was disabled by the blow, which unfortunately put an end to his life, Smith fiercely continued his assault on Tappan, the mate, nor did he relinquish his grasp, though Harriman repeatedly struck him with a heavy pump-brake, but persevered until the master came on board and put an end to the fight. It is in proof, that Tappan was severely beaten and bruised by Smith, or by Smith and Hadley together. Through the whole of the affair, until it came to blows, the conduct of the officers was moderate and forbearing. There was nothing particularly irritating, and certainly nothing that excused the intemperate violence and mutinous conduct of Smith. From the beginning to the end he was a volunteer in the quarrel, and it is difficult to account for the part he acted but by supposing it to flow from a radically quarrelsome disposition. It was commenced without cause and continued with a persevering malignity not often witnessed; and in fact the melancholy tragedy in which the affair ended may be distinctly traced to the insubordination and violence of Smith as its first cause.

Whether, but for the tragic end of this affair, the master would have thought it necessary, or would have been justified in discharging the libellant and putting an end to the contract, is a question on which perhaps one might pause. Smith had, on no other occasion, exhibited a temper of dangerous insubordination, and it might have been safe for the master to have retained him on board, and to have left this matter to be settled at the termination of the voyage. As it was, certainly it was the duty of the master to call on the civil authority of the place, and put the affair in a train of judicial examination. The result of that inquiry was, that Smith was sent home as a prisoner to answer for his conduct to the laws of his country. And, from the facts developed on the trial here, it appears to me that the civil authorities were perfectly justified in this course. The consequence was that the libellant was disabled from performing the service for which he was engaged, and from the whole facts in proof in the case, he may justly be considered as having disabled himself by his own voluntary act. On the principles of natural justice and universal law, he cannot claim a compensation for services which he has by his own fault disabled himself from performing. The libel must therefore be dismissed.

NOTE. As a part of the history of this transaction, it may be added that Harriman, the second mate, was indicted, in the circuit court, for an assault with a dangerous weapon, which resulted in the death of Hadley. Under the statutes of the United States, manslaughter would not lie, since the death occurred on shore, whither Hadley was removed after the fatal blow, and without the jurisdiction of the United States. On a verdict of guilty, the circuit court, in consideration of the circumstances of the case, sentenced Harriman to a brief imprisonment—the penalty for the offense laid being in fact, under the statute, the same as that for manslaughter.

Case No. 13,118.

SMITH v. TRIBUNE CO.

[4 Biss. 477.][1]

Circuit Court, N. D. Illinois. July, 1867.

LIBEL—JUSTIFICATION—NEWSPAPER PRIVILEGE—PLEADING—SEPARATE PLEAS—DEMURRER—NOT GUILTY.

1. A plea of justification must be as broad as the libel, and answer every material part of the declaration.

2. An allegation that the plaintiff, in order to avoid arrest for participation in an offense, feigned insanity, and took refuge in a lunatic asylum, is a material part of the libel.

3. It is not necessary that one particular plea answer the whole libel, if the whole is answered by the different pleas. The defendant may justify separately and distinctly, but in such case the pleas should purport to answer only the particular charges.

4. It is not a good plea that the plaintiff was a public man, a lecturer and speaker, and professed to be an educator of the public, and that the defendant, a public journal, made the publication complained of with good intent, having reason to believe it to be true; a journal has no right to make specific charges against a man, unless they were actually true, and honesty of motive is not a sufficient defense.

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

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

5. A demurrer to a count must take the innuendoes as alleged.

6. Plea of not guilty puts in issue the question whether the proof supports the innuendoes.

[This was a libel for slander by Gerrit Smith against the Tribune Company.]

Farwell & Smith, for plaintiff.

Wirt Dexter and John Van Arman, for defendant.

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

DRUMMOND, District Judge. The declaration contains various counts, among others one referring, by proper innuendoes, to the raid of John Brown into Virginia, the offense that he committed there, and his arrest, trial and execution for the offense; and the statement in these counts is that the libel which is referred to and set forth in them intended to convey the idea that the plaintiff was an accomplice of Brown, that he aided and assisted him, and that in order to avoid an arrest for his participation in the offense of Brown he feigned insanity, fled and took refuge in a lunatic asylum.

The pleas are, in the first place, the general issue, and secondly several short pleas which purport to answer the whole declaration, and aver that the plaintiff did aid and assist John Brown in Virginia, and that he did take refuge in a lunatic asylum. There is another long plea of justification, setting forth in various forms the acts and doings of the plaintiff as a public man, which plea also purports to be a plea to the whole declaration.

The main question raised by the demurrer to these pleas is this: Is the statement in the declaration that after having participated in this act of John Brown, the plaintiff, in order to avoid the consequences of it, feigned insanity, a material part of the declaration and one which it is necessary for defendant to meet and answer?—because, confessedly, this part of the declaration is not answered by these special pleas. The plea of general issue of course answers it, but these special pleas do not purport to answer that part of the declaration.

The rule in such cases is that the plea of justification must be as broad as the libel. It must answer, in other words, the whole libellous matter, else of course it is not a good defense, and while it is true that it is not necessary that the plea should answer an immaterial portion of the publication, still it must answer every material part.

The question therefore is, Is this a material part of the libel? I think it is, and I think that it should be answered in order that the plea should be good, otherwise there is a libel which is only answered in part, and at the same time the plea purports to be an answer to the whole.

Several illustrations were given in the course of the argument to the effect that if the plea did answer the libel that a mere incident in the libel need not be answered—that it was sufficient to answer the principal charge; that that being answered, as a matter of course the incident or appurtenant to the principal charge was answered. That is true. The only question is whether you can apply it to this case and call this charge a mere incident to the principal charge. It was said that the principal charge was the participation in John Brown's raid, in his criminal enterprise, and that the other was a simple incident. If it were so, then of course the plea would be good, but the view that we took of it before, and still hold, is that it was not a mere incident; that it was a substantial, direct libel in itself to charge that a man had participated in a wrongful act, or any act, and that for the purpose of avoiding the consequences to himself from that act he feigned insanity.

It is not necessary that one particular plea should answer the whole of the libel, provided that the whole libel be answered as a defense; for example, if there is a plea of the general issue to the whole declaration, that of course constitutes a defense. Then there may be other pleas answering various parts of the libel when it consists of different parts, but in such cases the plea should only purport to answer those parts, and it would be a good plea, of course, in answer to that part; so that if the libel consists of the allegation, in the first place, that the plaintiff participated in the criminal enterprise of John Brown, and in the second place that in order to avoid the consequences of that criminal act he feigned insanity, the pleader can answer the first, leaving the rest unanswered. The only question then would be whether there was anything left to answer. If there was, as a matter of course the parties would have to go to trial on that portion of the libel which was answered, and on the rest, as in this case, on the general issue.

If this were a case of libel consisting of substantive and distinct charges, and one of them alone was answered, the rule would be apparent that in such a case the plaintiff would have a right to take a default as to the other portion and have his damages assessed as to the portion that remained unanswered, but that would not prevent the party from answering such portions as he could answer, and if he answered those successfully, there could be no damages as to them.

This, I take it, must be the rule. While it is true that the justification must be as broad as the libel, still you are not prevented from justifying separately and distinctly. The only effect of it would be that that portion you do not justify remains undefended as to that particular plea.

For this reason I think that the demurrer to these pleas must be sustained.

The last plea, which is called the "plea of privilege," is substantially this: That the de-

fendant justifies the libel or publication on this ground; that the plaintiff was a public man; that he professed to be a teacher and educator of the public; that he had been in the habit of delivering speeches and lectures from time to time, and made various publications under his own name and of which he was the recognized author, and that the defendants are the conductors and publishers of a public journal, and that they, in the exercise of a proper, fair and just spirit of criticism, made the publication complained of with good intent, having reason to believe that the statements therein contained were true.

I do not think that this is a good defense. The declaration proceeds upon the ground of distinct and separate charges being made by the defendant against the plaintiff of his having participated in the crime, or that which was recognized as such by the laws of the country, and of his having, in order to avoid the consequences of that criminal act on his part, feigned insanity.

It is not an answer to that to say that he is a public man; that he affects to be an educator of the youth of the nation, and that the defendants are the publishers of a newspaper, and that they can criticise his acts in the way that the declaration alleges that they did. Undoubtedly they can criticise his acts. They can hold him up to ridicule so far as they are justified in doing so by his public acts, by anything that he has done or said, but they have no right in doing so to make a distinct charge against him that he has committed a crime, and that, in order to avoid the consequences of it, he has feigned insanity. That would be allowing the license of a public journalist to go further, I think, than any adjudicated case would warrant. We all desire the entire freedom of the press, but it has never been understood as authorizing the bringing of charges against a man of his having committed a crime, unless those charges were true.

Now there is nothing in this plea to indicate that these charges were true, but only that they had reason to believe that there was something in them, and that they were made in good faith and for honest purposes by them as the conductors of a public journal. That will not do. It would be tolerating charges in the public press against individuals simply under color of what was claimed to be a criticism. It may be said here that the motive was an honest one, but I hardly think that with an honest motive a journalist has a right to proclaim to the world that a particular individual is a thief or a murderer, or that he has committed any other crime in the catalogue of crimes. The only thing that can justify that is that it is true. Under our law, if it is true he can make it. All public men, if this were the rule, would be at the mercy of every journalist, and they could launch charges against such a man with entire impunity. I do not feel inclined to adopt any rule which would allow such a license; therefore, as to that plea the demurrer is also sustained.

Mr. Dexter.—I have not understood that your honor or Judge DAVIS decide that the article complained of contains a charge of feigning insanity, but simply that whether that charge was contained would be a question for the jury, and that if contained, it would be libelous. I suppose your honor does not mean to say that we must justify an assertion when there might be doubt as to whether it was actually made?

THE COURT. I understand the plea of not guilty puts that in issue. They make this statement in the declaration with innuendoes and we have to take them as they are alleged. They say that when you made this publication you meant so and so. I make no decision, of course, as to whether you did or did not mean so and so.

For the rules as to construction of libel and justification, consult Whitney v. Janesville Gazette (June, 1873) [Case No. 17,590].

Case No. 13,119.

SMITH v. TURNER.

[1 Hughes, 373.] [1]

Circuit Court, E. D. Virginia. Sept. 26, 1876.

RES JUDICATA—DIFFERENCE IN PARTIES—TAX SALE.

1. The principle of res judicata, which applies only where there is an identity of the thing sued for, of the cause of action, of persons and parties, and of the quality of the persons for or against whom the claim is made, does not work an estoppel against the complainant in a suit where the last three conditions are wanting.

[Cited in Blackwell v. Dibrell, Case No. 1,475.]

2. A decision of the supreme court of the United States, which held that the tax sale of a certain piece of land made by commissioners of the United States (which it assumed to be valid) carried to the purchaser the whole estate in the land free from incumbrances, does not prevent a person, who was not a party to the record before the court, from bringing suit against the purchaser of the land, for the purpose of contesting the validity of the sale which was the subject of the decision.

At a United States government's tax sale, made on the first day of March, 1864, at Alexandria, Virginia, David Turner became the purchaser and entered into possession of a lot of land and dwelling-house, on Royall street in that city. The land was at the time charged on the land-book for 1860, kept under the laws of Virginia, to R. M. & J. M. Smith. Turner still holds possession of the property. R. M. & J. M. Smith seem to have owned at the time, not the fee simple title in the estate, but only a rent-charge of $224 per annum. But they, and those from and through whom they claimed, had held undisputed possession

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

of the entire estate in the property since 1821. It is contended by Turner that their interest was in truth and in fact, by virtue of long possession and merger, the entire fee simple. In February, 1867, J. M. Smith, survivor of R. M. Smith, who had died, sued out a distress warrant against Turner, for rent in arrears from November, 1861, for five years, amounting to $1,120. He proceeded upon the ground that his rent-charge was not affected by the government's tax sale, only the fee simple passing to Turner, the purchaser. The warrant was levied upon household furniture of Turner found upon the premises to the value of $200. Turner replevied his property and contested the right of the distrainor in the county court, and afterwards in the circuit court of Alexandria. In the latter court a jury found a special verdict which traced the history of the title of the land down from 1819 to the tax sale to Turner. Upon this special verdict the circuit court rendered judgment in favor of the distrainor. The case was carried by writ of error to the supreme court of appeals of Virginia, where the judgment of the circuit court was affirmed. A writ of error was then taken out of the supreme court of the United States by Turner, and that court reversed the judgment of the state courts, and decided that there was nothing in the acts of congress of June 7th, 1862 [12 Stat. 422], and February 6th, 1863 [Id. 640], relating to the collection of taxes in insurrectionary states, which requires the tax commissioner to hunt up the owners of land assessed with a tax, or to make the tax out of personal property of his, or which may be found upon the land; but that it was clearly a direct tax upon the land and upon all the estates, interests, and claims connected with or growing out of the land, that all this was forfeited to the United States on non-payment of the taxes, and passed by the sale to the purchaser, subject alone to the right of redemption, which the law allowed; that in that respect only was it a defeasible title, but in all other respects was perfect, complete, and entire; and that in this case, the sale being a valid one, the rent-charge of the defendant in error was cut off and destroyed by it.

The case of Smith v. Turner (reported as Turner v. Smith in 14 Wall. [81 U. S.] 553) ended, of course, with this decision. But no notice had been taken in any of the proceedings which have been described of a deed of trust which in the year 1854 had been executed by R. M. & J. M. Smith to Benjamin H. Berry as trustee, to secure a debt due to Aquilla Glasscock, evidenced by several bonds, now amounting to some $6,500. These bonds were assigned by their holder to one William Smith as trustee, for the benefit of his children. This deed of trust conveyed to Berry the rent-charge of $224, which has been mentioned, and all the interest in the lot on Royall street derived by the grantors, R. M. & J. M. Smith, from those under whom they claimed and held possession. In April, 1874, William Smith, as trustee for his children, to whom Aquilla Glasscock had assigned the bonds of R. M. & J. M. Smith, which have been mentioned, brought a bill in the circuit court of the city of Alexandria, to foreclose the trust deed of 1854, making David Turner, one Robinson (who had been substituted for Berry, who had died, as trustee), J. M. Smith, and the heirs of R. M. Smith, deceased, parties defendant. The claim of the complainant was based on the ground that the tax sale of 1864 was invalid, and gave no title as against the complainant to the purchaser, David Turner. The complainant alleges facts in regard to the sale identical with those which were presented in the case of Tacey v. Irwin, reported in 18 Wall. [85 U. S.] 549, in which the supreme court had decided the tax sale invalid. This suit of Smith v. Turner [supra] has been removed from the circuit court of Alexandria into this court by writ of certiorari sworn out by the defendant. The suit is resisted on the ground that the supreme court of the United States in Turner v. Smith has already determined against the rights of the complainant by deciding that the rent-charge of R. M. & J. M. Smith conveyed by their deed of trust was "cut off and destroyed" by the tax sale of 1st of March, 1864, and that the purchaser holds the property clear of all incumbrances.

Hunton & French, for complainant.
Francis L. Smith & Son, for defendant.

HUGHES, District Judge. The chief question is, whether the principle of res judicata applies here in bar of the rights of William Smith under the trust deed of 1854. He sues for one of the very "interests" all of which the supreme court has decided to have passed to Turner by the tax sale of 1864. This principle applies only in cases where these four things concur, viz.: 1st, where there is an identity of the thing sued for; 2d, where there is an identity of the cause of action; 3d, where there is an identity of persons and of parties to the suits; and 4th, where there is an identity of character or quality in the parties for or against whom the claim is made. Bouv. Law Dict. tit. "Res Judicata," and the numerous cases there cited. In the present case it may be conceded, that the first condition exists. But the rest do not. As to the second, the cause of action in Turner v. Smith, 14 Wall. [81 U. S.] 553, was rent distrained for; while here the prayer is for a foreclosure of a mortgage of a rent-charge alleged to rest upon the land. As to the third condition, except the defendants, David Turner and J. H. Smith, none of the parties are the same as they were in Turner v. Smith [supra]. As to the fourth condition, in that case, J. M. Smith sued as owner of the rent-charge, while in this suit William Smith sues as beneficiary in a deed of trust, conveying the rent-charge and all the interests held by the grantors in the deed in the land in question. Thus, the cause of action, the parties, and the quality or character of the

parties are all different in the two suits, and William Smith is not estopped from bringing this suit by the judgment against J. M. Smith in the suit of Turner v. Smith. He may sue, moreover, for another and better reason. He certainly had rights in the lot on Royall street, Alexandria, at the time of the tax sale in 1864. If that sale was invalid those rights still subsist. He is not bound by any judicial decision upon the validity of that sale rendered in a cause in which he was not a party. The constitution declares that no person shall be deprived of his property, except by due process of law. If that tax sale has been declared valid, it has been declared so in a proceeding to which he was not a party, and he is in no manner bound by the decision. He has as much right to impeach that sale by judicial proceeding as if the suit of Turner v. Smith had never been brought. His right to sue is as good now as it ever was.

The other question in the case is, whether the decision of the supreme court in Turner v. Smith is not, as an authority in settling the principle of law on which it was decided, binding upon this court in this cause. It would undoubtedly be so but for certain considerations about to be stated. In the case of Turner v. Smith the validity of the tax sale of 1864 was not contested and was admitted. That being a concession in that case, the supreme court decided only that by a valid tax sale, under the laws of the United States cited, the land which is sold passes to the purchaser clear of all incumbrances. The complainant in the present suit, however, raises no question as to what passes by such a sale, but contests the validity of the sale of 1864, and rests his suit upon the question of its validity. And not having been a party to the former suit, he is not bound by the concessions, admissions, omissions, faults, or blunders of the plaintiff in that suit, and the decision there is only binding here as to the principle there settled, and not as to any different principle of law not raised or passed upon there, but relied upon here as governing this case.

The question here being the validity of the tax sale of 1864, and the facts of that sale being shown in the evidence to be identical with those which existed in the tax sale which was passed upon by the supreme court in the case of Tacey v. Irwin (reported in 18 Wall. [85 U. S.] 549), the complainant contends that this court is bound by the decision in Tacey v. Irwin, and not by that in Turner v. Smith. In the case of Bennett v. Hunter, 9 Wall. [76 U. S.] 326, the supreme court had decided that the owner of land assessed with a federal tax was not bound to tender the tax due in person, but might do so by another, and that if, in consequence of the refusal of tax commissioners to receive a tax when tendered by a person other than the owner of the land, the land was forfeited and sold, such tax sale was invalid. In the case of Tacey v. Irwin [supra], the supreme court held, that where the tax commissioners advertised, or gave out to the public, that they would not receive taxes from any but the owners of lands in person, then a tender by others than the owners was rendered useless and nugatory, and need not be proved, and that tax sales made of such lands were invalid and null.

The facts here being the same as they were in the case of Tacey v. Irwin, and the question of law upon these facts being the same, the decision there furnishes the law to this court of this case, and a decree must be given for the complainant.

Case No. 13,120.

SMITH v. TUTTLE.

[5 Biss. 159.] [1]

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

COURTS—FEDERAL JURISDICTION—CITIZENSHIP—RESIDENCE.

The acts of congress confer no jurisdiction over a defendant who is served with process while temporarily in a district in which he does not reside. The defendant has the privilege of litigating in the federal court in the state of his residence.

[Cited in Jewett v. Garrett, 47 Fed. 632.]

Demurrer to a plea to the jurisdiction. The plea sets up that the defendant, at the time of being served with process in this case, was a citizen and resident of the state of Iowa, and was temporarily in this district, and that the plaintiff is a citizen of New York. The plaintiff interposed a demurrer to this plea, on the ground that the act giving jurisdiction to the circuit courts confers jurisdiction on the court wherever the defendant might be found within the jurisdiction, although he may not be a resident of the district nor of the state.

BLODGETT, District Judge. This matter was called up during Judge DAVIS' visit to this city and the authorities examined, and Judge DAVIS, Judge DRUMMOND, and myself all came to the conclusion, in the light of the authorities, that this court has no jurisdiction over a citizen of another state who is temporarily found here long enough to be served with process; that the acts of congress conferring jurisdiction do not contemplate that a defendant shall be sued out of the state where he resides; that he has the privilege of litigating a question in the federal courts between himself and a citizen of another state in the state of his own residence. The demurrer will therefore be overruled.

That suitors within the jurisdiction of the court cannot be served with process, see Juneau Bank v. McSpedan [Case No. 7,582].

SMITH (UNION BANK v.). See Case No. 14,352.

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

SMITH (UNION BANK OF GEORGETOWN v.). See Case No. 14,362.

Case No. 13,121.

SMITH v. UNION PAC. R. CO.

[2 Dill. 278.] [1]

Circuit Court, D. Nebraska. 1872.

COURTS—FEDERAL JURISDICTION—UNION PACIFIC RAILROAD COMPANY CHARTER.

Under the act of congress creating the Union Pacific Railroad Company (12 Stat. 489, § 1), the federal courts have jurisdiction in actions by and against that corporation whenever these courts would have jurisdiction of the same class of actions between other parties.

[Cited in Bauman v. Union Pac. R. Co., Case No. 1,117.]

The plaintiff is a citizen of the state of Ohio, and brings suit to recover damages for injuries received while coupling cars on defendant's road, and while in the employ of defendant as a brakeman. The defendant demurred to the complaint on the ground that the court had no jurisdiction of the person of the defendant or of the subject-matter of the action. The demurrer was submitted to Mr. Justice MILLER, at the May term, 1872, and taken by him under advisement.

Mr. Redick and Mr. Howe, for plaintiff.
Poppleton & Wakeley, for defendant.

MILLER. Circuit Justice. The act of congress creating the defendant corporation (12 Stat. 490) contains this provision: "The Union Pacific Railroad Company" by "that name shall have perpetual succession, and shall be able to sue and to be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal," etc., (section 1).

I have examined the previous decisions of the supreme court of the United States supposed to have an important bearing on the question now presented, and, after reflection, am still of opinion that congress intended to make the defendant capable of suing and being sued in the federal courts which have jurisdiction of the same class of actions between other parties. Demurrer overruled.

NOTE. The previous decisions of the supreme court referred to are: Bank of U. S. v. Deveaux, 5 Cranch [9 U. S.] 61, 1809, holding that the charter of the Bank of the United States did not enable it to sue in the courts of the United States. The language of the charter was, "to sue and be sued * * * in courts of record, or in any other place whatsoever." Bank of U. S. v. Martin, 5 Pet. [30 U. S.] 479; Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 738, 1824. The court holds in this case that the act of congress then before it did give, in terms, the bank the right to sue in the circuit court, and that under the constitution it was competent to congress to confer such jurisdiction. Bank of U. S. v. Northumberland Bank [Case No. 931].

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

Case No. 13,122.

SMITH v. UNITED STATES.

[1 Gall. 261.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1812.

PLEADING AT LAW—PENAL STATUTE—CONCLUSION OF DECLARATION—OFFENCES—VERDICT—EMBARGO—SEIZURE.

1. A conclusion of a declaration of debt for a penalty under a statute "against the law in such case made and provided," is not a conclusion against the form of a statute; and is bad on error. See Sears v. U. S. [Case No. 12,592].

[Cited in Jones v. Vanzandt, Case No. 7,502.]
[Cited in Reed v. Inhabitants of Northfield, 13 Pick. 99.]

2. If two penal offences are described in one count, and one penalty only sought; after verdict. the declaration will be supported.

[Cited in Dobson v. Campbell, Case No. 3,945; Townsend v. Jemison, 7 How. (48 U. S.) 721.]

3. In debt for the penalty of the double value, under the embargo act of January, 1808, c. 8, § 3 [2 Stat. 453], it need not be averred in the declaration, that the vessel and cargo had not been and could not be seized for the offence.

[4. Cited in United States v. Platt, Case No. 16,054a, to the point that any one of various remedies may be employed, where either will enforce the right or obtain the satisfaction to which the party is entitled.]

5. In debt for a penalty, brought in the name of "the United States of America," if the verdict find that the party is indebted to "the United States," without saying, "of America," it is sufficient.

[6. Cited in State v. O'Donnell, 10 R. I. 475, to the point that declarations in penal actions are to be strictly construed, and that they must negative all exceptions, if in the same clause.]

[Error to the district court of the United States for the district of Massachusetts.]

This also was an action of debt for the penalty of the double value, under the embargo law, and was in many respects similar to the preceding case. The declaration was as follows: "Joseph Smith was attached to answer to the United States of America, in a plea of debt, for that during the continuance of a certain act of the United States, entitled, 'An act laying an embargo on all ships and vessels in the ports and harbors of the United States,' and of the several acts supplementary thereto, to wit, on the twenty-eighth day of February now last past, a certain schooner or vessel called the Traveller, whereof the said Joseph was then owner, agent, freighter, and factor, did depart from a port of the United States, to wit, the port of Gloucester in the district aforesaid, without a clearance or permit, and departing as aforesaid, and whilst the said Joseph was owner, agent, freighter, and factor as afore-

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

said, to wit, between the said twenty-eighth day of February and the first day of March then next following, the said schooner did proceed to some foreign port or place in the West Indies and to Halifax in the province of Nova Scotia, with a cargo of fish, soap, and candles, and other American produce, contrary to the law in such case made and provided, and that neither the said vessel nor cargo has been seized; whereby, and by force of said law, the said Joseph hath forfeited to the uses therein specified a sum of money equal to double the value of the said vessel and cargo aforesaid. And the United States do aver, that the sum of twenty-four hundred dollars is a sum equal to double the value of the vessel and cargo aforesaid, and that the said Joseph hath forfeited the said sum of twenty-four hundred dollars, and an action hath accrued to the United States to have and recover the aforesaid sum accordingly. Of all which the said Joseph hath had due notice, yet though often requested, he hath not paid said sum, nor any part thereof, but detains it." Upon nil debet pleaded and issue joined, a verdict was returned for the United States in the following form, "The jury find that Joseph Smith, Jr. is indebted to the United States in the sum of four hundred dollars. Fitch Hall, Foreman."

The following errors were assigned. 1st. There is error in this, that the offence, supposed in said declaration to have been committed, is not therein alleged to have been committed against the form of any statute or statutes, act or acts, not being an offence at common law. 2d. There is also error in this, that in said declaration two distinct offences, for each of which a penalty is provided by statute, are joined in one count, as containing together only one offence. 3d. There is also error in this, that it is not alleged in said declaration, that the said vessel and cargo had not and could not theretofore have been seized for the offence in said declaration supposed to have been committed. 4th. There is also error in this, that it is alleged in said declaration, that the complainant forfeited, to the uses specified in a law in such cases made and provided, a sum equal to double the value of the vessel and cargo, but it is not, as by law it ought to have been, therein alleged to whom, or to whose use, or to what uses, or by what particular law, said sum was so forfeited. 5th. There is also error in this, that it is not expressed in the verdict, as by law it ought to have been, whether the sum which the jury found the said Smith owed to the United States, was double the value of the vessel and cargo, or only the single value thereof, by reason of which uncertainty no judgment could legally be rendered thereon by the court. 6th. That the original writ was sued out in the name of the United States of America, but the verdict was returned, and judgment rendered for the United States, and not for the United States of America. 7th. The general errors.

William Prescott, for plaintiff in error.

The omission to allege the offence to be "against the form of the statute," &c. is fatal, and cannot be supplied by any circumlocution. Though the whole statute be set out, yet if this technical allegation be wanting, it is fatal. 2 Hale, P. C. c. 25, § 117; 1 Saund. 135; Rex v. Tucker, 12 Mod. 52; 1 Chit. Pl. 350; Doct. Plac. 332. By the third section of the supplementary embargo act, the penalty is given only in case the vessel has not or could not be seized. Till this exception is negatived, there is not enough shown to maintain the action. It was, therefore, necessary to aver both that the vessel had not been seized, and that she could not be seized. When an exception occurs in the body of the same section it must be negatived. Spieres v. Parker, 1 Term R. 144. Not so, if in another section. The statute intended to give the personal remedy for the double value, only in case of the impossibility of such a seizure. It could not mean to give the government an election to take the value only, or the double value. The allegation, "to the uses of the law," is not sufficient. It should have been stated specially, to whom the double value is forfeited.

The action is brought in the name of the "United States of America." The verdict and judgment are for the "United States," not "the said United States." The court cannot judicially know that the "United States," and the "United States of America" are one and the same. (But on this error Mr. Prescott did not rely.)

G. Blake, Dist. Atty., was requested by the court to confine himself principally to the first and third errors.

The objection contained in the first error assigned, might possibly have been good on demurrer, but it is cured by the verdict. By the statute regulating process (Judiciary Act, § 32 [1 Stat. 91]), a good case, substantially set forth, is not affected by informalities, unless on special demurrer. This statute is broader than any statute allowing amendments, even the last statute of jeofails. All the errors assigned relate to form only. The common law cannot properly be said to be "made" or "provided." It is co-eval with the origin of civil society. If not immemorial, it is not common law. The allegation, therefore, "contrary to the law in such cases made and provided," shows that the declaration relies on some statute. As to the third error; the averment is in the precise words of the law. That the vessel "has not been seized" necessarily implies, that she "could not be seized." Greater particularity would have gone beyond the statute. To say that the collector has not an election, is not to construe, but to legislate. Under the 50th section of the revenue law [1 Stat. 665], the forfeiture is only of the thing seized. There are no discretionary clauses. In the statute, on which this action is founded, an option is given to

the collector, because the thing itself might be the only property of the claimant, or the forfeiture might be too inconsiderable to be worth pursuing by an action.

STORY, Circuit Justice. The first error assigned is, in effect, that a conclusion "contrary to the law in such case made and provided," is not a conclusion against the form of any statute; and if not, then upon acknowledged principles, the judgment ought to be reversed. The objection savors a good deal of technical nicety; but as this is a penal action, if it be well founded in law, the plaintiff in error ought to have the full benefit of it. At the argument, no authority precisely in point was produced, and the objection therefore was endeavored to be supported upon the general rule, and upon the meaning of the word "law." It is true, that in 12 Mod. 52, Mr. Justice Eyre is made to say, that no words will supply the want of "contra forman statuti;" and he cited Cro. Jac. 142. The case in Cro. Jac. was where the conclusion was against the form of a statute, when the action depended upon statutes. And in the case before the court, in 12 Mod. 52, the opinion, if it meant to aver that no circumlocution would be sufficient, is at most but an obiter dictum, not necessary to the decision of that case. The other authorities cited at the bar prove no more than the general principle, that there must in effect be a conclusion against the form of the statute, but do not decide what the form of the allegation should be. 1 Saund. 135, note; 1 Chit. Pl. 358; Doct. Plac. 332. We are left then to consider the interpretation of the expressions used in the declaration. In an enlarged sense, without doubt, the word "law" may include positive as well as common law; but in technical precision, the word "law" is usually restrained to the common law, and other words, as "statute" or "act," are applied to legislative provisions. Now the common law is, without doubt, as much "made and provided," as the statute law, and therefore proprio vigore the expression, "law made and provided," does not necessarily imply a public act of the legislature. I find, on examination, that this very point was before the supreme court of this state, in Com. v. Morse, 2 Mass. 138. The conclusion in that case was, "against the peace of the commonwealth, and the law in such case made and provided;" and the court said, that the indictment did not conclude against any statute. It is of great consequence in a public view to preserve the accuracy of pleadings. Every relaxation induces a new irregularity, and brings numerous and embarrassing questions before the court. The opinion of the highly respectable court, which I have cited, is entitled to great weight; and as I think it stands confirmed by the general current of authority, as to the general principle, and is shaken by no opposing adjudication, I concur on the present occasion.

As to the second error, I do not think it well founded. If two good causes of action are shown in the declaration, and only one penalty is sought, I do not see how it can vitiate the title to a recovery. The party may thereby have imposed upon himself unnecessary proofs, or exposed himself to the suggestion of inartificial pleading; but it is sufficient for the court, if a good title any where appear on the face of the declaration. This is not denied in the present case.

As to the third error, the counsel for the plaintiff in error have argued that the declaration ought to have averred, "that neither the vessel nor the cargo could have been seized for the offence aforesaid;" for that, upon the true construction of the statute, the United States have not an election to seize the property, or to proceed for the penalty, but are limited to a suit against the property, if within their jurisdiction. And I think, upon the authority of U. S. v. The Eliza [Case No. 15,041], decided at last February term, this is to be considered as the true construction of the third section of the statute (Act 9th Jan., 1808, c. 8) on which this prosecution is founded. But it does not follow that the present allegation is not sufficient. It is stated in the terms of the statute, and if the property was within the United States and might have been seized, it was a good matter of defence at the trial under the general issue, and after verdict the inaccuracy, if any, would be cured. It is a general rule, "that wheresoever it may be presumed that any thing must of necessity be given in evidence, the want of mentioning it in the record will not vitiate it after a verdict." T. Raym. 487. And this rule extends to actions upon penal statutes. Hob. 78; Carth. 304. It would be but a little defectively set forth, and upon this ground the court proceeded against the first error in Frederick v. Lookup, 4 Burrows, 2018, and against the third and fourth errors in Lee v. Clarke, 2 East, 333. But I consider the averment is sufficient, even on special demurrer, and that the fact relied on would be a proper matter to come from the other party by way of defence. 5 Term R. 83; 2 Leon. 5. In general, it is sufficient to remain a suit upon a statute, that the case is brought within the terms of it. The case of Spieres v. Parker, 1 Term R. 141, is clearly distinguishable. It was there held, that if the enacting clause, which creates an offence, contains exceptions, such exceptions must be negatived by the plaintiff in his declaration for the penalty. In that case the exceptions were not negatived and the declaration did not therefore contain within its terms sufficient allegations to show that the penalty had accrued.

The fourth and sixth errors have been disposed of in the case of Sears v. U. S. [Case No. 12,592].

The fifth error was overruled in Cross v. U. S. (at May term, 1812) [Case No. 3,434].

On the whole, for the first error, I reverse the judgment of the district court. Judgment reversed.

See Com. Dig. "Pleader," 2, § 10; Yelv. 116; 1 Vent. 135; Hawk. P. C. b. 2, c. 25, § 117,—which countenance the allegation, "contra formam statutorum."

SMITH (UNITED STATES v.). See Cases Nos. 16,318–16,346.

Case No. 13,123.

SMITH v. The UTICA.

[4 Betts, D. C. MS. 41.]

District Court, S. D. New York. Feb. 16, 1844.

SEAMEN—WAGES—FORFEITURE—FAILURE TO REPORT ON BOARD—COMPETENCY OF WITNESS.

[1. A seaman failing and refusing, when specially requested, to render himself on board pursuant to his contract, and only attempting to do so when the ship is in the act of casting off, thereby forfeits his wages for the voyage. He does not, however, forfeit his trunk and contents; and, the same having been left on board, and part of the contents lost or purloined, the ship is liable for the value thereof.]

[2. The seaman is a competent witness ex necessitate rei to prove the contents of the trunk when delivered on board.]

[This was a libel by Charles Smith against the ship Utica for wages, and to recover the value of property alleged to have been lost or stolen while in custody of the ship.]

BETTS, District Judge. This cause having been heard upon the pleadings and proofs, and the premises being considered, and it appearing to the court that the preponderance of evidence is that the libellant did not render himself on board the ship pursuant to his agreement, but neglected and refused, when specially required so to do, and only attempted to go on board when the ship was in the act of casting off and getting under way, although he well knew she had been, and then was, detained and waiting for her crew to come on board, it is therefore considered by the court that the libellant has thereby forfeited and lost all right to wages under the shipping articles and his said contract, during the voyage of the said vessel. And it appearing to the court that the libellant put his chest or trunk on board the said vessel at the time of the contract, containing wearing apparel and other articles of value, and that the same has not been returned in full to him, but that portions of the contents thereof have been purloined or lost on board the said vessel; and it being considered by the court that the libellant has not forfeited the said property, and that the said ship is liable to him in this action for the value thereof; and it being further considered by the court that the libellant is a competent witness ex necessitate rei to prove the contents of the said chest or trunk at the time it was delivered, and left on board the said ship,—it is therefore ordered and adjudged that the libellant recover in this case the value of the articles left by him on board said ship, and not redelivered and restored to him on her return to this port, and that it be referred to the clerk to ascertain and compute such value, and that on such reference the testimony taken and used on the hearing of the cause, and such other testimony as either party may offer and produce, that is pertinent and admissible, be received by the clerk. And it is further ordered that the question of costs be reserved until the coming in of the clerk's report.

SMITH (VASSE v.). See Case No. 16,896.

SMITH (VIRGINIA v.). See Cases Nos. 16,965–16,967.

Case No. 13,123a.

SMITH v. WALKER et al.

[Hempst. 289.][1]

Superior Court, Territory of Arkansas. July, 1835.

APPEAL—BOND—FORM—CERTAINTY.

1. Appeal bond which does not set out the nature of the action, nor the court to which the appeal is prayed, is informal, but not void, and should not be adjudged invalid.

2. It is sufficiently certain to prevent a second recovery against either principal or security.

Appeal from Hempstead circuit court.

[This was an action on a bond, by Hiram Smith against Alexander S. Walker and James Gibson.]

Before JOHNSON and YELL, JJ.

OPINION OF THE COURT. This was an appeal from the Hempstead circuit court, and was submitted to the court upon a reargued case, as to whether the bond upon which this suit is instituted was void or not. The first part of the bond is in the usual form, binding themselves to the plaintiff Smith in the penal sum of one hundred and twenty dollars, and then follows the conditions, namely: "That whereas the said A. S. Walker has this day prayed an appeal, wherein Hiram Smith is plaintiff, and the said Walker is defendant, now if the said A. S. Walker," etc. This bond neither sets out the nature of the action, nor the court to which the appeal is prayed, and is certainly informal. There is enough, however, in the bond to authorize a court to enter a judgment. It is sufficiently certain to prevent a second recovery against either the principal, or Gibson the security, and the object of the bond being clearly legal, and nothing appearing on the face of it to show it to be void, it is to be taken as valid. Chit. Cont. p. 73. This court is of opinion there was error in the court below, in sustaining the demurrer on account of the supposed invalidity of the bond. Judgment reversed.

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

SMITH (WALKER v.). See Cases Nos. 17,-086 and 17,087.

Case No. 13,123b.

SMITH v. WASHINGTON.

[2 Hayw. & H. 220.][1]

Circuit Court, District of Columbia. May 23, 1856.[2]

MUNICIPAL CORPORATIONS — GRADING STREETS — COMPENSATION FOR INJURIES RESULTING.

The corporation of the city of Washington has power to regrade the streets of the city under its charter, without making compensation for individual injuries, unless in exercising the power given it acted corruptly or with a design to injure; the power is a continuing power, to be exercised whenever deemed proper.

At law. This action was brought by the plaintiff [Ann C. Cushing, for the use of Caleb Cushing] for injury sustained by the grading of K street in front of her premises in Franklin Row, in doing which they cut down that street some five or six feet, injuring, as she alleged, the value and use of her house. From the evidence it appeared that the street had been graded under the direction of the corporation in 1830, and had remained at that grade until the summer of 1851, when the street was cut down by direction of the defendants some two feet, and then gravelled and left, and in the fall of the same year they caused it to be again graded by cutting it down about three feet more. The grading destroyed the shade trees in front of plaintiff's premises, and rendered a stone wall in front and other improvements necessary for the convenient use of her house. No compensation was made by the city for the injury sustained. The plaintiff sought to recover the expenses incurred and damages sustained by these gradings in 1851. The defendants insisted that the general public good required the alterations made in the grade. The case finally turned upon a question of law. The defendants contended that they had, under the act of congress, the right to regrade whenever, in their judgment, it was necessary and proper, and that they were not responsible in damages unless the plaintiff showed that they acted corruptly, or with the malicious design of injuring the plaintiff. On the other side it was insisted that when the corporation had established the grade of a street, they had no power so to change it as to injure private property without making compensation to the owner, as had been done in three cases out of seven in the grading in front of Franklin Row.

R. H. Gillette, for plaintiff.

J. H. Bradley, for defendant.

THE COURT instructed the jury that the corporation had the power to regrade the streets of the city of Washington, under their charter, without making the compensation for individual injuries, unless the plaintiff showed that they had acted corruptly or with the design to injure; and that the jury must presume that they acted legally until one of these things was proved. They held that the power to grade was a continuing power, to be exercised whenever they deemed it proper to do so.

The jury under these instructions rendered a verdict in favor of the defendants.

[This judgment was affirmed by the supreme court, where it was carried on writ of error. 20 How. (61 U. S.) 135.]

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

[2] [Affirmed in 20 How. (61 U. S.) 135.]

Case No. 13,124.

SMITH et al. v. WATSON.

[1 Cranch, C. C. 311.][1]

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

BAIL—AFFIDAVIT.

An affidavit to hold to bail must be positive.

[Cited in Graham v. Konkapot, Case No. 5,-670; Lee v. Welch, Id. 8,204; Travers v. Hight, Id. 14,151; Clarke v. Druet, Id. 2,-850.]

Motion by Mr. Caldwell, for defendant [John F. Watson], to appear without bail. The cause of action was an account and affidavit by one of the plaintiffs, that the above account, as stated, is "true and correct, according to the best of his knowledge and belief." 1 Sell. Prac. 112.

PER CURIAM. The affidavit is not sufficient to hold to bail. It is not such as would support a prosecution for perjury. In general the court will rule bail upon the production of any written instrument purporting to be signed or sealed by the defendant, whereby he promises or obliges himself to pay a certain sum of money or quantity of tobacco, without an affidavit. In other general cases they will require an affidavit stating a certain sum due for the debt or damages, or that damages have been sustained to some certain amount; and if the cause of action arise upon an open account, the affidavit ought to be at least as certain and positive as that which the act of assembly of Maryland, 1729 (chapter 20, § 9), requires to make the account evidence in cases where the dealings do not exceed £10 in one year. See Graham v. Konkapot [Case No. 5,670].

Case No. 13,125.

SMITH v. WELSH.

[See Case No. 13,126.]

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

Case No. 13,126.

SMITH v. WELSH et al.

[4 Wkly. Notes Cas. 383; 25 Pittsb. Leg. J. 46; 23 Int. Rev. Rec. 378.]

District Court, E. D. Pennsylvania. Sept. 14, 1877. Oct. 26, 1877.

SHIPPING—FREIGHT—DAMAGED PACKAGES LANDED FROM WRECK—COST OF TRANSPORTING TO DESTINATION — EXPENSE OF BRINGING VESSEL TO PORT OF DESTINATION.

1. In case of wreck, freight is payable on each cask of sugar landed, provided a quantity equal in value to the stipulated freight remains in the cask.

2. Expense of transshipment to port of destination, under the circumstances of this case, is a charge upon freight alone.

3. Expense incurred in bringing a vessel into port, after separation of cargo, is a charge on the vessel alone.

This was an action for freight, instituted by the master of the schooner R. S. Graham, against S. & W. Welsh, on 529 hhds. and 200 boxes sugar from Havana to Philadelphia, amounting to $2,130. The vessel, while prosecuting her voyage, was cast ashore on the coast of Maryland. The vessel and cargo were placed by the master in the hands of wreckers. The cargo was landed from the vessel,—some of the packages being nearly empty,—but the libel alleged that no package when landed contained less than 100 lbs. of sugar. The contents of the hhds. and boxes partly full were placed together, so as to constitute, with the full hhds., in all, 270 hhds. and 180 boxes, which were sent overland to Philadelphia, and delivered to the consignees at an expense for land carriage of $1,743.26. After the cargo was landed from the vessel, the schooner was floated off from the beach, and brought to Philadelphia by means of steam pumps furnished by the wreckers.

H. Flanders, for libellants, contended that the libellants were entitled to full freight on each cask landed on the beach which contained sufficient sugar to pay freight, and that no deductions were to be made from freight for charges of land transport; that the saving of the cargo and the vessel was one continuous transaction, entered into by the master for all interests concerned; and all expenses, until arrival at Philadelphia, were chargeable in general average on ship, freight, and cargo, to which the freight would contribute for its full amount; and cited: Lown. Gen. Av. p. 104; Bevan v. Bank of United States, 4 Whart. 301; McAndrews v. Thatcher, 3 Wall. [70 U. S.] 347.

M. P. Henry, for respondents. Where the voyage is not performed, no freight is recoverable on the charter party, but the claim of the ship is for what is designated as "equitable freight," according to the benefit derived by the merchant. It is on this principle that freight pro rata itineris is allowed. Frith v. Barker, 2 Johns. 327; Nelson v. Stephenson, 5 Duer, 538; Cook v. Jennings, 7 Term R. 381; Post v. Robertson, 1 Johns. 24; Lutwidge v. Grey, reported in Abb. Shipp. p. 333. Deductions from freight must be made for the amount of cargo lost, and also for the amount consumed in salvage. Luke v. Lyde, 2 Burrows, 889; Pinto v. Atwater, 1 Day, 193. The cost of transshipment is a charge solely on the freight. Any excess above charter freight is a charge upon cargo. Thwing v. Washington Ins. Co., 10 Gray, 443; Cutts v. Perkins, 12 Mass. 206; Coffin v. Storer, 5 Mass. 352; Lemont v. Lord, 52 Me. 365. Where there is an actual separation from the vessel, the cargo does not contribute in general average to the subsequent expenses of saving the ship. McAndrews v. Thatcher, 3 Wad. [70 U. S.] 347.

THE COURT (CADWALADER, District Judge). I think that the whole stipulated freight, as upon a full package, is payable on every package which retained its whole contents, or a quantity equal in value to the stipulated freight on such package; and that the stipulated freight should be thus assessed, as if the packages partially emptied had not been refilled, but had reached Philadelphia and been delivered in their condition of partial emptiness. I am also of opinion that any extraordinary charges of transportation which were necessarily incurred by the defendants are allowable as a deduction from the freight otherwise due. I cannot, at present, perceive that, as between the parties here litigant, any question of general average can so arise as to affect the compunction of either the freight or the deduction. But on this point a definitive opinion is not expressed under either head; and the subject may be elucidated by a pro forma dis pacheuis adjustment if either party desire to exhibit it.

On October 26, 1877, a partial pro forma adjustment having been exhibited, THE COURT said: The decision of this case may be prefaced by a remark that the log book shows the stranding to have been involuntary, and not in any proper sense voluntary. The vessel could not have been kept from the beach. This point, however, seems to be immaterial; and I mention it only because the stranding is described by the libellant as voluntary. Recurring to the original question considered at the close of the former hearing, I retain my opinion then expressed as to the proper mode of estimating the freight which is to be allowed in the first instance.

The remaining question is, what amount should be allowed by way of deduction from freight, and reimbursement of the excess, if any, of charges on the cargo above the freight. On this point I am of opinion, upon the facts, that the services for saving the vessel were not with a view to making her the vehicle of continuing transportation of the cargo. Therefore the charges incurred in order to get her afloat were essentially distinct and different from those incurred for getting the cargo to its destination. Conse-

quently the case does not fall within the rule ordinarily applicable where the peril has originally been a common one. The accidental fact that the salvors were the same persons, and the contract was a single one as to both vessel and cargo, does not, in itself alone, suffice to make the charges of both kinds a common burden upon both subjects. The charges must be apportioned; those incurred for getting the vessel afloat being assessable upon her, and those incurred in making the cargo transportable and in transporting it being assessable first upon the freight, and afterwards, if in excess, upon the cargo.

If the libellant desires a reference to a commissioner to report whether any, and, if any, what amount is due to him for freight upon the above principles, the reference will be made; otherwise the libel will be dismissed.

SMITH (WHISTON v.). See Case No. 17,523.

Case No. 13,127.

SMITH v. WILLIAMS et al.

[9 Betts, D. C. MS. 33.]

District Court, S. D. New York. March 20, 1847.

DEPOSITIONS—CERTIFICATE OF MAGISTRATE—PERSONS AUTHORIZED TO TAKE DEPOSITIONS—ADMIRALTY LAW.

[1. The certificate of the proper magistrate to a deposition taken under the act of September 24, 1789 (1 Stat. 73), is competent evidence to prove that the requirements of the act have been fulfilled in taking and certifying the deposition.]

[2. The appellations of "Judge" or "Justice," in respect to members of courts, are the same; and a justice of a county court is, within the meaning of the statute, a judge of such court, and competent to take testimony under its provisions.]

[3. A suit cannot be maintained in admiralty upon a charter party or contract of affreightment, entered into by one of the parties upon representations of the other, not true in fact, and which misled the party first named to his injury.]

[This was a libel for breach of charter-party, by Daniel Smith against John G. Williams and Edward F. Northam.]

BETTS, District Judge. It is considered by the court that the certificate of the proper magistrate to a deposition taken under the act of congress of September 24, 1789, is competent evidence to prove the requirements of the act have been fulfilled in taking and certifying the deposition. It is considered by the court, that the appellation of "Judge" or "Justice," in respect to members of courts of justice, is of the same import, and that a justice of a county court is, within the meaning of the said act of congress, a judge of such court, competent to take the testimony of witnesses out of court, pursuant to the provisions of the 30th section of said act. It is considered by the court, that the depositions of Samuel W. Wallace and John Burgoyne, offered in evidence in this case by the respective parties, are both authenticated conformably to the requirements of the act of congress, and are admissible in evidence. It is considered by the court, that the allegations in the libel, if supported by the proofs, that the contract of affreightment or charter-party in the pleadings mentioned was entered into by the libellant upon representations of the respondents not true in fact, and which misled and deceived the libellant to his great injury, would not authorize and support an action thereupon in this court. And it appearing to the court, upon the pleadings and proofs in this case, that the contract of affreightment or charter-party in the pleadings mentioned was not executed or entered into by the respondents in their own behalf, or any way guarantied or made personally obligatory on them, but was executed and entered into by them as agents of John Burgoyne thereto duly authorized by him, and was received and accepted by the libellant as such with full knowledge of their authority in that behalf, it is considered by the court that no right of action has accrued to the libellant in this court, against the respondents personally, by means of the premises.

Wherefore it is ordered and decreed by the court, that the libel in this cause be dismissed, with costs to be taxed.

Case No. 13,128.

SMITH v. WILSON.

[13 Pittsb. Leg. J. 538; 31 How. Pr. 272.]

District Court, S. D. Alabama. 1872.

MARITIME TORT—MASTER—ALLOWING MINOR SON TO BE CHEATED BY GAMBLER.

1. Where the wrong complained of was committed on the high seas, or within the ebb and flow of the tide, and is of such a description that an action of trespass on the case might be maintained for it in court of common law jurisdiction, the admiralty court has also jurisdiction.

2. The powers, duties, and responsibilities of ship masters considered, with reference to passengers.

3. Towards women and minors, the master of a ship is bound, at all times, to exercise the care and tenderness of a pater familias, and this is especially his duty when they are unaccompanied by a natural guardian. The fact is that, in the eye of the law, he stands to all his passengers in loco parentis.

4. The odious character of gamblers commented on.

5. When a common gambler cheated a minor passenger out of a sum of money on board a vessel, and the captain, when informed of the facts, took no measures to compel the gambler to make restitution, he is himself liable for the loss to the minor's parent.

In admiralty.

BUSTEED, District Judge. The libellant is a widow woman, residing in South Caro-

lina, and the respondent is the master of the Manhattan, one of the line of steam vessels plying between Mobile and New Orleans, for the carriage of passengers and freight. On the 22d of February, 1866, the plaintiff's son, a minor eighteen years of age, took passage on board of this ship at New Orleans, where he had been to receive a thousand dollars of his mother's money, from her agents at that place. He got these funds, and was returning with them to her. In the course of the evening, and while playing a game of euchre, for pastime, with some of his acquaintances, a man came from one of the state rooms, having with him some gambling appliance, known to the fraternity as a "sweat cloth," and at once invited these young persons to leave their own game, and he would "show them something more attractive," saying that he had been given a considerable sum of money to distribute among those who made good throws with the dice he exhibited. Almost simultaneously with this, another man, who is proved by the testimony to have been a confederate of the owner of the sweat cloth, came from the same state room, and going up to young Smith, said: "Let us see him out." Smith and his challenger then went to the table upon which the sweat cloth was spread, and began playing by each putting down a dollar, and both losing. This continued until Smith, greatly excited, increased his stake to twenty dollars on each throw of the dice. The confederate of the gambler, meanwhile, had ceased to play. One of the companions of Smith, seeing how matters were going, tried to induce him to leave off, but the gamblers persuaded him to continue, upon the assurance that he could probably not only recover his losses, but make large gains. Under this stimulus, their inexperienced victim played deeper and deeper, until seven hundred and fifty dollars of his widowed mother's money was secured by the thieves. The exhibitor of the sweat cloth then coolly rolled up the gambling apparatus, and went with it and the stolen money into his state room. The Manhattan did not arrive at Mobile until after 12 o'clock the next day (the 23d). There is a conflict of testimony upon the question whether Captain Wilson was present, looking on, while the gamblers were fleecing young Smith. Whatever the truth is on this point, there is no dispute that the clerk of the boat was there the whole time, and witnessed the operation. The clerk himself admitted this on the trial, and it was testified to by a witness of unimpeachable veracity. It also appears, by the testimony of both the clerk and the captain, that the clerk informed Captain Wilson of the gambling affair, and the extent of young Smith's losses, immediately upon the occurrence of those events, but that no measures were taken to compel the gamblers to make restitution of their booty. It is further admitted by the captain and the clerk that the chief gambler was known to them both as a common gamester, in the habit of travelling on the boat, and that on a former occasion the captain prevented him from pursuing his abominable vocation. These facts are undisputed, and, upon the case as made and the law applicable to it, I am called upon to adjudicate between the parties litigant.

An objection, in limine, is made to the jurisdiction of the court. It is contended, by the counsel for the respondent, that the remedy of the plaintiff is by an action in a court of common law jurisdiction, and that this case does not come within the definition of a marine tort, cognizable in admiralty. On the other hand, the counsel for the libellant insists that the jurisdiction of the admiralty courts of the United States is conferred by the constitution, and does not, as was argued, depend upon the regulations of commerce; that where an action on the case may be maintained according to the course of the common law, the admiralty court has also jurisdiction, if the cause of action arose upon the high seas, or within the ebb and flow of the tide. The authorities cited by the libellant's counsel appear to settle the question in favor of the jurisdiction of this court. I have not reached this conclusion without being obliged to overcome preconceived opinions tending to a contrary result. In a doubtful case I am anxious not to find jurisdiction; preferring to think that where it is not plainly granted, or to be fairly implied, it is, for wise reasons, expressly withheld. But upon a careful examination of the cases cited, and the principles upon which admiralty jurisdiction is based, I am of opinion that the libellant and her cause of action are coram judice.

The test by which the jurisdiction of this court is ascertained in cases like the present is, the wrong complained of must be committed on the high seas, or within the ebb and flow of the tide, and be of such a description that an action of trespass on the case might be maintained for it in a court of common law jurisdiction. That great lawyer, Sir William Scott, said that an "injury done on the high seas is a fit matter for redress in a court of admiralty;" and Doctor Godolphin, whom Mr. Justice Story quotes approvingly, and whom he describes —Chamberlain v. Chandler [Case No. 2,575]— as a "very learned admiralty judge," declares that "all affairs relating to ship's officers or mariners, their office and duty, their offences, whether by willfulness, casualty, ignorance, negligence or insufficiency, with their punishments," are proper subjects of admiralty jurisdiction. If other and modern authority were needed on this point, it may be found in the case of Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. Towboat Co., reported in 23 How. [64 U. S.] Mr. Justice Grier (pages 214, 215) says: "The jurisdiction of courts of admiralty in matters of contract depends upon the nature and

character of the contract, but in torts, it depends entirely upon locality. If the wrongs be committed on the high seas, or within the ebb and flow of the tide, it has never been disputed that they come within the jurisdiction of that court. Nor is the definition of the term 'torts,' when used in reference to admiralty jurisdiction, confined to wrongs or injuries committed by direct force. It includes, also, wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case."

Having disposed of the question of jurisdiction, I will now consider the case on its merits. It is a case of much interest and importance. It concerns all that portion of the community who travel by water, and involves a consideration of the character of ship masters, their powers, duties and responsibilities. I know of no more important relationship to society than that of the commander of a vessel engaged in the carriage of passengers. Chancellor Kent (volume 3, marg. p. 159) says: "He ought to possess moral and intellectual as well as business qualifications of the first order." Cleirac, in his Jugemens d'Oleron C. I., says that "the title of master of a ship implies honor, experience, and morals."

Volumes might be written in amplification of these tersely stated premises, without adding to their pith and aptness. They are, in effect, declarations of the maritime law, that no man of blunted moral sense, or of low intellectual range, or who does not possess a nice, delicate sense of honor, or whose experience of life is narrow and meagre, should be allowed to occupy the position of master of a ship. His authority at sea is of the most absolute character, amounting almost to sovereignty. He can exact unquestioning obedience from all on board, and make even his caprices the law of the voyage. Passengers and seamen are alike subject to his control. He may suitably punish a refusal of either to obey the reasonable regulations of the vessel or for gross behavior while on board. If he is of opinion that the good order or safety of the ship requires it, he may invade the privacy of a state room, and exclude a passenger from the cabin. He "may refuse passage to persons whose characters are doubtful, or dissolute, or suspicious, and, a fortiori, whose characters are unequivocally bad." He has the right to inquire into the intent with which a traveller seeks a passage, and "to act upon reasonable presumption in regard to him," as, for instance, "if a known or suspected thief were to come on board," he would be authorized to presume his intention to be to carry out his criminal designs against the property of others, and not only may, but must, refuse to convey him, or accept all the liabilities of carrying him. Jencks v. Coleman [Case No. 7,258]. If, then, he may refuse passage to persons of known bad character, if he have the right to say to a thief, "I will not allow you on board of my ship," and if he should say and do this in regard to a notorious rogue, what should he do when he finds out that a common gambler, with the tools of his avocation for luggage, is among his passengers? The enlightened judgment of mankind consents to stigmatize gambling as a most pernicious vice. Every Christian code denounces it as a crime, and punishes it as such. A common gambler is a common nuisance. Insensible to honor, deaf to pity, and bent upon plunder, he is a human cormorant, more detestable than the bird of prey itself; and if it is within the power, it is the clear duty of the managers and directors of public conveyances to save the traveling community from contact with them.

The extensive powers with which the master of a vessel is clothed, are not, however, to be used except in furtherance of the objects the law has in view, and in every case responsibility runs parallel with privilege. The misuse of authority is the parent of accountableness, and it is a proposition of universal application in the affairs of civilized life that, whenever the laws invest any person with an enlarged degree of power over his fellows, they impose a corresponding obligation, and watch with a jealous eye the exercise of discretionary authority. Hence it is that the duties of a master of a vessel are stated with great precision and clearness in the books. I need not consider here what his duties are to the owners of a ship or to the officers and crew of his command. None of these are involved in the case under consideration. "In respect to passengers," says Judge Story (Chamberlain v. Chandler [supra]), "the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere ship room and personal existence on board. It is a stipulation not for toleration merely, but for respectful treatment; for that decency of demeanor which constitutes the charm of social life; for that attention which mitigates evil without reluctance; and that promptitude which administers aid to distress." Towards women and minors, the master of a ship is bound at all times to exercise the care and tenderness of a pater familias, and this is especially his duty when they are unaccompanied by a natural guardian. The fact is, that, in the eye of the law, he stands to all his passengers in loco parentis. They are entitled, as a matter of right, to his attention and protection. Is it to be tolerated that a person of immature years, or a female passenger, shall be beaten or robbed in the presence of the captain or one of his officers, and he not be held accountable in damages to the father or husband? And should it make any difference in his legal liability that, though not present at the perpetration of the crime, he takes no means to punish the assaulter, or make the thief disgorge, on being reliably informed of the commission of the offence? Does he not, in effect, consent to the outrage, if he does not use the means within his lawful reach, and promptly, so far as those means

extend, to redress the grievance? Judge Ware, in Plummer v. Webb [Case No. 11,-234], on this point, says: "He (the master) is intrusted by the law with the supreme power on board of his ship, and what is done by his permission must be considered as done by his authority." And in the case before me, if a generous construction of Captain Wilson's omission takes from it any collusive aspect, can justice or law require less than liability for the results of his negligence? Shall he go free, if he make no attempt to discharge a plain duty, the performance of which might, and in all probability would, have corrected the evil, while yet the wrongdoer was legally subject to his control.

A decree will be entered that the libellant, Mary A. Smith, recover from the respondent, Joseph A. Wilson, the sum of seven hundred and fifty dollars, with lawful interest thereon from the 22nd of February, 1866, together with costs.

SMITH (WINTERMUTE v.). See Case No. 17,897.

Case No. 13,128a.

SMITH et al. v. WOODRUFF.

[6 Fish. Pat. Cas. 476.][1]

Supreme Court, District of Columbia. Sept., 1873.

PATENTS—VALIDITY—EVIDENCE—COSTS.

1. The patent is prima facie evidence that the several grants of right contained in it are valid; that the several things, methods, and devices contained in it are new; that they were useful; that they required invention; and that they were the invention of the patentee.

2. This prima facie evidence must have full effect, unless it is refuted by sufficient countervailing evidence.

3. If one paper-file holds the paper better than another, which is patented, and has driven it out of the market, that is prima facie evidence that the mechanism is different, and is a new invention; and the use of it does not violate the patentee's monopoly.

4. Though the complainant's bill is dismissed, the defendant is allowed no costs, as by the decision the rights of the parties are settled, and he as well as the public receives a benefit from the decision.

[This was a bill in equity by Eldridge J. Smith and others against E. W. Woodruff.]

Final hearing on pleadings and proofs. Suit brought upon letters patent [No. 76,834] for "improvement in paper-files," granted to Eldridge J. Smith, April 14, 1868, and reissued April 19, 1872 [No. 4,864].

E. W. Edmondson, for complainant.
R. D. Mussey, for defendant.

HUMPHREYS, J. In this case the complainant files a bill against the defendant alleging therein an infringement by the defendant of the complainant's rights under a certain patent, and asking for an injunction. It alleges that letters patent were issued to the complainant for a certain invention for filing and holding papers; and that the defendant has infringed upon the rights of complainant under said patent by making and selling a like machine; all which allegations are denied by the defendant. The evidence shows that the application of the complainant for a patent was filed January 6, 1868, and that the defendant filed an application for letters patent for his machine January 7, 1868; that a patent was issued to defendant on March 31, 1868, and subsequently, on April 14, 1868, a further patent was issued for further improvements; and that on that day the complainant's patent was issued, and that complainant's patent was afterward surrendered and a reissue of the same made on April 9, 1872, for alleged infringement of which this suit is brought. But it is not claimed that these dates make any difference now as to the question in controversy. The patent office decided that there was no infringement or conflict between the two claims, and, so deciding, issued a patent to each party. It is here claimed by the complainant that that decision is erroneous; and the question now is whether the defendant's patent is an infringement upon the complainant's rights under his patent. The patent itself is made by law prima facie evidence that everything that was necessary to have been done in the office before the same could issue has been done; and that principle is carried even further than I at first thought a prima facie case would go. But it is in the language of a reported case that I prefer to state this principle, rather than in my own words. In Potter v. Holland [Case No. 11,329], this principle is clearly stated. I have looked at the text, and it fully authorizes the headnote, which is short, and which I will read: "The patent is prima facie evidence that the several grants of right contained in it are valid; that the several things, methods, and devices contained in it are new; that they were useful; that they required invention, and that they were the invention of the patentee; and this prima facie evidence must have full effect unless it is rebutted by sufficient countervailing evidence." Now, that is the extent to which the prima facie evidence of the patent goes. It purports to be issued after everything required to be done has been done. Now, here are two patents, and the question more particularly involved is whether or not the patent office decided correctly in deciding that there was no conflict between the two machines. The one patent is of as much force as the other; and the main question at present is whether the decision of the patent office, that there was no conflict between the two, is correct. I have come to the conclusion that the office decided correctly.

In the case of Gould v. Rees, 15 Wall. [82 U. S.] 187, the court says: "Patentable inventions may consist entirely in a new com-

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

bination of old ingredients, whereby a new and useful result is obtained; and in such cases the description of the invention is sufficient if the ingredients are named, the mode of operation given, and the new and useful result is pointed out, so that those skilled in the art and the public may know the nature and extent of the claim, and what the parts are which co-operate to produce the described new and useful result. Damages are claimed by the plaintiff for the alleged infringement of certain letters patent, and he instituted for that purpose an action of trespass on the case against the defendant to recover compensation for the alleged injury." Here, in this case, the bill is filed seeking an injunction against the defendant for the alleged infringement. The court there further says, that "where the defendant, in constructing his machine, omits entirely one of the ingredients of the plaintiff's combination without substituting any other, he does not infringe; and if he substitutes another in the place of the one omitted, which is new, or which performs a substantially different function, or if it is old, but was not known at the date of the plaintiff's invention as a proper substitute for the omitted ingredient, then he does not infringe." Now, it is held that the principle in the two paper-files here is the same; but the principle is not what was patented, but the mode of operation and construction of the machines. The defendant's machine holds the papers more securely than the complainant's, and it is decided in Singer v. Walmsley [Case No. 12,900], that "if the result of the mechanism used by the defendants is greatly superior to that described and claimed by the patentee, this fact may be considered by a jury as tending to prove that the mechanism of the defendants is a new invention, substantially different from that described by plaintiff."

It is in evidence fully in this case that the defendant's machine has supplanted entirely that of the complainant; and the court is greatly relieved, and will be so all the way up to the court of last resort, by the presumptions in favor of the finding of the office, to which is intrusted the determination of the question of patents and of conflicting claims therefor. I am not disposed to interfere with that finding; and, if there is no infringement there could be no interference.

The decree will be that, this cause coming on to be heard, being argued by counsel, and on due consideration, it is ordered, adjudged, and decreed that the complainant's bill be dismissed, and that each party pay his own costs. The reason that I come to this conclusion as to costs is that the public is benefited by this investigation, and the defendant is greatly benefited by having the case settled; and the complainant ought not to be required perhaps to pay more than his own costs, and it will be no hardship to the defendant to require him to pay his.

Case No. 13,129.

SMITH v. WOODWARD et al.

[2 Cranch, C. C. 226.][1]

Circuit Court, District of Columbia. April Term, 1821.

PRACTICE AT LAW—CONSOLIDATION OF CASES.

If the writ be issued against two defendants, and one only be taken on the first writ, and the other be afterwards taken on an alias or pluries, the cause against the defendant first taken will be consolidated with that against the other defendant, although there may have been the intermission of a term between the issue of the first and second or other writ.

The first writ issued against Woodward & Yerby in 1818. Woodward only was taken. The writ was not renewed against Yerby until several terms after, when a writ was issued against him, upon which he was taken.

Mr. Law, for plaintiff, moved the court to consolidate the suit against Woodward with that against Yerby.

Mr. Taney, for defendant, objected that the writ against Yerby had not been regularly continued. The object of the plaintiff is to avoid the plea of limitation. The docket, however, showed the connection, and the proceedings were ordered to be consolidated into one cause.

[See Case No. 5,253.]

Case No. 13,130.

SMITH v. WOODWORTH et al.

[4 Dill. 584.][2]

Circuit Court, D. Iowa. 1877.

DOWER—ADULTERY—DIVORCE—ST. WESTM. II. (13 EDW. I. CH. 34.)

1. The statute of Westminster II. (13 Edw. I. c. 34), making adulterous elopement of the wife a bar to dower, is not in force in Iowa, being inconsistent with the legislation of the state in relation to the descent of property, dower, and adultery.

2. The special verbal contract between the wife and husband, set out in the plea, in respect to release of dower, *held*, on demurrer, not to bar her action for dower, or the statutory substitute therefor.

The plaintiff [Sarah A. Smith] claims to be the widow of W. K. Smith, who died in Iowa, without issue, in 1872, leaving real and personal property, which he devised and bequeathed to others. This is an action originally brought, in 1873, in the circuit court of the state, claiming, under the statutes of Iowa, her share, as such widow, in the property of the said Smith. The defendants [W. C. Woodworth, executor, and others] insisted that the rights given the plaintiff in the real estate were in the nature of dower, being the statutory substitute therefor, and that

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

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

such rights were to be governed by the rules of law applicable to the estate in dower. The suit was removed to this court under the act of congress in that behalf. The marriage, seizin, and death are admitted. The defendants—the executor, devisees, and legatee of the husband—plead in bar as follows: 1. A decree of divorce, granted at the instance of the plaintiff, to which there is a replication, setting up that said decree was obtained by the procurement of the husband, without the knowledge or consent of the wife (the present plaintiff), and averring that she never knew of the divorce proceeding or decree until after his death. This decree was granted in Illinois, in 1860, the parties being then domiciled in that state. No question is made upon the sufficiency of the replication. 2. The defendants plead specially in bar the following: "That, on or about the 1st day of July, 1859, the plaintiff, being then the wife of said William K. Smith, did, of her own consent, leave the house and home of the decedent, and thereafter lived separate and apart from said William K. Smith, deceased, until his decease, in about the year 1872. Defendants aver that, within that period, without the consent of her said husband, the plaintiff committed many acts of adultery with persons unknown; and did, in particular, reside with and commit frequent adultery with one Freeman Miller; and did reside with for a long time, and hold adulterous intercourse with, one Charles Clinton; thereby forfeiting her right of dower, maintenance, and allowance as a wife. Defendants aver that at no time after the adulterous intercourse of plaintiff with him, the said Freeman Miller, and him, the said Clinton, and others, was the deceased, William K. Smith, reconciled to the plaintiff." 3. The defendants plead specially in bar the following: "That, sometime in the year 1860, in the county of Fulton, Illinois, the plaintiff had been guilty, during the existence of the marriage relation, of the crime of adultery, without the consent of her husband, the deceased William K. Smith, and the same had been discovered by said deceased; and thereupon, and shortly thereafter, the said plaintiff and said deceased, intending a final separation, and having been lawfully divorced, and the said parties agreeing to a separation for life, they contracted and agreed upon a sum of three hundred dollars to be paid plaintiff by deceased, in lieu of, and full satisfaction of, plaintiff's right of dower, support, and allowance, and all interest in and to any property the deceased had or might have. Defendants aver that said settlement was had, and payment of said money was made to plaintiff, in good faith, and without oppression; that it was fair and reasonable in all its parts, and was accepted by plaintiff in full of the rights now again demanded. Defendants also aver that decedent at that time had but little property, and the said sum of money constituted a very considerable portion of his estate; the said sum was all, and more, than plaintiff was legally or equitably entitled to." To the second and third pleas above, the plaintiff demurred, for insufficiency in law to bar her right of dower.

In relation to the second plea above, viz., the plea of adultery, the following legislation of the state of Iowa has a bearing upon the subject: In 1853 (see Revision 1860, § 2477), it was enacted that "one-third in value of all real estate in which the husband at any time during the marriage had a legal or equitable interest, and to which the wife has made no relinquishment of her rights, shall be set apart as her property, in dower, upon the death of the husband, if she survive him; said estate in dower to be and remain as at common law." In 1862 (Laws 1862, p. 173), the above provision of 1853 was repealed, and the following substituted therefor: "One-third in value of all the real estate in which the husband at any time during the marriage had a legal or equitable interest, which has not been sold on execution or other judicial sale, to which the wife has made no relinquishment of her right, shall, under direction of the court, be set apart by the executor, administrator, or heir, as her property in fee simple, on the death of the husband, if she survive him." "The above provision, in relation to the widow of a deceased husband, shall be applicable to the husband of a deceased wife. Each is entitled to the same right of dower in the estate of the other; and the like interest shall in the same manner descend to their respective heirs. The estate by courtesy is hereby abolished." This statute, among other changes, drops the word "dower," and substitutes the words, "as her property in fee simple," and omits the clause in the act of 1853, "said estate in dower to be and remain as at common law." The act of 1862 was the law in force when Smith died, in 1872. Under the legislation of Iowa, the dower right is relinquished by executing a conveyance, or by relinquishing it in a conveyance, in the execution of which she joins with her husband. Revision 1860, §§ 2215, 2255. Divorces from the bonds of matrimony may be decreed at the instance of the injured party, for the adultery of either the husband or wife, committed subsequent to the marriage. Id. §§ 2534, 2536. And "the court, when a divorce is decreed, may make such order, in relation to the property of the parties and the maintenance of the wife, as shall be right and proper." Id. § 2537. Adultery may be punished criminally, but only on the complaint of the injured husband or wife. Id. § 4347. The legislation of Iowa is silent as to the effect of the adultery of the husband or wife upon the property rights of either, or upon the right to dower. The common law of England, wherever applicable to our condition, and not inconsistent with the legislation of the state, prevails in Iowa; so held in a case relating to dower, by the

supreme court of the state. O'Ferrall v. Simplot, 4 Iowa, 381.

H. C. Henderson, for plaintiff.

H. E. J. Boardman and W. M. Stone, for defendants.

DILLON, Circuit Judge. In respect to the second special defence to the action, I am of opinion that the statute of Westm. II. (13 Edw. I. c. 34), upon which that defence is based, and which is: "If a wife willingly leave her husband, and go away, and continue with the adulterer, she shall be barred forever of action to demand her dower that she ought to have of her husband's lands, if she be convict thereupon, except that her husband, willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him; in which case she shall be restored to her action"—never having been expressly adopted in Iowa, is not in force therein, nor is it part of the law of the state. The ground of this conclusion is that its provisions are inconsistent with the legislation of the state on the subject of dower, or the widow's right in the estate of her husband, and the mode in which such right may be barred or relinquished, and with the statutory provisions in respect to divorce on the ground of adultery. The reasons which support this conclusion, under similar legislation, are so forcibly stated by the supreme judicial court of Massachusetts, in Lakin v. Lakin, 2 Allen, 45, that I content myself with a reference to that case, and to Bryan v. Batcheller, 6 R. I. 543, and Lecompte v. Wash, 9 Mo. 551, without here setting forth the arguments upon which they rest. This conclusion concedes that the fee simple provision for the widow made by the act of 1862, which is a substitute for dower, is governed by the same principles as to forfeiture that apply to the right or estate in dower; but the point need not be decided, for the concession is the view most favorable to the defendants. Under the act of 1862, the rights of husband and wife in the estate of the other are reciprocal and the same; and it would hardly be contended that the statute of Westminster would apply to deprive the husband, who had committed adultery, of his right to one-third of the estate of his wife.

As respects the third special defence, I am of opinion that the verbal transaction therein set forth does not amount to a relinquishment, or legal bar, to dower or the widow's right; and, in view of the allegation that there had been a valid divorce, which, of itself, would be a bar to dower, and the prospective nature of the alleged release, this transaction is not of such a nature, whatever might be its effect in equity, as to amount to a bar to this suit. See McKee v. Reynolds, 26 Iowa, 578, and cases cited. Both pleas are insufficient. Demurrer sustained.

SMITH (WYLIE v.). See Case No. 18,110.

SMITH (WYTHE v.). See Case No. 18,122.

Case No. 13,131.

SMITH v. YATES.

[15 Blatchf. 89.] [1]

Circuit Court, N. D. New York. July 18, 1878.

COUNTIES—BONDS IN AID OF RAILROAD—ACT OF NEW YORK LEGISLATURE.

The act of the legislature of New York, passed April 19, 1869 (Laws N. Y. 1869, p. 447, c. 241), authorized any town in the county of Orleans, "situate along the route of the Lake Ontario Shore Railroad," after certain proceedings, to issue its bonds in aid of the building of the road. Such bonds were issued by the town of Y., in said county, although, at the time, the route of the road was not located through or along that town, in the manner prescribed by the general railroad act of April 2, 1850 (Laws N. Y. 1850, p. 211, c. 140), under which the railroad corporation was organized: *Held*, that the want of such location was no objection to the validity of the bonds.

[Cited in Mellen v. Lansing, 11 Fed. 828.]

[This was an action on certain bonds by Andrew J. Smith against the town of Yates.]

Charles T. Richardson and Albertus Perry, for plaintiff.

Irving M. Thompson and George F. Danforth, for defendant.

WALLACE, District Judge. The only open question in this case, under the decisions which are controlling on this court, is, whether or not the defendant was authorized by the act of April 19, 1869 (Laws N. Y. 1869, p. 447, c. 241), to lend its credit to the Lake Ontario Shore Railroad Company, towards the construction of the railroad. If it was so authorized, the plaintiff, who is a bona fide holder of the coupons in suit, can rely upon the recitals contained in the body of the bonds, and the defendant cannot be heard to set up that its officers disregarded the requirements of the statute in issuing the bonds. Miller v. Berlin [Case No. 9,562].

By the act in question, upon the application in writing of twelve or more freeholders, residents in any town in the county of Orleans, situate along the route of the Lake Ontario Shore Railroad, it is made the duty of the county judge wherein such town is situated, to appoint three or more commissioners for said town, and the commissioners, when thus appointed, are authorized to borrow money on the faith and credit of their respective towns, and issue bonds for that purpose. If the town of Yates was one of the towns thus authorized to lend its credit, the county judge properly appointed commissioners for the purposes of the act, and these commissioners became the agents of the town, and, having issued the bonds of the town, it is not material to inquire whether, in doing so, they observed

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

or disregarded the terms of their authority. If the town of Yates was authorized thus to lend its credit, it was because it was a town situate along the route of the Lake Ontario Shore Railroad, within the meaning of the act, and, therefore, one of a designated class of towns upon which authority was conferred; and here arises the point upon which the defence of this action rests. The plaintiff has not shown that, at the time the commissioners were appointed by the county judge, the route of the railroad was located through or along the town of Yates, in the manner prescribed by the general railroad act of 1850 (Laws N. Y. 1850, p. 211, c. 140), under which the Lake Ontario Shore Railroad was organized. Section 22 of that act requires every company formed under that act, before constructing any part of their road into or through any county named in their articles of association, to make a map and profile of the route intended to be adopted, certified by the president and engineer, or a majority of the directors, and filed in the office of the clerk of the county in which the road is to be made. Subsequent provisions of that section indicate the object of the requirement, which is in order that the public may know what location of the route is proposed, and that any person aggrieved may apply to a justice of the supreme court for the appointment of commissioners, who are authorized to alter the route. Section 23 of that act authorizes the directors, by a two-thirds vote of their whole number, to change the route, or any part of the route, of their road, upon filing a survey, map and certificate of such alteration; and provides that no such alteration shall be made in any city or village without the sanction of a vote of two-thirds of the common council or trustees, and awards compensation to all persons for any injury done to lands that may have been donated to the company, in case the route is altered after the company has commenced grading; and concludes, by applying all the provisions relative to the first location to the new or altered location.

The defendant insists, that, as there is no proof that the route of the road was located according to these provisions, there is nothing to show that the defendant was a town situate along the route of the road, within the meaning of the law, and, therefore, nothing to show that it was authorized to lend its credit to the road. The position must rest on the argument, that the words "situate along the route" of the road, as used in the act of 1869, mean situate along the route as located, pursuant to the terms of the general railroad act. The question then, is, what does the act mean when it authorizes any town situate along the route of the railroad to bond? The language is to be interpreted in the light of existing facts. If a railroad had already been built, it would, no doubt, refer to the actual route of the road; and, if that route differed from another indicated by a map and profile made and filed pursuant to the general railroad act, no one would doubt that the legislature referred to the town upon the actual route. But, when the language is used in reference to a railroad not yet built, it refers to a town upon the contemplated route of the road. Callaway Co. v. Foster, 93 U. S. 567, 574. The statute, then, means to authorize any town which may be situated along the contemplated route of the railroad to lend its credit to the enterprise. It does not attempt to prescribe the evidence by which the route contemplated shall be made manifest; and a construction which, in effect, would define the evidence of the fact, would require an interpolation not warranted by the spirit of the legislation. The primary object of such legislation is to enable corporations to obtain the means to build projected roads by the aid of such municipalities as may be induced to co-operate, and proceeds upon the theory that this will be secured by stimulating rivalry among different localities which may be induced to compete for the benefits of the enterprise. Of necessity, it contemplates that competing municipalities will measurably control the selection of the route of the railroad. It is, therefore, not fairly to be implied that the legislature intended that the route should be definitely located before the municipalities should be in a position to co-operate in the enterprise. If it was the intent of the act that no town should take proceedings to secure the road until it had secured the location, that intent seems quite inconsistent with the general purpose of the legislation; and, if this was not the intent, it is hardly to be inferred that formal evidence was intended to be required of a non-essential condition. In my view of the act, if there had been nothing indicating that the route of the road was located, and no evidence that the defendant was a town situate along the route of the road, the plaintiff should recover, on the ground that it was the intent of the act to authorize any town upon the contemplated or proposed route of the road to lend its credit, and, in this behalf, to procure the appointment of commissioners to whose judgment the interests of the town were to be committed. The act provides that the commissioners shall not issue bonds until they have obtained the consent of a majority of the taxpayers of the town, and of persons owning more than one-half of the taxable property of the town; and it also provides that no portion of the bonds, or of the moneys arising therefrom, shall be paid, laid out or expended in any other town than that by which such bonds shall be issued, until at least ten thousand dollars per mile, upon an average, shall have been paid or expended upon the grading or construction of each mile of said road lying within such town, unless said road shall be graded and made ready for laying the rails thereon through such town at a less cost than ten thousand dollars per mile; but, by the terms

of the act, this provision is not to apply to any town through which the road shall not run. The commissioners are to be controlled by the wishes of the taxpayers of the town in issuing the bonds, and the railroad company is prohibited from using the moneys derived from the town until the town is substantially secured in the location of the road. Unless the taxpayers are satisfied that the town will derive the benefit of the location of the road, it is to be inferred they will not consent to the incurring of the debt. After it is incurred, the railroad company is required to observe good faith. It is repugnant to common sense to believe that legislation like the present contemplates that the municipalities are to be secured the benefits of the enterprise before they can be called on to assist in its promotion. An act that imposed such conditions would be an absurdity; and an act that made a paper location a prerequisite to the co-operation of the town, would seem to be more absurd, because it would not secure the location, while calculated to make it appear in fact secured.

In arriving at the conclusion reached, I have not lost sight of the rules which require a strict construction of statutes which impose a charge upon the property of the citizen without his consent, and which require proof of all jurisdictional facts before effect can be given to a judicial act taken in a special statutory proceeding. But, for the reasons stated in Munson v. Lyons [Case No. 9,935], these rules must be essentially modified in their application to acts like the one in question, designed to put upon the market, and invest with all the attributes of value, securities which will attract the investments of those who are ignorant of the history of the particular proceeding under which they are issued. If these rules were strictly applied, and it could be shown that one of the twelve freeholders, upon whose application the county judge appointed the commissioners, was not in fact a resident of the town, the whole proceeding would fail and the bonds be void; and, if every purchaser were bound, at his peril, to inquire and correctly ascertain if every freeholder who so applied was in fact a resident, there would be no sale for, and little, if any, value to the bonds. As was said by Mr. Justice Strong (Town of Venice v. Murdock, 92 U. S. 494, 497): "No sane person would have bought a bond with such an obligation resting upon him."

Judgment is ordered for the plaintiff.

SMITH, The ANNIE H. See Case No. 420.

SMITH, The L. P. See Case No. 13,191.

SMITH, The WILEY. See Case No. 17,657.

SMITHERS (UNITED STATES v.). See Case No. 16,347.

SMOCK (UNITED STATES v.). See Case No. 16,348.

Case No. 13,132.

SMOOT v. BELL.

[3 Cranch, C. C. 343.][1]

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

GUARDIAN—RIGHT OF WARD TO CHOOSE—ACCOUNTING.

1. A guardian, appointed by the orphans' court, continues until the infant arrives at full age; and he has not a right, at the age of fourteen, to choose another.

2. A guardian, appointed in Alexandria, who was also appointed by the orphans' court in Pennsylvania, and gave bond there, is not bound to account in Alexandria, for money of his ward received in Pennsylvania.

This was an appeal from the sentence of the orphans' court in Alexandria, ordering the former guardian, George H. Smoot, to pay over to the new guardian, Gideon Bell, chosen by the ward after the age of fourteen, money which Smoot had received in Pennsylvania under letters of guardianship taken out there, upon his giving bond and security to account there.

Mr. Taylor for the appellant. The orphans' court in Alexandria has only the same powers which the orphans' court of Maryland has; and in the case of Mauro v. Ritchie [Case No. 9,312], in Washington, at May term, 1822, this court decided that the orphans' court cannot appoint a new guardian upon the election of the ward at his age of fourteen; so that Mr. Bell is not guardian, and has no right to call Mr. Smoot to account.

Mr. Hewitt, contra, cited Toler, 134, which cites a case from Sergeant and Rawle; and contended that as Mr. Smoot had voluntarily charged himself with the money in his account with the orphans' court here, he is bound to account for it here.

CRANCH, Chief Judge, delivered the opinion of the court (nem. con.), as follows:

In this case it is admitted that Mr. Smoot was duly appointed by the orphans' court, guardian of the infant before his age of fourteen years. This appointment must have been made under the power given to that court by the Maryland law, which was in force on the 27th of February, 1801, when the orphans' courts of this district were erected. By that law of Maryland, the guardian appointed by the orphans' court is appointed until the infant arrive at the age of twenty-one, and the infant has no right, at the age of fourteen, to choose another. This point was decided by this court at Washington, in the case of Mauro v. Ritchie [supra], about eighteen months ago. Mr. Smoot, therefore, still remains guardian, and Mr. Bell has no authority to call him to account.

The next question is, whether Mr. Smoot is bound to account to the orphans' court here for the funds which he received in Pennsyl-

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

vania under his appointment there under the laws of Pennsylvania, and which he there bound himself to account for in the courts of Pennsylvania. We think he is not bound to account to the orphans' court here for that fund, although, under a mistake of his obligation, he may have given credit for it in his first account with that court. In his second account he is credited with that fund, as having been improperly charged with it in his former account. In his third account he is again charged with it by the orphans' court, and is required to pay over the balance to Mr. Bell; from which order he, Mr. Smoot, has appealed to this court.

We therefore think that the sentence of the orphans' court ought to be reversed, with costs.

SMOOT (HOUGH v.). See Case No. 6,723.
SMOOT (JONES v.). See Case No. 7,498.

Case No. 13,133.

SMOOT v. LEE.

[2 Cranch, C. C. 459.] [1]

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

PRINCIPAL AND SURETY—ACTION OF PRISON-BOUNDS BOND.

In an action against the surety in a prison-bounds bond the defendant will not be permitted to adduce evidence that the principal (the debtor) was insolvent, and therefore the plaintiff sustained no damage.

Debt on a prison-bounds bond given by W. Wise, who broke the bounds.

Mr. Wallach, for defendant (the surety), offered evidence to prove that Wise was insolvent when the bond was given, and therefore the plaintiff had suffered no damage by the breach of the condition of the bond.

But THE COURT (nem. con.) rejected the evidence.

Case No. 13,133a.

SMOOT v. WASHINGTON.

[2 Hayw. & H. 122.] [2]

Circuit Court, District of Columbia. Sept. 19, 1853.

MUNICIPAL CORPORATIONS—GRADING STREETS.

The power of grading and regrading the public streets of Washington must be considered as a continuing power in the corporation, to be exercised whenever and as often as the health, improvement and prosperity of the city makes it necessary.

[This was an action at law by Joseph Smoot against the corporation of Washington.]

Jos. H. Bradley and W. D. Davidge, for plaintiff.

James M. Carlisle, for the corporation.

BY THE COURT. The whole subject of the power and responsibility of the corporation, touching the grading and regrading of the streets in Washington, was involved in this case. There were cited a great many authorities on both sides from the reports of the highest courts in the several states, and of the supreme court of the United States, as well as English authorities. The court pronounced an oral opinion. The following conclusions were reduced to writing by the presiding judge: "The doctrine laid down by this court in the case of Devaughn v. Patterson (not reported) is affirmed and reasserted. The power of grading and regrading the public streets of Washington must be considered as a continuing power in the corporation, to be exercised whenever and as often as the health, improvement and prosperity of the city makes it necessary." That the graduation and regraduation by said corporation cannot be considered in the nature of a compact with the proprietor of the property fronting thereon, that it shall always so continue unchanged; and any such agreement to fetter or clog the exercise of legislative power would be void. That by the conveyance of the streets and squares, &c., from the commissioners in 1796, to the United States possessed an unqualified fee-simple in the streets and public squares exclusively, to which the corporation succeeded, so far as the power to grade and regrade is concerned. That though the right of ingress and egress in the proprietor of property fronting on a street is impaired by such regrading, it must be considered a loss in the nature of consequential damages, and not within the principle of the provision contained in the constitution, forbidding the taking private property for public use without just compensation. It is damnum absque injuria, for which no action lies. That there can be no breach of faith ascribed to the corporation in changing the graduation, because they had no power to make any pledge that it should always so continue. The foregoing propositions must however be considered as made with the qualification that the jury shall find from the evidence that such claim became necessary for the health, improvement and prosperity of the city, and was not capriciously or unskillfully made; also that the same was made in a proper manner, and within the line of said street so graduated.

SMULL, The ANNIE M. See Case No. 423.

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

[2] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

Case No. 13,134.

SMYTHE v. BANKS.

[4 Dall. 329.] [1]

Circuit Court, D. Pennsylvania. April, 1797.

WITNESS—PRIVILEGE FROM ARREST.

Capias. The defendant was a resident of Virginia, and had been subpœnaed as a witness in the case of Symes's Lessee v. Irwine [Case No. 13,714], which was marked for trial at the present term, but was continued on the 20th of April. He was arrested on the 26th of April; and the following day, Levy moved, that he should be discharged from the arrest and process, on account of the privilege of a witness, eundo, morando, et redeundo. 4 Com. Dig. 475; 2 Strange, 1094, 986; Vin. Abr. tit. "Privilege."

BY THE COURT. The witness is, undoubtedly, privileged from arrest, for a reasonable time, to prepare for his departure, and return to his home, as well as during his actual attendance upon the court. But the privilege does not extend throughout the term, at which the cause is marked for trial; nor will it protect him while the witness is engaged in transacting his general private business, after he is discharged from the obligation of the subpœna.

SMYTHE (CHAPON v.). See Case No. 2,611.

Case No. 13,135.

SMYTHE v. CHICAGO & S. R. CO. et al.

[11 Chi. Leg. News, 407; 8 Reporter, 709.] [2]

Circuit Court, N. D. Illinois. Sept., 1879.

RAILROAD COMPANY — LIEN OF CONTRACTOR — MORTGAGEE'S RIGHTS—PRIORITIES.

[1. The C. Ry. Co., having the right to construct a railroad about 20 miles in length, made a deed of trust, under which certain bonds were issued, and, after grading about 12 miles of road, abandoned operations for want of funds. The S. Ry. Co. acquired a right to build a road over substantially the same route, and completed such road, using the grading done by the C. Ry. Co. It also acquired a license for the road to enter the city of C., which greatly enhanced its value The C. Ry. Co. made a mortgage on the whole road, and issued bonds thereunder. One B., who had built the road, was adjudged to have a first lien on the whole line. *Held*, that the lien of the bonds issued by the C. Ry. Co. attached only upon the grading actually done by that company, and, as the greater part of the value of the 12 miles of road so graded had been added to it by the work subsequently done, the holders of the C. Ry. Co. bonds were not entitled to require B. to satisfy his lien out of the remaining part of the road, on the ground that he had recourse to two securities, only one of which was liable to such bondholders.

[2. *Held*, further, that the holders of the bonds issued by the C. Ry. Co. were not entitled to share in the enhanced value of the road given by the license procured by the S. Co., but that, in distributing the proceeds of sale of the road, the value of such license should be credited entirely to the part of the road constructed by the S. Co.]

In equity.

Lawrence, Campbell & Lawrence, for complainant.

Cooper, Packard & Gurley, for defendants.

DRUMMOND, Circuit Judge. In 1873, the Chicago, Danville & Vincennes Railway Company, having the right to construct a railway from Chicago to Thornton (a distance of about 20 1/5 miles), executed a deed of trust, under which certain bonds were issued, of which Loewenthall, one of the defendants, owns forty, of $1,000 each. After the execution of this deed of trust, the C., D. & V. Railway Company in that year graded twelve miles of the road, and then was obliged to abandon its further construction on account of want of funds. The Chicago & Southern Railroad Company was organized in 1874 to construct a road, over substantially the same route, and, in doing so, took possession of and used the grading, which was done in 1873 by the C., D. & V. Railway Company. John B. Brown was the contractor of the Chicago & Southern Railroad Company, and, it is conceded, was entitled to the first lien on the whole line of road, the Loewenthall bonds being claimed to be a lien on the twelve miles, subject only to Brown's lien. There was litigation in the state court, before this bill was filed, as to the rights of these parties, in which, among other things, Brown sought to enforce his prior equities. By a decree of the state court, he was adjudged to have a first lien on the entire railroad for the amount due to him. It was also decided that Loewenthall's forty bonds, and any other bonds given under his deed of trust, were a lien upon the twelve miles already graded by the C., D. & V. Railway Company, subject to the lien of Brown, and that the rights of the Chicago & Southern Railroad Company, and [Henry A.] Smythe, the plaintiff in this case, were subsequent in equity to the rights of Brown and Loewenthall. The plaintiff in this suit files a bill as the trustee of certain overdue bonds, issued on the first day of April, 1874, and under a deed of trust by the C. & S. R. R. Co. on the whole road from Chicago to Thornton. The litigation is still pending by appeal to the supreme court of the state, between the plaintiff and Loewenthall, or those who claim under him, as to his right to a lien, as against the claim of the plaintiff here to the twelve miles of road graded by the C., D. & V. Company. On the 30th of March, 1878, Brown filed an intervening petition in this case, asking that the receiver, in whose possession the property had been placed, be required to sell the same, and that the money be brought into court, and his lien first paid. Upon this petition,

[1] [Reported by A. J. Dallas, Esq.]

[2] [8 Reporter, 709, contains only a partial report.]

an order was made by this court, directing the receiver to sell the whole road, that Brown's lien might be paid, and the remainder of the purchase money brought into court, subject to the equities of the various parties. The road was sold for $155,050.00.

The case was referred to the master to take the proofs and report to the court the relative value of the twelve miles covered by the Loewenthall decree and of the balance of the road, and the master has made and filed his report, in which he finds that the property was sold for its fair value; that the claim of Brown had been paid, and costs, and other items, amounting in all to $50,538.64, leaving a balance of the purchase money of $104,-511.36. He also reports that the value of the twelve miles covered by the Loewenthall decree was 39.4 per cent. of the value of the whole property sold, and that part of the balance should be held instead of the twelve miles of road, to await the final disposition of the Loewenthall decree; leaving 60.6 per cent. of the whole as the value of the remainder of the property and franchise sold. To this report various exceptions have been taken by the parties in interest, under which the controversy arises.

It perhaps ought to be stated, that in October, 1874, the common council of the city of Chicago passed an ordinance giving permission and authorizing the Chicago & Southern Railroad Company to come into the city of Chicago with its road, and it is claimed by some of the counsel that this permission was an important element in the value of the property, and enhanced the price for which it was sold.

The principal objections made to the master's report are, first, that he subjected the twelve miles of railroad, upon which the Loewenthall decree was a lien, to the payment of the amount due to Brown, whereas, that amount should have been paid out of the proceeds of that part of the railroad on which Loewenthall had no lien; and, secondly, that the master erred in deducting from the proceeds of the sale a large sum as the value of the authority or license granted by the common council of the city of Chicago, to the Chicago & Southern Railroad Company, and credited that amount to the proceeds of the eight miles of road not covered by the lien of Loewenthall.

As the parties now before the court were also parties to the litigation in the state court, we must assume that the decree of the state court, until reversed by the supreme court, is binding, and so concludes the plaintiff in this case. As I understand, the counsel, who except to the master's report, claim that the distribution of the funds arising from the sale should be made upon principles which have been long settled in courts of equity; that where there are two funds on which one party has a lien, and another party had a lien on one of the funds only for another debt, the latter has a right to compel the former to resort to the other fund in the first instance for satisfaction, whenever it will not operate to the prejudice of the party entitled to the double fund; and where there is a lien upon an entire tract of land, as by a mortgage, and then a part of the land is sold by the mortgagor, it is the right of the purchaser to have that part of the land still remaining in the mortgagor first sold to satisfy the lien. If these principles apply to this case, then the objections to the master's report ought to be sustained; and the question is whether they are applicable under the facts of the case.

As I understand, it is claimed that the price paid for the road should be averaged upon each mile of the whole road. That being done, and the state court having decided that Brown had the first lien upon the whole line of road, it is insisted his claim should be satisfied out of that part of the road upon which Loewenthall has no lien. Let us recur to the facts of this case. The Chicago, Danville & Vincennes Railway Company made the deed of trust under which Loewenthall claims, and in the bill which he filed in the state court, and under which, with other pleadings, the decree of the state court was made, alleged that the company had only expended about $15,000.00 in grading the road, and had then abandoned it; so that in equity the only fund upon which that deed of trust could attach was the grading and appendages which had been done. When the Chicago & Southern Railroad Company was organized, it proceeded to build the whole line of road, with the grading, bridging, culverts, ties, iron, and all the necessary material to make it a finished railroad. It is true the state court has found that Brown had a lien upon the whole road; though it does not appear whether he was the contractor under which the twelve miles were graded by the C. D. & V. Railway Company. He was the contractor under which the remainder of the road was finished, and perhaps it is not important whether he was for both companies or not, as the court decided he had a lien upon the whole road, and it is conceded by parties to the litigation now before this court that his lien was prior to that of all others. Then it is plain that the Chicago & Southern Railroad Company contributed much the greater portion of expenditure to the line of railroad, and when it executed its deed of trust, under which the plaintiff in this case claims, as against the prior deed of trust, the property given as security was of much greater value. It seems that it would hardly be fair, if there were any enhanced value put upon the property by the license given to the Chicago & Southern Railroad Company, to construct its line of road within the city, to consider it as a part of the property belonging to the Chicago, Danville & Vincennes Railway Company and covered by the deed of trust given by that company. For, if there is any increased value added to the road by that li-

cense, in equity it apparently ought to attach to the Chicago & Southern Railroad Company, and to the deed of trust given by that company as a security to its creditors. So that, in view of these facts, I do not see how it is possible to apply the principle of equity referred to by the counsel of Loewenthall to this case. Clearly, such principles ought not to be applied unless in furtherance of the equity of the parties. It may be admitted, if the C., D. & V. Railway Company had completed the twenty and one-fifth miles of the road, the deed of trust given by it would have covered the whole, but it is difficult to understand how the completion, by another and independent company, even though it utilized the part already graded, could bring within the scope of the deed of trust more than the value of the work done and expenditure made by the C., D. & V. Railway Company, unless, indeed, the other company assumed or was bound by its obligations or duties, of which we have no evidence; and it cannot be said that the user in this case so operated per se.

It is urged that the decree of the state court made the deed of trust of the C., D. & V. Railway Company a lien on the twelve miles, with all the easements and appurtenances thereto belonging; but I can hardly suppose that this means that it brought within its compass every expenditure that had been put on the twelve miles by the Chicago & Southern Railroad Company, after the other company had abandoned the work, and never resumed it. And even if that is the true construction of the decree in the state court, I should hardly be prepared to hold, under the evidence taken by the master, that the creditors under the first deed of trust are entitled to a greater proportion of the fund in court than that found by him. If, also, it be admitted that the plaintiff in this case and Brown had a common lien with different priorities, on the whole line of road,—the same property,—still it is true that the lien of this plaintiff and of Loewenthall was created by different deeds of trust, and that the liens of the plaintiff and Brown and of Loewenthall did not operate, though with different priorities, on the same common fund or property, and for these reasons it would seem that the claim of distribution made by the counsel of Loewenthall cannot be maintained.

In this case the plaintiff makes no objection to the report of the master as to the distribution which he reports of the funds arising from the sale, and therefore it is unnecessary to decide whether or not the principle upon which he proceeded was in all respects sound. It is sufficient to say that the plaintiff is willing to acquiesce in the distribution recommended by the master; and it seems clear to me that he is the only party who can complain, and that it is not such a case as authorizes the parties claiming under the deed of trust given by the C., D. & V. Railway Company, to object to the proportion allowed by the master.

Under the statement of facts which has been made, and the equities which attach to the parties respectively, it seems as though, in confirming the master's report, the creditors under the deed of trust given by the C., D. & V. Railway Co. receive all to which, under any fair consideration of the case, they are entitled.

SMYTHE (DALLETT v.). See Case No. 3,545.

SMYTHE (DAVIDSON v.). See Case No. 3,604.

SMYTHE (FISKE v.). See Case No. 4,833.

SMYTHE (HALLET v.). See Case No. 5,959.

SMYTHE (LATTIMER v.). See Case No. 8,523.

SMYTHE (LEWIS v.). See Case No. 8,333.

SMYTHE (LOTTIMER v.). See Case No. 8,523.

SMYTHE (REICHE v.). See Case No. 11,666.

SMYTHE (WOLF v.). See Case No. 17,928.

SMYZER v. The MINNIE. See Case No. 9,117.

Case No. 13,136.

SNEED v. HANLY.

[Hempst. 659.] [1]

Circuit Court, Arkansas.[2] April, 1853.

ATTORNEY AND CLIENT—MONEYS COLLECTED BY ATTORNEY—WHEN LIABLE—STATUTE OF LIMITATIONS.

1. An attorney at law is a trustee for his client as to moneys collected, and cannot avail himself of the statute of limitations, until demand, directions to remit, or some equivalent act.

2. Nor is he liable to an action, nor to interest, except from that time; for the cause of action does not before accrue.

3. Cases cited in notes showing that an attorney is not liable until demand, or instructions to remit, or unless he denies the plaintiff's right, and thus disavows the trust relation.

Assumpsit for money collected by the defendant [Thomas B. Hanly] as an attorney at law, and which he failed to pay over to the plaintiff [Alexander Sneed] on demand. The defendant plead the general issue and the statute of limitations. The case was submitted to the court, and the proof was that the defendant collected the money in 1835 or 1836; and that a demand was made upon him, the 19th of September, 1848, to pay the money to the plaintiff, and he refused; and this suit was commenced on the 5th March, 1849. The question was on the statute of limitations of three years.

D. J. Baldwin, for plaintiff, contended that the relation between attorney and client was that of trustee and cestui que trust; and

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

[2] [District not given.]

which was fully developed in the present case, and consequently that the statute did not run; and he cited on that point, Overstreet v. Bate, 1 J. J. Marsh. 370; Coster v. Murray, 5 Johns. Ch. 522; 1 J. J. Marsh. 401; 2 Kinne, Law Compendium, 118, 119; Taylor v. Bates, 5 Cow. 376.

A. Pike and E. Cummins, for defendant, insisted that where a statute of limitations did not make an exception, the courts could create none, and they cited 1 Cow. 357; 5 Cow. 74; 18 Johns. 40; 12 Wend. 676; 3 Port. (Ala.) 393; 3 Johns. Ch. 142; and to show that an attorney can plead the statute they cited Denton v. Embury, 5 Eng. [10 Ark.] 228, and as to demand, cited Lillie v. Hoyt, 5 Hill, 396, and the cases there referred to.

Before DANIEL, Circuit Justice, and RINGO, District Judge.

DANIEL, Circuit Justice. An attorney stands in the light of a trustee in respect of moneys collected for the latter, and consequently cannot avail himself of the statute of limitations, which only begins to run from demand, directions to remit, or some equivalent act. This rule seems to be sustained by very respectable authority; and certainly is comformable to justice and fair dealing. Taylor v. Bates, 5 Cow. 376; Rathbun v. Ingals, 7 Wend. 320; Hutchins v. Gilman, 9 N. H. 359. That may perhaps be considered as ending the trust relation, and the holding of the attorney afterwards would be adverse to, and not for the client. Walradt v. Maynard, 3 Barb. 584. For the protection of the attorney, the law is settled that he is not subject to an action as to moneys collected nor to interest on such moneys, until the trust is ended by some of the means indicated. The cause of action accrues at that point of time, and as it would be unjust to subject an attorney to an action before he is thus put in default, so, on the other hand, it would be equally unjust to allow him to obtain an advantage over his client, while trust relations exist between them. The case of Denton v. Embury, 5 Eng. [10 Ark.] 228, we are not disposed to receive as authority. Although the money in the present case was in all probability collected as far back as 1836, yet no demand appears to have been made until the 19th of September, 1848; nor does any thing appear equivalent to a demand, or to excuse it. previous to that time. This suit was commenced on the 5th of March, 1849, within three years after demand, and hence the defence of the statute of limitations cannot prevail. Judgment for plaintiff.

NOTE. See notes to case of Sevier v. Holliday [Case No. 12,680a]. Where money was placed in the hands of an agent to purchase slaves, which was neglected to be done, it was held, in a suit brought for the money, that the statute of limitations did not begin to run until demand on the agent by the principal. Buchanan v. Parker, 5 Ired. 597. In Ferris v. Paris, 10 Johns. 285, a foreign factor was held not to be liable for the proceeds of sales till he should first be directed how to remit, and refuse to comply. In Ex parte Ferguson, 6 Cow. 596, a rule against an attorney who had collected money and failed to pay it over, was denied, on the ground that the money had not first been demanded from him. In Lillie v. Hoyt, 5 Hill, 398, Cowen, J., in delivering the opinion of the court, said, "If the attorney is to be protected until demand, it follows that he ought not to be allowed the benefit of the statute running till a demand is made." In Mardis v. Shackleford, 4 Ala. 493, it was held that an attorney was not liable to an action for money collected, until demand, or instructions to remit. And the same doctrine will be found in Staples v. Staples, 4 Greenl. 533; Satterlee v. Frazer, 2 Sandf. 141; Walradt v. Maynard, 3 Barb. 585; Krause v. Dorrance, 10 Barr [10 Pa. St.] 462. As to demand, it may be observed, that it may be sometimes dispensed with as being both unnecessary and useless. As where the attorney denies the right of the other to call on him, or claims the right to hold money collected against the client. A demand in such a case would be an idle act, which the law never compels; because the legitimate object of a demand is to enable the party to discharge his liability agreeably to the nature of it. But where the right is denied, it would be an useless ceremony to go through the formality of a demand when no good could result from it. In such cases the acts of the party would be equivalent to an actual demand. Walradt v. Maynard, 3 Barb. 586; Krause v. Dorrance, 10 Barr [10 Pa. St.] 462; Beebe v. De Baun, 3 Eng. [8 Ark.] 510. In the case of Lockhart v. Ross [Case No. 8,447], decided at the April term of the United States circuit court for the Eastern district of Arkansas, 1855, Daniel, J., presiding, it was held, that an attorney was not liable for interest on moneys collected by him, except from the date of the demand, where an actual demand was made, or instructions to remit, and where neither existed, then from the institution of the suit, considering that as a demand, and the above case of Sneed v. Hanly was cited as authority on that point.

SNELL (BROOKS v.). See Case No. 1,961.

Case No. 13,137.

SNELL et al. v. DELAWARE INS. CO.

[1 Wash. C. C. 509; [1] 4 Dall. 430.]

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

MARINE INSURANCE—OPEN POLICY—VALUE.

The foundation of all insurances, unless of the wager kind, is the real value of the thing insured. In a valued policy, the parties agree upon the value; in an open policy, the assured is bound to prove it. The prime or invoice cost, may, in most cases, be, prima facie, a very proper criterion of value; but it is not conclusive. The actual value should be ascertained and determined, and this may vary from the invoice, or prime cost; and, whatever the same may be, the assurers are bound to pay it in an open policy.

[Cited in Griswold v. Union Mut. Ins. Co., Case No. 5,840.]

This was an open policy on the brig Hound, from Kingston in Jamaica to New-York, on which 2500 dollars were underwritten by

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

this office. Proof of property, that she sailed on the voyage insured, and was lost as stated, was given. It appeared in evidence that the Hound, being the property of the plaintiffs [Snell, Stagg & Co.] was captured on her outward voyage, was carried into Kingston, condemned and sold, and purchased, at the instance of the captain, by Campbell & O'Harrow, for the plaintiffs, for about 3060 dollars; who also paid about 1100 dollars for her outfits to New-York, and about the same sum for the expenses of defending the claim. Campbell & O'Harrow took a bottomry bond on the vessel, to secure the above sums, and wrote to their correspondent in Philadelphia, mentioning that they had bought the vessel for the plaintiffs, much below her value, and had advanced as above; and ordering 5000 dollars to be insured on her, which was effected in the Phœnix Company. This loss has been paid by them. Evidence was given to prove that the vessel, when she left New-York, was worth about 7000 dollars. The only question was, whether the value of the vessel exceeded the 5000 dollars paid by the Phœnix Company; because, if it did not, it was agreed that the plaintiffs could not recover any thing in this suit, for the value of their resulting interest.

Condy & Rawle, for defendants, contended, that the price at which the vessel sold at Kingston, is the only criterion of her value, which, after adding the outfits, amounted to only 4122 dollars. The costs of defending the claim, though properly insurable by Campbell & O'Harrow, could add nothing to the value of the vessel. To prove that the prime cost or invoice furnishes the criterion of value, as to the cargo, they read Park, Ins. 98, 104.

Mr. Dallas, for plaintiff, insisted, that, though the rule mentioned was applicable to goods, it was not so to the vessel; if it were, it would operate, in general, more against the underwriter than the assured. He cited 2 Marsh. Ins. 535; Mill. Ins. 247, 251, 264; 2 Caines, 23.

WASHINGTON, Circuit Justice (charging jury). The foundation of all insurances, unless of the wager kind, is the real value of the thing insured; and the only difference between a valued and an open policy, is, that, in the first, the parties agree upon the value; and in the latter, the assured is bound to prove it. But, a new principle is now attempted to be introduced; namely, that the prime cost, instead of the real value, is to be the measure of the indemnity. The prime cost, or invoice price, may, in most cases, be prima facie a very proper criterion; and, in the case of goods, the latter is the proper measure of the value. The assured cannot object to it, because the invoice is tantamount to an agreement on his part, that that is the value; and it must, in all cases, be so near to the value, that it is very properly considered as the criterion. But, as to the prime cost, this may often vary very considerably from the invoice price; for instance, a cargo of flour may, when shipped and invoiced, be worth double as much as it cost; and, can it be contended, in such a case, that the prime cost would furnish the rule? Equally unjust, and repugnant to the principle of insurance, would it be to say, that, if a vessel be really worth twice as much as the owner gave for her, that the latter should be the criterion of value. If the prime cost is to furnish the rule, then, when the builder of a vessel insures, he must prove not what was her value, but what she cost him. The prime cost is a good rule, where no better is furnished; and, as in this case there is no proof of her real value in Jamaica, the jury may probably adopt the sum at which she sold, as the value of her. But, if they, from the evidence, are satisfied that she was worth more, they are not bound by what was given for her. I will add farther, that the rule contended for by these defendants, would, in many cases, operate most injuriously against underwriters.

The jury found for the plaintiffs upwards of 2300 dollars.

Case No. 13,138.

SNELL et al. v. FAUSSATT.

[1 Wash. C. C. 271.] [1]

Circuit Court, D. Pennsylvania. April Term, 1805.

PRIZE—CONDEMNATION AND SALE—RIGHTS OF PURCHASER—FOREIGN ADMIRALTY COURTS—CONSTITUTION THEREOF—PRESUMPTIONS.

1. It is incumbent on a defendant, who claims a vessel under a condemnation, by a foreign tribunal, to prove that the tribunal was properly constituted. Failing to do this, the condemnation is a nullity.

[Cited in brief in Rankin v. Goddard, 54 Me. 31.]

2. Where a condemnation is by a foreign court, it will be presumed to be a legal one, if the constitution of it be not known.

3. Where its constitution is known, it is proper for the court to examine into it; and, if it has been constituted by a different authority, from what is usual in civilized nations, it becomes him, who would support its jurisdiction, to prove it was erected by proper authority.

4. The erection of courts, is, in all civilized nations, the act of the sovereign; although he may delegate the authority to subordinate agents.

5. It is unusual for a military commander to exercise the right to erect courts; and nothing will be presumed in favour of tribunals so established.

Trover for a quantity of coffee. The case stated by the plaintiff, was; that the Charlotte, being his property, took in at Cape François, in 1783, a quantity of coffee for the plaintiff, and some for other shippers; and

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

whilst on her return to New-York, was captured by a British frigate; part of her hands taken out; a prize-master put on board, and ordered for Jamaica. After being in possession of the British prize-master for some days, she was captured by a French privateer, and carried into St. Jago de Cuba. Having lain there for a short time, her cargo, or a part of it, was transhipped into a vessel called the Messenger, and was brought to Philadelphia; came to the possession of the defendant; who, on demand by the plaintiff, refused to deliver it up; saying, it had been purchased at Cuba for him, by his super-cargo.

The defence was: 1. That the evidence adduced by the plaintiff, did not show his property in the coffee, delivered to the defendant; that the marks of the barrels and bags, as entered at the custom house here, did not correspond with those put on them at St. Domingo; and therefore, that if the coffee taken in by the Messenger at Cuba, was proved to have come from the Charlotte, yet it might as well be the coffee of the other shippers, as of the plaintiff; and if so, a recovery in this action, would be no bar to an action by those persons. 2d. That by an order of General de Noailles, general of brigade, commander in chief of the right northern division of the army at St. Domingo, dated the 6th of November, 1803, a council of prizes was established for Cape St. Nicolas Mole; who, on the 30th November, 1803, in consequence of a report made by their officer on the 29th, "that the Charlotte was cleared from the cape, for New-York, and was captured and recaptured, as before; that he is positive she was first detained, and afterwards condemned, by the captain of the British frigate; that it is evident she was prize to the English, and was found with an English prize-master on board; and concludes by stating, as the result of all this, that she and her cargo ought to be considered as English property, and ought to be condemned;" they do condemn the vessel and cargo, as good prize, taken from the British, and order her to be sold for the benefit of the captors. The vessel lay at St. Jago, at the time of the condemnation; and the transhipment into the Messenger, took place on the 5th November. She was entered at Philadelphia on the 5th of December. The counsel contended, on these facts, that the condemnation was conclusive as to the property. That the vessel being in a Spanish port, was no objection. That prima facie the court must presume, the tribunal that gave the sentence, was duly authorized to pass it; and that it is no objection to the condemnation, that the cargo was previously sold. Cases cited on this point: 3 C. Rob. Adm. 269; Bynk. B. 1, c. 15; Vatt. Law Nat. p. 515, B. 3, 5132; 1 Corp. de Pri. 8, 370; Mart. 98; Lampridi, p. 183; 2 Rath. 594; 4 C. Rob. Adm. 51; 8 Term R. 192. 3d. If all this be against the defendant, yet they are bona fide possessors; and according to correct opinions of civilians, the plaintiff, if he recovers, ought to pay the amount of what the coffee cost, or what it is reasonable to think the plaintiff would have given for the release of the property. That fraud, according to the understanding of civilians, consists in combination, and secures benefit to ourselves, and injury to others. On these points: 2 Kames, Eq. 390, 391; 2 Koch. 708; 1 Grot. 395; Puff. Law Nat. 451; 1 Ruth. Inst. 135; Case of The Neptune, before the district court of Pennsylvania [unreported].

On the other side were cited 2 Vatt. Law Nat. 272; Mart. 105; Peake, Ev. 47, 48; 1 C. Rob. Adm. 119, 135; 2 C. Rob. Adm. 209; 4 C. Rob. Adm. 35; 3 C. Rob. Adm. 192, 53, 83.

The defendant moved to nonsuit the plaintiff, upon the ground, that, this being a cause dependent on the question of prize or no prize, it belonged exclusively to the district court. Cases cited: 3 Term R. 341; Cro. Eliz. 685; 13 Coke, 52; 3 Bulst. 27; 1 Sed. 320; 2 Lev. 25; 2 Sand. 259; 12 Mod. 134; Carth. 432, 474; Doug. 572; 3 Term R. 333; Glass v. The Betsey, 3 Dall. [3 U. S.] 6; [Ross v. Rittenhouse] 2 Dall. [2 U. S.] 165; [Doane v. Penhallow] 1 Dall. [1 U. S.] 218; Mart. 100; Doug. 592; 2 Brown, Civ. & Adm. Law, 213; 2 C. Rob. Adm. 198; 3 C. Rob. Adm. 82.

On the other side were cited: Comb. 120; Carth. 31; 3 Keb. 297, 360, 364; 1 Lev. 243; 12 Mod. 16, 143; 1 Tuck. Blacks. App. 51, 52; 2 Bior. & D. Laws, 516 [1 Stat. 451]; [Talbot v. Commanders & Owners of Three Brigs] 1 Dall. [1 U. S.] 95; [Miller v. The Resolution] 2 Dall. [2 U. S.] 4; [Del Col v. Arnold] 3 Dall. [3 U. S.] 333; 2 Wood, Lac. 451, 454; 2 Burrows, 685, 1209; 10 Mod. 80; 4 C. Rob. Adm. 232, 240; [Taxier v. Sweet] 2 Dall. [2 U. S.] 81.

The motion for a nonsuit was overruled; THE COURT dividing upon it.[2]

WASHINGTON, Circuit Justice (charging jury). This is an action of trover and conversion, the ground of which is, property in the plaintiff in the goods claimed, and a conversion by the defendant. The evidence, to establish

[2] Upon the motion for a nonsuit, the court was divided in opinion. Judge Peters thought we had jurisdiction. I was of a different opinion. No reasons were given. But those which governed me, were, shortly, as follows: The Charlotte was captured by the English frigate, as prize; was recaptured by the French privateer, as prize; sent into Cuba, and afterwards condemned. The plaintiff, at the time of the capture, had an indisputable title to the property in question, if it is identified; but, if it was lawfully seized and condemned, the right of the plaintiff was divested. The very question in issue, therefore, is whether the property in dispute was captured as prize, and lawfully condemned, so as, by the law of nations, to change the property. The question, therefore, of prize or no prize, is the very gist of this action; and all the cases, from the earliest period, prove that such a question, as well as the consequences of it, belong exclusively to the court of prizes; and, in this country, to the district court. W.

the right of the plaintiff to the goods, brought in the Messenger, and delivered to the defendant, is very contradictory. It is essential to the plaintiff's recovery, that he should satisfy you upon this point. It appears, that other coffee than that belonging to the plaintiff, was shipped from the cape; that the marks upon the packages of the plaintiff's coffee, were different from those which appeared on the packages entered at the custom house at Philadelphia. It therefore becomes highly important, that you should carefully examine the evidence; and, unless you are satisfied, that the plaintiff has established his right of property, in the very coffee delivered to the defendant, your verdict must be for the defendant. But, if you should be of opinion, that the plaintiff has proved ownership in that identical coffee, delivered to defendant, then we are of opinion, that the condemnation at the Mole did not affect it. A condemnation of neutral property, by an unauthorized tribunal, is not to be regarded by the courts of other nations. It is contended, that, prima facie, the council of prizes at the Mole, is to be considered as a legitimate court. I admit, that, where we find a condemnation by a foreign court, of the origin of which we are not informed; we ought to presume it a legitimate tribunal. But, when the source of its authority and constitution is stated, we ought to examine it; and, if it be contrary to the usual mode of constituting courts, it shifts the burden of proof upon the party who would support the condemnation; particularly as it is more easy to prove the legitimacy of the court, than to disprove it. We know, that the appointment of courts is, in all civilized countries, by the sovereign power. This, however, may be lodged by the sovereign, in a subordinate civil officer; nay, in a military commander, if the sovereign so chooses. But, this latter mode is so unusual, that, when we hear of a court being constituted by a military commander; and, particularly where it is not clear, that he was, at the time, commander-in-chief, it destroys the presumption of its legality; so as to require the party, who would support the condemnation, to show that the court was instituted by lawful authority. The court being agreed upon this point, we think it unnecessary to decide the other objections to this sentence.[3]

The jury found for the plaintiff.

NOTE. If the question be, whether there has been a legal condemnation, to alter the property in a suit or claim, by the former British owner, it can only be made in the prize court, to decide whether she had become legal prize, and whether the property had been altered or not. 2 Brown, Civ. & Adm. Law. 214; 2 C. Rob. Adm. 239. In page 129 et seq., this author, Brown, is clear upon the points, that, in such a case, the question belongs exclusively to the provincial court. If the taking be not as prize, action, to repair the damage, may be at law; aliter, if taken as prize. Doug. 593; 4 Term R. 390. The prize jurisdiction does not depend on locality, but on the subject matter. 2 Brown, Civ. & Adm. Law. 222. If the subject matter be prize, it excludes the common law courts. Id. 225.

[3] I can meet with no cases at all applicable to this point; but, upon principle, I think the distinction is correct. Marsh. 289, says "that the court, in which the sentence was pronounced, must appear to have been lawfully constituted, and of competent jurisdiction."

Case No. 13,139.

SNELL et al. v. The INDEPENDENCE.

[Gilp. 140.][1]

District Court, E. D. Pennsylvania. Jan. 8, 1830.

SEAMEN—WAGES—FORFEITURE FOR ABSENCE—DEDUCTIONS—DEMURRAGE.

1. To subject a seaman to the forfeiture of his wages, for absence, according to the provisions of the act of 20th July, 1790 [1 Stat. 131], an entry of the fact must have been made in the log book, by the mate, stating the name of the seaman, the date of the absence, and that it was without leave of the master.

[Cited in The John Martin, Case No. 7,357.]

2. A seaman who returns to a vessel, after a week's absence without leave, and continues during the rest of the voyage, is to receive his wages at the rate originally contracted for, in the shipping articles, unless a new contract is explicitly made.

[See The Almatia, Case No. 254.]

3. The charge for a person necessarily employed in the place of a seaman, absent without leave, is to be deducted from his wages.

4. The police costs and charges incurred by a seaman, for improper conduct while on shore, are to be deducted from his wages.

5. Where a vessel is detained by the refusal of the seamen to work, they are to be charged with the demurrage, and the proportion of each seaman who refused is to be deducted from his wages.

[This was a libel for wages by John Snell and Joel A. Baker against the brig Independence.]

Mr. Grinnell, for libellants.

J. R. Ingersoll, for respondent.

HOPKINSON, District Judge. The libellant, Baker, shipped on board the brig Independence, at Philadelphia, on the 9th April, 1828, and proceeded in her from Philadelphia to Gibraltar, thence to Pernambuco, thence to Trieste, thence to Swinemunde, thence to Bordeaux, and thence back to Philadelphia, at fifteen dollars a month. The libellant, Snell, states that he shipped on board the said brig at Trieste, on the 14th May, 1829, to perform a voyage from Trieste to Swinemunde, and elsewhere, and thence to Philadelphia, at eight dollars a month. He says that he proceeded on the said voyage from Trieste to Swinemunde, thence to Bordeaux, and thence to Philadelphia, where the said brig arrived, on the 27th November, 1829. Annexed to the libel is an account stated by Snell, in which he charges the brig with wages, from the 14th May to the 27th

[1] [Reported by Henry D. Gilpin, Esq.]

November, 1829, at eight dollars, amounting to fifty-one dollars and forty-seven cents, and allows sundry credits to the amount of twenty-two dollars and seventeen cents, leaving a balance in his favour of twenty-nine dollars and thirty cents. Baker also annexes an account, in which he charges the brig with wages, to the amount of two hundred and ninety-four dollars, and allows credits for ninety-eight dollars and sixty cents, leaving a balance in his favour of one hundred and ninety-five dollars and forty cents.

The master of the brig, William Fennel, has filed an answer to these claims, in which he admits that the libellants shipped for the voyage, and at the rates of wages they have respectively set forth; but he denies that they faithfully performed their duty. On the contrary, he charges that their conduct was highly disobedient, refractory, and mutinous; that Baker, without authority, and against all order, twice ran away from the brig, while lying at Gibraltar; on one occasion, taking with him the boat of the brig, and on another, making his escape from confinement, to which he had been subjected in consequence of his first absconding. That while at Pernambuco, being drunk, he used gross and insulting language to the captain, and voluntarily jumped overboard and swam to the reef. That while at Trieste, he deserted from the brig, and abandoned his duty, of which an entry was made in the log book, in these words: "Monday, April 27th, 1829, John Bates," (agreed to mean the libellant, Baker,) "one of the men, off his duty." That while at Swinemunde, he frequently went on shore without leave, and contrary to express orders; and that on one occasion, both Baker and Snell, so being on shore without license, conducted themselves in so disorderly and riotous a manner, that they were placed under arrest by the civil authorities of Swinemunde, and imprisoned, the expenses of which, and of hands employed in their absence, the respondent was compelled to pay. The respondent further answers, that while at Elsinore, and the wind fair to get under way, the libellants, in disobedience of orders, refused to heave the anchor, or to perform duty; that, in defiance of all authority, they mutinously persisted in their resolution; and that Baker raised a handspike against the respondent. That, by reason of this mutiny, the favourable moment was lost, and the brig detained for some time at Elsinore, by contrary winds, subjecting the respondent to a heavy charge of demurrage. The respondent denies that the libellants are entitled to any of the wages claimed by them; but, on the contrary, are severally indebted to the brig.

An account is annexed to this answer, by which it appears there were due to Baker, on the 27th April, 1829, the day of his alleged desertion, eighty-one dollars and three cents; which the respondent contends was wholly forfeited by his desertion. In this account Baker is charged only with cash paid to him, or for him. It then credits him with wages, at eight dollars a month, from the 5th May to the 27th November, 1829, amounting in the whole to fifty-three dollars and eighty-seven cents, and charges him with various items, during that time, amounting to eighty-four dollars and forty-three cents, leaving a balance against him of thirty dollars and fifty-six cents.

The facts stated in the answer are substantially proved by the deposition of John Smith, the first mate of the brig; and the truth of them has not been materially controverted. An additional fact appears by this testimony, corroborated by a writing given by Baker; it is, that while he was absent from the brig, at Trieste, he became indebted to one John Wilkinson in the sum of twenty-four dollars, which Baker, by the writing, agreed should be deducted from his wages, afterwards to be earned.

The charges of misconduct made against Baker are supported by the evidence of the mate, and have not been disproved by any evidence on the part of the libellant; indeed, he has produced no testimony whatever. The argument has turned on the consequences of his misbehaviour, in the several instances mentioned; and whether or not, they, or any of them, have worked a forfeiture of his wages, or what amount of compensation may be taken from his wages to answer them.

The credits allowed to the ship, by Baker, are given in gross, amounting to ninety-eight dollars and sixty cents, including the hospital duty, which account he states only on his recollection. The total charges against him, in the captain's account, independent of the claims made for his misconduct, amount to one hundred and thirty-two dollars and eighty-three cents, and seem not to be questioned. The cash payments, therefore, charged to Baker, are presumed to be correct.

By taking the allowances claimed by the master as forfeitures, or deductions of wages, more or less, and disposing of them in their order of time, we shall come, in the most plain and satisfactory way, to the result. At Gibraltar, Baker appears to have conducted himself with great insubordination, leaving the vessel with an evident intention of deserting her. He was, however, brought back, and punished, by confinement in irons. He is not entered by name in the log book for this offence; nor has the captain in his account made any charge against him for any loss or expense incurred by it. The same may be said of his insulting violence when drunk at Pernambuco, when he jumped overboard and swam to a reef, but was brought back and returned to his duty, which he performed without complaint, until the arrival of the brig at Trieste. The real matters in controversy began there. Every thing up to that time seems to have been settled by punishment or forgiveness. On the 27th April,

1829, at Trieste, Baker went on shore, and did not return until the 5th May; and this absence is asserted to have been without leave, and to have incurred a forfeiture of all the wages due at that time. Was this absence without the leave of the officer commanding the vessel? It is nowhere said so, either in the log book, or by the mate in his examination at this trial. That witness says that "on the 26th April, Baker went on shore with his permission, that he returned, and said he had gone to ask his discharge from the captain, who said he had no objection if the consul was willing; he went on shore again, and did not return until the 5th May." There is no direct allegation that this going on shore, which is the one relied upon for the forfeiture, was without leave. But if it might be inferred from the evidence of the mate, and the circumstances, is it sufficient? I think not. The act of congress of 20th July, 1790 (1 Story's Laws, 104; [1 Stat. 132]), gives great advantages to the owner of a vessel in making his log book the evidence of a fact, which acquits him altogether of a debt; and courts have very properly held him strictly to the proof required. The truth is, it is a highly penal act. We must not look at a forfeiture of a seaman's wages, with regard merely to the amount due to him, which is generally small, but consider it rather as his all; as the sole fruit of long, laborious, and dangerous services; as the essential means of procuring for him the necessaries and comforts of life, while on shore, and, it may be, in sickness, or with a family depending upon it for their bread. Seamen, as a class of men, are entitled to receive peculiar indulgence. Their character, their education, the very nature of their employment, engender habits of recklessness and occasional violence, which other persons are not exposed to; much of their merit and usefulness is connected with their faults, and even with their vices.

When the master of a vessel intends to insist on the forfeiture of a seaman's wages, for a desertion for more than forty-eight hours, it is required that the absence shall be without leave of the master; and that the mate shall make an entry in the log book of the name of the seaman, on the day on which he shall absent himself. The entry must contain all that is necessary to incur the forfeiture. Of this, nothing is more essential than that the absence was without leave of the commanding officer of the vessel. The law is settled by several decisions, that it is not sufficient to state in the log book that the seaman was absent; but it must also be stated, whether it was with, or without leave; stating that the seaman left the ship is not sufficient. In this case the entry is no more than that the libellant was "off duty;" but where, whether in the ship, or on shore, and wherefore; whether with, or without leave, whether on account of sickness, or other justifiable cause, does not appear. As a proper entry in the log book is indispensable evidence of a desertion, for which a forfeiture of wages is claimed, and as no such entry was here made, the forfeiture cannot be ordered.

On the 5th May, at Trieste, Baker returned to the brig, after an absence of a week, and performed duty as a seaman. Another question here has been controverted by the parties. The master insists that he came on a new contract, and is entitled from that day to wages only at the rate of eight dollars a month, the amount given to other seamen at Trieste. This pretence is founded on the evidence of the mate, that the captain ordered him to tell Baker that he was no longer on wages, and he did so. But can this be sufficient to annul the original contract, by the shipping articles; and to make a new implied contract in the place of it? When this was told to Baker does not clearly appear, and no assent to it on his part is pretended. No new contract was formally made in the shipping articles; nor any entry made on them, or elsewhere, of the cancelling of Baker's original contract. It therefore stands now, as it did in the beginning. It would be too much to destroy it, and set up another on such evidence as is here produced. The mate does not insinuate that any new contract was made for eight dollars a month, or any other sum; and if wages had happened to be twenty dollars a month at Trieste, we cannot believe the master would have thought Baker entitled to them, on what is testified by the mate. The answer expressly admits that the libellants shipped for the voyage, and at the rate of wages set forth in the libel; and no other contract is averred or put in issue by the answer. I must, therefore, consider Baker as returning to the brig on his first contract; the only one ever made between him and the master of the vessel.

The charge of one dollar and fifty cents, for a man hired in Baker's place, is a proper charge. So also, the charge of four dollars and eighty cents for cash paid the police officers and prison expenses at Swinemunde.

Baker is charged with twenty dollars, as his one third part of the demurrage, for detaining the brig two days at Elsinore; where, when the vessel was ready to sail, the mate says, "the men refused to heave the anchor," Baker being one of them. In his cross examination the mate speaks generally of the crew being guilty of this disobedience. In his deposition he designates by name, only Baker and Snell. In the log book the name of a third seaman is introduced. The master, in his account, has divided the demurrage among the three, charging the present libellants, Baker and Snell each with one third. I wish the mate had been more explicit on this subject; but I do not think his expressions of the men and the crew, necessarily embrace every individual on board in that capacity. Certainly both Baker and Snell were prominent in this, as in other scenes of misconduct, and no injustice is done to them in the charge made on this account. Baker is also chargeable with

the twenty-four dollars which he ordered to be paid for him to John Wilkinson at Trieste.

Baker's account settled on these principles will stand:

Dr.	Wages from 9th April, 1828, to 27th November, 1829, at $15..		$294 00
Cr.	By cash payments, as per account	$132 83	
	Charges allowed against him	51 13	
			183 96
	Amount due to Baker.......		$110 04

To Snell there is nothing due.

Decree. That Joel A. Baker recover the sum of one hundred and ten dollars and four cents, and that the libel of John Snell be dismissed.

SNELL (RYBERG v.). See Case No. 12,190.

Case No. 13,140.

In re SNELLING.

[19 N. B. R. 120.] [1]

District Court, D. Massachusetts. Dec. 7, 1878.

BANKRUPTCY—COMPOSITION—SECURED CREDITOR—ASSENTING CREDITORS.

1. Where the creditors have full knowledge of all the facts, and the debtor, who is doubtful of obtaining his discharge, or who wishes to proceed at once with his business, as a fair compromise of possible litigation, induces his friends to pay more in composition than his estate could pay in bankruptcy, *held*, that the composition stands well before the court.

2. Where a creditor considers himself and is considered by the debtor to be fully secured, although in fact he is not, he is not to be counted as a creditor merely to defeat a composition to which the requisite number of creditors have assented.

In bankruptcy.

S. Hoar, for bankrupt.

G. H. Miller, for objecting creditors.

LOWELL, District Judge. The objections to the composition are founded upon a very large payment made by the bankrupt to his brother about three weeks before his first note was protested. It is urged that if all this money can be recovered, there will be a dividend larger than the offered composition. In support of the settlement, it is maintained that a considerable part of the alleged preference cannot under any circumstances be recovered by an assignee; because, as to one portion, the brother had a valid mortgage which he surrendered; and as to another portion, it consists of notes indorsed by the brother and paid to the banks as they came due in the ordinary course of business, without any arrangement or contrivance between the bankrupt and his brother, and that, whatever may have been the motive of the debtor, there is no circumstance upon which the brother can be charged as a preferred creditor; and, lastly, that the whole matter of the supposed preference was fully understood by the creditors and acted upon by them, and in consideration thereof they required a larger offer than the apparent assets would warrant; that this demand was acceded to by the debtor and by his brother, who indorses his composition notes; and that by this guarantee the brother in fact restores to the creditors more than an assignee could recover of him; and whether so or not, the creditors have passed upon this as well as upon other questions, and their wishes should be respected.

The composition offered is plainly more than the debtor can pay from his own resources. I have seen an English case in which this fact was considered a sufficient proof of fraud. That case must have had in it some exceptional circumstances. In my opinion one of the advantages of the law of composition, and one which compensates to a certain extent some decided objections, is that a debtor who is doubtful of obtaining his discharge, or who wishes to proceed at once with his business, may induce his friends to pay more in composition than his estate could possibly pay in bankruptcy. When such a result has been reached with a full knowledge by the creditors of all the facts, and as a fair compromise of possible litigation, I agree with the debtor's counsel that the composition stands well before the court. I consider this to be a fair and even liberal offer, and that the resolutions on their merits should be recorded.

A preliminary point was argued and an opinion intimated upon it at the hearing. The unsecured creditors are twenty-four in number, and precisely two-thirds of this number, representing a very large excess of value, have signed the confirmation. The objecting creditors maintained that two secured creditors were not fully secured, and therefore should be counted for some amount to be hereafter ascertained; and, if counted at all, the number of signers is insufficient. It turned out that those two creditors consider themselves to be fully secured, and are so considered by the debtor, and that they are ready to file a renunciation of all claim beyond their security. Under these circumstances, I do not think that the objecting creditors should be at liberty to set up the jus tertii, if I may so express it.

Granting, as is granted by the objecting creditors, that there is no fraud in the matter, but only an honest difference of opinion concerning values, I do not see any propriety in counting one as a creditor who expressly disclaims that character. There is no justice in forcing a creditor upon the bankrupt against the will of both parties, merely to defeat a composition to which the requisite number of acknowledged creditors have assented. Resolutions to be recorded.

[1] [Reprinted by permission.]

SNELLING (LAVERTY v.). See Case No. 8,124.

Case No. 13,141.

In re SNOW.

[2 Curt. 485.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1855.

BAIL—ADMIRALTY—PROCEEDING AGAINST SURETY—RETURN.

After a final decree for the libellant in a suit in personam, in which the respondent gave bail to appear and abide, the libellant may apply to the court, show that the respondent has gone beyond seas, and thereupon obtain a monition to the bail to appear and show cause why they should not be decreed to satisfy the damages and costs; and it is not sufficient cause to be shown by the bail that no execution against the principal has been returned non est inventus.

Peter Vickman had a decree at a former day, against Loring Snow, for damages and costs. After the decree was entered on application to the court, the following order was passed: "On motion of C. G. Thomas, proctor for the libellant in the above entitled cause, the court being satisfied that the said Snow has gone beyond seas, it is ordered that a monition issue to Augustus Hemmenway, to show cause, if any he has, why he should not pay the judgment awarded in this court at the present term thereof, against Loring Snow in admiralty in the libel of Peter Vickman, wherein said Hemmenway was bail tor said Snow. And further to show cause why the motion of the proctor for said libellant for process against said bail should not be granted."

[See Cases Nos. 13,149 and 18,042.]

The monition thus directed having been served and returned, the parties appeared, and Mr. Dehon showed cause.

C. G. Thomas, contra.

CURTIS, Circuit Justice. In this case the libellant had a decree against the respondent for damages for a tort, at the last term. After the decree was entered, the libellant's proctor appeared and offered evidence to show that the respondent had gone beyond seas, and he moved for a monition to Augustus Hemmenway, who became bail for the respondent, upon his arrest, to show cause why execution should not be issued against him. The monition was issued and made returnable to this term; and Hemmenway having appeared by his counsel, shows for cause that the condition of this bail bond not being to pay the damages which might be decreed, but duly to appear and answer and abide the final decree, there is no breach of the bond until an execution shall have been issued and returned non est inventus. But I am of opinion that it is not necessary to take out an execution against the principal to charge such bail in the admiralty. It is in conformity with the practice of the high court of admiralty in England, to proceed summarily against the bail, in a case where the principal has gone out of the kingdom, by issuing a monition to the bail to show cause why execution should not go against them, without citing the principal, or issuing any process against him. Clarke, Prax. arts. 64, 65. It is upon this practice that the rule No. 3 for the admiralty practice of the district court was framed. Though it authorizes the marshal to take bail with a condition to pay, as well as to appear and abide, and in this case the condition was only to appear and abide, yet the summary proceeding directed on a breach of condition, is applicable to a breach of one or the other of those conditions. There is no more reason why the libellant should be required to pursue the principal by an execution, when the bail stipulates that the principal shall appear and abide, than there is where the bail stipulates that he should pay as well as appear and abide. In Lane v. Townsend [Case No. 8,054], Judge Ware examined the subject of the rights of bail, with his usual learning and ability; and considers that a monition to show cause and a decree thereon, fixes the bail, though a return of non est inventus does not. In the case of The Harriett, 1 W. Rob. Adm. 193, a doubt was expressed how far it was necessary to prosecute the principal in the first instance, before proceedings could be instituted against the bail. In that case, it was held that the bankruptcy of the principal was cause for not first taking process against him. This must have been because there was no technical rule, like that at common law, requiring an execution against the principal to be returned unsatisfied, as a necessary foundation for proceedings against the bail. And that it was sufficient to satisfy the court that process against the principal would be fruitless. If he is beyond seas, when the time for satisfying the decree has arrived, it is certain he has not abided the decree that the condition of the bond is broken, and that any process against him would be fruitless. And where, as in this case, this is made to appear, and thereupon the bail has further time allowed to show cause, and shows none except the failure of the creditor to do a vain act, by taking execution against one who is out of the jurisdiction, I have no doubt execution should go against him. Domat (Cush. Ed.) notes 1866, 1867.

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

Case No. 13,142.

In re SNOW et ux.

[1 N. Y. Leg. Obs. 264; 5 Law Rep. 369.] [1]

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

BANKRUPTCY—WIFE'S CHOSE IN ACTION—ASSIGNEE'S RIGHTS THEREIN.

The official assignee is not entitled to a chose in action of the bankrupt's wife, where there is no evidence to show that the bankrupt ever asserted his marital right thereto, or made any attempt to reduce it into possession.

[In the matter of the petition of George W. Snow and Emeline, his wife.]

P. Clark, for Snow and wife.

The official assignee in person.

BETTS, District Judge. This case comes to decision in effect as upon a bill in equity on behalf of the wife to rescue from the possession of the official assignee a note for $800, claimed to be her sole property. On the 24th of March the general assignee moved the court for an order that the bankrupt deliver into his possession the note in question, as part of the property named in Schedule A. The bankrupt's counsel opposed the application, upon the ground that the note belonged to his wife before marriage, and had never been reduced to possession by him. The court, in view of the petition and schedule, observed that the title of the wife to the note was exhibited in so vague and loose a manner as to leave it doubtful whether the court had cognizance of the matter. If the assignee applied to the court to compel the wife to deliver up the note, the court could protect her rights thereto, and would be cautious in dispossessing her of the property which the husband had not made his own, or brought under his control; and even if he had attempted to assert his marital rights over it, but the aid of the equity powers of the court was necessary to complete his title, her interest would then be carefully considered and preserved to her, although the legal title of the husband should be acknowledged; but that, the inventory having set out a hypothetical right to the note, as taken in his own name for his wife's property, it was at least equivocal on that statement whether the assignee had not a legal title to the note, and in such case the court would not in an incidental and summary manner interfere with his right to the possession of property which prima facie belonged to the bankrupt. It was declared accordingly, that if the right was in the wife, or there was an equity in her behalf to a provision out of the note, she must proceed in some manner that would enable the assignee or creditors to meet the question directly. The husband and wife subsequently filed a petition to the court in the nature of a bill in equity, setting forth that the wife, before her intermarriage, became entitled to some real estate in the county of Dutchess, the property of her mother, deceased, and that on sale of it a note for $800 in part payment of the consideration was given her by the purchaser. After her marriage the note still continued in her possession, and she received the interest as it became due, and, the note having also fallen due, she, her husband not being present, and not desiring or knowing it, had a new note given for the amount, payable to her husband or bearer; but this is the note now claimed; and that since its execution it has remained entirely in her possession, she having, as before, received the interest payable on it, and the husband never having reduced it to his possession, or assumed any control over it. To these allegations the assignee took a formal issue, and the matter was, by consent of parties, referred to Commissioner Mulligan. The report, and the proofs upon which it is founded, being made, the case is thereupon submitted to the court on written argument by counsel for the respective parties.

The petitioners fail to establish their case by any facts proved by disinterested witnesses; no one having knowledge of any act of disclaimer on the part of the husband in respect to the note; and it being left equivocal whether the interest was paid to the wife or husband subsequently to the renewal of the note in his name. The common understanding of the parties to the note, and of persons most intimately acquainted with the transaction, was that the note continued to be regarded as belonging to the wife, and as having never been surrendered to the husband; yet, independent of the allegations of the petitioners, there is no direct proof that it was not held by him with his other papers, and the interest thereon paid directly to him.

I should have great difficulty in treating this proceeding as a suit in equity, giving the petitioners the right of making their allegations evidence when not rebutted by proofs or an explicit denial of the facts on the part of the assignee. The connection of the assignee with the subject-matter is merely official, and he cannot be chargeable with such personal knowledge of the subject that his omitting to deny an averment shall enable the petitioners to use it as if admitted. On the contrary, if the property had been found mingled with other of the bankrupt, and indubitably in his possession, I should think the petitioners would be required to support their claim by extrinsic evidence before it could be allowed. But on a careful review of all the circumstances disclosed in the case, I am rather disposed to regard the affirmative proceeding as still being on the part of the assignee, and that the evidence is to be weighed with a view to its effect as establishing his right, independent of the former order, and the possession of

[1] [5 Law Rep. 369, contains only a partial report.]

the note by virtue of it. That order was clearly only provisional. The court was not so informed of the actual rights of the case that it could adjudge the merits. The order was rested upon the statement of the schedule, and, as that imported some interest in the husband, and was at least vague as to the paramount title of the wife, the assignee, as the rightful depositary of every interest of the bankrupt, was decreed the possession of the note until the legal or equitable title of the wife could be presented and established. So far, however, as any advantage may be supposed to arise out of the form of the proceeding and posture of the parties, it was not the intention of the court to take that from the wife or confer it on the assignee.

Regarding the case in its present aspect as an appeal to the equity powers of the court to adjudge and settle the right of possession of the note, I shall discuss the question as if the note was only in custody of the law, and the pending application was alike on the part of the assignee and of the wife. The fair bearing of the evidence, in my judgment, is that the husband, in point of fact, never interfered with the exclusive right of his wife to this note and the moneys secured by it. It was natural that it should be cherished by her as a portion of her mother's estate, without regard to the circumstances of her husband, and it is clear that the alteration of the note from her own name to that of her husband was not made with any expression of a wish or expectation by her that the change would affect her exclusive interest in it. She had it done without the presence of her husband, in her own family and by her relatives, and, as then declared, for the purpose of enabling her to collect the money, being under the persuasion that it could not properly stand and be enforced in her name after her marriage. The testimony does not show that the husband had any knowledge whatever of the change when made, or that any act of his subsequently evinced an intention to reduce the security to his own possession; for, if the proofs do not show affirmatively that the interest was afterwards paid to the wife solely, neither does it, in evidence of his exercise of ownership, show that he received it. The matter was then so placed that the husband could at any moment have made this note his own by any act or assertion of title, but the evidence is wanting that he ever exercised that authority. The general doctrine is well settled that the assignee cannot take the wife's separate estate not reduced to possession by the bankrupt before his bankruptcy. Owen, Bankr. 120, 121; 3 Kent, Comm. 125; Clancy, Husb. & W. 124, 127, 148, 537, 476–491; 9 Ves. 87; Roper, Husb. & W. 203. And if the wife has title or a mere equity in real or personal chattels or choses in action, chancery will protect that as paramount to the right of the husband's assignee, who comes in by the operation of law. 1 Paige, 620; 2 Paige, 303; 6 Paige, 366; 4 Paige, 64; 2 Brod. & B. 233; Clancy, Husb. & W. 476.

The intimation in some of the cases that an assignee in bankruptcy would be deemed in possession of chattels and choses in action of the wife of the bankrupt, not reduced to possession by him, upon the ground that the assignee is clothed with all the legal powers of the husband, and may under such power demand possession, is not supported by the more modern authorities. The assignee is now limited, in respect to the wife's estate, to the interest of the bankrupt actually had or possessed, and cannot exercise in his behalf an election in that respect. I shall accordingly in this case order the note in question to be restored to Mrs. Snow, the wife of the bankrupt. But it being payable to the bankrupt, and the bankrupt in his inventory having named it as property in which he might have a legal interest, it became the duty of the assignee to claim the note, and afterwards to demand the judgment of the court whether it belonged to the estate of the bankrupt. This condition of things is brought about by the fault of the wife of the bankrupt, and not by that of the assignee, and accordingly the costs of this defence must be paid the assignee before surrender of the note.

Case No. 13,143.

Case of SNOW.

[3. Woodb. & M. 430;[1] 10 Law Rep. 344.]

Circuit Court, D. Massachusetts. Oct. Term. 1847.

INSOLVENCY — POOR DEBTOR'S OATH — RELEASE FROM PRISON—FORMER HEARING—SURRENDER OF PROPERTY—HABEAS CORPUS.

1. A debtor in prison and refused to be allowed to take the poor debtor's oath by a commissioner, may afterwards be allowed to take it by another commissioner, if, in the mean time, he has gone into insolvency and surrendered all his property to assignees.

2. It is not the same question in both cases, but his right relates to a different period and to a different condition of his property.

3. A second hearing might also be proper in such case, whenever a mistake or other facts appeared, which would justify a rehearing or new trial in other proceedings.

4. It is probable that in such case the decision of the district judge allowing a second examination, and it being had and the oath allowed, must be regarded as conclusive in favor of them in a petition by the debtor for a habeas corpus to the jailor for refusing to discharge him.

5. Especially may they be, unless so defective as to be void on the face of the record, or unless appearing on facts shown to be entirely erroneous and null.

6. Where the debtor appears to have surrendered all his property fairly and fully, doubtful points should incline in favor of giving him his personal liberty.

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

7. Where no injury or suffering is likely to happen during a hearing first, on a rule to show cause, the writ of habeas corpus will not issue till after such a hearing.

This was a petition by Nathaniel Snow, filed the 18th instant, for a habeas corpus, and setting out in substance the following facts: Two suits had been instituted against him by John B. Myers & Co. in this court, on which property was attached as belonging to Snow. But the title to it was contested, and after judgments only one execution was levied on it, and the question as to the property still remains unsettled. An execution on the other judgment was sued out June 14th, 1847, and the body of Snow arrested the 22d of the same month, and committed to the jail at Cambridge in Middlesex county in this state, where he is still detained by Nathaniel Watson, the keeper of said jail. On the next day after his commitment he procured the liberty of the yard on the prison limits, but was afterwards surrendered and again placed in close confinement. He soon petitioned the district judge to admit him to take the oath of a poor debtor, and be discharged from prison, and the judge appointed Charles Sumner, Esq., as commissioner for that purpose, who, after an examination, under objections by Myers & Co., that Snow still possessed property of considerable value, declined to administer to him the oath and returned the precept with his refusal indorsed thereon. On the 17th of September Snow applied for the appointment of another commissioner to administer the poor debtor's oath to him, having in the meantime gone into insolvency under the statutes of Massachusetts, and all his property passed to a messenger, and afterwards in due time to an assignee selected by his creditors. This last fact, however, was not set out in the petition for a habeas corpus, but was shown at the hearing of the case. The judge of the district court, on being informed of this change in Snow's situation, allowed another commission to issue, empowering Ephraim Buttrick, Esq., to make the examination and administer the oath, and on the 13th of October inst. he administered it, after a hearing of the parties, and certified the fact in writing to the jailer, who still refuses to discharge him. The court on this petition ordered a copy to be served on the jailer, and notice to be given to him and the creditors to appear the next day and show cause why a habeas corpus should not issue with a view to discharge the petitioner. The next day, viz., the 19th inst., the jailer and creditors appeared and the parties were fully heard by:

Mr. Chamberlain, for petitioner.
Mr. Hubbard, for jailer and creditors.

The writ of habeas corpus was allowed to issue, and the next day after the prisoner was brought into court by the jailer with a return that he held him by virtue of the original execution, which has been before described, and that, though the certificate last referred to of the poor debtor's oath having been administered to Snow had been lodged with him, he entertained such doubts of its validity, as not to feel justified in discharging the prisoner, on account of a prior examination and refusal, till some court of competent authority should direct it.

WOODBURY, Circuit Justice. In this case the petition would be in better form, if amended and containing the fact, conceded at the hearing, that between the first and second examination a change had happened in the situation of the petitioner as to the property, all of his having been assigned under the insolvent law, and that fact stated to the district judge as a reason for issuing a second commission. The petitioner is at liberty, therefore, to make that amendment, and having made it, the case will be considered as it now stands. First there had been one commission and an inquiry under it in August, 1847, and a decision made, that Snow then appeared to possess so much property as not to be entitled to have the poor debtor's oath administered to him, under either of the acts of congress on the subject of 1800, or 1824, or 1837. There is no objection to the validity of that proceeding. And whether, in strict law, it is to be considered as rem judicatam between the parties on this point, or not, it would be trifling with the process issued in these cases, and with the decisions of respectable commissioners, to allow another hearing of the same point before another commissioner on the same state of facts. There should, at least, be as much shown to justify it, as is required to have a rehearing in equity, or a new trial at common law.

There should be a new state of facts, or newly discovered evidence, or a clear mistake shown on the old facts. But when either of them is done, if a rehearing or new trial be proper on such grounds, it would be proper a fortiori to allow another examination in a case like this. Here some such grounds did appear on the second application to the judge: The whole property, which prevented a discharge at first, had been surrendered to the creditors, and all the obstacles to the debtor being considered poor were removed. The judge, on being informed of this, properly allowed another commission. And, for anything now shown on the merits, Snow was properly allowed then to take the poor debtor's oath. If, as is urged, proceedings of this kind should be viewed like actions between parties, and conclusive on the merits once settled, it is manifest that by analogy a new hearing was proper on a state of facts occurring which was materially new. So, beyond this, it is manifest that a former judgment between the parties, as for instance, that one was not a poor debtor on a certain day, viz., the 5th of August, should be no bar to showing that he had become a poor debtor on the 14th of October. The point settled is not the same; it relates to a different period, and of course, neither in form or substance, should the first decision in

such a case be conclusive as against the second one. See in Burnham v. Webster [Case No. 2,179], and Greely v. Smith [Id. 5,749], the precedents and reasons collected. It might have been better to have set out the change in his property in writing to the district judge on the second application. But in proceedings like these, not usually very formal, where both parties were present at the subsequent hearing, and the decision appears to have been correct on the facts, I am disposed, in this collateral proceeding, and in favor of personal liberty, not to be over critical and to uphold them. [1 Tidd, Proc. 567.] [2] It is another consideration in favor of such a conclusion, that this course cannot work any essential injury or damage to the creditors. They have a prior claim in the attachment in the other action to all the debtor's property which they choose to seize. They have enjoyed the privilege of waiving their doubtful attachment and resorting to imprisonment of the body in order to compel a surrender of any secreted property, and again, after this discharge, they can probably prove their debt and be allowed a pro rata dividend out of all the property in the hands of the assignees.

As another evidence that the second examination here was proper on a new state of facts, such an one is understood to be given by the Massachusetts statute in express terms. Rev. St. c. 98, § 12. Nor was the length of the notice of fifteen days, as is argued, objectionable, the act of congress requiring only fifteen days, however the local laws provide for more time. Lockhurst v. West, 7 Metc. (Mass.) 230. This objection, too, could not equitably avail after an appearance, and being overruled, as it was before the commissioner, and a full hearing had on the merits.

But beside these answers to most of the exceptions, there exists another entitled to much weight. This is, that the district judge, in whom the power is vested in these cases by the acts of congress, has allowed the second examination. That the commissioner under him, after objections made, has also decided to go into it, and has actually administered the oath to the debtor; and that no request has been made by the creditors to the district judge, on any other proceeding instituted, to annul or set aside the doings of the commissioner, or his certificate to the jailer. There is much, then, in the idea that in this collateral and, in some respects, independent inquiry, we ought to consider those proceedings binding till reversed or quashed. More especially should we do this, unless, on their face, they appear to be so defective as to be utterly void (see Suffolk Bank v. Merrill [Case No. 13, 591], Maine Dist., Oct., 1847), or are impeached now by proof of fatal irregularities. But so far from that, they appear well in form, though not so full in some particulars as might be desirable. Nor has any evidence been offered to show them to have been irregular and illegal, or to have been either fraudulent or evasive of the just rights of creditors. On the contrary, there seems presented a proper condition of things for permitting the poor debtor's oath and a discharge. And any suspected concealment of property, or any other attempt by the debtor not to let his creditors enjoy the full benefit of his estate under the insolvent law, is open to exposure, and can effectually be defeated by attending to and enforcing the provisions of that law before the appropriate state tribunals.

On the whole case, then, both on its face on the record, as well as on the facts elicited in this hearing, it seems to me that we should be doing violence to the wishes of congress, as expressed in their several acts, and be accessory to a further infringement of the liberty of a citizen after he has surrendered all his property, and on a hearing been adjudged entitled to a discharge, if we were to allow him to be detained longer in prison under the process of this court.

So far, then, as he is detained by that process in favor of Myers & Co. in the proceedings we have been examining, he must be set at liberty.

NOTE. Though a habeas corpus is often issued on the petition without any hearing first on a rule to show cause, and may be most proper where danger of removal, or much suffering and long delay are probable, yet in other cases as here it is better to issue a rule to show cause first. Ex parte Milburn, 9 Pet. [34 U. S.] 708.

[2] [From 10 Law Rep. 344.]

Case No. 13,144.

SNOW et al. v. CARRUTH et al.

[1 Spr. 324; [1] 19 Law Rep. 198.]

District Court, D. Massachusetts. May, 1856.

SET-OFF — ADMIRALTY — FREIGHT—DAMAGES—DECREE OVER—DIVIDING LOSS—BILL OF LADING.

1. In a suit by a carrier against a consignee, for freight, the consignee having made advances upon the consignment, and received the goods, may in defence, by way of recoupment, set up a claim for damages by the breach of his contract by the carrier.

[Cited in Kennedy v. Dodge, Case No. 7,701; Nichols v. Tremlett, Id. 10,247.]

[Cited in Dyer v. Grand Trunk Ry. Co., 42 Vt. 444.]

2. There is no general doctrine of set-off recognized in the admiralty.

[Cited in The Two Brothers, 4 Fed. 159; Gillingham v. Charleston Towboat & Transp. Co., 40 Fed. 650.]

3. And if a respondent set up a claim by way of recoupment, it can go only to diminish or extinguish the demand of the libellant.

[Cited in Ebert v. The Reuben Doud, 3 Fed. 522; The Tom Lysle, 48 Fed. 692.]

4. If the damage sustained by the respondent exceeds such demand, he can have no decree for the balance.

[Cited in Ebert v. The Reuben Doud, 3 Fed. 522.]

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

5. It is at his election whether to set up his claim in defence, or to file a cross libel therefor.

6. But if he set it up in defence, by way of recoupment, and his damages exceed the claim of the libellant, he will not be allowed to maintain a suit for the excess.

[See Bearse v. Ropes, Case No. 1,192.]

7. Where damage to goods is attributable partly to the fault of the carrier, and partly to the fault of the shipper, and it is impossible to ascertain for what proportion each is responsible, the loss will be equally divided between them.

[Cited in Christian v. Van Tassel, 12 Fed. 890; The Shand, 16 Fed. 572; The Tommy, 16 Fed. 608; The Max Morris, 24 Fed. 863; The Young America, 26 Fed. 176; The Dove, 91 U. S. 385; The Max Morris v. Curry, 137 U. S. 14, 11 Sup. Ct. 33.]

8. A carrier is liable for goods from the time they are shipped, although the bill of lading may be actually signed subsequent to the loss.

[Cited in The Edwin v. Naumkeag Steam Cotton Co., Case No. 4,301.]

By this libel, the owners of the ship John W. White, sought to recover of the respondents $653.63, for freight of 200 barrels of oil and 92 tierces of lard, brought from New Orleans to Boston, in the summer of 1854. There were two bills of lading, in one of which the respondents were the consignees, and the other had been assigned to them; and, on the whole consignment, they had advanced to nearly the value of the goods. On the arrival of the vessel at Boston, they received the goods, except as mentioned hereafter. The whole number of packages was delivered, but on gauging and weighing, it was found that 1,032 gallons (equal to 27 barrels,) of the oil, and 1,905 pounds of the lard had been lost by leakage. The respondents, not controverting the delivery of the packages, alleged a non-delivery of a part of said goods, and that the residue were not delivered in like good order and condition as when received; and also, that the libellants, after receiving said goods, or a part of them, (but before bills of lading were signed,) permitted them to lie upon the levee in New Orleans, for two days, exposed to the sun, whereby the casks were injured, and a loss by leakage caused. The libellants alleged due and proper care of the goods while in their possession.

H. A. Scudder, for libellants, claimed: 1st. That the respondents, as consignees, had not sufficient legal interest in the goods to maintain a claim for damages; that the contract for carriage was with the shippers; and that, until the respondents received the goods, there was no contract between them and the libellants, and that the cause of action, if any, accrued before that time. 2d. That no damages could be claimed, under a bill of lading, for injuries happening to goods prior to the date of such bill. 3d. That if the respondents had sufficient interest to maintain an action for damages, yet it could not be set up in defence, or by way of recoupment to the claim for freight. And to this point were cited, Abb. Shipp. 517; Davidson v. Gwynne, 12 East, 381; Sheels v. Davies, 4 Camp. 119, 6 Taunt. 65.

Thomas H. Russell, for respondents, cited, as to the first point, that the contract was with the assignees; Abb. Shipp. 421. And upon the third point, Ben. Adm. § 41; Conk. Adm. 13, 15; 2 Pars. Cont. 427; Chit. Cont. 656; Hunt v. Otis Co., 4 Metc. [Mass.] 464; Moulton v. Trask, 9 Metc. [Mass.] 577; Farnsworth v. Garrard, 1 Camp. 38; Fisher v. Samuda, Id. 190; Basten v. Butter, 7 East, 479; 1 Scam. 463; 5 Watts, 446; 6 Watts, 435; Willard v. Dorr [Case No. 17,680]; Spurr v. Pearson [Id. 13,268]; Abb. Shipp. 427, 652, note, and cases cited; Curt. Merch. Seam. 305, 306.

SPRAGUE, District Judge, in deciding the cause, overruled the first objection. On the second point, he held that the liability of the carrier commenced with the receipt by him of the goods. The bill of lading acknowledges that the goods have been "shipped" prior to its date; it may have been several days prior; the obligation of the carrier begins at the time of the shipment, although the document, which is taken as the evidence of the reception and contract, may be of a subsequent date.

Upon the third point his honor said: There have been several cases in this court, in which this defence was set up and sustained, but in those cases, the counsel for the libellant did not raise the question, whether or not such defence could be legally made. The text-books cited by the libellants, seem to be full to the point, that it could not. The cases there cited in support of this doctrine; were Davidson v. Gwynne, 12 East, 381, and Sheels v. Davies, 4 Camp. 119, also reported 6 Taunt. 65. These were both decisions of the common law courts; and the earliest, that in 12 East, was not a case which decided the point for which it was cited. The question there, was upon the pleadings. The plaintiff having agreed, inter alia, to perform a certain voyage, and to sail with convoy, sued and alleged performance of the voyage, but did not allege a sailing with convoy. The pleadings were held sufficient. Another point was this: the plaintiff having alleged a delivery of the goods in like good order and condition as when received, and it appearing that certain chests of tea had been damaged by the negligence of the carriers, it was insisted, that the plaintiff could not recover his freight; but the court held that he might recover his freight, and that the defendant had his cross-action for his damages; but the question does not appear to have been raised, whether he might not also have his remedy by recoupment in the same suit.

The case in 6 Taunt. is an authority to the point for which it was cited by the libellant's counsel; but the common law courts of Massachusetts hold a different doctrine.

See acc. Sedg. Dam. (2d Ed.) p. 145, c. 17. This, too, is an admiralty court, which is not bound by the decisions of common law courts, in a question of remedy. No authority has been cited, that this defence will not be allowed by a court of admiralty. On the contrary, the language of Judge Story, in the case of Willard v. Dorr [supra], is broad enough to cover the defence, although not expressing it in terms. Considering the question upon principle, there seems to be no reason for not allowing this defence. The libellant claims under a contract for freight. The defence goes to the question how much, if anything, he ought to recover for services under that contract. The claim and the defence are on the same contract, and the evidence necessary in each may, to a considerable extent, be the same, as, for instance, on the question of the delivery of the goods by the libellant.

It is true, there is no general doctrine of set-off recognized in the admiralty; and if the damage to the respondent be greater than the whole freight, there can be no decree against the libellants for the excess. The respondents are not bound to resort to this mode of indemnity. They may have a cross-libel, if they so elect, and that must be the remedy, if they seek to recover more than the amount of the freight. If the respondents elect to set up the damages, by way of recoupment, in a suit against them, for freight, and the amount of the damages is greater than the amount of the freight, I should not sustain a new libel afterwards for the excess. See acc. Britton v. Turner, 6 N. H. 481; Fabbricotti v. Launitz, 3 Sandf. 743; Nichols v. Tremlett [Case No. 10,247]. To refuse to allow this defence, might cause much embarrassment to respondents, as in the case of a claim against a foreign ship, which may have left the port before the libel for freight is brought. To put the respondents to a cross-libel for damages in such a case, might be a denial of justice.

It is further to be observed, that this is a question of remedy, and not a question of right. It would lead to embarrassments, if different courts held different doctrines upon the rights of parties; but as to the question of remedies, each court will administer them according to its constitution and jurisdiction. I shall allow this defence. It has been proved, that there was negligence on the part of the ship; and that the respondents are entitled to recover some damages. A more difficult question is, to what amount. It appears from the evidence, that some loss would necessarily attend the transportation of those articles, at that time of the year. I am satisfied, that the great loss in this case, (above the necessary leakage,) was partly attributable to the negligence of the carrier, and partly to the negligence or misfortune of the shipper or consignee, and that it is not practicable to ascertain for how much of the loss the one party, or the other, is, in fact, responsible. I am, therefore, obliged to adopt some arbitrary rule in determining the amount to be allowed the respondents. An analogy may be found in the rule adopted by courts of admiralty, in cases of collision, when both parties are in fault. In such cases, the aggregate amount of the damages is divided equally between the parties.

Let the decree be made up by deducting for the ordinary leakage, two gallons per barrel, and three pounds per tierce. And deduct from the amount of the freight one-half of the residue of the loss; and each party is to pay one-half of the aggregate costs.

Case No. 13,145.

SNOW v. EDWARDS.

[2 Lowell, 273; 7 Am. Law Rev. 362.] [1]

District Court, D. Massachusetts. Sept., 1873.

PRACTICE IN ADMIRALTY—DECREE—REHEARING—DEFAULTED ACTIONS—LIBEL FOR REVIEW.

1. Courts of admiralty have power to vary their own decrees.

[Cited in The Madgie, 31 Fed. 927.]

2. In the American practice, a summary rehearing, on motion, can be granted only during the term at which the decree was made.

3. In defaulted actions, the summary jurisdiction to rehear is limited to ten days, irrespective of terms of court, by admiralty rule 40 of the supreme court.

4. After the term has passed in ordinary cases, and after ten days in defaulted cases, the court can entertain a libel of review.

5. Decisions and dicta on the foregoing subjects examined.

6. In a libel for review by the defendant in a defaulted action, he may contradict the officer's return in that action.

Review in admiralty. A libel for wages of the libellant's minor son on two fishing voyages was filed in December, 1871. The marshal returned personal service on the defendant [Joseph Edwards], and he was defaulted; and, after an ex parte hearing, a decree was rendered for the libellant, [Ephraim Snow] Jan. 18, 1872, and execution was issued after the lapse of ten days thereafter. On the 4th of February the defendant in that suit petitioned for a stay of proceedings and a review, on affidavit that he had received no notice of the action, and had a valid defence to the merits thereof. Upon this an order to show cause was issued; but, owing to the death of one of the proctors, nothing was done about the case until now, when the libellant moved to dismiss the petition for a rehearing.

A. French, for petitioner.

F. Goodwin, for respondent.

LOWELL, District Judge. Doubts have sometimes been expressed whether an admir-

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission. 7 Am. Law Rev. 362, contains only a partial report.]

alty court could vary its own decrees. But it will be found that, with the exception of two decisions in the court of appeal in prize causes, those doubts have been thrown out in cases which called for no decision of the question, and that, whenever the point itself has been passed upon, the power has been found to exist, and has been exercised.

The earliest recorded doubts, and those which have exercised the greatest influence on the minds of succeeding judges, are those of Lord Stowell, expressed in The Vrou Hermina, 1 C. Rob. Adm. 168, and The Fortitudo, 2 Dods. 58, in passages often cited and variously interpreted, though they are considered by Mr. Justice Story, Judge Sprague, and Mr. Chitty, to mean that the power exists, though it should be cautiously exercised. 2 Chit. Gen. Prac. 538; The New England, infra; Janvrin v. Smith, infra. If we turn from the dicta of this learned judge to his decisions, we shall find, in two cases, not so often quoted as the dicta, that he varied his own decrees. In The Herstelder, 1 C. Rob. Adm. 114, Sir W. Scott had condemned a Dutch vessel as prize; and, in a note at the end of the report (page 118), we are told that the court, fifteen days afterwards, expressed great dissatisfaction that the vessel was lying in a port in Norway instead of at Plymouth, as described in the proceedings, and he ordered the register to annul the decree. This is decisive, for the jurisdiction of the court to pass on the question of prize in such circumstances was undoubted; and it was, therefore, a reversal of a valid decree. The Fortuna, 4 C. Rob. Adm. 278, seems to me an almost equally important case in this discussion. There, a final decree had been made to restore a cargo, and afterwards the captors came in and asked for an allowance for freight; and the court so ordered, although the objection was taken that the order would be ultra vires. It is true that this proceeding is called a new case in one part of the report; but it was really an opening of the decree between the same parties, and what had been an absolute order for restoration was changed to a conditional one. If it was a new case at all, it must have been by way of review.

In 1839, Dr. Lushington varied a decree which had been made by his predecessor. The Monarch, 1 W. Rob. Adm. 21. And this case has, I suppose, fully established the practice in England. Coote, Adm. Prac. 63. It may be said that the decree was interlocutory; but it was one which disposed of the merits of the cause, leaving only damages to be assessed; so that it was a final decree, excepting for the purposes of an appeal, and no distinction was taken on that ground; but the power was denied in argument on the authority of The Elizabeth, 2 Act. 58. That book I have not at hand; but, from the statement of the case in 2 Pritch. Adm. Dig. tit. "Practice," No. 1,058, it seems that the court of appeals refused to vary its own decree, as being contrary to its practice. In The Geheimrâth, reported in a note to The Elizabeth, the same court is said to have intimated that there might be a remedy in another shape, understood by Story, J., to mean a libel of review. The New England [Case No. 10,151]. As to The Elizabeth, it may be observed that a court of appeal may well establish a different practice from that which would be proper for one of original jurisdiction, because in the court of appeal there is much less room for surprise and mistake; indeed, scarcely any danger, except from absolute fraud, which, I suppose, any court would relieve against. I may add, that our court of last resort is understood to be ready to revise its own judgments during the term, and in some exceptional cases afterwards. Hudson v. Guestier, 7 Cranch [11 U. S.] 1; The Palmyra, 12 Wheat. [25 U. S.] 1; Alviso v. U. S., 6 Wall. [73 U. S.] 457. But whatever may have been the practice in the court which decided The Elizabeth, it is not binding on the court of admiralty, as appears by The Monarch.

In the American cases, too, some doubts have been expressed by eminent judges; but the decisions have varied former decrees. See United States v. The Glamorgan [Case No. 15,214]; The Enterprise [Cases Nos. 4,497 and 4,500]; The New England [supra]. We find a distinction taken in this country between a summary application to the court during the term at which the decree was made, and a libel of review after the term has passed. Terms of court were not known in equity and admiralty, and are still of little consequence in those courts; but, under the statutes of the United States, which appoint terms for all courts, the practice has grown up of considering decrees in equity as enrolled at the end of the term, by analogy to the practice at law. During the term, the decrees can be reviewed on motion or petition, and afterwards by bill of review, at any time within five years. Cameron v. M'Roberts, 3 Wheat. [16 U. S.] 591; McMicken v. Perin, 18 How. [59 U. S.] 507; Brockett v. Brockett, 2 How. [43 U. S.] 238; Whiting v. Bank of U. S., 13 Pet. [38 U. S.] 6; Story, Eq. Pl. § 403.

Mr. Justice Curtis decided that courts of admiralty are within the rule which limits the power to grant a summary rehearing to the term at which the decree was rendered. United States v. The Glamorgan [supra]. And no doubt he would, if the case had required any decision of the affirmative, have held that during the term they had such a power; for it is one that all courts in this country, civil and criminal, exercise, when justice requires it. In 1830, Judge Betts decided that he could not vary his decree, on motion, after the term. The Martha [Case No. 9,144]. He doubted whether any practice had been established in the admiralty courts, to vary decrees at any time, or under any circumstances, though he said they had a clear right to establish such a practice; and he further doubted whether all power was not gone when final process had been executed. In 1838, the same learned

judge published his Hand-Book of Practice, in which he repeated and enlarged on these opinions; and in the same year he made rules Nos. 156 and 157, for the practice of his court upon this subject, by which he required a summary motion for rehearing to be made at the term, and required libels for review to be filed before enrolment of the decree or the return of final process; meaning, perhaps, the enrolment when no final process was required, and the return of the process, when there was any. The decision of The Martha, refusing to vary a decree, on motion, for a mistake of law, after the term had passed, was in accordance with American practice. But if the reasons for the judgment were, as they appear to have been, that a court can enlarge its own powers by a rule of its own making, or that it should refuse to exercise an admitted power until it has seen fit to regulate its own practice, they cannot so well be defended.

In 1839, before the decisions in either The Martha or The Monarch had been published, Mr. Justice Story considered this subject with his usual fulness of research and discussion, and said that he had not the slightest doubt of the competency of a court of admiralty to rehear a cause, pending the term, and before the decree was enrolled. He went on to show that, by the American practice, decrees were usually considered to be enrolled at the end of the term. Concerning a libel of review after the term, his opinion leans decidedly in favor of such a jurisdiction. The New England, ubi supra. Mr. Justice Grier, in the case in which he expresses a doubt about libels of review, considers it clear that the court may grant a rehearing before execution executed, according to a rule of the district court for the Eastern district of Pennsylvania. The Enterprise, ubi supra.

In 1842, Judge Sprague took jurisdiction of a libel of review filed after the term, in an opinion in which he denies the soundness of the distinction taken by Judge Betts, as to process having been fully executed. His reasoning is made with evident reference to the opinion expressed in Judge Betts' book, then lately published, though he does not cite it. Janvrin v. Smith [Case No. 7,220]. In 1846, he granted a rehearing in a case which had been fully tried; and on the rehearing he reversed his former decree, as it would seem from a note at the end of the report of the case. Perkins v. Hill [Id. 10,986]. The records do not show that he entered a formal decree in conformity with his first opinion; but the prevailing party might have had it entered as of course. In 1849, the same learned judge varied a decree fifteen days after it had been made and had been fully executed, by requiring a libellant, on motion of a third person interested in certain proceeds in the registry, to repay into court the sum of one hundred dollars, out of a larger sum which had been decreed him out of those proceeds by a mistake on the libellant's part in making up his decree, and that a mistake not apparent on the record. 21 Records, p. 189; 34 Records, p. 135. In 1865, Mr. Justice Davis, of the supreme court, upheld the jurisdiction of the district court to entertain a libel of review after the term had passed. Northwestern Car Co. v. Hopkins [Case No. 10,334].

It appears, then, that the power of an admiralty court of original jurisdiction to vary its own decrees has been freely exercised in England and in America, and has never been denied in any case that called for a determination of the question, excepting that in America the summary process by motion has been held to be inapplicable after the term, which is the American equivalent of a decree enrolled, and, on the whole, a very convenient one; and excepting that some courts appear to consider the power gone after the return of final process.

There is a further difficulty in this case, from the fact that this was a defaulted action, and rule 40 of the supreme court regulates such actions to a certain extent, by saying that the court of admiralty may, on motion of the defendant and the payment of costs, rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof, at any time within ten days after the decree has been entered. It cannot be understood that this rule is intended to take away the jurisdiction of libels of review generally, because it makes no mention of any but defaulted actions. If, by mistake or fraud, a libel should be pronounced deserted, or if in any contested case, as were some of those I have above cited, justice could only be had by a libel of review, this rule does not touch them. And, upon consideration, I am of opinion, and so decide, that the supreme court, in passing this rule in 1845, while Judge Story was still on the bench, and must have had in mind the doctrines discussed and the opinions expressed in The New England, did not intend to regulate libels of review at all, but only to do what, indeed, the language of the rule fairly imports, provide for the rights of any defendant to have such an ex parte decree rescinded on motion, though the term should have lapsed within ten days. It is probable that the practice in defaulted actions was in need of regulation at that time. The old practice of the admiralty was very slow and cautious in that class of cases. It required a delay of a year and a day in all actions in rem, where no claimant appeared; and this was recognized as the rule so late as 1839, by the supreme court of Alabama. Read v. Owen, 9 Port. (Ala.) 180; and it is still the rule in prize causes, when condemnation is asked for on mere default. The Julia [Case No. 7,576]. In personal actions, there were monitions, defaults, and decrees, in great numbers, before execution; and, I suppose, by the early practice a decree was not entered on the merits in personal actions until an

appearance had been compelled by attachment. Although, therefore, a mere motion cannot be entertained after ten days, I do not believe the rule was intended to deprive a defendant who has had no notice of the action, or, for any other reason, is entitled to review it, of his libel of review. A claimant, say, in an action in rem, whose ship has been seized, but who has had no actual notice, or was unable to attend; or in the case put by Judge Sprague, of a service by attachment of goods or effects without personal service; or in the case at bar, if it be true that the wrong person was served with process, there is no other remedy; for the appeal, like the motion for rehearing, is limited to ten days.

Janvrin v. Smith [supra] was a defaulted action; but as it was decided about three years before the rules of the supreme court were adopted, it is not an authority for their interpretation; though, in the opinion as published in 1861, there is a reference to the rules as if they existed in 1842, an oversight, no doubt, in revising the opinion for the press, but one which tends to show that Judge Sprague, who himself revised the opinions, saw nothing in the rules adverse to his decision. The case which is reported on appeal as The Enterprise [Case No. 4,497] consisted of two actions, in one of which a decree by default was opened by Judge Sprague; but, on examining the docket and records, I find that the account of the case given is incorrect, in this, that the application was not made after the adjournment of the court without day, but before, and, what is of more importance, it was made within ten days after the decree; so that it is not an authority upon the point now in judgment. However, for the reasons I have given, I think a libel of review may be maintained after ten days.

The last point is, that the officer's return of personal service on the defendant is conclusive. I might have thought so, but for the very important case of Brewer v. Holmes, 1 Metc. (Mass.) 288, in which the supreme court of this state, giving their opinion by Shaw, C. J., held, that on a petition for review under the statute of Massachusetts, which, like a libel for review, is an equitable proceeding, the plaintiff in review, who was the defendant in the original action, might prove, in contradiction of the officer's return, that he had received no notice of the action. By reference to that opinion, it will be found not to rest on any ambiguity in the return, or other circumstance peculiar to that case, as was ably argued before me, but upon the broad doctrine of equity and justice, in contradistinction to technical rules. It was argued in that case that the petitioner might have his remedy against the officer for a false return; to which the learned judge replies: "Supposing he could, which may be doubted, the result would be that the present respondent, the original plaintiff, would have a sum of money, which, in the case supposed, he had no just claim to recover, and the officer would be compelled to pay a like sum for a slight and perfectly innocent mistake. An officer goes to a house to leave a summons with John Smith. Not knowing the person, he is led to believe, without fault of anybody, that his brother, James Smith, is the man he is looking for; and he leaves the summons with him, and makes his return accordingly. This is a false return. If somebody must necessarily suffer loss, it is, no doubt, right that it should fall on him who made it. But, if it is seasonably discovered in time to prevent loss to anybody, why should not the remedy be applied, and the rights of all parties be secured?" I am content to follow the reasoning and practice of that case.

The application here is scarcely formal enough to be called a libel of review, though it is so indorsed. I think, however, as the whole matter has stood open by the tacit consent of the parties, and no rights have been changed, that I may treat this as an application for leave to file a libel of review. That is an application which should accompany the libel; and the practice should be, I suppose, to hear the preliminary question first, as is done in nearly all cases under the state statute. When I heard argument the other day, I understood that the parties were only prepared to present the legal aspects of the case, and so I did not go into the evidence concerning want of service. It would be hardly worth while to have two more hearings, and I will hear the parties on the whole case. The petitioner should at once prepare a formal libel, of which a precedent will be found in Janvrin v. Smith, 25 Records, p. 345, and I have no doubt the respondent will waive notice; and then the case can be heard as soon as possible on all the questions together. If the decree should be varied, the present respondent will have the right to take all the questions, including the power of this court in the premises, to the court of appeal. Libel of review to be filed within one week.

SNOW (ELFELT v.). See Case No. 4,342.

Case No. 13,145a.

SNOW v. The INCA.

[17 Betts, D. C. MS. 28.]

District Court, S. D. New York. Nov. 6, 1849.

SHIPPING — DAMAGE TO CARGO — DELIVERY ON WHARF—PLACING IN STOREHOUSE—NOTICE.

[1. Delivery of goods upon the wharf is not a delivery to the consignee, unless he has authorized such a delivery, or there is proof of a well-defined and notorious custom to that effect.]

[2. Placing goods in a public storehouse without notice to the consignee, when he is known, does not release the liability of the ship for their safe keeping and ultimate safe delivery.]

[3. Publication of notice in a newspaper, requiring consignees to present their permits within five days, or the goods will be sent to the public store, is not sufficient to charge a consignee with notice, in the absence of positive provision of law to that effect, or proof that the notice actually reached him.]

[This was a libel by Nathaniel Snow against the bark Inca to recover damages for injury to goods.]

BY THE COURT. The bills of lading executed by the master of the barque at Marseilles admitted the casks therein referred to to have been received on board in good order, "weight and contents unknown." On the inspection of the contents at the public store in this city, it was found that the cream of tartar was damaged, and that damage was estimated by the public examiner at 25 per cent. That estimate he confirmed on his examination in court as a witness. The theory of the libellant is that the drug was injured from the casks' having been badly stowed, and being wet by bilge water, in which was also dissolved portions of a barrel of verdigris, stove on the passage. Two port wardens and the public examiner testify that the injury arose in that manner. Two druggists and chemists of great experience and learning testify on the part of the claimants that it is impossible, from the description given of the injury, to determine whether it was caused by dampness from salt or fresh water; and the first mate testified that the barrels in question were landed on the wharf from the vessel, and lay there, exposed to the melting of snow, for a day and night, or longer. In the judgment of the last-named witness, such exposure would account for the stains to the casks and contents described as the alleged injury. It must be taken as established, upon the proofs before the court, that the goods were laden on board in good order. The responsibility of the ship then becomes absolute so to deliver them, the dangers of the sea excepted. The defence, equally with the prosecution, unite in proving that no damage accrued from the perils of the sea; the vessel did not leak, and shipped no water.

The claimants prove by the master the casks were taken out of the ship in as good order as they were received on board, and this, it is contended, is a delivery and acquittance under the bill of lading. No permit was obtained for the delivery of these goods, and they were, by general order, sent to the public store. The delivery on the wharf is in no case a delivery to the consignee, without evidence of his authorization so to make it, or at least proof of a well-defined and notorious custom to that effect. Ostrander v. Brown, 15 Johns. 39; Gibson v. Culver, 17 Wend. 305; House v. The Lexington [Case No. 6,737]; The Grafton [Id. 5,-656]. Placing the goods in a public store, without notice to the consignee, when he is known, would not release the liability of the ship for their safe keeping and ultimate safe delivery. House v. The Lexington [supra]; Burgthal v. The George Skolfield [Case No. 2,155]. It would therefore not relieve the claimants from their responsibility, if it be proved that the damage accrued by wet or dampness to the casks on the dock. The ship had no right to leave them there without previous notice to the consignees. I lay little stress on this branch of the case, because the mate is contradicted by Jervis, the customhouse inspector, and the circumstances of the case support his evidence, against that of the mate, in this particular. The only proof of notice is the publication in the newspapers requiring the owners and consignees of goods on board the ship to present their permits within five days, or that the goods would be sent to the public store. No evidence is offered raising an implication that the claimants had seen those publications. The insertion of notice in the public papers does not charge a party with knowledge of it, unless it be made evidence by positive law, or some circumstance be proved indicating that it actually reached the party interested to receive it. 1 Phil. Ev. 4082; Id. 77 (Cow. & W. Notes, 1145, 1146). Evidence is not, therefore, furnished, authorizing the claimants to place the goods upon the dock, and leave them exposed there to injury from dampness. The mate swears the casks lay on the wharf, in the snow, and, in the opinion of experts, such exposure would account for the injury, the cream of tartar was subsequently found to have sustained; but as before remarked, the mate is probably mistaken as to this fact.

It is unnecessary to consider what effect sending the goods to the public store would have on the contract in this case. The consignees were not named in the bill of lading, and no evidence is given that the master or owners of the barque knew to whom the goods were to be delivered. It is not intended to say, under such circumstances, the ship may be made liable for injuries to the goods in the public store, nor but that the notices given in the newspapers were sufficient to justify sending the goods there. But it is clearly proved that the goods were not exposed to dampness in the store, and could not, therefore, have been so injured at that place; and upon the question whether the injury arose from internal causes, or from fresh water or bilge water, the clear preponderance of evidence is that it was occasioned by one or the other of the two latter causes, and not from inherent defects, for neither of which the ship must be held responsible, whether the damage accrued on shipboard or on the dock.

The evidence is reasonably satisfactory that the injury was 25 per cent. upon the value of the contents in the damaged casks. The value of the nine casks not being proved, a reference must be had to ascertain that value, unless it be agreed between the par-

ties, and a decree be rendered in favor of the libellants for 25 per cent. thereon, with costs to be taxed.

SNOW, The LUCINDA. See Case No. 8,591.
SNOW (MAYO v.). See Case No. 9,356.

Case No. 13,146.

SNOW et al. v. MILES.

[3 Cliff. 608.][1]

Circuit Court, D. Rhode Island. June Term, 1873.

ACTION—FORM—OBJECTIONS—WAIVER—INTERNAL REVENUE STAMP—PLEADING—PAYMENT—CONTRACTS—SALE.

1. Objections to the form of an action are usually considered as waived by the submission of a case to the decision of the court upon an agreed statement of facts, unless such objections are expressly reserved for the consideration of the tribunal to which the submission is made.

2. Where a contract was alleged to be shown by letters, it was *held* that all objection to their admissibility on the ground that they were not stamped—the act of congress then requiring contracts in writing to be stamped—was waived by the annexing of the letters, without reservation, to the agreed statement of facts under which the case was submitted.

3. Where the declaration contains the general counts in addition to a special count which may contain many causes of action, the payment of money into court, generally upon the whole declaration, is not an admission of the defendant's liability, upon the special count.

4. By such payment the defendant does not admit any specific contract; the only effect is, that he admits a liability on some one or more of the causes of contract set out in the declaration, not exceeding the amount paid into court.

[Cited in The Rossend Castle, 30 Fed. 464.]

5. An offer of a bargain from one person to another imposes no obligation upon the one unless it is accepted by the other according to its terms.

6. Departure from or qualification of those terms invalidates the offer.

7. Until the terms of the agreement have received the assent of both parties, the negotiation is open and imposes no obligation.

This was an action of assumpsit [by J. L. Snow and D. B. Lewis against Dawson Miles], and the case came before the court upon an agreed statement of facts. On the 25th of November, 1868, the parties entered into a written contract, as set forth in the declaration, in which the defendant promised to deliver to the plaintiffs, on or before the 15th of February of the next year, two hundred tons of logwood of a good merchantable quality on the wharf at Boston, at $19.50 gold per ton, and the agreed statement showed that he failed to deliver the logwood at the time specified in the contract. Importations failing, the defendant, on the 13th of May, 1869, wrote to the plaintiffs that he did not wish that any expenses should be incurred in the matter; that he had two small vessels of one hundred and sixty tons each in the foreign market, which he had directed his agent to load with logwood without regard to price, and that he believed the vessels would get cargoes, and that the vessels should "be here," that is, would arrive in the port of Boston during the next month. Pursuant to these representations he requested the plaintiffs to await the arrival of those vessels, assuring them that thereupon he would deliver the logwood, as specified in the written contract. They replied upon the 15th of the same month, accepting the proposition, and requested the defendant to advise them of the arrival of the vessels, and stated to the effect that they, when so advised, would promptly inform him how to ship the logwood to them, evidently showing that they did not expect any further communication from him until the vessels should arrive. Delay followed, and on the 8th of July the plaintiffs wrote again to the defendant, referring to his last letter, and requested a reply by return mail in explanation of the delay to deliver the logwood. None appeared to have been sent until the 23d of September following, when the defendant wrote to the plaintiffs that he was prepared to deliver the logwood, and requested them to state on what wharf they would have it landed. Receiving no satisfactory reply to their letter of the 8th of July, the plaintiffs on the following day commenced the present action, claiming damages for the non-fulfilment of the contract.

Thurston, Ripley & Co., for plaintiffs.
Edmund Burke, for defendant.

CLIFFORD, Circuit Justice. Damages are claimed in the first count for the breach of the contract made on the 13th of May, 1869, for the delivery of two hundred tons of logwood in the month of June following; but the declaration contains a second count, in which the original contract is set forth according to its tenor and effect, and which contains the further allegation that the time for the delivery of the logwood was subsequently postponed, and the breach alleged is that the defendant did not deliver the same during the month of June, as stipulated between the parties in the form of the contract as modified; appended to the special counts are counts also for goods sold and delivered, and the common counts.

Argument to show that the defendant was guilty of a breach of his contract is unnecessary, as that is admitted. The only question of much importance submitted to the court in the agreed statement being, whether the damages of the plaintiffs shall be assessed as of the 15th of February next after the date of the original contract, or as of the 30th of June of the same year. It is admitted by the defendant that he is liable for a

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

breach of his contract, the only question being whether the damages shall be the difference between contract price and the market value of the logwood in February, 1869, or the June of the same year. Some doubts are expressed by the defendant whether the declaration is sufficient to warrant a judgment for the plaintiffs if the court adopts the first theory, which, as he contends, is the only theory the facts will sustain; but the court is of the opinion that those doubts are without any foundation, as the agreed statement in terms submits that question to the determination of the court.

Objections to the form of the action are usually considered as waived, by submitting the case to the decision of the court upon an agreed statement of facts, unless such objections are expressly reserved for the consideration of the tribunal to which the submission is made. Ellsworth v. Brewer, 11 Pick. 318; Kimball v. Preston, 2 Gray, 567; Scudder v. Worcester, 11 Cush. 574.

But it is not necessary to resort to that well-settled rule of practice in this case, because it is expressly stipulated between the parties that the question for the examination of the court is whether the damages shall be computed as of the date first mentioned, or of the second date, which is all that need be said upon the subject.

Suppose that is so, then the defendant admits that he is liable in damages for the difference between the contract price of the logwood and the market price of the article on the 15th of February, when he contracted to deliver it to the plaintiffs. Large damages, however, are claimed by the plaintiffs, as the market price of the article increased before the 30th of June in the same year, when, as they contend, the breach of contract actually took place.

Their theory is, that the time for the delivery was extended, by mutual consent of the parties. from the 15th of February to the 30th of June, as evidenced by the correspondence. Two answers are made by the defendant to that proposition: 1st. He contends that it amounts to a new contract, and that it cannot be supported as a new contract, as the letters composing the correspondence are without the requisite stamps. 2d. His second proposition is, that the theory is not supported by the true construction of the letters. 1st. Strong doubts are entertained whether letters of the kind are required to be stamped, as no one of them contains a contract; but the better answer to the objection in this case is, that the letters are not offered to prove a new contract, but only to show that the condition of the subsisting contract between the parties was waived; but if it were otherwise, the objection cannot prevail, as the act of congress does not make the contract void for want of a stamp. Contracts not stamped are not admissible in evidence; but the objection in this case comes too late, as the letters without any objection or reservation of any kind are annexed to and made a part of the statement of facts, and must therefore be considered as before the court by the consent of both parties, as evidence in the case.

Before discussing the second question, it may be important to inquire whether the act of defendant in paying money into court admits the claim of the plaintiffs, as set forth in his second special count. It appears that the defendant, at the return term, under the common rule, paid $400 into court, and the plaintiffs, four days before the agreed statement of facts was signed, took the same out of court.

Serious question would arise if the writ contained only the special count, alleging the breach in June, whether that payment into court, under the common rule, did not admit the breach as alleged, and entitle the plaintiffs to a judgment on that count.

Besides the special counts, however, the declaration contains a general count of indebitatus assumpsit, and the common counts in such a case. The better opinion, as tested by more recent authorities, is, that the payment of money into court is not an admission of all the counts in the declaration. Where there is a count on a special contract, together with the general indebitatus counts, the payment of money, generally upon the whole declaration, says Phillips, is an admission of the defendant's liability upon the special count, and there are other authorities to the same effect. 1 Phil. Ev. 4 (Am. Ed. by Edwards, 788); Jones v. Hoar, 5 Pick. 290; Huntington v. American Bank, 6 Pick. 347.

Undoubtedly the rule is so where a special cause of action only is set out in the declaration; but the rule is now well settled otherwise, where the declaration. as in the present case, contains the general counts in addition to a special count which may include many causes of action, as the defendant in such cases, by payment of money into court, does not admit any specific contract, the only effect being that he admits a liability on some one or more of the causes of action set out in the declaration, not exceeding the amount paid into court. Hubbard v. Knous, 7 Cush. 557.

Repeated decisions have established that rule both in England and in this country. Kingham v. Robins, 5 Mees. & W. 94; Archer v. English, 1 Man. & G. 873; Story v. Finnis, 6 Exch. 123. Evidently, therefore, the case must depend upon the legal effect of the letters given in evidence, as the agreed statement confers no authority upon the court to draw any other inferences than such as their language imports. Weighed in that light, I am of the opinion that those letters do not establish a mutual agreement between the parties to extend the time of delivery, as alleged in the plaintiffs' declaration.

Coming to the correspondence, the defendant, in his letter of May 13, states to the effect that he has two small vessels at Jamaica,

one hundred and sixty tons each, that should be here next month, and that he has ordered his brother to load them with logwood at any price, "therefore I want you to await their arrival, when the first shall be delivered to you"; adding, "Sooner or later you will get your two hundred tons of logwood." Such language cannot be construed into an absolute promise or statement that the vessels would arrive in June, nor that the two hundred tons of logwood would be delivered in June, but only that he confidently expected that the vessels would arrive in June, and that the plaintiffs, on their arrival, should have their contract filled, as originally promised. Grant all that, still the suggestion is, that the plaintiffs understood the matter differently, and reference is made to their letter as proving that suggestion, and it must be admitted that its tendency is that way, as they say in their reply, "Yours is received, advising you are to have two cargoes of logwood from Jamaica next month, and proposing to fill our contract from these vessels. We accept the proposition, and will thank you to advise the arrival of the vessels, when we will promptly give" the necessary directions.

It is an undeniable principle of the law of contracts that an offer of a bargain from one person to another imposes no obligation upon the former unless it is accepted by the latter according to the terms in which the offer was made; any qualification of or departure from those terms invalidates the offer, unless the same be agreed to by the person who made it; until the terms of the agreement have received the assent of both parties the negotiation is open, and imposes no obligation upon either. Elliason v. Henshaw, 4 Wheat. [17 U. S.] 228.

Beyond all doubt the reply of the plaintiffs to the offer made by the defendant is a wide departure from the proposition tendered by the latter, and it is quite probable that the modification of the proposition offered was made for the purpose of securing better terms than those proposed by the defendant in his letter; but the insuperable difficulty in the plaintiffs' case is, that the agreed statement does not show that the suggested modification of the offer was ever accepted by the defendant; and the rule is that until the terms of the agreement have received the assent of both parties, the negotiation is open. Taken as made, the offer was never accepted by the plaintiffs; and there is no evidence whatever to show that the defendant ever accepted the modification suggested by the plaintiffs, but both parties suffered the matter to drop without completing any new arrangement, so that the question must turn upon the construction of the first letter of the defendant; and in respect to that, it is clear that he did not make an absolute offer to deliver the logwood in June, as assumed in the declaration. All he did was to express a confident opinion that the vessels would arrive in June, and promised to the effect that the plaintiffs should have their logwood from the first cargo; but they never accepted those terms, and the matter was suffered to drop without any new arrangement having been accepted. Tested by these views, it is clear that the plaintiffs are entitled to recover as damages the difference between the contract price of the logwood and the market value of the same on the 15th of February, at the time the defendant stipulated to deliver the same in the original contract.

Hearing if necessary as to judgment.

Case No. 13,147.

SNOW v. TAPLEY.

[3 Ban. & A. 228;[1] 13 O. G. 548.]

Circuit Court, D. Massachusetts. Feb. 4, 1878.

PATENTS—NOVELTY.

The invention claimed in letters patent issued to George K. Snow, December 17, 1872, numbered 134,105, for machine for uniting paper and cloth: *Held*, not invalid for want of novelty.

[This was a bill in equity by George K. Snow against George W. Tapley for the infringement of letters patent No. 134,105, granted to complainant December 17, 1872.]

Chauncey Smith and Benjamin F. Thurston, for complainant.

Charles F. Blake, Edmund Wetmore, and William A. Jenner, for defendant.

SHEPLEY, Circuit Judge. In this case, upon a review of the evidence, I find:

First. That the letters patent issued to complainant, December 17, 1872, numbered 134,105, are not void by reason of any anticipation of the invention therein described by the description in the English letters patent to Eugene Corliss, or by any use proved in the case of the Corliss machine.

Second. That the Gibson machine, set up in the answer of the defendant, was not an abandoned experiment or an abandoned machine, the disuse of the machine for a time, proved in the case, being satisfactorily accounted for by proof of circumstances connected with demand and supply of the product and independent of the efficiency of the mechanism, and, therefore, that the use of the Gibson machine was, and is, open to the defendant.

Third. That a material and essential step in the process of continuously uniting paper and cloth taken from separate rolls or packages. described in the patent of the complainant and in the first claim of the letters patent issued to him, is the process of applying paste or other adhesive material to the cloth alone, by passing the cloth through or past the paste in the manner and by the instru-

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

mentalities described in the specifications and drawings of said patent.

Fourth. I do not find in any contrivance proved to exist prior to Snow's invention, or in any process proved to have been practised prior to the invention of his process or art, any anticipation of Snow's process as a whole, treating his mode of applying the paste to the cloth, as I have in the third clause, as an essential element in his process.

Fifth. I allow the defendant to amend his answer (motion for leave so to do having been made before final argument), to allege that the patentee has forfeited his right to a patent, by allowing the invention to be in public use and on sale in this country for more than two years before the application for the patent was made.

Sixth. An interlocutory decree will be drawn up and submitted to the court in accordance with these findings; the case, after the amended answer is filed, will be opened for the taking of testimony by either party for the space of sixty days thereafter, on the issue solely of prior public use and sale, and no other issue; such amended answer to be filed within ten days.

Case No. 13,148.

SNOW v. TAYLOR.

[4 Ban. & A. 5;[1] 14 O. G. 861.]

Circuit Court, D. Massachusetts. Oct. 9, 1878.

PATENTS—PAPER COLLARS—METHOD OF CUTTING—PATENTABLE INVENTION.

Letters patent No. 132,547, granted to George K. Snow, October 29th, 1872, for a method of cutting collars from sheets of paper, etc., the claim of which is for: "The method of cutting two or more series of collars, side by side, from a strip of paper, or other suitable material, in such a manner that the wide parts of the collar of one series shall come opposite to the narrow parts of the adjoining series, substantially as described," *held*, in view of the state of the art, not to describe a patentable invention.

[Cited in Walker v. Rawson, Case No. 17,-083.]

[This was a bill in equity by George K. Snow against Varnun N. Taylor for the infringement of letters patent No. 132,547, granted to complainant October 29, 1872.]

Chauncey Smith and William W. Swan, for complainant.

Edmund Wetmore and William A. Jenner, for defendant.

LOWELL, District Judge. This suit was brought for the infringement of two patents; but as to one of them no evidence was taken, and it is not now under consideration. Patent No. 132,547, which is the one in controversy was issued to the complainant in October, 1872. It states the saving of material which is obtained by cutting out collars in such a way as to bring the wide parts of one series opposite the narrow parts of the adjoining series, and gives several illustrative figures or patterns of collars cut in this mode from a strip of paper. The claim is for: "The method of cutting two or more series of collars, side by side, from a strip of paper, or other suitable material, in such a manner that the wide parts of the collar of one series shall come opposite to the narrow parts of the adjoining series, substantially as described."

That linen collars have been cut in this mode, by hand, long before the date of the invention is admitted. It is further a matter of common knowledge, and is mentioned by some of the witnesses, that, in various branches of manufacture, material has been cut in such a way as to bring the wide part of one article of the manufacture against the narrow part of the next, so as to save material. In this state of facts, it is clear that a patent for this mode of using material for collars is not patentable. See Milligan & H. Glue Co. v. Upton [Case No. 9,607], decided in this district, October, 1874, and the cases cited in the opinion of Clifford, J. That decision has lately been affirmed by the supreme court. See, also, case decided at the same term of this court, in which the appeal was not prosecuted, and the decree was affirmed. Needham v. Washburn [Id. 10,082]; and Brown v. Piper, 91 U. S. 37.

The complainant contends that his claim may be limited to collars cut from a strip precisely wide enough for two collars or two series of collars, and for cutting such a strip so that each edge of the strip shall form an edge of each collar. If such a limitation were adopted, we think the method described would only be a neat application of a well known operation—that is to say, the only improvement would be in cutting a strip of precisely the proper width for two collars, and would not be patentable. But the patentee, by his description, his drawings, and his claim, distinctly refuses to be thus limited. As he is not content with claiming whatever of machinery or other means he may have invented for cutting collars—and it is understood that he has patents for these—but attempts to monopolize a well known mode of cutting generally, independently of means, we must pronounce his patent void.

Bill dismissed with costs.

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

SNOW (UNITED STATES v.). See Cases Nos. 16,349 and 16,350.

SNOW (WEED v.). See Case No. 17,347.

Case No. 13,149.

SNOW v. WOPE.

[2 Curt. 301.][1]

Circuit Court, D. Massachusetts. May Term, 1855.[2]

SEAMEN—SHIPPING ARTICLES—ACT OF CONGRESS—POWER OF MASTER TO IMPRISON—TORT.

1. If the shipping articles do not sufficiently describe the voyage, the seaman may leave the vessel at any time; and if the master imprison him because he refuses to remain and do duty on board, this is a tort.

[Cited in The Gem, Case No. 5,304.]

2. A description of a voyage in the articles, as being, "from the port of Boston to Valparaiso, and other ports in the Pacific Ocean, at and from thence home, direct, or via ports in the East Indies, or Europe," is not a compliance with the requirement of the 1st section of the act of July 20, 1790 (1 Stat. 131), and the contract is void by the 10th article of the 1st section of the act of July 20, 1840 (5 Stat. 395).

[Cited in The Hermine, Case No. 6,409.]

3. The power of the master to imprison the seamen on shore, *held* not to exist in this case.

[Cited in The Elwin Kreplin, Case No. 4,427.]

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

In admiralty.

Mr. Dehon, for appellant.

C. G. Thomas, contra.

CURTIS, Circuit Justice. The appellee, Edward Wope, filed his libel in the district court, against Loring Snow, alleging that the latter was master of the ship Loochoo, on a voyage from Boston to Valparaiso; that the libellant was a mariner on board, and was entitled to be discharged on arrival at Valparaiso; that he there requested the master to discharge him, and, instead of doing so, the master caused him to be imprisoned by the local authorities on shore, for the space of thirty-four days, in a common prison of the place; and when brought on board, at the expiration of that time, in order to compel him to do duty on the passage to the United States, confined him in irons without food for the space of about twenty-four hours. Both the confinement in the prison, on shore, and afterwards on shipboard, are admitted; and the alleged justification is, that the libellant, being bound to continue on board and do his duty as a mariner, insisted on being discharged at Valparaiso, and refused to do any more duty on board; and the imprisonment on both occasions was resorted to necessarily, as a means to reduce the libellant to due subordination. The first question is, whether the libellant was entitled to his discharge at Valparaiso; for, if he was, the imprisonment on shore and on shipboard, was illegal. I am of opinion he was entitled to his discharge.

By the 1st section of the act of congress of July 20, 1790, it is provided, that the master of such a vessel as this, bound on a foreign voyage, shall make an agreement, in writing or print, with every seaman or mariner, "declaring the voyage or voyages, term or terms of time, for which such seaman or mariner shall be shipped." And if the seaman shall not have signed such a contract, he is declared not bound by the regulations, nor subject to the penalties of the act. The act of congress of July 20, 1840, in the tenth article of its first section, declares: "All shipments of seamen made contrary to this and other acts of congress, shall be void; and any seaman so shipped may leave the service at any time," &c.

The articles signed by Wope, describe the voyage to be, "from the port of Boston to Valparaiso, and other ports in the Pacific Ocean, at and from thence home, direct, or via ports in the East Indies, or Europe." It would have been within this description, after leaving Valparaiso, to sail to any number of ports in the Pacific Ocean, then to visit in succession every port in the East Indies, or in Europe, and to occupy such time in their passages and in staying in the different ports, as the master, under the directions of the owner of the ship, might think fit. It is manifest that no definite and specific voyage, nor even any limited number of voyages is here described; but liberty exists to carry on any number of voyages, during such time as the vessel may last, at the discretion of the master, provided that the first port to which the vessel goes is Valparaiso, and her ultimate port of destination is Boston. These are the only fixed termini, and between them, there are no limits of time, and scarcely any of space. If this is a sufficient description to satisfy the requirement of the act, it is an idle requirement, and affords no protection to the seaman. It leaves him bound for a service, which is not perpetual, only because the vessel may not last as long as his life; or it may be the pleasure of the master or owner to terminate it by a return to the home port of the vessel. Now I cannot concur in the opinion of Judge Hopkinson,—Magee v. The Moss [Case No. 8,944],—that when articles contain too broad a description of a voyage to satisfy the requirement of the act of congress, a court of admiralty will take care that an oppressive use is not made of it, but that as long as the master does only what the court thinks reasonable, under such articles, the seaman cannot leave the service. Independent of the express provisions of the act of 1840, I should prefer the contrary opinion of Judge Ware,—Pratt v. Thomas [Id. 11,377]. But under the act of 1840, I take it to be clear, that if the owner or master has not obeyed the act of 1790, in describing the voyage or voyages in the articles, the seaman may leave the service at any time. In my opinion, it was not obeyed in this case.

I feel no inclination to strain after a con-

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

[2] [Affirming Case No. 18,042.]

struction of the description of the voyage, which might by possibility bring it within the act of congress. The master or owner chooses his own phraseology, and should take care to use such as will not give rise to any suspicion, that he designed to have the contract vague, to leave him the more power over the men. The policy of the law forbids this. I know many commercial enterprises are so undefined at their outset, that they cannot be described by precise geographical limits. Such are most whaling voyages. But some description of the character of the voyage, or the term of time not to be exceeded, can, with due care, give to these contracts that certainty, which justice to the men, as well as the positive demands of the act of congress, require.

My opinion therefore is, that Wope was entitled to his discharge when he requested it, and consequently that his imprisonment was illegal. But if he had not been entitled to it, I should still be of opinion, that the master committed a tort, by confining him on shore in the common prison. The consul of the United States for that port was absent. His clerk came on board and saw the libellant, and told him he was not entitled to his discharge, and appears to have aided the master to procure the interposition of the local authorities. If this had been done by the consul, under the powers conferred on him by the act of congress of July 20, 1840, and there was no illegality in the conduct of the master in applying to him for his action in the matter, then, as was held by this court in Jordan v. Williams [Case No. 7,528], the master would not have been liable for such imprisonment. But no one but a duly appointed consul or commercial agent of the United States, is intrusted by the act of congress, with power to employ the local authorities to check insubordination. No justification can be found in the act of the clerk or assistant of the consul. The master must rely in this case upon the authority with which he is clothed, by the marine law, to imprison his men; and if it had been true, that the libellant was bound to continue on board and do duty, and that he insisted on his discharge and refused duty, no case existed for confining him in a foreign jail; especially in such a prison as is described by the testimony in this case. It is suggested, that the vessel was lying in a roadstead, taking in cargo, and that people from the shore were frequently on board; and that four others of the men were combined with the libellant, and also refused duty. But the crew and officers were twenty-one, all told; there was no insubordination among the rest of the crew; nor was there any difficulty with these men, save that they claimed a right to be discharged, as they alleged, pursuant to the contract made with them in Boston. Under these circumstances, there was no such necessity for removing the men on shore, and confining them in the common prison of the place, as can justify the master in doing so. I have not thought it necessary to investigate minutely, the question whether the libellant was entitled to his discharge at Valparaiso, by virtue of a stipulation to that effect made by him with the shipping master, at the time he signed the articles, and which he believed the shipping master put down on the articles. The testimony on this point is conflicting, and the phraseology of the articles, standing by itself, is equivocal. If I were obliged to decide either way, I should probably say that I was not dissatisfied with the finding of the district judge on this subject. But I am convinced the libellant believed he was entitled to his discharge, and on the other hand that the master had no knowledge of the special stipulation on which the libellant relied; and that the master acted in good faith, in refusing to discharge him. As the master committed a tort, he must pay such damages as to indemnify the libellant, even though he acted under the belief that he was doing his duty. I must say, however, that his omission to visit the men, while at the prison, and his total neglect of their necessities there, which is not satisfactorily accounted for, in my judgment aggravates his wrong. But I shall not disturb the decree of the district court as it respects the amount of damages. In an action of tort, when the damages are within the sound discretion of the court, of the first instance, either some error in principle, or a pretty wide departure from my individual views respecting their amount, would alone induce me to reverse a decree, in order to change the damages. I perceive no such departure, and no such error in this case. By an amendment, the libellant claims additional damages for bringing him to Boston, and leaving him here instead of at Valparaiso. But it was admitted that wages had been sued for and recovered for the entire voyage; and I think this prevents the libellant from treating the master as a wrongdoer, in bringing him to Boston, instead of leaving him at Valparaiso.

The decree of the district court is affirmed, with six per cent. damages, and costs.

[See Case No. 13,141.]

Case No. 13,150.

SNOWDEN v. McGUIRE.

[2 Cranch, C. C. 6.] [1]

Circuit Court, District of Columbia. July Term, 1810.

EVIDENCE—COSTS—CORRECTING VERDICT.

1. In an action of assault and battery, the questions, "Who printed the handbill?" and "Where was it printed?" are too general; not showing any agency of the defendant.

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

2. If the jury give only one cent damages, believing that it would carry costs, when it would not, they will not be permitted, after the verdict has been taken and they have been discharged from the cause, to go out again to alter their verdict.

Assault and battery.

THE COURT refused to suffer the plaintiff's witness to be asked by the plaintiff's counsel where the handbill was printed, as being too general. THE COURT, for the same reason, refused to suffer the witness to be asked who printed it. (THRUSTON, J., absent.)

After the verdict had been taken for one cent damages, and the jury had been discharged from the cause and retired from the bar, but not out of the passage to the court-house, the foreman came into court, and informed the court that they had understood that one cent damages would carry the costs; and that they supposed, as the assault was admitted, they were bound by law to give damages enough to carry the costs, but they now understood that one cent would not carry the costs.

Mr. Taylor, for plaintiff, prayed the court to suffer the jury to retire again and correct their verdict, and stated that such was the practice in Virginia.

Mr. Jones, for defendant, objected.

THE COURT (THRUSTON, Circuit Judge, absent) refused.

SNOWDEN (MILLETT v.). See Case No. 9,600.

Case No. 13,151.

SNOWDEN v. PIERCE.

[2 Hayw. & Haz. 386.][1]

Circuit Court, District of Columbia. 1861.

PATENTS—EXAMINERS—APPEAL—ACT MARCH 2, 1861—SECRETING INVENTION.

1. Under the circumstances of this case, it was not necessary for the appellant to go before the examiner-in-chief under the new law, and then appeal to the commissioner, before appealing to this court. It would give the act of March 2d, 1861, a retrospective operation.

2. The principle laid down by the court in Lovering v. Dutcher, governs this: That an inventor, to entitle him to the protection of the law, must be diligent in obtaining a patent. That, by delay and neglect to give the public his invention in presenting it at the patent office, he forfeits all claim to receive a patent.

In April, 1860, Thomas Snowden, United States inspector at the port of Pittsburg, obtained a patent on a valuable improvement in heating the feed water of steam boilers, by the direct agency of the live steam in the boiler. Subsequently Ephraim Pierce and Wm. McClurg made separate application for patents for the same invention. The commissioner of patents, according to the law of patents, declared an interference between the patent of Snowden and the said application. At the hearing before the patent office, priority of invention over McClurg was awarded to Snowden, and priority of invention over both McClurg and Snowden was awarded to Pierce.

DUNLAP, Chief Judge. This was an appeal by Thomas Snowden, from the decision of the commissioner of patents in the interference between his patent, No. 27,743, of April 3, 1860, and the application for a reissue of Ephraim Pierce's patent, No. 28,658, of June 12, 1860, and the application of William McClurg.

The invention in controversy, is for improvements "in heating the supply water for steam boilers." The object of Snowden's invention, as stated by the office in its decision of March 6, 1861, "is to avoid the inconvenience and danger due to the difference in temperature of different parts of the steam engine boiler, for supplying the water at a low temperature, when operating under a high pressure of steam; and his invention consists in locating the feed water pipe within the steam space of the boiler, having one end attached to the feed pump, and the other end terminating in the water space of the boiler."

Pierce, in his application for reissue, claims the same thing, as does also McClurg in his application. The interference was therefore rightly declared. McClurg has taken no appeal to me from the decision of the office of March 6, 1861, and the controversy before me is narrowed to the decision only of the conflicting rights of Snowden and Pierce. Mr. Leski's reply to Mr. Stanton's argument on the merits was filed with me June 1, 1861, and Mr. Fenwick's closing argument on the 12th inst., when the case was submitted.

A preliminary question has been raised as to my jurisdiction of this case, the same having been decided, March 6, 1861, four days after the passage of the act of March 2, 1861, entitled "An act in addition to an act to promote the progress of the useful arts." I will give my views generally of the true construction of this act of March 2, 1861, and then of the special circumstances attending the decision of this case, in the office.

Previous to the passage of the act March 2, 1861, all judicial acts done in the patent office by the primary examiners, or the board of appeals organized under the office regulations, were, in intendment of law, the judicial acts of the commissioner, and had no legal validity till sanctioned by him. The primary examiners and board of appeals, under the old system, were the organs of the commissioner, to enquire and to enlighten his judgment, and, till the commissioner gave validity to their judicial acts by his fiat, they had no legal existence as judgments. Under the act of March 2, 1861, the primary examiners and the examiners-in-chief are, by the terms of the act, recognized as judicial officers, acting independently of the commissioner, who can only control them when their judgments, in due course, come before the commissioner on appeal. The commissioner,

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

under this act of March 2, 1861, can give no judgment till the appeal reaches him, and this cannot be done till the judgment of the primary examiner has first been submitted to the examiners-in-chief. The judges of the circuit court of the District of Columbia, by law, can entertain no appeal, except from the decisions of the commissioner. All the decisions of the office, whether, by examiners or the old board of appeals, were, in law, the decisions of the commissioner, when sanctioned by him. When a primary examiner, under the old system, refused a patent, or decided an interference case, and the commissioner approved such decision, an appeal lay directly to one of the judges from such decision of the commissioner; not so under the new law of 1861. The primary examiners and the examiners-in-chief are all by the act of 1861, treated as judicial officers, having power, without control, within the sphere of their duty, to the exercise of their independent judgment. Their acts under the new law are not, as under the old system, the acts of the commissioner, but their own acts. They are no longer the mere organs of the commissioner, but independent officers. He can only reach and overrule them when their judgments come regularly before him on appeal.

It follows, therefore, that no judgment now in any patent case of the character above described can be given by the commissioner till it reaches him in due course, by appeal; that is to say, the applicant must go from the primary examiner, by appeal, to the examiners-in-chief, and from them, by appeal to the commissioner, and lastly from the commissioner to the judges of the circuit court.

The appeal to the judges, lies from the decisions of the commissioner, under the old system, and has not been expressly taken away. We have no right to infer or conclude that it has been taken away, by implication, by the creation of the appeal board of examiners-in-chief, with the right of appeal from them to the commissioner all such implication is repelled by the fact, well known, that an express repealing clause in the act of 1861, on its passage through the legislature, was stricken out.

I think there is no repugnancy, between the appeals given by the act of 1861 and the ultimate appeal to the judges. They may all well stand together. The ultimate appeal, to the judges, is the same appeal which originally, under the old law, laid to the old board of examiners outside the office, appointed by the secretary of state. This appeal extended to all final decisions of the commissioner refusing an applicant a patent, or determining an interference, and was afterwards transferred to the judges of the circuit court. I think this appeal to the judges still exists, but it can only be exercised after the applicant has gone the rounds of all the tribunals created by the new law, and after the decision of tne commissioner.

I do not think, however, under the particular circumstances of this case, the applicant, Snowden, was first bound to have gone to the examiner-in-chief under the new law, and then to the commissioner, before coming to me. His case was submitted to the commissioner before the passage of the act of March 2, 1861. All the testimony had been taken, and closed, the arguments made, and the case in the hands of the commissioner for decision, before March 2, 1861. To apply the act to such a case would give it a retrospective operation. I entertain no doubt, therefore, that I have jurisdiction of this appeal.

On the merits of the dispute between Snowden and Pierce, I need spend but few words. The principles to govern it have been carefully considered by me in the case of Lovering v. Dutcher [Case No. 8,553], decided by me May 24, 1861, to which I refer, and the authorities cited in it. According to Mr. Pierce's own account, and the testimony of his witness Arthur, he discovered this invention in March, 1857, and described it so particularly to Arthur that he, Arthur, or any skillful mechanic, could have applied it practically to steamboats. Pierce enjoined secrecy on Arthur, as the witness states, and a most important invention, saving expense in steam navigation on the Western waters, and materially contributing to prevent explosions of boilers, and to save human life, and now in extensive use, is withheld from the public over three years. Pierce's first movement being to file a caveat, on February 9, 1860. Even this caveat gave no publicity. It went into the secret archives of the office, and was probably stimulated by the movements Snowden then had on foot, and was pressing, to secure the patent he applied for in the following March, and obtained April 3, 1860. But, however this may be, Pierce's gross negligence in secreting and failing to patent his invention for more than two years after its discovery forfeits all right in him now to claim a patent. His caveat in February, 1860, was too late. He had lost his right then, more than two years having then elapsed.

Nor would it do Mr. Pierce any good to treat his invention as immature in 1857, and in February, 1860, when he filed his caveat, asking time to mature it (although Arthur proves it perfect in 1857, and capable then to be applied to steamboats as now), because he would still be in default, and guilty of culpable negligence. He does not appear to have experimented since 1857, or to have used any means further to mature his discovery in this long period, or to have made any additions to it, and cannot and ought not, in that aspect of the case, to stand in the way of a subsequent original inventor, who had conceived and diligently pursued the same invention, and applied for and obtained a patent.

The appellant's first and second reasons of

appeal are sustained; and I do, June 25, 1861, reverse the judgment of the commissioner of patents of March 6, 1861, awarding priority of invention and a patent to Ephraim Pierce, on his reissue application.

Case No. 13,152.

SNOWDON v. LINDO.

[1 Cranch, C. C. 569.] [1]

Circuit Court, District of Columbia. July Term, 1809.

LIBEL—ACTIONABLE WORDS—JUSTIFICATION.

It is a libel to print and publish these words, "He is a lying, slanderous rascal;" and it is no justification, that the plaintiff had stated what was not true, unless he had stated it maliciously.

Case for libel—for printing and publishing these words of the plaintiff, "He is a lying, slanderous rascal."

The defendant pleaded, in justification, that the plaintiff had untruly published that the dinner was given to Mr. Lewis for his public services, when in truth it was given for his service to the town of Alexandria. The plea did not aver that the plaintiff maliciously, as well as falsely, published, &c.

Demurrer and joinder.

Mr. C. Lee, for plaintiff. Words written and published are actionable, which would not be, if spoken only. Any words written and published, throwing contumely on the party, are actionable. Villers v. Monsley, 2 Wils. 403; Bell v. Stone, 1 Bos. & P. 331; Bull. N. P. 8; Esp. N. P. 260.

Mr. Swann, contrà. The declaration is bad; the words "lying, slanderous rascal," although printed and published, are not libellous and actionable. But if the declaration is good, the justification is good.

THE COURT rendered judgment on the demurrer for the plaintiff.

Case No. 13,153.

SNYDER v. BRACHEN et al.

[5 Biss. 60.] [2]

Circuit Court, D. Wisconsin. Jan. Term, 1860.

JUDGMENT—RELEASE—REVIVOR.

A release of a judgment, which has been subsequently revived by scire facias, cannot be pleaded in an action brought on the revived judgment.

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

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

[This is a suit by John Snyder, executor of David Snyder, against John Brachen and Archibald Stett.]

MILLER, District Judge. The summons was served on John Brachen. The suit is upon a record of a judgment rendered in the court of common pleas of Huntingdon county, Pennsylvania, by the plaintiff's testator against these defendants and one William Simpson who has since died. The defendants pleaded nul tiel record, and a release in writing by plaintiff's testator of Archibald Stett, dated September 24, 1850, of his liability on the judgment for the consideration of $120, in which is an express stipulation that it shall not release or discharge Brachen and Simpson of their part of the debt. This was originally a partnership debt of the several defendants.

It appears from the record that the judgment was originally entered against the three defendants for $213, with interest, on the 11th of March, 1835. A fi. fa. was issued and personally served, property sold, and the proceeds of sale were applied to previous executions. The judgment was revived on the return of nihil August 15, 1842. Alias scire facias to revive judgment was issued to the November term, 1857. Nihil returned. November 26, 1857, affidavit of defense filed, and defendants plead nul tiel record and payment, with leave to plead specially. July 16, 1858, a jury rendered a verdict for the plaintiffs of $478.51, and judgment was entered upon the verdict on the 21st of July, 1859.

Upon inspection of the transcript I am satisfied that there is such a record.

The plaintiff demurred to the plea of release. The release as set out was no doubt given to Stett. But there has been a revival of the judgment against the defendants by verdict, upon the plea of payment interposed, which would have entitled the release to be read in evidence, and a judgment since the date of the release.

This court is to give to judgments the same force and effect as given to them in the state where they were rendered. Now here is a judgment rendered by the court after the date of the release pleaded. This is conclusive upon this court, and the demurrer to the plea must be sustained. It is a rule that after a judgment or revival, we cannot go behind that judgment to admit evidence affecting the judgment. Nor on a scire facias to revive a judgment can evidence be admitted affecting the merits of the original judgment, as that would have been a defense to the demand upon which the judgment was rendered. Demurrer sustained.

See, also, Cardesa v. Humes, 5 Serg. & R. 65; Share v. Becker, 8 Serg. & R. 239; Wilson v. Hurst [Case No. 17,809].

Case No. 13,154.

SNYDER v. MUTUAL LIFE INS. CO.

[3 Ins. Law J. 579; 4 Bigelow, Ins. Cas. 424.]

Circuit Court, E. D. Pennsylvania. May 6, 1874.[1]

INSURANCE — LIFE — CONDITIONS —SUICIDE—HOW DETERMINED—REPRESENTATIONS—ANSWERS TO QUESTIONS.

1. The policy contained the condition that if the insured died by his own act or hand, whether sane or insane, then the policy should be null and void. *Held*, that the plaintiff was bound by the condition of the policy, and if the jury believed that the insured died by his own hand, whether sane or insane, the plaintiff cannot recover.

2. It was a question for the jury to consider and decide, whether the insured died by murder or suicide, and the burden of proving, to the reasonable satisfaction of the jury, that deceased died by suicide, lay with the defendant; otherwise, it was liable.

3. The fact that the insured was induced by the earnest solicitations of agents to take large amounts of insurance, and make semi-annual or quarterly payments, is no evidence that he meditated suicide at the time of insurance. The insured left a written memorandum, in which he referred to a policy of accident insurance as a part of an available fund for the payment of his debts. *Held*, that it was for the jury to consider whether this reference was evidence of a contemplated violent death.

4. It was for the jury to consider the facts that the insured expected an early settlement of his policies of insurance, that they would be difficult to collect, that the policy against death by accidents was included in the rest, in determining the question whether the insured meditated suicide.

5. The only answer to the questions in the applications, "Have you ever had a disease or other attack?" "Have you ever had any serious illness, disease, or personal injury?" was, "Smallpox thirty years since." *Held* that if the insured had a fall on the head, and the injury was a severe one, or if he had a severe concussion on the brain, resulting from the fall, the answer is untrue, and the plaintiff cannot recover. The answer to the question in the application, "How long since you were attended by any physician, and for what disease? Give the name and residence of such physician"—was "Not for twenty years." *Held*, that if the insured, about five years previous, had a severe fall on the head, and was attended several times by a physician, though employed by a railroad company, which is the same in law as being employed by the insured, then the answer is untrue, the policies are void, and the plaintiff cannot recover.

At law.

CADWALADER, District Judge. Gentlemen of the jury: On the morning of Saturday, the 22nd of February, 1873, at about seven o'clock, two men, driving a wagon across the Monocacy bridge, just at the entrance from the railroad depot, toward Old Bethlehem, saw in the water of the Monocacy creek, as they crossed the bridge, something which they looked at, and discovered to be a dead body; and one of them had seen at just the same place, a few weeks before, the dead body of another man, Louis Conner, who was murdered, as was reported, and, it seems to have been assumed, in that neighborhood. It is conceded to be impossible that the body could have been where it was found through any simple accident, without some effort of will of a human creature. There is a difficulty, which we will consider more particularly hereafter, in comprehending how the body could have been where it was found without some other agency than that of the dead person in his lifetime. The stream had not force enough to move it, even if the fall had been in the water, but the weight of probability is that the fall was in a dry place, and not in this shallow stream. The body was from 20 to 25 feet—I think you will safely say, from the evidence, at least 22 feet—from the nearest point which it could have reached from the bridge. Now, it lay there until, as I said, some time, which, according to the best evidence, I think, must have been between ten and eleven o'clock, when a person, with the assistance of the coroner, got it out upon the bank of the creek,—the Monocacy,—and there it was ascertained to be the body of Monroe Snyder, a citizen of good standing in Bethlehem, a man of whom the most undisputed account is that at a quarter past nine, in the evening before, when he was in apparently good health and spirits; during this period of some thirteen hours, more or less, we have accounts which, according to one side or the other of the contention of the parties, may refer to him, until a short time after two o'clock, supposing him identified sufficiently by the witnesses whose testimony we will have to consider hereafter; but from the time before three o'clock until the body was seen, at seven o'clock, I suppose, at least four hours, we have not even the obscurest evidence, or ground for conjecture from any distinct fact. Now, then, when the body was examined, there were four wounds, one a mortal wound, on the head, from which it seems to be fairly agreed that he died from suffusion of blood upon the brain, caused by a severe blow. That mortal wound and the three wounds from an instrument which the surgeons think was not sharp-pointed, but of the knife kind, these three wounds were not mortal; that is to say, though they might have caused inflammation from which death would have ensued, that could not have occurred probably for days; but the earliest time is said to be eighteen hours, and that is much under the time that the other surgeons indicate; probably for two or three days, if not much longer, these wounds were not necessarily mortal; even then may not have caused death. The exact character of the wounds,—these three wounds,—much as it has been discussed by the counsel, and extended as the testimony is from surgeons, we know very little of. They were on the belly, in the neighborhood of the navel, one a little above, and the other below, and one moving upward and inward, and the other downward and inward, and the third not so

[1] [Affirmed in 93 U. S. 393.]

distinctly described, and apparently more trifling. These three wounds appear to have been about the same width at the bottom as at the place where the instrument inflicting them entered the body, and I do not think there is any reason to doubt, from the testimony, that one of them at least had penetrated the peritoneum, but they were very shallow cuts, and the measure of the little finger seems to be the greatest length attributed to them. They were very shallow cuts, and so shallow that the one which penetrated the peritoneum must have barely penetrated it. They took it for granted that it was murder at that time, and perhaps it may not be wholly unimportant, in that stage of the cause, that they did, but I am not now discussing that. They all took it for granted that it had been a murder. No idea of suicide then entered anybody's mind, and this remarkable fact is undisputed: That, when they stripped the body to examine these wounds, they put the inner red shirt, the outer white shirt, and the drawers under the head, which lay upon them so as to saturate them with blood. That occurred almost immediately after the examination, and after that, of course, no inspection of the clothing would help us. Now, gentlemen, it is very unsafe here even to argue about probabilities; the most improbable things are sometimes true, and the most probable things sometimes don't happen; but if you go for mere probabilities, if the murderer stabbed this body after death, it is very strange he did not cut deeper; if, on the contrary, the wounds were inflicted during life, either by the murderer or by a suicide, there is no difficulty in finding just such little wounds as these. If a man stabs himself, he will very likely shrink from cutting deep, and if a man stabs another he must do as he best can, and though the counsel put themselves in a fencing rather than in a forensic attitude, in discussing the question, it would be arbitrary to adopt any conclusion of probability, except in the event of death; but, if death had occurred before these wounds, you will say whether it will be very probable that the murderer would not have struck more deeply into his victim.

Now, these are the external aspects of the case, as it was exhibited at the coroner's inquest on post mortem examination. Whatever may have been thought then, and we don't know, and I don't see as we need care, there was further investigation, supposed or actual further developments, and there arose a very natural difference of opinion whether this death had occurred through murder or suicide; the theory of accident not seeming to be adopted by anybody, and I don't think being reasonable. How the body got where it was seems to have been a matter of immediate attention; and of continued thought and observation; and what motives were attributable to the deceased man in case of imputed suicide was also a matter of considerable thought. It is not surprising that two parties—that conflicting opinions—arose in the community, even if it had been a larger one; and there seems to have been a difference very soon arising. I say that because some of the witnesses appear to have had a theory on one side or the other of the question. A difference of opinion naturally arose, I say, whether this was murder or suicide.

Now, this deceased person, Monroe Snyder, had effected certain insurances, on three of which, for the sum of thirty thousand dollars, this action is brought. It is admitted that the insurance was made. It is admitted that the premiums were paid, or what is equivalent, accepted. It is admitted that the man died on the day in question. It is admitted that due proof of death was made, and the admission is such as to dispense with the exhibition of the proof, and all these admissions are made in what are technically called the pleadings; that is to say, the written declarations of the parties and the defendant. The insurance company alleges that the insured died by his own act, and the policy, by its express terms, is null and void if he died by his own act or hand, whether sane or insane; and the defendant asks me to give you instruction in a point of law,—that each of the policies sued on was issued to and accepted by the insured with the express condition and agreement that if the insured died by his own act or hand, whether sane or insane, then the policies should be null and void; and I am asked to say to you that, if you believe on the testimony that Monroe Snyder died by his own act or hand, then the plaintiff cannot recover anything for any of the policies, except the premiums paid upon the policies, to wit, a certain sum of money. I affirm that proposition, and give you the instruction as requested. It is admitted that the defendant has assumed and taken on itself the burden of proving that theory to your reasonable satisfaction, that this man died by his own act or hand,—in other words, that the death was caused by suicide; and the question or questions whether the evidence is incompatible with the contention on either side,—on one that it was suicide, and on the other side that it was murder. If the evidence is incompatible with one and compatible with the other theory, of course, your verdict will be found without difficulty, if you reach that conclusion. But it is difficult to find any such simple view of the case justly, and it becomes necessary to weigh opposing theories one against the other; then you are to make an effort of reason to assume the different contingencies that are to be considered, to say how one or the other is compatible, or more compatible, with murder or with suicide,—what the difficulties are of adopting the opposing theory; and in doing so, gentlemen, you are not (I undertake to give you advice in the matter justly, not mine) to get rid of your duty by sheltering yourselves behind

a doubt. There should be a plain, manly effort to resolve doubts, and when a doubt is once resolved, as I have often said in this court, it is no longer a doubt. It is our duty to grapple with doubts, and to resolve them if we can, and not to say, "Oh, that is a doubt, and I will find it in a particular way, and get rid of all difficulty and a solemn duty." You will have to grapple with several in this case, gentlemen; try to resolve doubts to the best of your ability. If finally you cannot resolve doubts, and the case is so obscure that it cannot be cleared up, then you may at least consider upon whom the burden of proof lies, and, if there is a failure of that party to relieve itself of the burden of proof, then it may become your duty to find a verdict upon that ground; but it is the very last standard of duty which ought to govern your consciences.

The insured is described in the policies as a retired merchant. We have no account of his business before 1866, when he had an agency for a slate company, and since that time we have some evidence of how he was engaged, and it is reasonable from the description of him in the policy, and the other evidence, to assume that he had some years before retired, with what may then have been supposed a competency. Now, if Monroe Snyder retired before the Civil War with his competency, say a dwelling-house with a stable and a one-horse carriage,—large double dwelling-house,—able to fit his son out in the neighboring apothecary establishment, and perhaps worth, if clear of incumbrances, $16,000 or more, as it is alleged, with what investments we do not know, he might have been living very comfortably, and have found a sad change when the expenses of living were doubled; and it is not surprising, if the increase of expenditures was leading a gradual diminution of capital and income, that this gentleman should have resorted to speculation to make up the deficiency, and in a letter or confidential writing to his son, which he left behind him, and which I shall quote often as I proceed, he says to the son: "You know that I always tried to do the best I could, but oftentimes where I thought I could make something, I lost." He seems to have, in other words, entered into speculation. He appears to have been a kind-hearted man, irresolute, and easily influenced by others; the same letter shows that. He says: "Don't do as I have done; don't let people talk you into anything, to go security, or indorse notes to the banks, and all sorts of such things." Then he says: "Whatever you do, don't let people belie you, or lie you in things as they did me." I suppose he means, "lie you into speculations"; that is my judgment of the meaning, from what he says. "Do the best you can, but never go security for anybody, nor ever indorse a note for no man, no matter who he is. If you manage right, you can get along without asking anybody to go security for you, or to indorse for you." Then he warns him against speculating in corporation stocks: "Keep out of these companies, for it is worth nothing to be in these large companies. Be very careful that you don't get cheated so much, and don't let people take you into all these things." Then again: "If anything should happen to me, sell my interest in all those iron mines or ore leases; it is too expensive, and very risky business: and don't listen to what other people tell you, and tend well to your store." Then he says again: "Stay out of these companies; never go in a company of no kind, for it is worth nothing to be in these companies; but you are old enough to look a little ahead; and don't spend much money on them iron ore leases; if you can get a little something for them, sell; and, if not, let them run out, and don't spend much money on them, for it's very risky business—lottery business, as Mr. Jacob Herstand said." There is a good old German name, gentlemen. Then he says: "So now, Lewis, keep out of these things, as I told you often." That passage struck me. It seems that he had then had such conversations with his son. "As I told you often, because it is worth nothing; this mining is very risky business; don't spend any money on them leases what I hold; if you can get anything for them, sell them, if not, let them run out,—particularly the one at David McCrea's, where Tinsman is interested, for I don't think he is much better than Lynn, and Coffin is about the same, and if you are a partner you are in for the debts if she makes any." This writing corroborating all, he remarks: "I will try and get you out of all these things, and stay out. If I do something I will do it alone hereafter."

Now, gentlemen, I have read these passages because they give you a sort of biography or history of this man, and the ordinary result, I think, appears in the inventory of the estate after his death,—that his available funds had been diminishing, while his speculative investments were increasing. He says: "If I could"— This is the ordinary result, I think,—what I am about to read,—of speculation to retrieve diminished capital and income. He says, "If I could turn things into money, what I would like to sell, I could shift it around; but there is no sale for nothing at present." Thus he was going behind-hand, and unless he could make profits out of these speculations; at least, it is not for me, but for you, to say whether that is the proper meaning of the letter. In the meantime, what had he done? He had insured his life, and he says of that—and he writes, I think, like a simple-hearted, natural man—he says, "I am insured too much; it costs me too much to keep it up, or to pay the premiums, but I am in now; I will keep it up if I can." He says for that purpose—that is, to pay the debts—"I insured so much that all my debts can be paid." Now, gentlemen, this was not after the old fashion

of Bethlehem; it was incongruous to the locality and with the olden time, and it was entirely incongruous with the educational opinions or feelings, if I might so state, of the deceased man himself. There are some curious traits of the old German, hard money, economical feeling, by which he would have liked to have made the rule of his conduct, and I will remind you of what no doubt attracted your attention. He had a safe, as you recollect; it has often been referred to. Now, in that safe it appears that there was money which he had put apart, belonging to two deceased children. There was gold $115, silver $91.33, making $206.33, and the safe was worth $40; and here was a gentleman whose debts and assets are discussed by units of ten thousand dollars by counsel, and twenty, thirty, and sixty thousand dollars of insurance, and so forth. Now, he writes to his son Lewis, "Keep that safe, and the gold and silver money what is in the safe; keep that without fail." Then he repeats: "Don't let that safe go to strangers; keep that, and keep the silver and gold money which is in it,—the $206.

Now, gentlemen, there is another thing showing the old-fashioned way of this man, as he probably was when he became a retired merchant, expecting it to be enough for his old age. His son, you recollect, he set up in business,—at least, that is the fair inference from the evidence. Now, as I understand the passage in this letter, when that son was able to pay to the father the advance, he paid it, and the father gave him a receipt for it, and when the father, expecting to die insolvent unless his affairs were retrieved, referred to that transaction in this letter, he was afraid the creditors might consider it a defense, and he refers the son to the receipt. He says: "You will also find a receipt for your stock in the drug store, so you can hold that; perhaps my creditors might try to get hold of it; that shows that you paid me for it." Now, I read that naturally, not as anything wrong, or as anything the creditors would have a right to take hold of, but as what creditors through mistake think they had a right to take hold of; and he says: "You have paid me for it, and there is the receipt." So here was this old-fashioned, hard-money man, who kept his son in good habits of not squandering advances, but keeping to quaint, economical ways while he was making money, found himself involved in a vortex of speculation, and what was, to his good old German notions, an awful state of things to contend with. That is the way I look at his condition. It is for you to say whether it is correct. It may not have been so bad. It is very probable that his condition was not anything like as bad as he thought, if the arguments of counsel and the evidence are correct; but, as he looked at it, it was embarrassed. The counsel for the plaintiff, on the contrary, say that this only meant that he was afraid that the property would be sacrificed, and that then the life insurance would be necessary to prevent it, and so forth. The jury will say.

Now, we have had this deceased man's character assailed most violently on one side, and praised most emphatically and eloquently on the other side. I rather think the arguments are about equally mistaken, gentlemen, and that, like most human beings, he had his faults; they may have been very great faults; and, like most human beings, he had his good qualities, and that the good qualities were commendable, and the faults and weaknesses were to be viewed with indulgence, so far as he was concerned, and with rigidity, for the sake of justice, so far as others are concerned; and that is the view we have to take, or that ought to be taken of most of us after we are dead; and it don't do to assail a man because his standard is not, in one respect, that of the highest, nor to praise him to the skies in other respects. He seems to have had an unassailable point of self-respect, if we are to judge of the memorials he has left behind.

Then he had another matter in charge, for which he was very much to blame, but that is not the question under trial here. He had used—what at the time probably was not a very large amount—the money of three young women to whom he was guardian; he had kept the accounts carefully, and we have every reason to believe faithfully, as to the mere writings, and they were in the safe, showing exactly what he owed; but he had used the money, and he was technically in the relation—counsel say he was morally in a worse relation—but, as I stated, we are not trying him for that. Now, he had a strong desire to see justice done to these people. The amount of his deficiency we know exactly; for Owen Beil's child, as he calls her, he was, with interest, $2,303.89, in arrears; and for Louis Berkerstock's two little girls, $949.93; making, say, $3,249.82.

Then, again, gentlemen, there is what I think deserves attention: He had, no doubt, stated in these policies,—there is some evidence of it, I think, in the letter, and he had observed on this probably as of more importance in another relation than appears yet. He observed in these policies that the money was payable, for he had so made it, to his son and wife, respectively. You recollect the form of the policy. Now, he seems to have been afraid these creditors would not get that money from the form of the insurance, and this was a thing he did not mean to permit, if he could help it. He meant that these insurances should go first to pay his debts; that is part of the case; that is of twofold importance, not merely for the introductory purpose I am citing it for now, but for an arbitrary purpose. He says: "Pay all my debts, for I borrowed some money to pay the premiums on the insurance, so that my creditors could perhaps get hold of insurance, and, if they could not, pay all my debts, and be a man, so that nobody can say they lost money

on your father. You can pay all my debts, and hold the property, if you can get the money out of the insurance companies, and have money left. But when you get the money out of the insurance companies, if it ever should happen so, don't think you would keep the money and not pay the debts."

Now, gentlemen, this was the man, and such were his ordinary relations, and I do not think that we can do our duty to this case without, in some measure, looking at these considerations. I don't mean to say that the man did not contemplate suicide, but not at the time and in the manner imputed to him. Let us look carefully at this case, and see whether he meditated suicide, and in the manner imputed to him. The case, as opened by the defendants, was that the deceased made the insurance with the view to suicide,—with the premediation to commit suicide. I think the evidence refutes that wholly. In the first place, that I don't think so much of, for the insurance agents disprove it as far as they can. They say they forced this insurance upon him,—that they tempted him to it. These are not their words, but the substance of what they testified,—that they accommodated him in order to increase the amounts, and if they had not approached him he would not have insured as much as he did; but he appears to have driven a close bargain with them, and have required the temptation of an abatement of $25 from some $500 more or less of premium, and to have had indulgence offered by taking notes. He seems to have required quarterly instead of annual payments, and especially the two insurance agents certainly say that, as a general matter, they pressed the subject on him, and that he generally was reluctant, but I think we have much more conclusive evidence than that. We have to take, gentlemen, this letter, or confidential letter, as a whole; if it is used against him, it must be used for him. Now, you will recollect, gentlemen, that he, in this paper, enjoined particularly on his son to take no advantage of the form of the insurance in order to avoid the payment of the debts, but to be a man, and pay them. Now, the last of these insurances is made payable to the wife. What does that mean? Did he then contemplate suicide with a view to pay his debts, and afterward his family? Let me be understood. This paper was written, the whole of it, after the 13th of January, when the last insurance was made; that is evident from its contents. How it came after, we don't know, except that it was finished the day before he died. Now, after the 13th of January, when the last insurance was effected, he wakes up to this firm conviction that his creditors would not get this money. Did he wish that? On the contrary, he takes every measure that a man can that his creditors may get the money. He therefore would have made that last policy, not in the name of his wife, not even in the name of his son, but he would have made it in his own name, that his creditors would have got it. Now, I do not know whether you agree with me, gentlemen, but I don't think that it is fair to take that last letter of his, and tear it up, and spit upon it—to use a vulgar expression. He says in that, that the insurances were for his creditors, not for his family. If he had meditated suicide when he wrote that letter and made those policies, the money would have been payable so his executors could have got it for the creditors,—at least, so it strikes me. You will decide for yourselves; but I think this important only for this reason, for the sake of truth. It is, for the decision of the case, of no importance whether he afterward conceived the idea of suicide, or entertained it when the insurance was effected. It is the same thing, in the legal result, but it is important that we should get at the truth, by whatever means, because, if we get upon the path by untruthful means, we get off the track, and don't know where we shall lose ourselves; and for that reason I have thought it my duty, in this painful case, to do justice to this man's memory, for he has an awful account to settle, of debts; and in this respect I think injustice has been done him, and that there is not the least ground to impute to him an intention to take his life when he made the last of these insurances; but, as I said before, that is not, I think, the question. The true question is whether, after that last policy was effected, this man, considering the desperate condition of his affairs if he lived, and the favorable condition to his family if the insurances were received by them, did not conceive, but meditate with more or less of resolution, the thought of taking his own life. If that is made a subject of serious inquiry, and I think, gentlemen, that it is, if you go into probabilities, much more probable that when this simple-hearted man, as I think he seems to have been, found himself in this vortex of difficulties, not able to look his affairs in the face,—when he saw that he had the insurance to this large amount,—that the thought or temptation, or whatever it may be called, may have come into his mind; and that is the inquiry which we must approach with candid and serious thought. Now here the evidence is twofold: First, the letter; and secondly, the occurrences which immediately preceded and followed it. When I say immediately preceded, I say immediately preceded the last stage of it. Gentlemen of the jury, this paper is not, independently of its particular contents, of an extraordinary kind, as I can see, at all. I mean to say that there is nothing surprising in a man's leaving confidential directions to his only son and heir, as to what shall be done after he is dead,—the sort of directions that are not to go into a will. I suppose there are few men in this courtroom, and probably few on the jury, who have not had

large experience of such papers. Men give special directions which don't concern the world at large. I am not now speaking of this paper in particular. I am only speaking of the character of such documents. These are among the most difficult questions that lawyers have to meet,—as to whether such post mortuary documents are testamentary or not. That is to say, they must be proved as such, or may be kept as confidential papers. There is nothing in the direction to keep such a paper secret, unless the confidence. There is nothing extraordinary in all that, that I can see; but, gentlemen, in order to get rid of the prejudice that ought not to attach to the subject, I have made these remarks, because I don't mean to say that the paper is one which you can get rid of in this way, but I do wish a just and proper and unprejudiced introduction to it.

Now, there are two views of this paper called a letter. One is that it was a post mortuary, confidential communication to the son and heir; the other, that it was a letter of one contemplating suicide; and there is a third view, perhaps, that it was partly each, and that it was the production of a man who, though he contemplated suicide, was irresolute in writing it, and afterwards as to executing the purpose. He certainly speaks in this paper of what he was to do if he were to live and go on in the world. He certainly speaks in the other parts of it that he was to go out of the world very soon, with violence. It is, it seems to me, a paper of a man who seems to be vacillating between contending purposes. Now, the parts which I have heretofore read of this paper are principally, if not altogether, consistent with it in one sense, for they bear on the question of insolvency, you recollect; then I shall not repeat them; therefore you will bear that in mind. Now, of the parts which I have not read, there are, we may say, two divisions: One of matter apparently quite innocent, and the other of matter which seems to indicate a purpose to take his own life,—whether a definite resolution, or an indefinite or undefined one, will be for you to consider, if it becomes important.

You have looked, at my request, in the early stage of this case, at the signatures of the three stages of this paper. It is, I think, both from the contents of the papers themselves, and from one of the signatures,—there are three places where it is signed,—evident that this paper was written at intervals. When the first stage of it was penned, nobody can conjecture, except we all know that it was after the 13th of January. Of that fact there can be no doubt. We also know the last of it was finished either on the night of the 20th of February, or the morning of the 21st. Well, now, as I said before, there are a great many matters, any of which are only material on the question of insolvency. There are others, because I do not want to leave any of this paper unconsidered. Here he says: "Lewis, if God calls me away,"—which we all understand, in German phrase, to heaven,—"If God calls me home, and away from you and mother, you must do the best you can. First of all, be kind to mother, and, whatever you do, see that she is well cared for." Very proper for a letter for his son, gentlemen, after death. That passage about insurance companies I mention in another connection, afterward. Then he says: "About keeping the insurance policies up,—you can do as you please or as you think best." Then he says: "Lewis, I think I told you the Penn Mutual Life Insurance Company holds a mortgage of $5,000 on our house, for which they hold one of my insurance policies for $5,000 as collateral security. I have the paper in the safe which shows it, and the receipts that I paid the premium on it; they also hold fire insurance policy as collateral security, which is transferred to them. You must see that it comes all right. Jonas Snyder holds the fire insurance policy on the drug store building as collateral security for Mr. Taylor's mortgage. That policy is not transferred. I have a receipt in the safe from Jonas Snyder. Lawyer Spout, at Easton, is the agent for the fire insurance company where the drug store property is insured in. Mrs. Reeder, at Easton, holds the insurance policy on your stock as collateral security for the thousand dollars what Shoemaker had loaned of her. Lawyer Reeder attends to her business. So that you can find everything and try to straighten it up, for God's sake." "Lewis, I think"—one of these is in the first stage, the other in the second stage; now I come to what occurs in the third stage—"Lewis, I think it would be best, if something should happen with me, if you would get everything appraised, and sell it." Here, you will observe, gentlemen, what I am about to read changed his purpose. When he wrote the first of these three parts he thought he would keep the property, and pay the debts out of the policies. He, in the third stage,—the third division of the third part,—changed his mind, and, thinking things not likely to be quite as favorable as he thought at first; he thinks they had better sell, and he says: "Lewis, I think it would be best, if something should happen with me, if you would get everything appraised, and sell it." Then again he says: "Lewis, if mother gets money of the insurance companies, if she lives longer than I do, you must take care of it, for she can't; and don't let her lend out, unless you see it. If you put it in a good national bank, I think that is the safest, or take the first mortgage on real estate." Then, gentlemen, he goes on: "Lewis, I settled up everything with Lynn; he is to pay everything we owe over in Jersey." Then he describes his first settlement, and he closes up with Lynn over again: "If anything should happen with me,—I hope it won't, but we don't know, for life is uncertain, but death is certain,—Lynn must pay everything what I

owe for lumber and work, and for hauling the ore, and Kline's royalty and Kline's timber, and everything, before he can get them notes what he left me as collateral security. I also gave him that lease there at Kline's what I had on Henry R. Keuntz's land; otherwise I could not settle with him."

Now, gentlemen, I have detained you with this apparently prosing reading, even of these passages, because I have desired to keep together what is, as far as the subject goes, just what the man might write confidentially without any unfavorable imputation, but the paper unfortunately contains a great deal more, and I will ask now your attention to the parts of it which seem to import, or may be contended to import, that he intended, or expected, or contemplated an early and violent death. The heads of the argument on this subject are several, one that in which concealment is enjoined. Now, gentlemen, this, I repeat, is unimportant, unless it is made out that there is something to conceal. Merely directions to the son that this paper was not to be exhibited unless there is something in it which gives effect to that direction, I have said, would be dealing very unfairly with what men leave behind them for their families. There is, however, I observe, as I shall read presently those parts of the letter, frequent expressions of apprehension of death,—early death. There is also an indication of doubt as to getting money from the insurance companies. There is also an indication of an early time of anticipated settlement of dependencies, but that is fully assured by other passages which look to the future as though he was going to live. Now, with this long preface, I will read and comment upon the remaining part of the paper: "Lewis, sometimes I feel, and it appears to me that I won't be here with you and mother in this world long any more, but we don't know what God will let happen with us, but we have to submit. I don't hope to get killed or die soon, but sometimes I feel and think that I would not be in this world long any more. Lewis, if God calls me home, and away from you and mother, you must do the best you can. First of all, be kind to mother, whatever you do, and see that she is well cared for." The word "hope" has been commented upon and explained as in this man's natural language, and his family appears to have been German; they seem to have spoken German, as far as we can learn, and the word "hope" in the German parlance, is said to mean nothing more than "expect." You will say what meaning you attribute to it, but it is not to be expected that he would write such a letter that his son would understand that he meant to commit suicide. It would be couched at least so that that would not be exhibited in it. Then he says what is more important: "Lewis, I have my life insured for $65,000 altogether; for $20,000 in the Penn Mutual Life Insurance Company of Philadelphia, and for $30,000 in the Mutual Life Insurance Company of New York, and for $10,000 I have an accidental policy in the Hartford Company of Connecticut, and $5,000 in the Mutual Protection Life Insurance Company of Philadelphia, which is for the benefit of mother; $5,000 in the Penn Mutual is for mother, and $10,000 in the Mutual Life of New York is for mother. All my other insurance is for your benefit. If anything should happen with me, Lewis, get the money out of the insurance companies, for they have to pay it. The agents of the companies I insured in will assist you." Now there is nothing surprising or evil in his telling his son that he had effected this insurance, and that the son must get the money; but the manner in which the subject is recurred to afterward is important, and the passage I have read is perhaps, in one respect, very important, but that is more for your consideration than for mine. He refers to the whole of the insurance as amounting to $65,000, which he looks to as a fund for the payment of his debts. Now, he includes in that $15,000, as I understand it, or $10,000, as it is admitted, of insurance against accidents. If he did not contemplate a violent death, would he have reasonably considered that as of a part of the available funds of his estate? Now, gentlemen, I don't want to put that as a hair-splitting remark from a lawyer, as it may be regarded, but I want you to look at it as a matter of common sense; would a man who would look to something out of the common course as the cause of death speak of an insurance against accidents in the same category with the insurance that must be paid at all events, and sum them up as one whole, as a fund to pay his debts with? The answer to it, however, is that there was enough without the policy against accident. But is that a satisfactory answer? Don't it still remain that whether there was enough or not he looked upon it as a fund to come into the hands of his executors? It is for you, as a matter of common sense, to say how it strikes you, and you will take it for what it is worth. I have not been quite satisfied with the explanation of it, but you may be. "Lewis, don't show this paper to anybody; whatever you do don't let any person see it; keep it an entirely a secret. If anything should happen with me, sell my interest in all those iron mine or ore leases, it is too expensive and very risky business; and don't listen to what other people tell you, and tend well to your store. The insurance companies must pay the insurance what I am insured; they can't get out of it; if I am gone once, don't let people know for how much I am insured, or how much I am in debt. Keep it as much secret as you can, for not everybody need to know, for it won't make it any better; but when you get the money out of the insurance companies, if it ever should happen so, don't think you would keep the money and not pay the debts."

Gentlemen, the printer has put stops that will mislead you in reading those printed copies,—naturally no fault in it, but this is one of the places: "If anything should happen you can pay the debts and have some money left, and keep all the property what we have, if you manage it right. The agents of the companies will assist you in taking the affidavits for proof of death," and so on. Also: "Lewis, I don't hope or expect to die soon, or get killed; but God only knows, we can't tell; life is uncertain, but death is certain. About keeping Llewellyn's policy up, if he lives longer than I, you can do as you please, or as you think best. Try and keep everything as it is, and as quiet as possible; it is of no use to let everybody know how things are; I know if something should happen with me mother would trouble herself a great deal about it; if it should be the case, take good care of her whatever you do. If the insurance is all paid you can get along right well, and I can't see no reason why they won't be paid, for the premium is all paid on the policies, and the companies are all good companies." One of the premiums was quarterly, and in a few weeks one of the quarterly premiums was to become due. "Mother's money you must take care what she gets out of the insurance companies, for she can't; you must see, too, that you will also find a receipt for your stock in the drug store, so that you can hold that; perhaps my creditors might try to get hold of it, but I don't see how they can if you have this receipt—that shows that you paid me for it. If anything happens with me, settle everything up all right and as soon as you can, and as quiet as you can; the sooner the better. If you sell the houses, let mother buy them, or get a good friend to buy them for her, and she can take the deed and give you the deed again. I think Henry Beil would be a good man to buy the houses for mother; you can't trust anybody, particular no stranger; perhaps if you would try and get Hess to buy it he would not let you have the half, any; if you sell the houses for cash or a short credit, they won't come so high, and you can do that, because you get the money out of the insurance companies. If mother ever gets money of the insurance companies, if she lives longer than I do, you must take care of it, for she can't," and so on.

Now, gentlemen, I have, I believe, read to you, in one connection or another, every word of this paper, and at the hazard of fatiguing you. Now, there was an early time for the expected settlement with the insurance; that he had an idea of some difficulty about it; that he includes the policy against accidents in the sum of the insurance money, are the points of chief importance bearing on the question whether he committed suicide, in my opinion.

In this immediate connection I will refer you to the interview with his sister, Mrs. Kresgy, because if the letter alone is sufficient, or if it warrants suspicions, they may be increased by what passed at the interview with Mrs. Kresgy, and now certainly by the occurrence which followed. Mrs. Kresgy was the widowed sister who had recently lost her husband, and on whom the deceased called on the Thursday before his death, and it was probably the interview before the last of the third part of the letter was begun,—certainly before they were finished. He called on this lady, and after some conversation about garden seed he began talking about the dreams of their parents,—having seen them in his dreams. He said he was going to New York to consult a physician in regard to his hearing. He said, it worried him so about his hearing, he was going to consult a doctor. He said he was going to New York, but, if something should happen to him, folks could help themselves. That visit, it is contended, indicates a purpose that he was in contemplation of an early death in connection with the intended visit to New York. He did not shed tears when he went away, and she says that after he got into the street he shed tears. Now, she said he often shed tears; that he was a very affectionate man; and that he had spoken of his parents, and of seeing them in a dream, and talked with them; and he said, going so often on a railroad, he was afraid of being hurt, on account of his deafness; advised about the husband's estate. The question is, gentlemen, whether anything in this interview amounted to a leave-taking? It has somewhat that tendency, apparently, but we might have heard the answer; that it is only from what we know afterward, a sort of after-born wisdom that makes us attribute importance to what may have been a mere ordinary occurrence; in its important relations I confess it has some bearing on the question.

But now, gentlemen, let us consider the occurrence which followed, because it may be that these occurrences are such that, compared with the letter and with the interview with Mrs. Kresgy, you may put them together and attribute a purpose that no one alone would satisfy you in attributing, and all of them together may remove a doubt that you might have as to any one in particular.

The occurrences which followed the letter, if they form the inferences of premeditated suicide, they certainly throw a great doubt upon the question of the firmness of any such resolution. This man is said to have been a religious person. He certainly was a man attentive to religious observances. Mr. Keeler, Mr. Bruler, and Mr. Hartwig describe him as an attendant both on Sunday and on week day, and at every service. He certainly, therefore, was a man observant of a respect due to religion, and the letter shows that he had a future state in his mind. He says: "If God calls me home, or away from mother."

Now, gentlemen, if he contemplated suicide, and I wish you to watch the evidence very

carefully as I proceed in review of it, in order and to determine whether he had any fixed purpose, whether it was a resolute determination or a floating thought, that he felt that he at times could not look the future in the face, and might or would probably commit suicide, or whether he had a fixed purpose to do it. He was not a man who without some proof you would expect to be willing to rush unqualified into the presence of the Almighty, as Blackstone says. You would not expect him to be free from the dread of something after death that puzzles the will. He was not the man to be wholly dull and indifferent to such considerations, or like the novelist who makes his hero fall off the monument to cheat the underwriters. He did not appear to be that sort of a man, but he appears to have been a man who did contemplate an early and violent death.

Now let us see what occurred after the night of Friday, at eight or nine o'clock. When he had finished a settlement he went home. He was at home by nine o'clock, or earlier, and he had his breakfast at an early hour, and soon after seven the next morning, in pursuance of his purpose which he had stated to Mrs. Kresgy and Squire Kruler, he got into the early train to go to New York. There is no other evidence of his purpose than that he had stated to these two witnesses, and you will say whether that might not have been a sufficient purpose to take him there. He arrived at New York at or soon after noon. It was then raining. He had no umbrella, and he said to Mr. Worman, who separated from him as they arrived, that he would buy an umbrella, and would return with him in the afternoon from New York. Accordingly, at half past five in the afternoon he came with his new umbrella, and he found Mr. Worman, and he accompanied Mr. Worman in the cars home again. Mr. Worman has related the conversation. Others have said that he was cheerful. He had made an appointment with Squire Kruler to go a day or two afterward in a sleigh to a neighboring place where they had business to attend to, and in riding home in the cars there occurred a circumstance to which I attribute some importance. The train was detained thirteen minutes in the neighborhood of Easton, or South Easton, I think it is. Now, that thirteen minutes made him too late for the omnibus. In this good town of Bethlehem they don't do as they do any other place. Mr. Omnibus Man waits five minutes and says, "They are too late; I guess I'll go home," instead of waiting. Mr. Snyder knew this, for he said to Mr. Worman—Mr. Worman don't recollect whether it was before or after that detention at Easton, but this makes it probable it was afterward—he says to Worman, "I wonder if the omnibus will be there." Then you will observe a natural idea of the thirteen minutes' detention, and it turned out that the omnibus was not there, at Easton. It was a natural suggestion, and the words "Are you going to your store? for I don't like passing those bridges at night." You will recollect that Conner got killed on that very bridge. Now, there was nothing more natural than that question, and the answer of Mr. Worman was that he was not going to his store, or he would have taken him (Mr. Snyder), but that he was going the other way, toward his house at South Bethlehem. Now, gentlemen, nothing can be more natural than that conversation, which the event verified because the omnibus in fact was not there when he got there. Now, if he meditated suicide, it would have been a great comfort to him to have somebody to go home with him to prevent it. From that conversation, in other words, if he did he was irresolute, and if there was any doubt about that, the doubt, I think, is removed upon the testimony of Mr. Wilson. Now, counsel have made an attack respectively upon these two witnesses which I do not see the reason of at all. They contradict each other in little, immaterial things, but they confirm each other in the substantial parts, which is that Mr. Snyder would have been very well satisfied to have had somebody to go home with him that night. If the omnibus was there, he would have gone in the omnibus and got home. If it was not there he would have gone with Worman, and he was not with Worman. Wilson's testimony is that they made an arrangement to meet the next day with a view to some business, and that the deceased man, Mr. Snyder, asked him to pass the night at his house. He asked Mr. Wilson to go and stay with him that night. Mr. Wilson declined, and when they parted Mr. Snyder took leave of Wilson in what they called the aisle, and that I think a church phrase, and when they got to what they called the aisle he repeated his invitation, and he said he had better go home and stay with him.

Now, gentlemen, this transaction indicated, you may think, that if he meditated suicide he would have been very glad for an excuse for not executing his purpose that night, in other words that there was irresolution and no fixed purpose, but that he would if he found himself alone. No omnibus, no companion, occurs to the thought of suicide as quite consistent. But we have been leaving the car on its arrival at Bethlehem thirteen or fifteen minutes behind, therefore losing the omnibus. We find him leaving the car on his homeward side, and there is evidence that he passed rapidly, as most persons do in front of the engine, and that two men were following him rapidly, as they would naturally do in front of the engine. I confess, gentlemen, I do not attach any materiality to that, but one of the witnesses says, what is probable, that the man in front was Mr. Snyder, and that is just what would occur, if he meditated suicide or not. I see nothing in that, either way. The counsel for the plaintiff thinks that these two men probably murdered him.

It may be so, but I attribute as little importance to the evidence on the other side, or to the assumed number of papers that he had to get rid of. I think that, on the contrary, these quite old people, and Lindeman, one of them, escorted a lady and gentleman to the "Eagle." I do not think there is much importance in what they say. I do not say on a dark night; the gas was then burning in one or two of the hotels; that did not prevent people from carrying lighted lanterns, you will recollect.

On the whole, therefore, we find him in a situation in which we would expect him to go home. Did he go home? He certainly never reached home. Now, where do we next find him? And here comes a different part of the case. You find him, if you believe Henry Billing—I see no reason why you should not; we shall think of that presently—we find him lying on his back on the footpath of the Lehigh bridge, apparently asleep, at five minutes before ten. Billing would seem to have been a stagnant sort of a person, but a very good man, apparently. Billing says he used to take a journey every evening to the end of the bridge to put the lights out, and that he put the further light out first, and that he found upon the bridge a man that he supposed to be a drunken man, toward the furthest part from the toll-house, and that is nearest to the depot, you know. He tried to wake him, and shook him gently, shook him harder, and got from him what the details are; that he got him up without much difficulty; and that the man said during this time, "I am stabbed, and stabbed twice;" that as he was getting him up he thought it was Monroe Snyder, and that when he got him up, and had the light thrown full in his face, he saw it was Monroe Snyder. In the meantime he told him what was very true: "You will be frozen to death." Snyder showed him the stabs. He could not see that he was stabbed, and he did not believe that he was stabbed, and that he then went his way, and put the light out, and coming back looked for Mr. Snyder. He was gone, and he went to the length of 150 feet to the next hotel, and could not see anything of him, and he then walked quickly back, and his daughter said in the meantime she had heard somebody go down the steps.

Now, Mr. Billing knew Mr. Snyder perfectly, and he says that when he last looked at him he was sure that it was Mr. Snyder. Is he to be believed? Why should he not be believed? Let us consider that a moment, if at that time his testimony was very seriously damaged, because he gave the following account of what occurred afterward. By the by, I forgot to mention that he said he went into the toll-house and told his wife and daughter what had happened, but he thinks nobody else; while he then says that he heard next morning that a man had been killed, and went down and took a look, but did not know who it was. He then went back, and soon after heard that it was Monroe Snyder, and he concluded that may be Snyder's friends would think that he ought to have looked to him, and that he would not say anything about it, and did not say anything about it. He thought they would blame him. But when he saw it was going to be a serious matter—he did not use these words, but that is what we may understand—he thought it was his duty to let Mr. Misch know. He went to Mr. Misch, and he told Mr. Misch, "I know something about it." That was very natural. And by Mr. Misch the subpœna was issued. Then he went to the inquest, and he found he was not wanted that afternoon, nor the next day, nor the day after. The present chief burgess, Mr. Irwin, sent for Mr. Billing, and he, Mr. Billing, found himself confronted with two New York detectives, and Mr. Irwin wanted him to tell those detectives all about it, and he said he would not give any statement except what he would give on oath before the coroner's inquest. On the whole, therefore, I cannot see what there is against this man's testimony, except the supposition of the witness as to what occurred before the New York detectives went upon this, what proved to be a hunt in the wrong place. If he did say it, it detracts somewhat from the accuracy of his evidence, and may have been in this respect mistaken. There was some carelessness about the date. It appears to me, however, that it would be very unsafe to reject or disregard in any way the testimony of Mr. Billing.

If it is true, then how stands this case? Can we mince this matter by speculations about going to church, or about anything else? Here was a man who should have been at home, and was found lying on his back with, as he said, wounds. If these were the wounds already inflicted, and he had lain down there to die, and got asleep and was likely to be frozen to death with the cold, how does that alter the aspect of the case, unless you believe that the wound had been inflicted by some person who had left. Now, Mr. Snyder, the deceased person, if that was the man on the bridge, did not make a long stay on the bridge. He went his way toward home, and he said, "I can go home," so Mr. Billing tells us, but independently of that what he did was the same thing as saying it; he went toward town. Here was then a man who, after more than half an hour, is found in this position, saying he was stabbed, moving toward home, and not reaching home. How does this present itself to your mind? How are you going to explain it? Do you believe that he had been wounded by men who had left him there? If so, you will adopt that theory, if you think it a rational one. If you believe what he said was untrue about the wounds, if he must have had some thought that he would not state—that is, therefore,

an explanation that diminishes the difficulty. Then he was wounded, as he said, able to walk, to go toward home, even though he might have been frozen to death and got to sleep after the wound. Why did he not reach home? What was the impediment?

Now, gentlemen, as to the evidence which follows. Its effect depends probably on what effect you attribute to Billing's testimony. As to the subsequent witnesses, I do not think that, in the absence of Billing's testimony, they sufficiently identify Mr. Snyder as the man who was seen, although I would leave that entirely to you as a matter of fact, but that the testimony of Mr. Billing, with the testimony which follows him, suffices entirely to convince you that Mr. Snyder, in a state of irresolution, unwilling to execute his purpose, hesitated, not content to go home, nor with firmness enough to take his life, was rambling and tumbling about in the dark at night. Now, if you take this theory as to that, and all that is a mistake—though you will decide upon that yourself—if he is the man referred to by the subsequent witnesses, then it is almost impossible not to look back to this letter, however obscure, and not to look back at Billing's testimony, not to look back to his interview with his sister, not to take a painful view of this occurrence. The buttoning of the clothes seems to me to be fully explained by Billing's testimony. You have heard a good deal about the clothes being found buttoned. He says the overcoat of Mr. Snyder was open; he cannot tell whether the undercoat was buttoned or not, but he raised his vest. You recollect the waistcoat, too, was on. Now, if Mr. Snyder, with the cuts which he said he had, if he had inflicted those cuts himself and he was able to walk off the bridge, he was able to button the coat, and the mystery ceases to be a mystery of which you have heard so much, and the same explanation can be made of his gloves. It was cold; he buttoned his coat and he put his gloves on. That part of the subsequent examination of the case seems to me to be explained, and to be attended with no mystery at all, if you give full effect to Billing's testimony.

Now, was he seen afterward? Did he remain on that bridge without going home, or was he dead, or soon after murdered by one or more unknown men, or the same men who crossed after him in front of the engine, or some other man or men, or by some man who was heard talking to another about how to divide some money, or any of these suggested facts? Why, gentlemen, if Billing's testimony is true, it requires a great deal of self-possession to comprehend how this man was not taking care of himself, and why he did not go home, and so forth. Now I get right. Now I will go back and recur to Fetter's testimony. Fetter was going to the hotel after 11 o'clock, and he saw a man whose actions frightened him, and well they might. Mr. Fetter says that between 11 and a quarter past 11 he passed down Main street on the sidewalk on the west side of the way. "Did you see anybody on or near Monocacy bridge? Answer. I did, going down the plank walk, all by himself. I passed the man just far enough"—then occurs a blank in my notes—"I saw it was a man going across slowly; I was going pretty fast myself; I could not very well tell whether he was standing or moving; as I neared him I saw he was going from me. I slackened my pace; he was about as far as across the room on the bridge, his back to me, and walking slowly." Now, gentlemen, this evidence certainly, in the absence of Billing's testimony, and the testimony which follows of the three men at a later hour, would be very unsatisfactory; in fact I should advise you to consider it no identification at all; however probable it might be, it would be but probable. But we come to a later hour, when there is something more like identification. There is a man whose name is Sceitzer, or Schreiner,—it does not matter,—who was engaged in the zinc works, and who was walking home after two o'clock at night, and Bush and Barr, who you recollect were one of them going home in a sleigh, and the other one walking. This sewing machine man, Swifel, so Bush, also, says he saw a pretty tall man walking in front of him toward the Monocacy bridge. He describes his size and walk, and says the man was not black, that he was a white man, and he saw him all the way from Fetter's Hotel to the Monocacy bridge.

The testimony of these two witnesses, without Mr. Billing's, would amount to very little; but the same man whom they saw was seen by Billing, and to his testimony more attention is due,—that he recognized this person as some one he thought he knew, and resembled Monroe Snyder, whom he did know. He says, "I recognized the person as some one whom I knew, and resembling Monroe Snyder, whom I knew." He then describes him. He says it was a pretty cold night. A few minutes after starting the man passed on ahead of him, and "I started off; passed Fetter's residence; I saw a person on the Monocacy bridge, on the south side, about twenty feet from the south end of the bridge; when I first saw him he was leaning in this position; I myself was in doubt: I suppose he recognized me; he turned and walked toward me; I stopped; went on fast; walked to say within a foot of the person. When I first saw him he was going north; he came to a standstill; he was facing me; as soon as I saw I could have my place, the place that I wanted, I stopped; looking around over my shoulder, I saw the man standing pretty much where I left him. I passed up the street and went home. I recognized the person as the same one I thought I knew; he resembled Monroe Snyder, whom I knew." The remaining testimony is not important.

Now, gentlemen, I think this is sufficient

identification for us, if it is to be considered by you for what it is worth; if Billing tells the truth, and, as I said, I see no reason why we should disbelieve him; and if Monroe Snyder, as is unquestionable, never got home, and a man is seen by these three persons in this attitude, and with such means, whose figure resembles Monroe Snyder, with Billing's testimony, and the fact that he had not got home, there is not much evidence, if it satisfies you, of identification for your consideration. I do not state that as a matter of law, but as a matter of common sense, for what you think it goes. So, then, this man roamed about in the darkness of this night until after two o'clock. Was that Monroe Snyder? Had he, before or after he was with Billing, stabbed or attempted to stab himself? Had he passed or crossed the bridge without going to his house? Had he thus been on the bridge? If so, there is evidence tending strongly to prove that he was meditating suicide; that he was irresolute; that he could not bring himself to carry his purpose into effect; that for the want of an instrument to stab himself he could not stab deep enough; that if he meant anything else he could not execute his purpose; in short, he was very irresolute.

Now, gentlemen, it does not do to theorize about what may have occurred. If we can find any other rational view of the case, it would be very irrational to say that he had been all this time meditating suicide. He nevertheless might have been afterward murdered and thrown over, but if you can find any other way of reconciling evidence, as I said before, probabilities are not facts. If he was the same man, as the defense alleges, thus roaming about, he certainly had not had courage enough to execute his purpose; however, you may believe that he meditated it. I do not say that we have any other light upon this case to guide us until we come back to what we first considered of the place where the body was. Before we come to that, however, I would say this to you, that if you believe he meditated suicide, whether he formed that resolution after the cars had been detained at Easton, or had formed it as long before as forty-eight hours, when he was conversing with Mrs. Kresgy, some earlier time, when he was writing this paper for his son, for I say, if you find that he meditated suicide, then I would advise you to attribute his death to the purpose he had formed, if you can reconcile the way the body was found with suicide. But observe, you must be convinced that he meditated suicide, and that the position of the body was consistent with the commission of suicide. If on the contrary, gentlemen, you doubt his identification by Billing, if you disregard this loose identification which followed, if you think the writing and the interview with Mrs. Kresgy can be reconciled with a more natural and more innocent purpose, why then there is no trouble in your verdict; but supposing that you cannot get over these things; supposing that he did meditate suicide; then let us recur to the crisis: how did the body get where it was found? Could it have reached the position where it was found without some other human agency than that of the deceased man himself? Now it is not for me to pass over that part of the case after the long delay I have subjected you to. You have heard all about it. You have heard the arguments there are about the idea. You have perceived already that a murderer would throw a man over, intending to kill him from that height, is by no means an impossibility. That a man, himself, should form that idea, intending to commit suicide, deserves some consideration. If he happened to fall on his head it would do very completely. It is for you to say whether there would not be more than that blood on the hat, and whether his skull would not be dashed to pieces; but he might not have fallen on his head. It is not like a man on the monument that Dickens wrote about in that flippant way I have indicated. Might he not at least have broken his arms or legs and saved his life, and not been killed by it? Did he choose that mode of death, therefore, if he wanted to commit suicide? You cannot say that he did not; but did he? The fact is evident, the body was found; but is it found where it would have been consistent with such a purpose? And if you find the purpose executed you might get over the difficulty; but if you find that the body could not be where it was without some other human agency than his own, have the defendants succeeded in proving suicide? The burden of proof is on them. I don't bring it beyond any unmanly doubt; I mean within a reasonable ground. Have they failed in the affirmative issue which they have taken upon themselves? And I advise you to take the theory of suicide and look at that ground, remembering the testimony of Mr. Leer and the others, attributing such effect as you think right to the footsteps; but, as I think more important, looking at the positions, you cannot mistake the nature of the question.

If you think that that man could have got to the place where his body was found without some other human agency, then your verdict should be, I think, for the defendant. If you find from the evidence that he meditated suicide, I don't say that as a matter of law, but as a rational conclusion from the evidence; or if you find the contrary—(and I don't know how far a man of fifty can jump, but I believe nine feet is a pretty good jump; we young men think thirteen feet a pretty good long one—you can take into consideration these measures; but as far as a man could jump, he would fall short of it. There would be a curve inward before he could get to the ground, and if you think he could have got, by his own jump, more than six feet, then his body was found twenty odd feet from the bridge, as I under-

stand the evidence. Could he have got there?)—if you think, further, that he could not have been where he was found without some other human agency, then it would be forcing things to say that he committed suicide and murder both, or that he attempted suicide and was afterward murdered and dragged to the place where he was found. These are fancies which you will hardly entertain. Now, gentlemen, there is no apology at all for the time I have taken, because, if I can save you trouble, I shall be glad to have done it. I leave that part of the case. You understand what the question is, and you will say whether you find that Monroe Snyder died by his own act or not. I come now to some similar questions in the case; they all grow out of one fact. It seems that in the year 1867, I think when Mr. Snyder was the agent for the salt company, he was either loading or unloading a wagon at a railway car, and he fell and struck his head against the wall or ground (it does not matter,) and was stunned for some minutes. He had a bump on his head; I think that is the whole evidence; but whether he was able to get into his carriage is for you. His son had come to drive him home in the meantime. The railway company, being very properly vigilant, as a matter out of which lawsuits might arise, sent for their physician, who arrived in time to see him get into his carriage. Mr. Snyder seems to have allowed the physician to make six calls at the expense of the railroad company; but the physician says he did not find anything particular the matter with him, and did not recollect giving him anything but nitre. It was not in evidence that he took to his bed at all, and in a few days he was quite well. As to the point of law, I will instruct you, that if Mr. Snyder accepted the services of the physician, he ratified the employment of him by the railroad company, and it was the same thing in law as if he employed him himself; but it is not evident that it was the same thing in fact. As to the seriousness of the injury, that is for you to consider. It is the same thing in law, as to the question of employing a physician; of the seriousness of the injury; to this matter you will give such effect as you may think due to it. Now, in the post mortem examination, it was found that there had been a slight adhesion, probably at the place where he got this bump. That adhesion, the surgeon told you, would have occurred from a very slight injury that would not have made him unsound. If I understand the testimony rightly, that is about the whole of the case.

Gentlemen, upon these simple facts four legal propositions are put to me:

First. The written applications as made by the insured, dated respectively July 9th, 1872, and the subsequent September 18th and January 10th, 1873, constituted the basis of contract of insurance, and Monroe Snyder in answer to that part of the question in No. 13, in which it says, "Have you ever had a disease or any other attack?" answered, "Smallpox, thirty years since." But you have the uncontradicted testimony that Monroe Snyder had a severe fall on his head on the 9th day of December, 1867. The answer to this part of the question, No. 13, in the application for which the policies are sued, is untrue, and the plaintiff cannot recover the said policies.

I answer, if the jury find that the fall on his head was a severe one, or that it injuriously affected any vital part, the verdict in this case should be for the defendant.

Second. The written application for the policies signed by Monroe Snyder, the insured, on July 9th, 1872, September 18th, 1872, and January 10th, 1873, form the basis of the contract for the insurance of Monroe Snyder, and he having, in answer to the question No. 14, contained in application: "Have you ever had any serious illness, disease, or personal injury?" answered, "Smallpox, thirty years since," and the testimony uncontradicted is that on the 9th day of December, 1867, Monroe Snyder had a severe concussion of the brain, the answers of Monroe Snyder are untrue, and that the plaintiff is not entitled to recover on any of the policies sued on.

Answer. If the jury find the concussion of the brain a severe one, the verdict in such case should be for the defendant.

Third. A severe fall, by which the head is struck, resulting in concussion of the brain, is a severe personal injury, within the meaning of the term used in the several applications signed by the insured.

Answer. If the jury find that the blow by which the head was struck was a severe one, resulting in concussion of the brain, it was a severe personal injury, within the meaning of the term within the several applications.

Fourth. If the written applications, bearing date September 18th, July 9th, 1872, and January 10th, 1873, signed by the insured, form the basis of the contract of insurance, and the policies were issued upon the express condition and agreement that if any of the statements and declarations made in the applications be different, or in any respect untrue, then the policies should be respectively null and void, and Monroe Snyder, in the insured, having in answer to question seventeen in the said policies, which is, "How long since you were attended by any physician, and for what disease? Give name and residence of such physician," answered, "Not for twenty years;" well, the testimony is unimpeached and uncontradicted that Monroe Snyder was, in the month of December, attended several times by a physician for a severe fall upon his head, this answer is untrue, and the policies are thereby rendered void, and the plaintiff cannot recover upon them.

To that I answer, that if the fall upon the

head for which Monroe Snyder was attended by a physician was a severe one the answer in such case was untrue, and the verdict in such case should be for the defendant. It is not contended that every bump on a man's head, received from a fall, is enough to induce an affirmative answer to these questions; but I leave it for you, whether you think so, as the questions imply.

The case is with you, gentlemen.

Verdict for plaintiff for amount of policy, with interest.

[On writ of error the judgment of this court was affirmed by the supreme court. 93 U. S. 393.]

SNYDER (UNITED STATES v.). See Case No. 16,351.

SOCIETE LA ANONYME DES MINES v. BAXTER. See Case No. 8,099.

Case No. 13,155.

SOCIETY FOR THE PROPAGATION OF THE GOSPEL v. HARTLAND et al.

[2 Paine, 536.] [1]

Circuit Court.[2]

STATUTE OF USES—RES JUDICATA—PARTIES—THIRD PERSONS—EQUITY—EFFECT OF DECREE.

1. The statute of uses (27 Hen. VIII.) has been adopted by Vermont, and generally by the New England states.

2. A matter which has been directly tried and decided by a court of competent jurisdiction, cannot be again contested between the same parties or privies in the same or any other court; and in this there is no difference between a verdict and judgment in a court of common law and a decree in a court of equity; but no rights will be affected by a recovery except those of the actual defendants, and those claiming through them and purchasers pendente lite.

3. But this rule does not apply to matters which come only collaterally or incidentally under consideration, or can only be inferred by arguing from the decree.

4. All persons materially interested in the subject of a suit in equity, ought to be made parties, either as plaintiffs or defendants; but as this is a rule established for the convenient administration of justice, it is subject to many exceptions, and is more or less a matter of discretion in the court, and ought to be restricted to parties whose interest is involved in the issue, and to be affected by the decree. And where one was clearly interested in the subject-matter of the suit, but nothing was asked from him by the bill, and his rights were not put in issue, and nothing was required by the decree to be done by him, it was held not necessary to make him a party.

5. The ground of the rule as to dispensing with parties, is especially applicable to the courts of the United States on account of their peculiar jurisdiction over parties. And although they will require the plaintiff to do all in his power to bring every person concerned in interest before the court, yet, if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person whom the process of the court cannot reach ex. gr., a non-resident ought not to prevent a decree upon the merits. If, however, such a decree cannot be fitly made without substantial injustice to third persons, the court will withhold its interposition.

At law.

THOMPSON, Circuit Justice. The two questions which arise in this case are: 1. Whether the propagation society are seized of such estate in the land in question, as will enable them to maintain an action of ejectment. 2. Whether the decree of the supreme court of this state, in the year 1811, is conclusive upon the right of the society, and estops them from maintaining this action.

The charter under which the society claims the land in question, is from the governor of the province of New York, and bears date on the 23d of July, 1766; and by this charter the land in question is granted to the persons therein named, to and for the only proper and separate use and behoof of the Society for the Propagation of the Gospel in foreign parts, and their successors forever; and to and for no other use and uses, intent or purposes, whatsoever. If this charter is to take effect under the statute of uses (27 Hen. VIII.) the use here declared is by the operation of that statute converted into a legal estate. That statute transfers the uses into possession, by turning the interest of the cestui que use into a legal estate, and annihilating the intermediate estate; and the cestui que use becomes seized of the legal estate by force of the statute, and the use and the land become convertible terms. There can be no doubt but that a party, in order to maintain an action of ejectment, must have the legal estate.[3]

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [District and date not given. 2 Paine, 536, includes cases decided from 1826 to 1840.]

[3] In ejectment by the people, proof that the premises claimed were vacant and unoccupied within the period necessary to be shown to establish against the plaintiff's title by adverse possession, is prima facie sufficient to authorize a recovery. People v. Denison, 17 Wend. 312. It cannot be objected on the trial of an action of ejectment in which the people are plaintiffs, that the suit is prosecuted without the knowledge or permission of the attorney-general. Id. It is not necessary that the wife should join with the husband in an action of ejectment, for the recovery of land conveyed to husband and wife. Jackson v. Leek, 19 Wend. 339. In ejectment by two plaintiffs, where the declaration contains two counts, one alleging title in one plaintiff only, and the other alleging title in the other, and a verdict is found in favor of one plaintiff, and as to the other plaintiff the jury find for the defendant, costs are recoverable by the defendant against the plaintiff who fails to show a right to recover. Maybury v. Evans, Id. 625. Where the premises are unoccupied, parties claiming title thereto, or some interest therein, may be named as defendants in an action of ejectment; and they are not permitted to complain that others should have been made defendants instead of themselves, if, when applied to on the subject, they omitted to set the plaintiff right. It seems, that sometimes the plaintiff in ejectment has an election as to defendants. Edwards v. Farmers'

When this charter was granted, the territory in which this land is included was under the jurisdiction of the province of New York; and if the effect and operation of the charter is to be construed with reference to the laws of that province, the question would be considered at rest. It was not denied upon the argument, and I believe it cannot be doubted, but that, at the date of this charter, the statute of uses, as a part of the common law, was in force in that province. 3 Johns. 485, 394, 302, 304, note a.

It may be proper, however, to inquire whether that statute is to be considered in force in the state of Vermont. We have not been very satisfactorily referred to any settled course of decision in the courts of this state upon that subject, and the few cases that have arisen seem not to have settled the question, in the opinion of the bar. It has been a principle very generally admitted in the several states, that the English statutes passed before the emigration of our ancestors, and which were applicable to our situation, and were in amendment of or amelioration of the English common law, were to be considered in force here, and to constitute a part of the common law; and this would seem to be a principle recognized by the legislature of this state; for, by an act passed in February, 1779, it is declared that the common law, as it was generally practiced and understood in the New England states, shall be the law of this state; and the act passed in June, 1782, adopts the common law of England, with such statutes and parts of statutes as were passed prior to October 1, 1760, for the alteration and explanation of the common law, and which were not repugnant to the constitution or any act of the legislature, and were applicable to the circumstances of the state. Mr. Dane, in his Abridgment of American Law, says: Though the question has been made by some, there is no doubt but that the statute of uses was adopted in the English colonies generally. Conveyances found upon it appear to have been made at very early periods, much after the English form. There can be no doubt, says he, but that the statute of uses has been adopted in Massachusetts, though not practiced upon in numerous instances, yet it has been here in use from the first settlement of the country; and the adjudged cases referred to by him, and those cited in the argument, show his remark to be well founded—so far, at all events, as relates to the New England states; and the Vermont statutes referred to would seem to adopt this as the rule by which to determine this question in Vermont. 4 Dane, Abr. 214, 251; 4 Mass. 133; 6 Mass. 31; 3 N. H. 261, 264; 1 N. H. 64, 232, 264; 1 Swift, Dig. 133; Kirby, 368; 1 Conn. 354.

If, then, the society has the legal estate so as to maintain an ejectment, the next question is, how far their right is affected by the decree of 1811, in the supreme court of this state. The bill, in that case, was filed against Oliver Willard, and the tenants on the land who held the possession under him, (Willard,) to convey to the town of Hartland the legal estate he held under the charter, and to put the town in possession of the land, and the receipt of the rents, the town claiming to hold the land under certain laws of the state of Vermont, which had declared the right claimed by the society invalid or void, and to be vested in the town for the use of schools. In the course of the proceedings Oliver Willard died, and his administrator was substituted in his place; and the decree, so far as it relates to the title, was against the administrator: by which he is required by a good and sufficient deed to quit-claim to the orators, all the right and title of the said Oliver Willard which he

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Fire Ins. & Loan Co., 21 Wend. 467. If the name of a lessor is made use of in an action of ejectment without his consent, the court will order it struck out. Jackson v. Ogden, 4 Johns. 140. Where it appeared that a lessor in ejectment had been made a lessor against his consent, the court expressed a disapprobation of such practice; and said that the attorney, and not the lessor, should be liable to pay the costs. People v. Bradt, 6 Johns. 318. But, in such case, the court cannot judge between the contradictory affidavits of the party and the attorneys. The defendant must have his costs, and is not to lose them in consequence of the denial of the lessor and his attorneys of any responsibility. It is enough for the court, that the lessor appears as a party to the record; but as the costs were large, his recognizance was taken at his prayer until the next term, to the end that he may, in the meantime, sue his action against the attorneys. Id., 7 Johns. 539. See Jackson v. Ogden, 4 Johns. 140. Ejectment for dower, as in other cases, must be brought against the actual occupant, if there be one; and if there be none, then against the person exercising acts of ownership over, or claiming to be interested in the premises. Sherwood v. Vandenburgh, 2 Hill, 303. Several defendants may be joined in one action, where the title of the plaintiff in respect to all is the same, although their possessions are several and not joint; and each of the defendants may be found guilty for the part in his possession, and the plaintiff have judgment against them severally. Jackson v. Woods, 5 Johns. 278; Jackson v. Scoville, 5 Wend. 96; Jackson v. Andrews, 7 Wend. 152. In ejectment, although the use of the names of any other than the real claimants is abolished, still counts may be inserted in the name of both grantor and grantee, where the objection of adverse possession at the time of the conveyance to the grantee is anticipated; otherwise, the recovery may be defeated by showing a conveyance out of the plaintiff named in the first count. Ely v. Ballantine, 7 Wend. 470. The general rule is, that a person ought not to be made a lessor who has no claim or pretension to a subsisting title or interest in the premises. If any person, who may have once had a title, is to be made a lessor, the burden of deducing a title from him, is taken from the plaintiff and thrown on the tenant, which would be unreasonable. If there is a case which ought to be excepted from this rule, it ought to be clearly and specially stated to the court. Jackson v. Richmond, 4 Johns. 483. See Vermont v. Propagation Society [Case No. 16,919.]

held in trust for the said society. A deed in execution of the decree was accordingly given, and the tenants required to attorn to the town, and pay all the past rents due from them from the 21st of April, 1806, and to pay to the town all future rents to accrue upon the leases from Oliver Willard. The society was in no way made a party to the suit, and it was not necessary it should be for the purposes for which the bill appears to have been filed. The only object of the bill was to put the town in the place of Willard, by releasing to it the legal estate he held. The town assumed to hold the right of the society under and by virtue of certain laws of the state of Vermont; but nothing in the bill is asked from the society. The right of the society is not put in issue, and nothing is required by the decree to be done by the society. No one, says the supreme court of the United States, in the case of Kerr v. Watts, 6 Wheat. [19 U. S.] 650, need be made a party defendant, from whom nothing is demanded; and no rights will be affected by a recovery but those of the actual defendants and those claiming through them; that none are subject to the direct and binding efficacy of an adjudication except parties, privies and purchasers pendente lite. The general rule undoubtedly is, that a matter which has been directly tried and decided by a court of competent jurisdiction, cannot be again contested between the same parties or privies, in the same or any other court; and in this there is no difference between a verdict and judgment in a court of common law and a decree of a court of equity. They both stand on the same footing, and may be offered in evidence under the same limitations. This rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because, without it, an end could never be put to litigation. The point is considered res judicata, so far as the court professes to decide the particular matter in dispute. But the rule does not apply to matters which come only collaterally or incidentally under consideration, or could only be inferred by arguing from the decree. This is the rule and the limitation upon it, as laid down by the supreme court in the case of Hopkins v. Lee, 6 Wheat. [19 U. S.] 113. In the case of Mechanics' Bank of Alexandria v. Seton, 1 Pet. [26 U. S.] 306, it is laid down as a general rule, as to parties in a bill in chancery, that all persons materially interested in the subject of the suit ought to be made parties, either as plaintiffs or defendants, in order to prevent a multiplicity of suits, and that there may be a complete and final decree between all parties interested; but that this is a rule established for the convenient administration of justice, and is subject to many exceptions, and is more or less a matter of discretion in the court, and ought to be restricted to parties whose interest is involved in the issue, and to be affected by the decree. That the relief granted will always be so modified as not to affect the interest of others. 2 Madd. 180; 1 Johns. Ch. 350. And in the case of Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 54, the court, in commenting upon this rule, which requires all persons concerned in interest, however remotely, should be made parties to the suit, say, that though the rule is applicable to most cases in the courts of the United States, it is not applicable to all. In the exercise of its discretion, the court will require the plaintiff to do all in his power to bring every person concerned in interest before the court. But if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach, as if such party be a resident of some other state, ought not to prevent a decree upon the merits; and in the case of Mallon v. Hinde, 12 Wheat. [25 U. S.] 197, the court, in speaking of the liberal extension of this discretion, as to parties in the courts of the United States, owing to their peculiar jurisdiction over parties, say, we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure or jurisdiction. We put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court. This rule, as to parties in equity, is very elaborately considered in the case of West v. Randall [Case No. 17,424]; 8 Wheat. [21 U. S.] 451, note,[4] and it is said that the ground of the rule as to dispensing with parties is peculiarly applicable to the courts of the United States. But the principle always, of course, supposes that the decree can, as between the parties before the court, be fitly made without substantial injury to third persons. If it be otherwise, the court will withhold its interposition.

Let us apply the rules and principles recognized and established by these cases to the

[4] It is a general rule in equity, that all persons materially interested in the matter of the bill, as plaintiffs or defendants, ought to be made parties to it, however numerous they may be. West v. Randall [supra]; Caldwell v. Taggart, 3 Pet. [28 U. S.] 190; Trescot v. Smyth, 1 McCord, Eq. 301; Crocker v. Higgins, 7 Conn. 342; Duncan v. Mizner, 4 J. J. Marsh. 447; Wendell v. Van Rensselaer, 1 Johns. Ch. 344. But there are exceptions to the rule, as where the other party is without the jurisdiction, &c. So part of a crew of a privateer, suing for prize money. So creditors suing in behalf of all creditors, &c. West v. Randall; Lucas v. Bank of Darien, 2 Stew. (Ala.) 280; Joy v. Wurtz [Case No. 7,554]. But it cannot be dispensed with where the rights of persons, not before the court, are so indispensably connected with the claims of the parties litigant, that no decree can be made without impairing the rights of the former. Hallett v. Hallett, 2 Paige, 15. Where there are many persons having claims on a fund, and the shares of a part cannot be determined until the rights of all the others are

decree now in question. The society was not made a party. The object of the bill did not require it. The court had before it all the parties necessary to enable it to decide upon the specific relief prayed, and the decree does not profess to decide directly the right of the society; and then, upon the broad rule laid down in the case of Mallow v. Hinde [supra], that no court can adjudicate directly upon a person's rights who is not a party before the court, it follows, as matter of course, that the rights of the society cannot be affected by that decree.

It was urged, at the argument, that this court was concluded by its own decision upon this point in a case between these same parties, at the October term, 1834. If this court, in that case, decided any point repugnant to the doctrine contained in the cases now referred to and relied upon, it was erroneous, being in conflict with the decisions of the supreme court of the United States, by which we are controlled, and the error ought to be corrected; and it is matter of consolation, that if any mistake was then made, it was not to the prejudice of the party against whom we now feel ourselves bound to decide. But we apprehend it is a mistake to suppose that our present decision upon this point is at all in conflict with what was decided in that case. The object of the bill, in that case, was to recover from the defendants the rents they had received under and by virtue of the decree of 1811, and at the same time impeaching the decree, and denying that it concluded the right of the society. The court dismissed the bill, on the ground that this decree could not be impeached in this manner, and that the society, by claiming the rents that had been received under it, thereby affirmed the validity of the decree. Judgment for the plaintiff.

SOCIETY FOR THE PROPAGATION OF THE GOSPEL (VERMONT v.). See Cases Nos. 16,919 and 16,920.

settled and ascertained, as in the case of residuary legatees, or creditors of an insolvent estate, all must be made parties; or they must have an opportunity of coming in and substantiating their claims before any distribution of the funds can be made. Id. If persons are made parties defendant unnecessarily, the bill will be dismissed as to them with costs. Covenhoven v. Shuler, 2 Paige, 122. A person is a necessary party to a suit, when no decree in relation to the subject-matter of litigation can be made until he is properly before the court as a party; or where the defendants in the suit have such an interest in having such person before the court as would enable them to make the objection if he were not a party. Bailey v. Inglee, Id. 278. A defendant may in some cases be a proper party to a suit, although he is not a necessary party; as in the case of a fraudulent assignment of a trust-fund, where the cestui que trust may, at his election, either proceed against the trustee alone, or may join the fraudulent assignee in the same bill. Id.

Case No. 13,156.

SOCIETY FOR THE PROPAGATION OF THE GOSPEL v. WHEELER et al.

[2 Gall. 105.][1]

Circuit Court, D. New Hampshire. Oct. Term, 1814.

WAR—ALIEN ENEMY—PARTY TO SUIT—IMPROVEMENTS—CONSTITUTIONAL LAW.

1. If a foreign corporation, established in a foreign country, sue in our courts, and war intervene between the countries, pending the suit, this is not sufficient to defeat the action, unless it appear on the record, that the plaintiffs are not within any of the exceptions, which enable an alien enemy to sue.

[Cited in Cochran v. Cunningham, 16 Ala. 448; March v. Eastern R. Co., 40 N. H. 453.]

2. Of the nature and effect of a plea of alien enemy.

[Cited in Taylor v. Carpenter, Case No. 13,-785.]

3. There is no legal difference as to the plea of alien enemy between a corporation and an individual.

[Cited in Adams v. Wiscasset Bank, 1 Greenl. 363; Wood v. Hartford Fire Ins. Co., 13 Conn. 212.]

4. The act of New Hampshire of the 19th of June, 1805 [Laws 1815, p. 170], allowing to tenants the value of improvements, &c. on recoveries against them, so far as it applies to past improvements, is unconstitutional.

See Withington v. Corey [2 N. H. 115].

[Cited in Foxcroft v Mallett, 4 How. (45 U. S.) 379; Tufts v. Tufts, Case No. 14,-233; Re Griffiths, Id. 5,825; Satterlee v. Matthewson, 2 Pet. (27 U. S.) 414; Sturges v. Carter, 114 U. S. 519, 5 Sup. Ct. 1,-017; Griswold v. Bragg, 48 Fed. 522.]

[See Albee v. Bundy, Case No. 134.]

[Cited in Briggs v. Hubbard, 19 Vt. 88; Clark v. Clark, 10 N. H. 387; Commissioners v. Rosche, 50 Ohio St. 111, 33 N. E. 408; Connecticut & P. R. Co. v. Town of St. Johnsbury, 59 Vt. 320, 10 Atl. 573; Dow v. Norris, 4 N. H. 19; Forster v. Forster, 129 Mass. 563. Cited in brief in Freeland v. Hastings, 10 Allen, 574. Cited in Girdner v. Stephens, 1 Heisk. 285, 286; Griffin v. McKenzie, 7 Ga. 163; Griswold v. Bragg, 48 Conn. 582. Cited in brief in Kennebec Purchase v. Laboree, 2 Greenl. 278, 289. Cited in Martindale v. Moore, 3 Blackf. 284; Mills v. Peirce, 2 N. H. 13. Cited in brief in Moon v. City of Ionia, 81 Mich. 636, 46 N. W. 25. Quoted in Newton v. Thornton, 3 N. M. 189, 5 Pac. 259. Cited in brief in Philadelphia v. Gray's Ferry Passenger R. Co., 52 Pa. St. 179. Cited in Pickering v. Pickering, 19 N. H. 392. Cited in dissenting opinion in Rich v. Flanders, 39 N. H. 341. Cited in Shay's Appeal, 51 Conn. 167; Simpson v. City Sav. Bank, 56 N. H. 474. Cited in brief in Tilden v. Johnson, 52 Vt. 629. Cited in Willard v. Harvey, 24 N. H. 351; Withington v. Corey, 2 N. H. 118; Woart v. Winnick, 3 N. H. 478, 480.]

[5. Cited in Kent v. Rand, 64 N. H. 48, 5 Atl. 760, to the point that a mere moral obligation is not sufficient to support an express promise.]

[6. Cited in American Mut. Life Ins. Co. v. Owen, 15 Gray, 493, and in March v. Eastern R. Co., 40 N. H. 579, to the point that a foreign corporation may maintain a real action in the courts of this country.]

[7. Cited in Adams v. Hackett, 27 N. H. 294; City of Cincinnati v. Seasongood, 46 Ohio St.

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

303, 21 N. E. 630; Dunbarton v. Franklin, 19 N. H. 262; Leete v. State Bank of St. Louis, 115 Mo. 198, 21 S. W. 788; Opinion of the Justices, 41 N. H. 556; Rairden v. Holden, 15 Ohio St. 210; Rich v. Flanders, 39 N. H. 311; Wendell v. New Hampshire Bank, 9 N. H. 421; Willard v. Harvey, 24 N. H. 354; and in Pritchard v. Spencer, 2 Ind. 486,—to the point that a legislature may enact retrospective limitation laws where they do not deprive parties of a reasonable time for prosecuting their claims before being barred.]

[See Auld v. Butcher, 2 Kan. 150.]

Entry sur disseisin.—In the writ, the demandants, describing themselves as "the Society for the Propagation of the Gospel in Foreign Parts, a corporation duly constituted and established in England, in the dominions of the king of the United Kingdoms of Great Britain and Ireland, the members of which society are aliens and subjects of said king," demand of the tenants, who are all citizens of the state of New Hampshire, seisin of a tract of land in Westmoreland in said district of New Hampshire, which they aver to exceed in value the sum of five hundred dollars; and they count upon their own seisin, and a disseisin by the tenants, within thirty years. At the May term of this court, 1808, the tenants pleaded the following plea: "And the defendants come and say, that this court ought not to take cognizance of the said action, because they say, that said action is sued by and in the name of a supposed corporation or body politic, supposed to be created by a law of a foreign state, and is not sued and commenced by any citizen or subject of any foreign state, against them the said defendants, and this, &c. Wherefore they pray judgment, whether this court will take further cognizance of this action, and for their costs." The demandants replied as follows: "And the said society say that this court ought to take further cognizance of their action aforesaid, notwithstanding any thing by the said John Wheeler and others in their plea aforesaid alleged, because the said Society for the Propagation of the Gospel in Foreign Parts say, that at the time of the commencement of the said action, they were, and still are, a corporation constituted and established in England, in the dominions of the said king of the United Kingdoms of Great Britain and Ireland, and the members of said society then were, and still are, aliens, and subjects of the said king, as by their writ aforesaid is supposed, and this they pray may be inquired of by the country." To this replication there was a general demurrer, and joinder in demurrer.

The court having overruled the plea to the jurisdiction, the tenants, at the November term, 1810, pleaded the general issue, non disseisiverunt, which was joined by the demandants. At the May term, 1814, the tenants severally filed claims under the third section of the statute of New Hampshire of the 19th of June, 1805 (Laws N. H. Ed. 1815, p. 170), in which they alleged a seisin and possession of the demanded premises in themselves, or those, under whom they claimed, for more than six years before the commencement of the present action, and that by buildings and improvements the value of the land was increased in a certain sum, wherefore they prayed that the jury might, if they found a verdict for the demandants, inquire and ascertain the said increased value, and that no writ of seisin or possession should issue, until the demandants should pay into the hands of the clerk for the use of the tenants, such sum as the jury should so assess. At the October term, 1814, the jury found a verdict for the demandants, and they also found the value of the improvements made by the tenants severally. The demandants moved for a judgment on the verdict notwithstanding the statute, and the tenants moved in arrest of judgment, upon the ground, that the demandants appeared by the record to be alien enemies.

Mr. Freeman, for demandants, on the motion in arrest of judgment for alienage.

The demandants are entitled to judgment, unless their disability to sue appears on the record. The only ground of objection is contained in the description, which they give of themselves, for the purpose of giving jurisdiction to the court, viz. "The Society, &c. a corporation constituted in England, in the dominions of the king, &c. the members of which society are aliens and subjects of said king." If from this description, connected with other things of which the court are bound to take notice, it appears that the demandants cannot have ability to sue, judgment must be arrested; otherwise, they are entitled to it on the verdict

Two grounds of disability may be pretended. (1) That it appears, by the demandants' own showing, that at the commencement of the suit they were aliens, and so could not sustain a real action. (2) That, since this action was brought, they have become alien enemies, and therefore disabled to sue any action.

As to the first ground, it is certain. that, at the commencement of this action, British subjects, whether resident in this country or in the British dominions, might sue for, and recover, all lands, which they held previous to Jay's treaty, in the same manner as citizens, and this, whether disseised before or after the treaty. They are entitled to sue in the United States' courts, and the allegation of alienage in the writ is necessary to give the court jurisdiction. It does not, therefore, appear from the writ, whether the demandants were disabled to sue or not. And as to the merits of their claim, no new writ or other form of declaration is given them by the treaty, but the ordinary form of remedy for citizens. The count is simply on the seisin of the demandants, and disseisin by the tenants, in the same form, as though the suit were in the state court, where no such allegation is

necessary for the purpose of jurisdiction. The demandants are not bound to anticipate, nor can they anticipate or forestall the defence of the tenants, and the whole course of the pleadings, nor would it avail them, should they attempt it. But much less could they be bound in their declaration to anticipate a defence, which might arise after the action was commenced. If therefore by any possibility, the demandants might, consistently with this writ, reply sufficient matter to avoid the defence of alien enemy, if pleaded; the tenants were bound to plead it, and having answered to the merits, they must plead the new matter puis darrein continuance, else the disability is waived, and they are estopped to set it up afterwards. It is not denied, that the court ex officio must take notice of the declaration of war by congress, as indeed in England they must of the king's proclamation. No doubt, it is a public act. But, admitting all this, and that the members of the corporation, at the commencement of the suit, were and still are subjects of Great Britain, in such sense as is necessary to give this court jurisdiction, it does not necessarily follow, that they are alien enemies in such sense, as to disable them from sustaining this suit. In their corporate capacity, they have no such political relations, as to denominate them corporaliter a subject or an alien. Hope Ins. Co. v. Boardman, 5 Cranch [9 U. S.] 60. The disability then, if any, must result from the character of the individual members. But although alienage of the members of a corporation may be averred for the purpose of jurisdiction, it does not follow, that they can be considered as alien enemies, so as to destroy rights.

The plea of alien enemy cannot apply to a corporation aggregate, at all. If it could, it would follow, that a single stockholder of one of our banks residing in an enemy's country would disable the corporation to sustain any action in our courts. So is the law as to joint partners. McConnell v. Hector, 3 Bos. & P. 113. Co. Litt. 129a, is express, that alienage is no plea to an action, real or personal, by a corporation, because they sue in their corporate capacity and en autre droit. The same doctrine is laid down in Bacon's Abridgment, and applied to an alien enemy. And an alien enemy, for the same reason, viz. because he acts en autre droit, may sue as executor or administrator. 1 Bac. Abr. "Alien," D; "Abatement," B 3; 1 Salk. 46 pls. 1, 2; 1 Strange, 282; 1 Com. Dig. "Alien," C 7; Brocks v. Phillips, Cro. Eliz. 684; Caroon's Case, Cro. Car. 8; 3 Burrows, 1739, 1741; Wyngate v. Marke, Cro. Eliz. 275. Yet it might be a good plea, that the testator or intestate, at his decease, was an alien enemy. Skin. 370. From these authorities it would seem, that the law rather regards the person represented or the use than the party on the record. The law will protect the interest of an innocent assignee, or cestui que trust, in a chose in action. Winch v. Keeley, 1 Term R. 609; Brandon v. Nesbitt, 6 Term R. 23. On the principle of these cases, it would seem, that the assignee of a judgment, or other chose in action, would not be barred from suing in the name of a foreigner by the breaking out of war. In personal actions the thing is forfeited to the king, and after inquest he may have an action on the contract with an alien enemy for his own benefit. But not when the equitable property is in another. Nor can he have a writ on a disseisin done to an alien enemy, or other real action on his seisin. 1 Taunt. (Eng. Ed.) 29, 33. The reason of the law is, to prevent the property's being withdrawn from the country, and going to increase the resources of the enemy. It does not, therefore, apply to the case of lands, which cannot be withdrawn. Nor could it apply to a case of trust, where the proceeds of the suit must be applied to charitable and religious uses. There is nothing hostile in the purposes of this corporation. The government of the United States have not made war on the Christian religion. There is no case, in which the rule "cessante ratione cessat et ipsa lex" could apply more strongly. But, even in the case of individuals suing for their own benefit and in their own right, alienage for the purposes of jurisdiction, and the question of alien enemy to disable the party, are governed by very different rules. "Alienage" for the purpose of jurisdiction is opposed to "citizenship." Persons inhabiting here, not having political rights as citizens, are aliens, and may sue in the federal courts. Hollingworth v. Duane, 4 Dall. [4 U. S.] 353. But on the question of alien enemy the domicil settles the character. It is uniformly so held in prize causes. La Virginie, 5 C. Rob. Adm. 98; O'Mealey v. Wilson, 1 Camp. 482. The matter alleged in the writ would clearly be insufficient in a plea of alien enemy, if any such plea might be allowed in the case. This plea requires the greatest strictness. The constant inclination of courts has been to narrow this ground of objection. It is a defence not favored in law. It is only temporary in its nature; it is considered as a dilatory plea; as being against right; and of all pleas the most odious. 8 Term R. 166, 71; 2 W. Bl. 1326; 13 East, 332; 10 East, 326; 1 Bos. & P. 165, 169, 170; 9 East, 321. Non constat, that in this case every member of the corporation is not now, and ever since the commencement of the war has been, commorant here. They sue in their corporate capacity, and en autre droit. They sue for their lands in a real action, to which case the plea of alien enemy has never been extended, and the reason of it does not apply. And so far as the court can determine from the name of the corporation, they sue for property as being devoted to a benevolent and pious use, not less beneficial to this country, than to any other, and wholly unconnected with any hostile or commercial purposes.[2]

[2] The reporter regrets, that not having been present at the argument on this point in behalf of the tenants, he is unable to insert it.

Mr. Freeman, on motion for judgment upon the verdict.

To the defendants' claim of compensation for their improvements, the plaintiffs object the 2d, 3d, 12th, 14th, and 23d articles of the bill of rights in the constitution of New Hampshire, article 1, § 10, of the constitution of the United States, and article 5 of the amendments. They contend: (1) That the statute relied on by the defendants (Act N. H. June 19, 1805; Laws 1815, p. 170), so far as it might be construed to affect this action, is void, being repugnant to the provisions of the constitution of New Hampshire above cited, as well as to the constitution of the United States, and to the principles of natural justice. (2) The act does not extend to suits in the United States' courts, nor bind those courts. (3) Nor to suits of foreigners; at least, of foreigners suing in the United States' courts. (4) The claims are insufficient, by reason of their uncertainty in respect to setting out the defendants' title, the persons of whom purchases were made, and the consideration.

I. The courts of the United States, not less than the state courts, must, when the question arises in a case properly before them, judge of the validity of an act of a state legislature, under the state constitution. Vanhorne's Lessee v. Dorrance, 2 Dall. [2 U. S.] 308; Cooper v. Tellfair, 4 Dall. [4 U. S.] 14; Ogden v. Blackledge, 2 Cranch [6 U. S.] 272, 276; New Jersey v. Wilson 7 Cranch. [11 U. S.] 164. The statute in question may be considered in two points of view: (1) As conferring a right on one party, and imposing a corresponding liability on the other; or, (2) as regulating a remedy, and prescribing the time and mode of proceeding.

From the verdict of the jury, by which the improved value is assessed, it appears that the demandants, at the time of passing the act, had, or would have a perfect right to recover the demanded premises. This was then an absolute and unconditional right to their remedy for the possession, clear of any incumbrance, "freely and without purchase." Till then there was no legal or equitable liability of the demandants to compensate for the increased value in case of a recovery. The law imputed no wrong, or fault, or laches, to the demandants for not suing within six years. It implied no contract in favor of an adverse possessor, who litigates a just title. It imposed no duty on the demandants. It gave no rights to the tenant. And so destitute even of moral obligation is the claim, that an express promise on such a consideration has been held to be nudum pactum and void. Frear v. Hardenbergh, 5 Johns. 272, 277. Such then being the rights of the parties, laying aside the constitutional objections, a statute must be very clear and unequivocal, to impair those rights on account of any facts or circumstances, which happened before the passing of the statute; for it is a general principle, that laws should be construed prospectively and not retrospectively, so as to take away a vested right. The case should not exist, at the passing of a law, upon which the law is to operate. The barring, defeating or impairing the recovery of a former right, by a statute, upon a consideration wholly past, is within the same general principle, and equally within the consideration of the constitution, as the creating of a new direct liability to an action. The principle of this statute would have been no worse, had it provided, that the tenant should have his action for such past improvement, in consideration of the prior purchase and possession, nor had it said, that such tenant then in possession, should hold the land absolutely forever. The right of recovery was before perfect and unconditional. Now, on the defendants' construction, it becomes, by the mere force of the statute, conditional, and charged with an incumbrance, for that, for which there was before no legal or equitable right. It is equally inadmissible to extend the statute to a case, where any part of the six years' possession was before the act passed. A statute of limitation is different; as it relates merely to prosecuting the remedy, and always contains an alternative of bringing suits within a certain time to run after the act passed. Here is no time allowed to bring a suit so as to avoid the charge of improvements, unless the act be wholly prospective. An action brought the next moment after the act was passed stands on the same ground in this respect, as one brought at any time within six years afterwards, for there can be no division of the time. It is repugnant to the very notion of a law, as defined by elementary writers, that it should be considered a rule for past cases. 1 Bl. Comm. 44–46; 1 Burlam. Nat. pp. 99, 101, 102, 104, c. 10, §§ 2, 3, 5, 6, 7; 2 Burlam. Nat. pt. 3, c. 1, §§ 2, 4; Puff. Laws Nat. bk. 1, c. 6, § 7; Id. bk. 7, c. 6, § 2; Bract. lib. 4, fol. 228; 2 Inst. 292; 7 Johns. 502, 504; Cod. l. 1, t. 14, l. 7. "Leges et constitutiones futuris certum est dare formam negotiis, non ad facta preterita revocari; nisi nominatim, et de preterito tempore, et adhuc pendentibus negotiis, cautum sit." A few authorities will show, that in analogous cases such construction of statutes, as that under which the defendants in this case claim, has been reprobated, as against natural justice. Grotius, J. B. & P. lib. 2, c. 10, §§ 1, 5; Id. lib. 3, c. 14, §§ 7, 8; Id. c. 20, §§ 7, 9, 10; 2 Vanhorne's Lessee v. Dorrance, 2 Dall. [2 U. S.] 304; Calder v. Bull, 3 Dall. [3 U. S.] 386; Ogden v. Blackledge, 2 Cranch [6 U. S.] 272, 276; Jackson v. Phelps, 3 Caines, 69; U. S. v. Heth, 3 Cranch [7 U. S.] 399, 403, etc.; 4 Johns. 75, 76, 78; 5 Johns. 139, 142; 4 Burrows, 2460; Dash v. Van Kleeck, 7 Johns. 477.

2. Considering the statute in the other view, viz. as regulating the remedy, and prescribing the time and mode of proceeding, the

same constitutional objections apply with equal force, and the defendants' construction of the act is doubly guarded against by those provisions, which relate to the protection of property, and the right of a free and certain remedy by law for all injuries.

II. But this statute, being directory only to courts, and prescribing a certain mode of proceeding, extends no further than the state courts, and does not bind those of the United States. The 34th section of the judiciary act (1 Stat. 74) passed September 24, 1789, does not extend to this case. There is a marked distinction between those statutes of the several states, which are to be considered as measures of right and rules of property, which congress has no authority to dispense with, and such as regard only the time, form and mode of pursuing remedies, and of process and proceedings in their courts. This distinction seems to be observed in the different statutes of the United States, which have reference to the state laws. Statutes of the first class only are embraced in the 34th section of the judiciary act. This provision recognizes the laws of the states for the time being, in cases where they apply, as rules of decision, &c.

On most questions, that arise in the trial of causes, the state laws must be the only rules of decision. Such are those concerning the attestation and effect of wills, course of descents, distribution of estates, modes of conveyances, contracts, and generally whatever regards the internal police and government of the state. Respecting such matters, congress has no legislative power, and it was probably for the removal of doubts upon this subject, and to prevent an extension of the powers of the general government by implication, and especially to allay those jealousies, which were assiduously fomented on its first adoption, that this section of the judiciary act was introduced. That this provision was not intended to extend at all to forms of process and proceedings in the federal courts, and those incidents generally, which it properly belonged to congress to regulate, is evident from the act to regulate process, which passed a few days afterwards, as well as from various other provisions of the statutes of the United States. The United States' government may establish their own limitation acts for proceedings in their courts, and, if they choose, make them uniform through the United States. A new state limitation act, as to the time of bringing suits, would not apply to suits in the United States' courts, unless expressly adopted by the general government. The limitation of penal suits is different under the United States' laws, and those of the states. In the United States, it is two years, in the state of New Hampshire but one. The limitation of writs of error in the United States' courts is also different from that in the state courts.

The courts of the United States are not governed by those statutes of the several states, which regulate costs, bail, process and trials, juries, challenges, &c. The words of the former statute regulating process, &c. (Act Sept. 29, 1789; 1 Laws [Folwell's Ed.] 146 [1 Stat. 93]) are "forms of writs, and process, and modes of proceeding in the courts of the United States shall conform to such, as are now used and allowed in the supreme courts in the respective states, &c." The existing statute regulating process (Act May 8, 1792; 2 Laws [Folwell's Ed.] 103 [1 Stat. 275]) adopts such form of writs, execution, and other process, and forms and modes of proceeding in common law suits, as were then used in the United States' courts in pursuance of the former act. The time and mode of remedy, &c. follow only such state statutes as were then in force, or else the common law. So in the statutes as to returning jurors (5 Laws [Folwell's Ed.] 195 [2 Stat. 82]) such mode, as then used, is adopted. There are also special provisions, as to writs of error, stay of execution, new trials, judgment on bonds with penalty, &c. See, also, section 15 of the judiciary act, and the provisions respecting prisoners for debt, 3 Laws [Folwell's Ed.] 335 [1 Stat. 482]; 5 Laws [Folwell's Ed.] 6 [2 Stat. 4]. The form of remedy and course of judicial proceedings, and the time when the action may be commenced, follow not the lex loci contractus, nor the law of the place where the right or liability accrues, but that of the jurisdiction where the remedy is prosecuted. Pearsall v. Dwight, 2 Mass. 84. This distinction as to the objects of the state laws, which goes to exclude the case in question from the purview of the 34th section of the judiciary act, appears to have been insisted on with effect in the trial of Judge Chase. Evans' Trial of Judge Chase, Append. pp. 4, 5, arts. 5, 6; Answers, p. 31, etc.; Randolph's Reply, art. 5; Harper's Opening, p. 59; Clarke, 115; C. Lee, 164, p. 268, and Append. 62, the vote.

III. As to the application of the law to foreigners, it is to be observed, that whatever the state sovereignty may direct respecting its own subjects, yet in cases where the rights of foreigners are concerned, the law of nature and of nations is paramount to the municipal or common law, or rather may form exceptions and restrictions to general rules. The law of nations in its full extent, where applicable, is part of the common law of every country. 3 Burrows, 1480; 4 Burrows, 2016. It may justly be questioned, whether any one of the state sovereignties has authority to divest foreigners of their rights, or destroy their remedies, as is attempted in this case. A regulation respecting remedies, and proceedings in the state courts, where citizens only are bound to sue, might, from the different organization of the federal courts, and the course of their proceedings, and the different situation of their suitors, operate very unequally, if applied to them. For example, a very short term of

limitation for bringing suits, as in this case for paying betterments, might defeat the rights of foreigners altogether, without any laches on their part. The federal judiciary was intended to protect the rights of strangers against local and state partiality and injustice.

IV. As to the fourth point, on the sufficiency of the defendants' claims, I shall submit it to the court, if they should come to it.

Mr. Richardson, for tenants, on the motion for judgment upon the verdict.

It is not denied, that the legislative power is limited by the constitution, nor that the court have a right to declare an act, which is contrary to the constitution, void. But in the first place it is denied, that any right secured by the 2d, 3d, or 12th articles of the New Hampshire bill of rights, or by the 5th article of the amendments of the constitution of the United States, is violated by this act.

What are the facts? The defendants, supposing they had acquired a legal title to the land, having paid a valuable consideration for it, entered, and at great expense and labor increased the value of the land, by buildings and improvements made thereon. To whom do these improvements and buildings belong? Every man has a right to the fruits of his own labor. By this rule the buildings and improvements belong to the defendants. How do the plaintiffs derive their right to them? They own the lands; these improvements cannot be severed from the land; they can recover the lands and these improvements as incident to them. But this course of reasoning shows not a vested right to the improvements, but the mode in which a vested right may be acquired. When the plaintiffs shall have recovered the land, they will then, and not before, have a vested right in the improvements. This distinction is clearly recognised in the case of Taylor v. Townsend. 8 Mass. 411. It is not true, that whatever is annexed to the freehold becomes immediately the property of the owner of the land, as is evident from the right of a lessee to remove certain buildings by him erected. Bull. N. P. 34. There is, in principle, no distinction between improvements, that can be severed and removed from the land, and those which cannot. The man, who turns unproductive low land into productive meadow, is, in equity and justice, as much entitled to the increased value, as he who erects a building, is entitled to that building, although, as the law stood before this act, the one had no remedy to enforce his right, and the other had a remedy in certain cases. The design of the law, against which the plaintiffs object, was to provide a remedy, where none existed before. It is founded upon the supposition, that the tenant has a vested right to the improvements, he has made, as the fruit of his own labor, and that the owner of the land has no right to them. If the broad principle be assumed as true, that whatever improvements are made upon land become immediately the property of the owner of the land, by a vested right, whether he is in possession or not, the doctrine laid down in Bull. N. P. 34, and the principles of the case of Taylor v. Townsend, would be a violation of the constitution of New Hampshire; and yet both cases are understood to be law here. What right of the plaintiffs is violated? Before this act they had a right to the land; they had a right to a remedy, to recover the land with all the improvements. These rights they still retain. The legislature, in this act, say, you may have your land, you may have your remedy to recover it, but you shall not acquire a right to the improvements made upon it by an innocent tenant, through a mistake of his rights, till you have paid him for those improvements. You shall not turn him out of possession, and enjoy the fruits of his labors, till you make him a compensation. If this be a violation of an essential natural right, it is apprehended that by the same course of reasoning it may be shown, that the maxim in equity, "you shall do justice before you receive it," is inequitable. There is no novelty in making a distinction between the value of the land at any particular time, and the improvements afterwards made upon it, as appears from the opinion of C. J. Kent, in Pitcher v. Livingston, 4 Johns. 17.

With regard to the objection, that this act violates the first article of the bill of rights, the defendants apprehend, that the history of that article shows that it was not intended to apply to a case of this kind. The clause of that article, on which the plaintiffs rely, has always been understood to have been copied from the "nulli vendemus justitiam" magna charta, which was certainly intended to apply to a very different case. Sull. Lect. 272. But it is said, this law, as applied to this case, is a retrospective law for the decision of a civil cause. Before discussing this question, it seems necessary to ascertain, what is a retrospective law within the meaning of this article in the bill of rights. It is apprehended, that the opinions expressed by the court in Calder v. Bull, 3 Dall. [3 U. S.] 386, and Dash v. Van Kleeck, 7 Johns. 477, authorize the definition, that a retrospective law is one, that takes away or impairs rights acquired by existing laws. It is believed, no other definition can be found.

Now it is denied that this act, applied to this case, takes away or impairs any vested right. It is denied, on the grounds before stated, that the plaintiffs ever had any vested right to the improvements made by the defendants upon the land. Under the law, as it stood before this act, they might have acquired such a right, but they never did acquire it, and the statute only declares, they shall not now acquire it without making compensation. The statute secures to the defendant a vested right, which justice requires should be secured

to him. The case cited from 5 Johns. 272, does not apply to this case. There the tenant went upon the land, knowing it to belong to another. In this case, the tenants entered innocently and by mistake, and it is humbly submitted, that unless the plaintiffs had a vested right to acquire property from the defendants against justice and equity, there is no foundation for this objection. The other objections made by the plaintiffs' counsel require no answer.

Mr. Freeman, in reply.

The facts assumed by the defendants' counsel, viz. "that they, supposing they had acquired a legal title to the land, having paid a valuable consideration, entered, and at great expense and labor increased the value of the land by buildings and improvements," are not warranted by the defendants' claim, nor by the case provided for by the statute. It was not necessary, in order to make out the case according to the statute, for the defendants to show, nor does it at all appear, that the improvements or any considerable part of them, were made by the defendants themselves, or by any person, who held under a bona fide purchase, or any color of title. But the broad rule, "that every man has a right to the fruits of his own labor," would apply equally well to any case, where a stranger should undertake to manage my affairs without my consent. It never can be contended, that a mere wrong doer, entering wilfully and knowingly on another's land without his consent, without color of title, and retaining the possession, acquires any right merely by bestowing his labor upon it. But the rule laid down by the defendants' counsel must be maintained in all this extent, in order to prove the defendants' right to the benefit of improvements before the act passed. For it does not appear that the improvements were not wholly made by the original wrong doer, long before any purchase. He, after six years, could have no claim under the statute for compensation, and yet, by his sale, the defendants, it is said, have become entitled to that compensation. And still, as the defendants' cases show, the purchaser, on eviction, might recover on his warranty the full value at least of the land and improvements, as they were when conveyed to him; so that, in the event, the original wrong doer would have the benefit of the improvements, or else the purchaser would have a double satisfaction. But put the case, as the defendants' counsel, without any ground, supposes it, that the improvements must have been made by the bona fide purchaser, still he had no right to compensation before the statute. Such right, at any rate, could be considered as no better than the imperfect one, that a man may have to the charity or generosity of others. It stands on hardly so good a foundation as a mere debt of gratitude. Can the legislature enforce the discharge of such previous obligations? It is believed they cannot.

Rights of property, as enforced in courts, must not depend on any vague and imaginary notions of natural justice, but on the settled rules of law. These are the great landmarks, which limit the rights of parties, and they must be observed. They settle the questions, What is right? and, What is just? And on this subject, the rule in law and in equity is the same, "Equitas sequitur legem." It is said, that the statute is founded on a supposition, that the tenant has a vested right to the improvements he has made, and that the object of the law was, to provide a remedy where, it is conceded, none existed before. But it is a maxim of law, that for every right there is a remedy. Want of right and want of remedy are convertible terms. If any such right existed, there seems to be no difficulty in adapting the existing forms of common law remedies to it. The case in 5 Johns. 272, did not turn on any question as to the form of remedy. The cases of warranty, &c. have no bearing in favor of the defendants. They respect only the construction and effect of contracts as between the parties and privies. The cases cited of buildings, which may be severed and taken away by the lessee during the term, are also inapplicable, and they do not warrant the doctrine inferred from them, "that whatever is annexed to the freehold does not become the property of the owner of the land." The principle of these cases I apprehend to be, that the things never were annexed to the freehold, or if they had been so annexed, yet they were severed from the freehold or inheritance by the contract of the parties, express or implied, and common usage may be evidence of such contract. The cases of lessees, however, might not be quite so inapplicable, if it could be shown, that they had a right to compel their landlords to pay for the coppers, buildings, and ameliorations of the soil, by them put up and made on the land, when not stipulated for in the lease.

Every principle of the common law is repugnant to the notion of any such right of the defendants to compensation for their improvements, antecedent to the statute. The improvements themselves, in most cases arising under the statute, are such as would be considered waste by the common law, and if made by the tenant of a rightful particular estate, would subject him to forfeit it. Co. Litt. § 67. This notion is repugnant to the law in relation to personal property, in the cases of accession and confusion of goods, as laid down, 2 Bl. Comm. 404, etc. And Bracton in the place there cited, as well as Co. Litt., applies the rule of accession more strongly to real estate. It is impossible to conceive what is meant by a "vested right to land," and "a vested right to a remedy to recover the land with all the improvements," and a vested right, at the same time, in the improvements in an adverse possessor. Permit me to have the effect of my vested rights to the land, and to the remedy to recover the land, as it is, with the improvements, and also to keep my money in my own possession, to which I suppose I have also a

vested right, and my adversary may enjoy such vested right in the improvements as he can.

2. The 14th article of the bill of rights secures a remedy for every right of property, as absolutely as the right itself is secured. It is immaterial to the party pursuing his rights, whether he is obliged to pay the purchase money to the government, or to the adverse party.

3. If it be true that, in law, the defendants had no vested right to compensation for improvements before the act passed, then it seems to be conceded, that the constitutional objections, both on the articles protecting the rights of property, and on the article prohibiting retrospective laws, are well grounded. But it is doubtful, at least, whether the defendants' definition of a retrospective law is so perfect, as to comprehend all civil cases, that come within the 23d article. Any law subjecting a person to loss or detriment, or imposing an obligation on him on a past consideration, or made to apply to existing cases, is retrospective. A law enhancing the measure of damages in civil actions on past cases is equally prohibited by this article, as a law that enhances the punishment of a crime already committed. There can be no doubt, that such a law is retrospective, and it makes the case no clearer to compare it with the definition of the defendants' counsel. No vested right is impaired, in the case put, more than there is by the statute now in question. In one case the party's money is recovered, from him, on a past consideration, in the form of damages. In the present case, he would be compelled by the statute, on such past consideration, to part with his money, or else lose his land, and either alternative is equally exceptionable.

STORY, Circuit Justice. This is a writ of entry sur disseisin, brought on the demandants' own seisin, and a disseisin by the tenants within thirty years; the writ bears teste on the 22d December, 1807. The tenants, at May term, 1808, having pleaded a plea to the jurisdiction, which was overruled by the court, afterwards pleaded the general issue nul disseisin; and at the present October term of this court, a verdict was found for the demandants; and also the value of the improvements made by the tenants on the demanded premises, pursuant to the statute of New Hampshire of the 19th of June, 1805. Acts 1805, p. 395; Acts 1815, p. 170. After the verdict, a motion was made by the demandants for a judgment on the verdict, at common law, and writ of seisin thereon, without any regard whatever to the provisions of the statute of 1805, or the value of the improvements found by the verdict, principally upon the ground that this statute was unconstitutional. A cross motion was also made by the tenants in arrest of judgment, upon the ground that the demandants were, by their own showing, alien enemies, and therefore not entitled further to pursue the present action. These motions have been ably argued, and the decision, which after much deliberation I have formed, will now be pronounced.

And first, as to the motion in arrest of judgment. The demandants are described in the writ, as "The Society for the Propagation of the Gospel in Foreign Parts, a corporation duly constituted and established in England, in the dominions of the king of the United Kingdoms of Great Britain and Ireland, the members of which society are aliens and subjects of the said king." If from this description, and the other facts apparent upon the record, the court must intend, that the demandants have not a capacity further to pursue the present action, then the motion must prevail. If, on the other hand, by possibility, and consistently with the facts on the record, such capacity can remain, then judgment must pass upon the verdict for the demandants. There is no pretence for holding, that the mere alienage of the demandants would form a valid bar to the recovery in this case, supposing the two countries to be at peace; for however true it may be, in general, that an alien cannot maintain a real action, it is very clear that either upon the ground of the 9th article of the British treaty of 1794, or upon the more general ground, that the division of an empire works no forfeiture of rights previously acquired, (and in point of fact the title of the demandants was acquired before the American Revolution) for aught that appears upon the present record, the present action might well be maintained. Kelly v. Harrison, 2 Johns. Cas. 29; Jackson v. Lunn, 3 Johns. Cas. 109. The whole objection therefore must rest on the existing war.

The defence of alien enemy is by no means favored in the law (see Steph. Pl., Ed. 1824, p. 67); and some modern cases have gone a great way in discountenancing it; further, indeed, than seems consistent with the general rules of pleading. In Casseres v. Bell, 8 Term R. 166, the court held, that the plea of alien enemy must not only aver such hostile character, but also set forth every fact that negatives the plaintiff's right to sue; and this decision is expressly put upon the mere ground of authority. On a careful examination, however, of the cases cited, it will not be found that they support the doctrine. In Derrier v. Arnaud, 4 Mod. 405, the original record of which, Lord Kenyon says, had been examined, the plea negatived every presumption that could arise in favor of the plaintiff's right to sue. But the case did not turn at all upon that point, but simply on the question, whether oriundus, in the plea, was equivalent to natus, and upon examining precedents, the court held the plea good; and, as no such objection was made, it seems difficult to admit, that a mere averment of the additional facts was adjudged necessary, when upon the judgment of the court it stands purely indifferent. In Openheimer v. Levy, 2 Strange, 1082, to an action of assumpsit the defendant pleaded, alien nee, without saying alien ene-

my, and the court held, that, as an alien friend may maintain a personal action, and in order to abate the writ, the plaintiff should be shown to be an alien enemy, which is not to be presumed, nor the contrary necessary to be replied, therefore the plea was bad; and so the law had before that time been held. Dyer, 2. The case, therefore, steers wide of the doctrine contended for. In Wells v. Williams, 1 Ld. Raym. 282, Lutw. 34, and Salk. 46; to debt upon a bond by an executor, the defendant pleaded, that the plaintiff was an alien enemy, and came into England without a safe conduct. The plaintiff replied, that at the time of making the bond he was, and yet is, in England, by the license, and under the protection of the king; and upon demurrer the court held, not that the plea was bad, but that the replication was good; and the court resolved, that if the defendant came there before the war, there was no need of a safe conduct; and if he came since the war, and continued without molestation, it should be intended that he came by a license, and his right to sue was consequent upon his protection. In this case, also, the objection did not arise; for the only question seemed to be, whether a residence by the license, and under the protection of the king, would entitle the party to sue without having a safe conduct; and the court held that it would. And this is but an affirmance of the doctrine of the year books. 32 Hen. VI. p. 23b. These are all the authorities, upon which Casseres v. Bell professes to have been decided. On the other hand, in Sylvester's Case, 7 Mod. 150, which was not cited, where the plea was alien enemy, or demurrer, the court held it good; and that, if the party were entitled under a general or special protection of the king, he ought to reply that fact. And so were the pleadings in George v. Powell, Fortes. 221. And there are several other precedents, in which the plea does not negative the facts, which might enable an alien enemy to sue. 9 Edw. IV. p. 7; Cro. Eliz. 142. If, therefore, the present question turned at all upon Casseres v. Bell, which was cited at the argument, it would require a good deal of consideration, before that decision could be maintained. The case of Clarke v. Morey, 10 Johns. 69, pushes the doctrine further, and asserts that an alien enemy, who comes and resides here without a safe conduct or license from the government, (for so is the averment in the plea) is at all events entitled to sue, until ordered away by the president; and this too, although the party is not known by the government to have his residence here. The English authorities have always required an express safe conduct or an implied license; and Boulton v. Dobree, 2 Camp. 163, decides, that a license is not to be implied from mere residence, unless sanctioned by the government after the commencement of hostilities. The present case, however, may well rest upon distinct grounds; for whether the facts should, in pleading, come from one party or the other, to bring the plaintiff within, or to take the plaintiff out of, the disability of alien enemy: it is very clear, that every fact must appear on the record, which negatives his right to sue; otherwise the judgment cannot be arrested.

The objections to the rendition of judgment for the demandants, in the case at bar, seem to be two; first, that the corporation itself, being established in the enemy's country, acquires the enemy's character from its domicil: second, that the members of the corporation are subjects of the enemy, and therefore personally affected with the disability of hostile alienage. It is certainly true, that as to individuals, their right to sue in the courts of a belligerent, or to hold or enforce civil rights, depends not on their birth and native allegiance, but on the character, which they hold at the time when these rights are sought to be enforced. A neutral, or a citizen of the United States, who is domiciled in the enemy's country, not only in respect to his property, but also as to his capacity to sue, is deemed as much an alien enemy, as a person actually born under the allegiance and residing within the dominions of the hostile nation. This, indeed, has long been settled as the general law of nations, and enforced in the tribunals of prize; and has been latterly recognised and confirmed in the municipal courts of other nations. O'Mealey v. Wilson, 1 Camp. 482; McConnell v. Hector, 3 Bos. & P. 113. And the same principle has been applied to a house of trade established in a hostile country, although the parties might happen to have a neutral domicil; the property of the house being, for such purpose, considered as affected with the hostile character of the country, in which it is employed. The Vigilantia, and the cases therein cited, 1 C. Rob. Adm. 1; The San Jose Indiano [Case No. 12,322].

In this respect, a corporation, authorized by its charter to carry on a trade, and established in the hostile country, such as the East India Company, would undoubtedly be held, as to its property, within the same rule, even admitting its members possessed a neutral domicil. In general, an aggregate corporation is not in law deemed to have any commorancy, although the corporators have (Inhabitants of Lincoln Co. v. Prince, 2 Mass. 544); yet there are exceptions to this principle; and where a corporation is established in a foreign country, by a foreign government, it is undoubtedly an alien corporation, be its members who they may; and if the country become hostile, it may, for some purposes at least, be clothed with the same character. Even in respect to mere municipal rights and duties, an aggregate corporation has been deemed to have a local residence. It has been held to be an "inhabitant" under the statute for the reparation of bridges (22 Hen. VIII. c. 5; 2 Inst. 697, 703); and an "inhabitant and

occupier" liable to pay poor rates, under the statute, 43 Eliz. c. 2. Rex v. Gardner, Cowp. 83. It may therefore acquire rights, and be subject to disabilities, arising from the country, if I may so express myself, of its domicil. And, indeed, upon principle or authority, it seems to me difficult to maintain, that an aggregate corporation, as for instance an insurance company, a bank, or a privateering company, established in the enemy's country, could, merely from its being an invisible, intangible thing, a mere incorporeal and legal entirety, be entitled to maintain actions, to enforce rights, acquire property or redress wrongs, when its own property on the ocean would be good prize of war. If the reason of the rule of the disability of an alien enemy be, as is sometimes supposed, that the party may not recover effects, which, by being carried hence, may enrich his country, that reason applies as well to the case of a corporation, as of an individual, in the hostile country. If the reason be, as Lord Chief Justice Eyre in Sparenburgh v. Bannatyne, 1 Bos. & P. 163, asserts it to be. that a man professing himself hostile to our country, and in a state of war with it, cannot be heard, if he sue for the benefit and protection of our laws, in the courts of our country, that reason is not less significant in the case of a foreign corporation, than of a foreign individual, taking advantage of the protection, resources and benefits, of the enemy's country. In point of law, they stand upon the same footing. It has been argued, that the court will look to the purposes, for which the corporation was instituted, and to the conduct, which it observes; if these be innocent or meritorious, they afford an exception from the general rule. But it is not the private character or conduct of an individual, which gives him the hostile or neutral character. It is the character of the nation, to which be belongs and where he resides. He may be retired from all business, devoted to mere spiritual affairs, or engaged in works of charity, religion and humanity, and yet his domicil will prevail over the innocence and purity of his life. Nay more, he may disapprove of the war, and endeavor by all lawful means to assuage or extinguish it, and yet, while he continues in the country, he is known but as an enemy. The same principle must apply, in the same manner, to a corporation. The objects, indeed, of the present corporation are highly meritorious and worthy of public favor; but, upon the doctrines of law, it must be deemed a British alien corporation, and as such liable to the imputation of being an enemy's corporation, unless it can be protected upon other principles.

Let us now advert to the second objection, which is, that the members of the corporation are all alien enemies. In the writ, it is expressly alleged, that all the members are aliens and subjects of the king of the United Kingdom of Great Britain and Ireland. It does not however hence necessarily follow, that they are alien enemies. This averment in the writ was proper, if not indeed indispensable, in order to sustain the jurisdiction of this court; for the corporation, as such, might perhaps have no authority whatsoever to maintain an action here, under the limited jurisdiction confided by the constitution of the United States to their own courts. But in the character of its members, as aliens, we have incontestable authority to enforce the corporate rights; and it has been solemnly settled by the supreme court, that for this purpose the court will go behind the corporate name, and see who are the parties really interested. Bank of U. S. v. Deveaux, 5 Cranch [9 U. S.] 61. And if, for this purpose, the court will ascertain who the corporators are, it seems to follow, that the character of the corporators may be averred, not only to sustain, but also to bar, an action brought in the name of the corporation. It might therefore have been pleaded in this case. even if the corporation had been established in a neutral country, that all its members were alien enemies; and upon such a plea, with proper averments, it would have deserved great consideration, whether it was not, pendente bello, an effectual bar. Where the corporation is established in the enemy's country, the plea would a fortiori apply.

But, although the corporation itself, and the members also, may be liable to the imputation of being alien enemies; yet that character does not necessarily or unavoidably attach to either. For aught that appears upon the face of the record, every member of the corporation may be now domiciled in the United States, under the safe conduct or license of government. In such a predicament, it is clear, that though aliens, they would not be enemies. but might sue and be sued in our courts. Bynk. c. 25, § 8; Wells v. Williams, 1 Ld. Raym. 282. And in respect to the corporation itself, although established in Great Britain, it may have the safe conduct or license of the government of the United States for its property, and the maintenance of its corporate rights. It is clearly competent for the government, under the general rights of war, to grant letters of protection, and thereby to suspend the hostile character of any person; and when he has such protection, wherever he may be domiciled, he is to be considered, quoad hoc, a neutral. Bynk. c. 7; Usparicha v. Noble, 13 East. 332.

Nor is there, in this respect, any difference between a corporation and an individual. And it would be highly injurious to humanity, as well as public policy, if institutions established in a foreign country for religious, literary or charitable purposes, might not, during war, obtain protection and patronage for their laudable exertions to soften

private misery and diffuse private virtue. To support the motion in arrest of judgment, it is necessary for the court to negative every presumption, that could arise, of a safe conduct or license, either to the members or to the corporation itself. This cannot be done in the present case consistently with the principles of law. The suit was commenced in a time of peace, and every presumption, which can, ought to be made, to support it. It is sufficient, however, that by possibility the demandants, in their corporate capacity, and the capacity of their members, may have a persona standi in judicio, to entitle them to judgment.

There is another consideration also, which may properly weigh in this case. The suit was commenced during peace, and, on the declaration of war, it was competent for the tenants to plead the hostile alienage of the demandants, if it existed, in bar to the further prosecution of the suit, in the nature of a plea puis darrein continuance, as it was pleaded in Le Bret v. Papillon. 4 East, 502. They did not so plead, and thereby have affirmed the ability of the demandants to prosecute the suit to judgment. Upon this ground, where the disability of alien enemy occurred before judgment, and on a scire facias on the judgment the disability was pleaded, the plea has been held bad. West v. Sutton, 2 Ld. Raym. 853.

Another consideration derived from the express provision of the 9th article of the British treaty, of 1794, ought not to be omitted. That article stipulates, that British subjects, who then held land in the territories of the United States, and American citizens, who then held land in the dominions of his majesty, shall continue to hold them, according to the nature and tenure of their respective estates and titles therein, and may grant, sell and devise the same, to whom they please, in like manner as if they were natives; and that neither they, nor their heirs or assigns, shall, so far as respects the said lands and the legal remedies incident thereto, be regarded as aliens. This article has never been annulled, and therefore remains in full force. It deserves, and ought to receive, a liberal and enlarged construction. There can be no doubt, that corporations, as well as individuals, are within its purview; and the present cla'm not only may be, but in fact is, one which it completely embraces. The title of the demandants, as has been already stated, accrued before the revolutionary war. It was obviously the design of the contracting parties, to remove the disability of alienage, as to persons within the purview of the article, and to procure to them a perfect en'oyment and disposal of their estates and titles. If, during war, their right to grant, sell or devise, such estates and titles were suspended, it would materially impair their value. If the remedies incident to such estates for trespasses, disseisins, and other tortious acts, were during war suspended, not only would the security of the property be endangered, but if war should last for many years, the statute of limitations of the various states would, by lapse of time, bar the party of his remedy, and in some cases of his estate. This seems against the spirit and intent of the article, and puts the party upon the footing of an alien enemy, while the language concedes to him all the benefits of a native. Looking to the general moderation, with which the rights of war are exercised in modern times, under the policy, if not the law, of nations; perhaps it would not seem (for I mean not to give any absolute opinion) an undue indulgence, to hold, that as to all titles and estates within the article, an alien enemy may well maintain all the legal remedies, as in a time of peace. At least, it cannot be presumed, that in this favored class of cases, the party has not received the license or safe conduct of the government, to pursue his rights and remedies during the war. And unless such presumption can be made, when there are no facts on the record to warrant it, the plaintiffs must be entitled to judgment. Upon the whole, the motion in arrest of judgment must be overruled.

The other question, which has been argued upon the motion of the demandants, is yet of more delicacy and embarrassment. It is always an unwelcome task to call in question the constitutionality of the acts of a state legislature. It is still more unwelcome, when there has been an apparent acquiescence on the part of state tribunals, for whom this court cannot but entertain the most entire respect and confidence. The parties, however, have chosen to present the question before us, and we are bound to pronounce the law, as upon a careful examination we find it; and if an error be committed, it is a great consolation, that the decision here is not final, but a revision may take place before other judges, whose diligence, learning and ability, cannot fail to insure a most exact and well considered determination.

The demandants contend, first, that the act in question is in contravention of the 2d, 3d, 12th, 14th and 20th articles of the bill of rights, in the constitution of New Hampshire; and of the 10th section of the first article, and the 9th article of the amendments, of the constitution of the United States; and is also repugnant to natural justice; and is therefore void. Secondly, that the act, if constitutional, extends only to suits in the state courts, and not to suits in the courts of the United States; and, at all events, not to suits, in which a foreigner is a party. There is another objection, as to the shape in which the claims for the improvements are asserted in the pleadings, upon which it is unnecessary to say more, than that they have as much certainty, as has been deemed necessary in the practice of the state courts, and as seems

required by the act, and therefore, are good in substance.

The objection, that the act had in contemplation actions in state courts only, between citizens of the state, cannot prevail. Whatever force such an objection might properly have in cases of personal contracts executed without the territories of a state, where a remedy should be sought in the courts of the United States, under circumstances, in which the state laws could afford no remedy, it is a general rule of the law of nations, recognised by all civilized states, that rights and remedies respecting lands are to be regulated and governed by the law of the place, where the land is situated. Huber. tom. 2, lib. 1, tit. 3; Vatt. Law Nat. bk. 2, c. 7, § 85; Id. bk. 2, c. 8, §§ 109, 110. Independent, therefore, of the act of congress of September 24, 1789 (chapter 20, § 34), which declares, "that the laws of the states, except where the constitution, treaties, or statutes of the United States, shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply," the laws of the state regulating titles and remedies to real estate, must, in the absence of other regulations by the United States, be, upon general principles, the rules of decision equally between foreigners and between citizens.

In respect also to the constitution of the United States, the statute in question cannot be considered as void. The only article which bears on the subject, is that which declares, that no state shall pass "any ex post facto law, or law impairing the obligation of contracts." There is no pretence of any contract being impaired between the parties before the court. The compensation is for a tort, in respect to which the legislature have created and not destroyed an obligation. Nor is this an ex post facto law within this clause of the constitution, for it has been solemnly adjudged, that it applies only to laws, which render an act punishable in a manner, in which it was not punishable, when it was committed. Calder v. Bull, 3 Dall. [3 U. S.] 386; Fletcher v. Peck, 6 Cranch [10 U. S.] 87. The clause does not touch civil rights or civil remedies.

The remaining question then is, whether the act is contrary to the constitution of New Hampshire. Various clauses of that constitution have been cited; but that which seems most directly pointed to the case, and which must (if any one can) govern it, is the 23d article of the bill of rights, which declares, that "retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made, either for the decision of civil causes or the punishment of offences."

What is a retrospective law, within the true intent and meaning of this article? Is it confined to statutes, which are enacted to take effect from a time anterior to their passage? or does it embrace all statutes, which, though operating only from their passage, affect vested rights and past transactions? It would be a construction utterly subversive of all the objects of the provision, to adhere to the former definition. It would enable the legislature to accomplish that indirectly, which it could not do directly. Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective; and this doctrine seems fully supported by authorities. Calder v. Bull, 3 Dall. [3 U. S.] 386; Dash v. Van Kleeck, 7 Johns. 477. The reasoning in these authorities, as to the nature, effect and injustice, in general, of retrospective laws, is exceedingly able and cogent; and in a fit case, depending upon elementary principles, I should be disposed to go a great way with the learned argument of Chief Justice Kent.

Let us now consider the particular facts of the case at bar, and the provisions of the act of the 19th of June, 1805. Before the passage of that act, the demandants had a clear vested right and title in the demanded premises in fee, absolute and unconditional; and although the seisin was in another, yet the existing laws afforded a complete remedy to perfect that title by an union juris et seisinae, under judicial process. The demandants were also entitled, both at law and equity, not only to the land, but to all the improvements thereon, which were annexed to the freehold, by whomsoever made, under that vested right and title. The law imputed no laches to the demandants for not pursuing their legal remedy to recover seisin, for the time of the statute of limitations had not run against them; and it imposed no obligation to pay for any amelioration of the soil, or any erections, which had been made by any person claiming an adverse possession or seisin. Then came the act, which, in the third section, provides "that when any action shall be brought against any person for the recovery of any lands or tenements, which such person holds by virtue of a supposed legal title, under a bona fide purchase, and which the occupant, or the person under whom he claims, has been in the actual peaceable possession and improvement of for more than six years before the commencement of the action, the jury which tries this action, if they find a verdict for the plaintiff, shall also inquire and by their verdict ascertain, the increased value of the premises by virtue of the buildings and improvements, made by such person or persons, or those under whom he or they claim, and no writ of seisin or possession shall issue upon such judgment, until such plaintiff shall have paid into the hands of the clerk of said court, for the use of the defendant, or person or persons justly entitled thereto, such sum as

said jury shall assess, as aforesaid, which sum shall be paid to the clerk within one year after the verdict rendered by the jury, otherwise no writ of possession shall issue." This section was to take effect from the passage of the act.

The present action was brought in 1807, and if, as the tenants contend, the act applies to it, it must be upon the ground, that the six years' possession under a supposed legal title is to be calculated backwards, from the time of the commencement of the action, although that time should not have elapsed after the date of the act. And in this view, the argument to support its constitutionality must be the same, as though the action were commenced immediately after the passage of the act. It may be admitted, that if this were a mere statute of limitations, barring the actions in the realty after a reasonable time, under the exercise of legislative discretion, its constitutionality could not be doubted. And if the statute had declared, that if a party entitled should, for six years after passing the act, or for six years after any ouster or disseisin in futuro, neglect to pursue his remedy for the recovery of his right, then the recovery should only be had upon the terms of the act, it might, perhaps, have fallen under the same consideration, for it would in effect be only a rigorous statute of limitations.

But if the legislature were to pass an act of limitations, by which all actions upon past disseisins were to be barred, without any allowance of time for the commencement thereof in futuro, it would be difficult to support its constitutionality, for it would be completely restrospective in its operation on vested rights. Call v. Hagger, 8 Mass. 423. But the present cannot be considered as a statute merely regulating a remedy, and prescribing the mode and time of proceeding. It confers an absolute right to compensation on one side, and a corresponding liability on the other, if the party would enforce his previously vested title to the land. And unless he should comply within a given time, his title, or, what is in effect the same thing, his remedy, is completely extinguished. It is not, therefore, in form, or in substance, a modification of the remedy, but a direct extinguishment of a vested right in all the improvements and erections on the land, which were annexed to the freehold. It also directly impairs the value of the vested right of the party in the land itself, inasmuch as it impairs the remedy, and subjects the party to burthens, which may render the right not worth pursuing; and that too upon past considerations, respecting which the party had incurred no legal obligation, and had imputed to him no legal laches. If, indeed, it ought, as is alleged, to be the very essence of a new law, that it is to be a rule for future cases, "nova constitutio futuris formam imponere debet, non praeteritis," (Bract. lib. 4, fol. 228), and that it is against natural justice to apply it to past cases, it would seem to follow, that an act, which works the effects, which have been stated, ought to be deemed a retrospective law within the prohibition of the constitution of New Hampshire; for it is a law for the decision of a civil cause, which affects past cases; and has a retroactive operation.

It is argued by the tenants' counsel, that although there was no legal remedy, yet there was an equitable right in the tenants, before the statute, to compensation for the amelioration of the soil, and the improvements made by erections thereon; that upon the principles of natural justice, it is iniquitous that one man should enjoy the fruits of another man's labor; that until a recovery actually obtained by the demandants, they had no vested title to such improvements, but the title remained in the tenants; and therefore the statute had no operation to devest previous rights. In this respect the case is likeened to that of temporary fixtures and erections, made by a tenant for years during his term, in which the reversioner has never been supposed to have any interest whatever.

It is difficult to perceive the foundation of the equitable or moral obligation, which should compel a party to pay for improvements, that he had never authorized, and which originated in a tort. If every man ought to have the fruits of his own labor, that principle can apply only to a case, where the labor has been lawfully applied, and the other party has voluntarily accepted those fruits without reference to any exercise of his own rights. For if, in order to avail himself of his own vested rights, and use his own property, it be necessary to use the improvements wrongfully made by another, it would be strange to hold, that a wrong should prevail against a lawful exercise of the right of property. In the case of a tortious confusion of goods, the common law gives the sole property to the other party without any compensation. Yet the equity in such case, where the shares might be distinguished, would seem such stronger than in the present case.

There would also have been plausibility in the argument, if the statute had confined itself to visible erections made by the tenant, who had been six years in possession, under a supposed legal title. But the improvements may be altogether in the soil, and even made by the original wrong doer, and yet the compensation must be allowed. And they may be just such improvements, as, in the case of a rightful tenancy, would at common law be deemed waste. It is sufficient, however, that no such equitable right, as is now contended for, is recognised in the law; and indeed it has been deemed so far destitute of moral obligation, that even an express promise, to pay for improvements made by a person coming in under a defective title, has been held a nude pact. Frear v. Hardenbergh, 5 Johns. 272.

As to the argument, that the demandants

had no vested title in the improvements until a recovery, it is clearly unfounded in law. In respect to the amelioration of the soil by labor, (which is embraced both by the statute and the verdict) it would be absurd to contend, that the amelioration was a thing separate from the soil, and capable of a distinct ownership. In respect to erections, the common law is clear, that every thing permanently annexed to the freehold passes with the title of the land, and vests with it. And here lies the distinction as to fixtures during a lease. They are not deemed to be permanently annexed to the soil, and may, therefore, well be removed; and so indeed would the law be, as to like fixtures by a mere trespasser. Taylor v. Townsend, 8 Mass. 411. The right then to permanent erections follows as a necessary and inseparable incident to the right of the soil, and is not acquired, but is merely reduced into possession, by a subsequent suit.

On the whole, if the statute must have a construction, which will embrace the case at bar, with whatever reluctance it may be declared, in my judgment it is unconstitutional, inasmuch as it devests a vested right of the demandants, and vests a new right in the tenants, upon considerations altogether past and gone.

But there is a construction, which although not favored by the exact letter, may yet well stand with the general scope of the statute, and give it a constitutional character; and that is, to give it a prospective operation, so as to apply to improvements made after the statute, and where the possession has been for six years after its date. In deference to the legislature, this construction ought to be adopted, if by law it may. And upon the authority of Helmore v. Shuter, 2 Show. 17, 2 Mod. 310 (1 Freem. 466; 2 Lev. 227; 2 Jones, 108; 1 Vent. 330), and Couch v. Jeffries, 4 Burrows, 2460, and Dash v. Van Kleeck, 7 Johns. 477, where the wording of the statutes was equally strong, I do not at present perceive any difficulty in adopting it. In either view, the tenants can take nothing by their claims for improvements, and judgment must pass for the demandants, and a writ of seisin issue immediately non obstante veredicto quoad haec. See Fox v. Southack, 12 Mass. 143; Hutchinson v. Brock, 11 Mass. 119.

Judgment was entered on the record as follows:

All which being seen and considered, it appears to the court here, that the tenants are not by law entitled to the value of the buildings and improvements so as aforesaid found by the verdict aforesaid, or to any part thereof, under the statute of New Hampshire in this behalf provided. It is therefore considered by the court, that the demandants recover their seisin and possession of the demanded premises, whereof the jury have by their verdict aforesaid found that they were disseised by the tenants—and that a writ of seisin immediately issue in this behalf; and further that the demandants recover of the tenants their costs of suit taxed at ——. And as to the residue of the demanded premises, that the tenants go thereof quit without day.

Case No. 13,157.

SOFIELD v. SOMMERS.

[9 Ben. 526.] [1]

District Court, E. D. New York. May, 1878.

SHIPPING—VESSEL BURNED AT PIER—WATCHMAN—EXPLOSION OF GAS.

Where the fumes of crude petroleum, carried in a tank on a lighter used in the oil trade, escaped into a locker, which locker—there being no watchman on board when the lighter lay one night with other vessels at a pier in Jersey City—was forced open during the night by a thief, who exploring the locker with a lighted match, set fire to the gas and caused an explosion and a fire, whereby the lighter and the libellant's lighter that lay alongside were destroyed: *Held*, that the escape of gas into the locker was an accident, and the presence of a lighted match in the locker not the natural result of the absence of a watchman. Between the act of omission charged upon the defendant, and the explosion, there intervened an independent human agency, the presence of which had no natural relation to any act of the defendant, and which therefore entailed no responsibility upon the defendant for the explosion.

[This was a libel by Charles Sofield against George Sommers to recover damages for injury done to plaintiff's vessel.]

Beebe, Wilcox & Hobbs, for libellant.

J. J. Allen, for respondent.

BENEDICT, District Judge. The defendant was the owner of a lighter called the Competitor, used for transporting petroleum about the harbor. On the evening of July 28, 1875, this lighter, having on board a deck-load of refined petroleum in barrels, was moored for the night at a certain wharf and there left without a watchman on board. After the lighter was moored the libellant's boat came to the same wharf and made fast for the night a short distance from the lighter. During the night a violent explosion occurred on the defendant's lighter by which not only that vessel but also the libellant's boat was set on fire and destroyed. This action is brought to recover of the defendant the amount of the loss thus occasioned to the libellant.

In behalf of the libellant it is claimed that it was negligence on the part of the defendant to leave his lighter without a watchman, and that the destruction of the libellant's boat resulted from that negligence of the defendant. According to the evidence and the admitted facts, the explosion was caused by the act of a thief who brought a lighted match in contact with explosive gas in the hold of the lighter.

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

It appears that below the deck of the lighter was a tank used for transporting crude petroleum, and separated from the tank was a sort of cabin or locker used for storage of rope, &c. The connection with the hold was by hatches, which hatches were, on this occasion, left securely locked. The thief broke off the lock which fastened the hatch leading to the cabin or locker, and the inference is that he used a lighted match to examine the contents of the locker, and that the flame of the match came in contact with explosive gas that by some means had got into the cabin from the tank where it had been generated from the crude petroleum with which the tank had been filled the day before. There is no testimony showing how the gas escaped into the cabin, nor any testimony to show that the presence of gas in the cabin was caused by any neglect on the part of the defendant. It does not appear that the presence of explosive gas in the cabin was to have been expected or that it was known to any one.

Upon these facts it must be held that no want of due precaution against fire on the part of the defendant has been shown. The escape of gas into the cabin was accidental, and the presence of a flame in that locality was caused by the act of a thief who was compelled to force the locks before he could reach the place where the gas happened to have accumulated. But it is said no precaution was taken to prevent the access of the thief, and this is negligence that renders the defendant liable for all that followed. To sustain this position it must be held that the natural result of the absence of a watchman was the presence of the thief; that the natural result of the presence of a thief was the presence of a lighted match; and that a lighted match in that locality would naturally result in an explosion.

But the presence of a thief with a lighted match cannot be said to be the natural result of an absence of watch. Between the act of omission charged upon the defendant, and the explosion, there intervened an independent human agency, the presence of which has no natural relation to any act of the defendant, and for which he is not therefore responsible. The unlawful act of the thief, whose presence was neither caused nor procured by the defendant, not the omission of the defendant to maintain a watch, was the immediate cause of the explosion, and an explosion resulted from the act of the thief by reason of the accidental circumstance that, unknown to any one, explosive gas had passed into the cabin. The damage of which the libellant complains arose from a combination of circumstances and must be considered to have been accidental, so far as the defendant is concerned.

The libel must be dismissed with costs.

SOHIER (CLARK v.). See Case No. 2,835.

Case No. 13,158.

SOHIER v. MERRIL.

[3 Woodb. & M. 179.][1]

Circuit Court, D. Maine. May, 1847.

INSOLVENCY — COLLUSIVE JUDGMENT — DEFAULT— ATTACHMENT—PARTNERS—INJUNCTION.

1. When a temporary injunction is asked after filing of the bill, and before an answer and hearing as to a permanent injunction, it may be sufficient, in the first instance, to show that the judgment and execution objected to, were obtained by a default of the debtors, that they soon after went into bankruptcy, that the plaintiff was a relative, and the demand large, and of some years standing; but that when other evidence is put in, showing the original debt to be bona fide, that the delay of several years was to accommodate former partners and relatives, that the action was defaulted because there was no defence, that the plaintiff had promised as much favor as other creditors gave, and that the suit was brought in this court and the attachment properly made, as the plaintiff had long lived in a different state, and did so when the debt arose,—these circumstances removed suspicion and sustained the proceeding sought to be enjoined against.

2. One of the signers of the note sued on was a new partner, and had affixed his name within a year, and most of the real estate now stood in his name instead of that of one of the former partners, and he became sick and infirm, and his name was asked as security, and six months' more credit was given afterward; this was binding on him, so as not to justify the setting aside the default, or allowing an injunction on motion of the assignees of the debtor.

This was a bill in chancery asking an injunction against the respondent in the following case. It was filed September 8th, 1847, at an adjourned session of the May term. In March, 1847, an action had been instituted by John Merril in this court, as a citizen of the state of Maine, against Andrew Horn, Richard Horn, and Sinclair, citizens of Massachusetts, on a promissory note made by them to him, dated May 1st, 1841, for $16,000, in one year, with interest. It was returnable at the May term ensuing; was defaulted and judgment rendered June 19th, 1847, against Andrew Horn and Sinclair, the death of Richard being first suggested. Execution issued the same day and was within thirty days extended on certain property of the respondent, chiefly equities of redemption, which had been attached on the original writ. It was advertised for sale on the 16th inst. The bill alleges that the respondents were petitioned against as insolvents, on the 2d of August, 1847, and the complainant [William Sohier] appointed assignee, August 28th. That in behalf of the creditors, he seeks to avoid the note and judgment upon it, because believed to be collusive and without due consideration; and asks a temporary injunction till further pleadings, answer and process can be had.

In order to justify the preliminary injunction now requested, the complainant offered copies of the records referred to, and proved

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

the facts that this firm had been accustomed to defend other suits, but had allowed this one to be defaulted; that Merril was father-in-law of Richard Horn, and that the respondents became embarrassed last January, and proceedings in insolvency had been instituted against them, April 6th, 1847, and a warrant issued which had never been delivered to a messenger or returned. The plaintiff also put Sinclair on the stand, as a witness, and put in the deposition or examination of Andrew Horn before the master, to show the origin of the debt, and the note and certain property conveyed to Merril. But this evidence unexpectedly proved that Merril, as early as 1836, became a silent partner in a firm composed of Richard Horn, his son-in-law, and Sinclair, for dealing in lumber and real estate; that he loaned to them the capital of $6,000 to $8,000, and was to have one-half the profits; that in the spring of 1841, Merril wished to withdraw; that on an inventory and examination of their concerns it was estimated that they (Richard and Sinclair) were worth $40,000, including the firm property; and repaying to Merril half the profits in that and his principal, would give to him about $16,000 and leave them worth $24,000 as security for his final payment. That Merril was wealthy, and waited for his money till about the summer of 1846, when he became uneasy and requested that Andrew Horn, who, in the meantime, had become a member of the firm, should sign the note. One ground urged for this was, that most of the new debts for real estate had been taken in his name instead of Richard's, who was sick and not expected long to survive; and that Richard having conveyed most of the old estate, Merril would not be so secure as he was at first, without Andrew's name. Accordingly, in September, 1846, Andrew signed the note, and no further steps were taken to collect it till the suit in March, 1847. After the firm became embarrassed, in January, 1847, Merril agreed to compromise on the same terms which all the other creditors would accede to, but after an attempt to get them all to unite in a settlement, it failed. Sinclair testified that the action on this note was not defended, as no valid objection existed against it, and because Merril had agreed to a compromise if the rest of the creditors would; but though provision had been offered to pay several of them in full, including Merril, all did not agree. Sinclair swore further, that everything had been endorsed on the note by Merril, which had ever been paid to him in any shape.

Mr. Sohier, pro se.
Mr. Simmons, for Merril.

WOODBURY, Circuit Justice. The complainant in this case had sufficient grounds, prima facie, as assignee of the creditors, to suspect from the large amount of this note, and the relationship between the parties, and the great length of time it had run, as well as its being defaulted, that it was not entirely for a valid consideration. He has done right, therefore, to have the real facts ascertained. But as developed by his own witnesses, they remove the suspicions, explain all which was questionable, and furnish no apology for the interference of this court in the legal proceedings by any extraordinary measure of an injunction. If regarded in another light, such as a motion to set aside the default and the subsequent proceedings, made at another session of the same term on the ground of a good defence to the note or cause of action, the case is not clearly made out. The consideration of the note was valid and ample. All payments on it have been allowed. There is no defence of the statute of limitations against it. Nor is there the least fraud or collusion proved which would enable the assignee to defend where the debtor might not. See cases in Leland v. The Medora [Case No. 8,237]. If Andrew Horn could in strict law defend, because he signed after the original making of the note, it would not avail in favor of the other signers. But, in my view, he has in strict law no good defence, much less in equity, and much less in such a way as to justify us in setting aside the default to let in a defence of so harsh and unjust a character. Such a subsequent signer may well be regarded as a principal, and as adopting both the original promise and original consideration. See cases in Phillips v. Preston, in 5 How. [46 U. S.] 278. He, in truth, received the benefit of much of the very property left with the firm, for which this note was given. When he afterwards became a member, and Richard conveyed it, the title to other property received in exchange or bought with its proceeds was taken in his name instead of Richard's. Again, he not only in this way obtained property, but Richard's name ceased to become good security by this means, and Andrew's was properly substituted or added to it in consequence of his holding much of the estate which had before been in Richard's name. This course was not only just, to Merril, but it doubtless led him to give further indulgence to all on the note. He, in fact, waited nearly six months longer, and thus the consideration in either view seemed sufficient to make Andrew responsible for what he promised, deliberately, in writing, and over his own signature. But, in the other view, as a case where the plaintiff, Merril, in a suit at law is prosecuting an action unjustifiably, or getting an improper advantage in this court, the application for an injunction does not seem, after all the evidence has been put in and weighed, as at all sustained by any sufficient ground. There is no combination to uphold the attachment against the insolvent law by a collusive action in this court, when it should not be here. Merril lives in Maine, and did in 1841, when the

note was given, and long before. Towne v. Smith [Case No. 14,115]; Perry Manuf'g Co. v. Brown [Id. 11,015]. Merril obtained his lien, then, by his attachment first. It was not only first, but a fair and legal lien. Merril seems, also, in law and equity entitled to recover all the note, deducting the endorsements. The partnership was on fair terms, the settlement fair, the execution of the note fair, the suit conducted in a fair manner. In this state of things it would not do to issue an injunction, because something may be obtained from Merril's answer to the bill which would injure his case. No such presumption exists, since the whole has been explained satisfactorily by the other parties, under oath. Without evidence, then, of wrong or fraud, and indeed, against evidence to the contrary, I do not feel justified in interfering with an actual judgment.

Motion for a temporary injunction refused.

Case No. 13,159.

SOHIER et al. v. WILLIAMS et al.

[1 Curt. 479.] [1]

Circuit Court, D. Rhode Island. Nov., 1853.

WILLS—TRUSTEE—SALE OF LANDS—SPECIFIC PERFORMANCE—PARTIES—DOUBTFUL TITLE.

1. Where a testatrix empowered a trustee to sell lands, for purposes of reinvestment, "when the major part of my children shall recommend and advise the same," it was held that the consent of the major part of those living at the time when the sale was made, was sufficient.

2. The tenant for life, together with the contingent remainder-man in fee may represent the inheritance in a bill for specific performance, though their interests are merely equitable, provided the issue of the remainder-man will take, if he fails to do so by reason of the contingency.

[Cited in McArthur v. Scott, 113 U. S. 399, 5 Sup. Ct. 672.]

[Cited in Clarke v. Cordis, 4 Allen, 476. Cited in brief in Regan v. West, 115 Ill. 605, 4 N. E. 365.]

3. A court of equity will not force on a purchaser a doubtful title; and a title may be doubtful, because it depends on a doubtful interpretation of a will, if all parties who may be interested in the estate are not bound by the decree.

[Cited in Chesman v. Cummings, 142 Mass. 68, 7 N. E. 13; Jeffries v. Jeffries, 117 Mass. 186.]

Bill for the specific performance of a contract for the sale of land in the city of Newport. The case was, that Mary Gibbs, being seised of the land in question and other lands, and possessed of personal property, on the nineteenth day of May, 1823, made a will, whereby, in respect to her lands, she devised as follows:

"I give and devise to my brother, Walter Channing, of Boston aforesaid, Esquire, all my dwelling-houses, farms, lands, and real estate, situate in the state of Rhode Island, and also all my lands, dwelling-houses, and real estate of every description, situate in the commonwealth of Massachusetts or elsewhere, to have and to hold the said farms, lands, houses, and real estate, to him the said Walter, his heirs and assigns, upon the special trusts, following, and no other, to wit: that he and his assigns shall and do take or cause to be taken reasonable and proper care of said lands, dwelling houses and other real estate, and, at his discretion, maintain and preserve the buildings in repair, and make such improvements of the farms as he shall think necessary, or for the interest of my children, and shall and do take and receive the rents, issues and profits of said farms, dwelling-houses and other real estate during the lives of my said children, George, William C., Ruth, and Sarah, the survivors and survivor of them, and after deducting from the same all the expense of maintaining and preserving the buildings in repair, and making such improvements of the farms as he or they shall judge to be necessary, or for the interest of my said children, and the reasonable charges and expenses of executing this trust as respects the real estate, and a reasonable compensation to himself and themselves for his and their services therein, shall and do pay the rest and residue of all said rents, issues and profits semiannually to and among my said children equally during their joint lives; and if one or more of them should die before me, leaving issue, then to pay to such issue the parent's share or proportion thereof, and if without leaving issue, then to pay such deceased's child's share or proportion to and among my surviving children equally.

"And upon this further trust, that from and after the decease of any and each of my said children, after by decease, leaving issue, the said Walter, his heirs and assigns, shall and do pay to the issue of such child the whole of the share of rents, issues and profits, his or her parent, my child, would have been entitled to if living, during the lives of my surviving children, the survivors and survivor of them, equally to be divided among such issue; and if my child, so dying, shall leave no issue, then to pay the whole of such child's share of said rents, issues and profits to my surviving children, and the issue of such as shall have deceased, equally among them, according to the stocks, during the lives of my said children and the survivors and survivor of them, and upon and after the decease of the longest liver of my said children, then upon this further trust, and confidence that said Walter, his heirs and assigns, shall and do, by proper and legal deeds and instruments for the purpose, convey, assign and transfer to the children of my said children and the issue, (if any) of such grandchild or grandchildren as may have deceased, (the children of a deceased child or grandchild in all cases in this will to represent their parent,) all the aforesaid lands, dwelling-houses, and other real estate herein given in trust to said Walter,

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

and all his and their right, interest and estate therein, to be equally divided among them, according to the stocks; and I do hereby further expressly grant, devise and direct that all the aforesaid lands, dwelling-houses, and other real estate before mentioned, shall, from and after the decease of the longest liver of my said children be and remain to the sole use and behoof of the children of my deceased children, and the children of such of my said grandchildren, if any, as shall have deceased and their heirs in fee-simple for ever, in the shares and proportions aforesaid.

"Ninth, I give and bequeathe to my said brother, Walter Channing, all the residue and remainder of my personal estate of every description to have and to hold the same to him, his heirs, executors, administrators, and assigns upon these special trusts following and no others, to wit: that he and they shall and do invest the whole of said residue of my personal estate in stocks, or loan the same on mortgage or other good security, at the discretion of my said trustee, and keep the principal so invested or placed out at interest, or mortgage, or other good security, during the lives of my said children and the survivors and survivor of them, and during all that time shall and do collect and receive the dividends, interest and income accruing on said principal, and after deducting from the same the reasonable charges and expenses of executing the trust as respects the personal estate, and a reasonable compensation for the services of the trustee therein, shall and do pay the residue of said dividends, interests and income, semiannually, to and among my said children equally during their lives, and if one or more of them should die before me, leaving issue, then to pay to such issue the share their parent, my child, would have been entitled to, if living; and if without leaving issue, then to pay such deceased child or children's share equally to and among my surviving children and the issue of such as shall have deceased, equally, according to the stocks; and upon this further trust, that upon and after the decease of any or either of my said children, after my decease, leaving issue and a widow or widower, that the said Walter, his heirs, executors, administrators, or assigns, shall and do pay to such widower or widow —— dollars per annum, as long as he or she shall remain single and unmarried, and no longer, and shall and do pay to the issue of such child, semiannually, the residue (after deducting said annuity) of the share of said dividends, interest, and income, that their parent, my child, would have been entitled to, and upon and after the decease or marriage of their surviving parent shall and do pay the whole thereof to the said issue of such deceased child during the lives of my surviving children, and the survivors and survivor of them; and if such child, so dying, shall leave issue, and his or her wife or husband, shall have deceased in the lifetime of such child, then that said Walter, his heirs, executors, administrators, and assigns, shall and do pay to such issue, semiannually, equally among them the whole share of said dividends, interest, and income which such deceased child would have been entitled to, during the lives of my surviving children and the longest liver of them, and if such child so dying after me shall leave a widow or widower, and no issue, then that said Walter, his heirs, executors, administrators, or assigns, shall pay to such widow or widower, five hundred dollars per annum so long as he or she shall remain single and unmarried, but no longer, and the residue thereof, after deducting said annuity, shall pay to my surviving children, and the issue of such other or others as may have deceased, semiannually, and from and after the decease of such widow or widower, shall pay the whole of such share of said dividends, interest and income, semiannually, to and among my surviving children, and the issue of such as may have deceased, equally among them, according to the stocks, during the lives of my surviving children and the survivors and survivor of them; and if my child, so dying, shall leave neither issue, nor a widow or widower, then to pay the whole of said child's share of said dividends, interest and income to and among my surviving children, and the issue of such other child or children as may have deceased, equally among them according to the stocks, during the lives of my surviving children, and the survivors and survivor of them; and upon and after the death of my said children, and the longest liver of them, then upon this further trust and confidence, that said Walter, his heirs, executors, administrators, or assigns, and any trustees under this will, shall and do, by legal and proper deeds and instruments for the purpose, convey, assign, transfer, and deliver over to the children of my said children, and the issue, if any, of such grandchild or grandchildren, as may have deceased, equally among them, (the children of a deceased child or grandchild, in all cases in this will, to represent their parents,) all the stocks, mortgages, bonds, notes, and other securities for money, and all other personal estate, which he or they shall have received, taken and holden as trustee or trustees under this will, or which he or they shall have in his or their hands, except so much as may be necessary to pay the annuities aforesaid to a surviving husband or wife of one or more of my deceased children as hereinafter is provided; and it is my will, and I hereby direct that in case the husbands of my said daughters, or either of them, or the wives of my said sons, or either of them, should survive the longest liver of my said children, then the said Walter, his executors, and administrators, or any trustee under this will, shall retain out of the share, the issue of such daughter or son would have been entitled to, so much personal estate as will yield an income sufficient to pay the annuity herein given to the surviving parent of such issue,

and to hold the same and appropriate and apply the interest and income thereof to the payment of such annuity to such surviving parent, so long as he or she shall remain single and unmarried, and upon his or her death or marriage, whichever shall first happen, then to pay and transfer the personal estate so reserved, to the issue of such daughter or son, equally among them; provided, however, if such issue shall secure to their surviving parent, to his or her satisfaction, the payment of said annuity, then the said trustee shall pay to such issue the whole of their share of said personal estate.

"Tenth. I hereby authorize the said Walter, and any person who may hereafter become trustee under this will, upon the application of any of my children in writing, or of the guardians of the issue of such child as shall have deceased, to invest a portion of such child's, or issue of a child's share of my personal estate, not exceeding five thousand dollars, in the purchase of life annuities for the benefit of such child, or issue of any of them, and upon their lives, and the life of the husband or wife of such child, at the discretion of said trustee.

"Eleventh. And if my said brother, Walter, from any cause whatever, shall wish to be acquit and discharged from this trust, or if he shall be desirous of having some other person or persons joined and associated with him in this trust, I do hereby fully authorize and empower him to substitute and appoint in his stead and place, or as an associate trustee to act with him, as he shall think necessary or most expedient, any one or more persons, that he alone, or he and my executors, shall think fit and well qualified to execute said trust, and thereupon to convey, assign, and transfer the whole real and personal estate of every description, which he shall hold in trust under this will, to such person or persons, either to hold to him or them and their heirs, in his, said Walter's, place and stead, or to hold jointly and together with him, and in either case upon the same special trusts, and for the same uses, and subject to the same limitations as are expressed in this will, and as the said Walter held the same under and by virtue of this will; and further, in case my said children shall, in writing, request him, said Walter, or any trustee or trustees he may appoint, to relinquish the trust, then I hereby authorize and request him, and such other trustee and trustees to relinquish said trust accordingly, and I do in that case authorize and empower the judge of probate for the county where this will shall be proved, to appoint such trustee or trustees as he shall deem fit and suitable to execute said trust in his or their place or stead; and in case said trustees, or either of them, shall refuse to resign the trust upon such request by my said children, I hereby authorize and empower the judge of probate to remove him or them from the office of trustee, and to appoint other fit and suitable persons in their stead. And I further authorize, direct and require the trustee and trustees under this will, who shall resign their trust at the request of my children, or be removed by the judge of probate, to assign and transfer to the person or persons who shall be appointed trustees by the judge of probate, all the estate, real and personal, which the trustee and trustees so resigning or removed then hold under this will, to be held to and by the new trustees, so appointed, and the survivor of them and his heirs, upon the trusts, and for the uses, and subject to the limitations expressed and contained in this will, and no other, and to prevent a failure of trustees to execute this will, I authorize and request the judge of probate for the county where it shall be proved, to appoint such trustee or trustees to execute the trusts herein contained and created, as the trustee herein named and my executors shall recommend, and on failure of such recommendation, such trustee as said judge shall deem fit and suitable.

"Twelfth. Reposing in my said brother, Walter, full and entire confidence, I do hereby expressly declare, that he is not to be responsibility for any loss whatever that may happen in the execution of this trust, unless it should happen through his own wilful default, and that the said Walter and the trustees he shall appoint are not to be accountable or responsible the one for the other, or for the acts, doings, or defaults of the other. And as the said Walter has, upon my solicitation, consented to accept the trust, I further request and direct, that no bond be required of him for the faithful discharge of the trust. And I further order and direct that such compensation be allowed to the trustees who shall execute the trust herein created, for their trouble, responsibility and services as my executors shall think reasonable, and in case of their death or disagreement, as the judge of probate for the county where this will shall be proved, shall allow and declare to be just and reasonable.

"Thirteenth. I hereby give, devise, and grant to the said Walter, and any other trustee and trustees he may appoint, pursuant to the power herein given him, full power and authority to sell and convey any part or parcel of the real estate devised to him in trust as aforesaid, except my two farms situate easterly of Easton's beach, in Middletown, in the state of Rhode Island, and my farm situate westwardly of Easton's beach and Pond in Newport, in said Rhode Island, to hold to the purchaser in fee-simple discharged of said trust, or to exchange the same for other real estate, when the major part of my children shall recommend and advise the same, and to invest the proceeds in other real estate, or in personal estate, as my children shall direct and advise; and in default of such direction and advice, as the said trustee or trustees shall think most for their interest, to be taken and held upon the same trusts and for the same

uses, and subject to the same limitations as the estate sold or exchanged was holden by said trustee or trustees.

"Lastly. I hereby revoke all former wills by me made, and declare this only to be my last will and testament. And I hereby appoint my said brother, Walter Channing, John Parker, Esquire, of said Boston, and the Honorable William Prescott, of said Boston, sole executors thereof."

In the year 1825, the testatrix, then a resident of the city of Boston, died, and her will was duly proved in the probate court of the county of Suffolk, and afterwards was duly registered in the probate court of the town of Newport, pursuant to the statute of the state of Rhode Island, so as to give effect to the same as a will of lands. Walter Channing, named in the will as trustee, having declined the trust, the complainant, William D. Sohier, was duly appointed trustee. The children of the testatrix, living at her decease, were the same who are mentioned in the will, viz. George, William C., Ruth, and Sarah. George died after his mother. His children and heirs at law, together with Ruth and Sarah, advised and assented to the sale of the land in question, by the trustee, to John D. Williams. William C. Gibbs, the only other surviving child of the testatrix, refused to assent to the sale. He, however, attended the auction, and bid for the land. The purchaser, Williams, declines to take the title, upon the ground that the power of sale was not duly executed, only two of the children of the testatrix having advised the sale. This question was raised by a demurrer to the bill.

CURTIS, Circuit Justice. The purchaser objects to taking the title offered by the vendor, because the latter had not power, under the will of Mrs. Gibbs, to make the sale. The thirteenth clause of her will confers the power to sell "when the major part of my children shall recommend and advise the same." This makes the recommendation and advice of a major part of her children a condition precedent to the exercise of the power. If this condition has not been complied with, it is the same as if no power of sale existed, and no title can be made. The question is, if it has been complied with. This is purely a question of the intention of the testatrix, to be deduced by construction from her will. Some very nice distinctions concerning the survivorship of powers have been taken in the ancient common law, though I apprehend that, even in those cases, the only purpose of the courts was, to arrive at the actual intention of the donor of the power. Co. Litt. 112b, 113a, 181b; Dyer, 177. And in modern times, this is clearly the object in all those cases which are not governed by statute law. Peter v. Beverly, 10 Pet. [35 U. S.] 532; [Bank of U. S. v. Beverly] 1 How. [42 U. S.] 134; Osgood v. Franklin, 2 Johns. Ch. 19; Shep. Touch. (by Preston) 526.

To determine the question raised in this case, it is therefore necessary to ascertain whether the testatrix, by the words, "the major part of my children," meant all her children living at her decease when the will speaks, or only such of her children as might be living when it should become necessary to act. The power of sale given to the trustee, and made dependent for its exercise upon the consent of a majority of the children, is merely for the purpose of reinvestment. In our country, where such great changes take place in the uses of lands during one life, prudence dictates the insertion of such a power in nearly every settlement of property. And when this testatrix was creating a trust, to continue during so many lives, and was inserting such a power, there is a probability that she intended it should not become impossible to exercise it, on the decease of only two of her children, and that the decease of only one of them should not enable one of the survivors to control the other two and the trustee, and prevent an exercise of the power. Mr. Sugden (1 Sugd. Powers, 144) lays down this rule: "As the law now stands, it seems, that where the authority is given to three or more generally, as to 'my trustees,' 'my sons,' &c., and not by their proper names, the authority will survive whilst the plural number remains." In 1 Chance, Powers, 242, 243, this position is examined, and the result arrived at is: "Upon the whole, though a court might, in aid of the probable intention, extend the doctrine of Lee v. Vincent [Cro. Eliz. 26] to the case of a power not preceded by an estate, it would, it is conceived, be unsafe in practice to act upon such a supposition." The testatrix not only uses language in this particular clause which designates a class, but she omits the word, "said." In the other parts of her will, she uses the expression, "my said children," which is strictly equivalent to naming them. Here she says only, "my children." A circumstance of no great weight, certainly, but leaving the descriptive words applicable to a class of persons generally, not designated by their names, and coming, therefore, within the rule as laid down by Mr. Sugden.

In Hewett v. Hewett, 2 Eden, 332, Lord Chancellor Northington, chiefly upon the ground of the presumed intention of the donor to have a power continue as long as the estate, held that it descended to the heirs of the surviving donee of the power. Now the presumption in this case, of the intention of the testatrix to have this power to consent continue, is certainly strong, not only for the reason above given, drawn from the expediency of such a power, but because the power itself is unlimited in point of time, and seems to have been intended to be exercised by the trustee, at any period during the existence of the trust; and yet the consent is essential to the exercise of the power. It would seem also, that when

the testatrix created a power to be exercised for the interest of her children and their issue, and required the consent of a major part of her children, she would naturally have in her mind, and expect to consent or refuse, only those living when the consent or refusal should become necessary, for no others could act; and that if she had intended to require the consent of a major part of all her children, though some of them should be then dead, she would have so declared in express terms. My conclusion is, in accordance with the rule laid down by Mr. Sugden, and in aid of the probable intention of the testatrix, that the major part of the children living when the power was to be exercised, were capable of consenting to the execution of the power, and that their advice and consent was sufficient.

But, at the same time, it must be admitted, that the question is not free from doubt, and therefore I have felt obliged to look at some other considerations connected with this case.

Where the question is, whether a title shall be forced on a purchaser, the court is bound to see that the title is not doubtful. A title may be doubtful because it depends on a doubtful question of law, not settled by any binding authority, of which different courts may take opposite views, and where those who may hereafter claim an interest in the estate will not be concluded by the decree. A purchaser should not be compelled to take a title which there can be no judicial certainty he can force another to take, under which the court cannot know he can himself hold the land, against parties not before the court, or precluded by its decree. In Wilson v. Bennett, 5 Eng. Law & Eq. 45, where the objection was that the power of sale was not sufficient, the vice-chancellor held that the point was too doubtful to force the title on the purchaser, and refused the relief; and in Macdonald v. Walker, 11 Eng. Law & Eq. 324,—where the same objection was made to the title, and the point of law was involved in conflicting decisions, it was held that the uncertainty was fatal to claim for relief. And in Wilson v. Bennett, 13 Eng. Law & Eq. 431, relief was refused on the same ground.

The question whether the children and grandchildren of the testatrix, who are all before the court, can so represent the inheritance, as to enable the court to make a decree, binding on whomsoever may succeed to it, is, therefore, of the first importance in this cause. To determine this question, I must first see what are the estates devised by this will. This does not involve much difficulty. The trustee clearly has the legal estate in fee-simple, not only because it is limited to him in fee by appropriate words, but because the due execution of his trust requires him to have it. This fee he holds until the decease of the last surviving child of the testatrix, for the purpose of collecting and paying over the rents and profits to those entitled to them; and upon the decease of such last surviving child, he holds the fee, to serve the uses declared in the will, and by force of the statute of uses or of wills, and it is immaterial which, the legal estate vests at once in the then surviving grandchildren, and in the issue of any deceased grandchild, as tenants in common. The only equitable estates created, are an estate for life in each child of the testatrix, remainder to his or her issue as tenants in common until the decease of the last surviving child of the testatrix. At that point of time, the equitable estates all terminate, and the legal estates vest as above mentioned. To ascertain whether the children and grandchildren are now capable of representing the inheritance, it is necessary to see what each grandchild's relation to the inheritance now is; and I take the children of Mr. William C. Gibbs, who is still living, because it is necessary that all should be thus capable. His children, then, if they survive him, will be entitled to the legal estate in fee, if he shall be the last surviving child of the testatrix; if not, they will be entitled to an equitable estate in the rents and profits during the life of such last survivor, and if any of them die before its termination, it goes to their issue, and continues in such issue until they shall take the legal estate. And this equitable estate for lives is now vested in his children, subject to be devested by death before the parent. There is therefore before the court, William C. Gibbs, who has an equitable estate for life, and from and after his decease, either the rents and profits of the land, or the land itself, will go to his issue; it being contingent, however, as in case of tenancies in tail, whether his children, or grandchildren, or more remote issue will first take. And there are also before the court his children, who are entitled as above mentioned. Lord Redesdale (Giffard v. Hort, 1 Schoales & L. 408) says: "It is sufficient to bring before the court the first tenant in tail in being; and if there be no tenant in tail in being, the first person entitled to the inheritance; and if no such person, then the tenant for life." The first two positions are supported by numerous authorities, which it is unnecessary to cite. Calv. Parties, 48, &c. The last, respecting the sufficiency of the tenant for life, is confirmed by Finch v. Finch, 2 Ves. Sr. 492; Gaskell v. Gaskell, 6 Sim. 643; Baring v. Nash, 1 Ves. & B. 551.

In Nodine v. Greenfield, 7 Paige, 544, there was a devise of rents, and profits, and income to the testator's wife for life, with remainder in fee to the children of his brother who should be living at the time of her death, and to the issue of such of the children as should then have died leaving issue; and the testator empowered his executors, or the survivor of them, to sell the real estate for reinvestment. It was held, that the

children of the testator's brother, living at the testator's death, took vested remainders in fee, subject to open and let in after-born children, and subject to be devested, by death before the testator's widow, and that they were necessary parties to a bill of foreclosure, and that with the tenant for life they could represent the inheritance, though their right of possession was contingent. The case at bar differs from Nodine v. Greenfield in this: that here there is a trustee interposed, who holds the legal estate. But I do not consider this material. For the grandchildren of the testatrix have the same substantial interest in the land in this case, as the children of the testator's brother had, in that case. It is true, that in the event of their parents' death, leaving some child of the testatrix, their interest will, during the life of the surviving child of the testatrix, be equitable only. But I conceive this is unimportant. A court of equity looks to the substantial interest, and not to the particular mode of enjoyment, for this purpose of representation, and if the party before the court is one, whose interest is of such a nature as to insure his giving a fair trial to the question in contestation, that is sufficient. If a tenant for life of an estate tail, to whose unborn issue the remainder is limited, can sufficiently represent the inheritance, because it is presumed he will act as well for them as himself, a fortiori can the tenants for life and the grandchildren in this case; for though the contingency may cause the latter to take only an equitable estate for a time, and may defeat altogether their possessing rights legal and equitable, yet they will be defeated only in favor of their issue, who must succeed if their parents do not. I consider, therefore, that the parties now before the court are capable of representing the inheritance, that a decree will preclude all future claims, and consequently that whatever doubt might be raised elsewhere concerning the title is unimportant. The demurrer must be overruled.

[NOTE. This cause was again before the court for further directions upon the question whether the purchaser should be compelled to pay interest on the purchase money. The court held that the defendant should be required to pay interest from the expiration of 20 days after the sale. Case No. 13,160.]

Case No. 13,160.

SOHIER v. WILLIAMS.

[2 Curt. 195.] [1]

Circuit Court, D. Rhode Island. Nov., 1854.

SPECIFIC PERFORMANCE — DOUBTFUL TITLE—INTEREST ON PURCHASE PRICE.

If the vendee refused to receive and pay for a title, which the court decrees him to take, and the vendor tendered a conveyance, on the day fixed by the contract of sale for the payment of the price and the delivery of the deed, and there were no rents and profits, the vendee must pay interest, though there was a doubtful point of law involved in the title, which it was prudent to have settled, and the vendee acted in good faith.

This court having, at a former term, made a decree for specific performance of a contract of purchase (see [Case No. 13,159]), the case now came on for further directions upon the question whether the purchaser should be compelled to pay interest on the purchase-money. The parties agreed on the following statement of facts.

It is argued that the sale mentioned in the bill, took place at the time and on the conditions mentioned in said bill, namely, the 28th day of August, A. D. 1852, and as set forth in Exhibit B. to the bill, found on pages 19 and 20 of the printed record; that the deposit of ten per cent. on the amount of the purchase-money provided for in the conditions of sale contained in said Exhibit B., was paid down by the respondent, and at the expiration of twenty days, according to said conditions of sale, the deed mentioned in the bill, and a copy of which is found on pages 20, 21, and 22, of the printed record, was tendered to the respondent, and by him refused under the advice of counsel, on the ground that the title offered to him by said deed was not a good title, because said deed was not executed by a majority of the children of the said Mary Gibbs, living at the time of her death, but by a majority only of the children of said Mary, living at the time of said sale; that on the 14th of January, 1853, the respondent received back, with the consent of said William D. Sohier, from the auctioneer who made the sale, the deposit so before paid by him, and gave to said auctioneer the following receipt, namely:—"Newport, January 14, 1854. Received of Samuel A. Parker, autioneer, the sum of five hundred and seventy-eight dollars, which I deposited with him in compliance with the conditions of sale, under which I bid off certain portions of 'The Old Mill Lot,' at auction, in August last; said sum is restored to me at my request, and for my accommodation, to prevent the loss of interest, whilst the question respecting the title to the land sold is undecided, and my accountability for the whole purchase-money and interest shall not be varied by the return of the deposit-money to me, in case I should have taken the conveyance. (Signed,) John D. Williams." That the said John D. Williams never took possession of the premises to him sold, which is a portion of a vacant lot in the city of Newport, used for pasturage only, and that the said lot, including the precincts sold, was let by the said William D. Sohier, trustee, during all the time between the said sale and the present time to different persons, as tenants at will, at the rate of thirty dollars per annum, which said rent has been received by said William D. Sohier, trustee; but the said rent was only forty

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

cents more than sufficient to pay the taxes upon the whole of said mill lot, leaving but the sum last named to be applied to the necessary repairs of the fence about said lot; and that in the mean time the said lot, including the premises sold, has appreciated in value in a sum greatly exceeding the interest on the purchase-money; the said John D. Williams having since, by contract, sold to the city of Newport the said lots of land mention in said bill by him purchased, for a public park, at an advance on the price he paid therefor of five cents per square foot.

The conditions of sale were as follows: "The above sale will take place by order of William D. Sohier, Esq., trustee under the will of Mrs. Mary Gibbs, deceased, and will be conveyed to the purchasers by Mr. Sohier, in his said capacity of trustee, and twenty days will be allowed each purchaser to examine the title to the premises sold. Conditions of payment, ten per cent. of the purchase-money to be paid to the auctioneer on the day of sale: twenty-three and one third per cent. additional on the balance of the money on the delivery of the deed; or, if desired, two thirds of the purchase-money may remain on a credit of five years, secured by note and mortgage on the property sold, the note to bear six per cent. per annum, and the interest to be paid annually."

Mr. Ames, for complainant.
Mr. Jenckes, contra.

CURTIS, Circuit Justice. In adjusting the respective rights of the vendor and vendee under a decree for a specific performance of a contract for the sale of land, equity generally considers what would have been the condition of the parties if the contract had been actually performed according to its terms, and endeavors to place them as nearly as possible in that condition. But if only one of the parties has been in default, and it is not practicable to render to both, what each would have had by performance on the day, the party in default must lose rather than the other. Applying these principles to the subject of interest on purchase-money, it has been uniformly held, that if the contract fixed a day for the payment of the money and the conveyance of the land, and the vendor was ready and offered to perform, and the vendee refused to perform, the vendee must pay interest. In such a case it is due, not only by force of the contract, and as compensation for not paying the money on the day fixed, (Robinson v. Bland, 2 Burrows, 1086,) but also because, as the vendee is in default, if the court cannot give to each party all the benefits he would have enjoyed by the execution of the contract, the vendee, being in default, should alone be the loser. Where, as in the case at bar, the land is unproductive, the rents and profits during the delay, are not all the purchaser would have had if the title had been passed to him, nor are they a compensation for the interest. The land having been purchased for sale, or for building lots, the chances of a favorable sale, or the opportunity to improve them by buildings, are the advantages contemplated by the purchaser, in lieu of the purchase-money. These, he does not enjoy during the delay, and they cannot be restored to him. In this case, in point of fact, these may not be important; for perhaps the purchaser would not have sold, or built on the lands, if he had had the title. But whether small or great, the loss in his, if he is in default, and the fact that he must bear it, is no reason why the vendor should not be compensated for not receiving his money, on the day when it was the duty of the plaintiff to pay it.

To apply these principles; this contract fixed a day for the payment of the money and delivery of the deed. The complainant tendered the same deed, which the court by its decree, has required the defendant to receive. The defendant then refused to accept it. It is urged, that there was a doubtful question of law involved in the title which the plaintiff offered to make. This, in my apprehension, is true; but I do not think I can say that the existence of a question, doubtful in my apprehension, amounts to any default on the part of the plaintiff, or relieves the refusal of the defendant to receive the deed, from the character of a default on his part. It is true, that where such a question exists, it is not only consistent with good faith, but is required by reasonable prudence, to have the question settled; but when it is settled against the purchaser, he must take the consequences of having broken his contract. This affords a practical rule, and the only one, it seems to me, which can be laid down. For how doubtful, in point of law, must a title be, to relieve the purchaser from paying interest; and in whose apprehension must the doubt exist. Is it enough that the purchaser has acted in good faith, upon the advice of counsel? If not, then after all, he takes the risk of satisfying the court of something; and I think it better to say, at once, he must satisfy the court the complainant's title is one which he ought not to be compelled to take. If he fails in this, he has been in the wrong, and should make compensation for the injury done to the vendor, by withholding the purchase-money; that wrong is none the less real, because his intentions were fair. Any other rule would refer the whole matter to the discretion of the court, and to its apprehension of the degree of doubt which in each case should relieve the purchaser from paying interest. I prefer a known and fixed rule, which is not inequitable, to such exercise of discretion. It is, no doubt true, that whilst a material objection to the title remains to be cleared up, the purchaser may refuse to go into possession, and he will not be charged with interest on the purchase-money. 2 Sugd. Vend. 797. But I understand this to be some actual objection, not merely a doubtful point of law. Mr. Sugden refers only to Horniblow v. Shirley, 13

Ves. 81, 2 Swanst. 223, which was a case of actual incumbrance on a part of the land. In the case at bar, the defendant has profited by the breach of his contract; for he has had the use of the purchase-money, a circumstance which, in many cases, has a controlling weight. 2 Sugd. Vend. 794. And though I do not consider that the appreciation in value of the land, any more than its depreciation, could change the rights of the parties, yet it is satisfactory to know that the defendant has, in fact, gained largely by the delay.

On the whole, my conclusion is, that the defendant must be required to pay interest from the expiration of twenty days after the sale.

Case No. 13,161.

SOHN v. WATERSON.

[1 Dill. 358.] [1]

Circuit Court, D. Kansas. 1870. [2]

LIMITATION OF ACTIONS—KANSAS STATUTE—CONSTRUCTION—REPEAL.

1. The act of the Kansas legislature of February 10, 1859 (Comp. Laws Kan. 1862, p. 232), providing that actions on contracts made and judgments rendered beyond the limits of the state, "shall be commenced within two years after the cause shall have accrued," should have a prospective operation; and where the defendant resided in the state when that act took effect, the creditor has two years thereafter within which to bring suit; but if he was not such resident, the statute does not begin to run in his favor until he comes into the state.

2. After a claim has been fully barred under that act, the defendant's liability is not revived by its subsequent repeal; but he is protected from such liability by express legislative provision.

This action is brought in this court by the plaintiff, a citizen of Ohio, upon a judgment which he recovered against the defendant, in the court of common pleas of Butler county, in the state of Ohio, on the 17th day of October, 1854. It is alleged in the petition that the defendant is now a citizen of the state of Kansas, and has been a citizen and resident of said state ever since the year 1854. The defendant pleads, in defence, that the action is barred by the limitation statutes of the state of Kansas; first, that it is barred because it was not brought within two years; second, because not brought within three years, and third, because not brought within ten years after the cause of action accrued. To these pleas the plaintiff demurred, and their sufficiency was the question argued and submitted to the court.

N. C. McFarland, for demurrer.

Wilson Shannon, opposed.

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

DILLON, Circuit Judge. On the argument the defendant's attorney stated to the court that he relied exclusively upon the plea that the action was barred, because not brought within two years after the right of action accrued; and to this single question our opinion is limited.

The present action was commenced in this court in August, 1870. It was founded upon a judgment rendered in Ohio, in 1854. It was alleged and admitted that the defendant came into this state to reside and has resided here ever since the year 1854.

Since the defendant claims nothing from the statute of 1855 (Laws 1855, p. 96), nor from that of 1858 (Laws 1858, pp. 66, 67, § 18), but rests the sufficiency of his plea upon the act of February 10, 1859 (Comp. Laws Kan. 1862, p. 232), and the twenty-fifth section of the limitation act in the Statutes of 1868 (Comp. Laws Kan. 1862, p. 635, § 25), it is not necessary to refer at length to other statutory provisions noticed by counsel in the course of the argument.

By the above mentioned act of February 10, 1859, it is provided that "all actions founded on any promissory note, * * * contract, judgment, decree, or other legal liability, made, executed, rendered, entered into, or incurred beyond the limits of this territory shall be commenced within two years next after the cause or right of such action shall have accrued, and not after."

This act was amendatory of the general statutes of limitations then in force, which contained no provisions in terms applicable to foreign judgments; but which did contain a provision that "if, when a cause of action accrues against a person, he be out of the territory, * * * the period limited for the commencement of the action shall not begin to run until he comes into the territory." Comp. Laws 1862, p. 128, § 28. The two acts are in pari materia, and are to be read together.

This act of February 10, 1859, it is admitted is not now in force, but it remained in force more than two years after it went into effect. In fact it continued in force until it was repealed by the Statutes of 1868. In the General Statutes of Kansas of 1868, there is, it is conceded, no provision limiting actions on foreign or other judgments. This was probably a casus omissus. But the chapter on limitations of actions (chapter 80, art. 3), contains the following: "Sec. 25. When the right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or defence." Gen. St. 1868, p. 635. This enactment took effect October 31, 1868. And by another provision it is enacted that the repeal of a statute shall not affect any right which accrued thereunder. Id. p. 1128, § 6.

As the defendant was a resident of this state when the act of February 10, 1859, took effect, it is our opinion that the two years limitation therein provided, began to run in favor of the defendant as against the present cause of action, from that period, and

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

[2] [Affirmed in 17 Wall. (84 U. S.) 596.]

that this action might have been brought at any time within two years after that act went into operation. Not having been brought within that period it was barred; and under the statute provisions before mentioned, the repeal in 1868 of the act of 1859, did not revive the liability of the defendant, or affect the right of the defendant which accrued thereunder to have the present cause of action treated and held as barred thereby.

But however this might be independent of the above mentioned section 25, c. 80, art. 3, Gen. St. 1868, it seems perfectly clear that the effect of that section is to continue to the defendant the benefit of limitation provided by the act of 1859. Its language is that "when the right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or defence."

The present right of action was barred by the act of 1859, before it was repealed, and by the express terms of the statute that right is not now available to the plaintiff.

The argument made by the plaintiff against the effect of section 25, is that a statute, merely, never bars a right of action; that to operate as a bar a suit must be brought, and the statute of limitation pleaded, or specially relied on; and hence as no suit was brought on the judgment while the act of 1859 was in force, the right of action is not barred. But this is not the meaning of the legislature. Such a construction of section 25 would quite nullify the statute, and deprive it of practical effect, making it either useless or unavailing. The provision of this section would be useless if the act of 1859 had been successfully pleaded to a suit brought while it was in force; unavailing if successfully set up in such a suit.

As it is our opinion that the act of 1859 would not begin to run, if the defendant was a resident of the state, until the date of its taking effect, and if he was not a resident when it took effect, then not until he became such, it follows that the defendant's proposition that the statute is void and wholly inoperative, as respects the plaintiff's cause of action, because it barred it instantly upon its going into operation, is not applicable to the case.

This giving to the statute a prospective operation, notwithstanding its language that the "action shall be commenced within two years next after the cause or right of such action shall have accrued, and not after," is consonant with justice, with established rules of construction, and is necessary as applied to past or pre-existing causes of action, arising out of the state, to prevent the complete overthrow of the legislative intention which was to provide a limitation period in such cases.

When viewed, as all cases ought to be, in the light of the special facts on which they were decided, this construction is not in conflict, but rather in harmony with the questions ruled in the cases referred to by counsel as having been decided by the supreme court of the state. Auld v. Butcher, 2 Kan. 135; Bonifant v. Doniphan, 3 Kan. 26; Hart v. Horn, 4 Kan. 232.

The precise point here involved does not seem to have been adjudged by that court, but we feel quite satisfied that they would not decide it otherwise than we have done. Judgment accordingly.

[This judgment was affirmed by the supreme court, where it was carried by writ of error. 17 Wall. (84 U. S.) 596.]

Case No. 13,162.

In re SOHOO.

[3 N. B. R. 215 (Quarto, 52).] [1]

District Court, E. D. Missouri. 1869.

BANKRUPTCY—DISCHARGE—ACT OF BANKRUPTCY—FRAUDULENT SUSPENSION.

1. If the court, upon examining the record upon an application for a final discharge, perceives that the bankrupt has done any act which under the statute would be a bar to the granting of a certificate, it will refuse to make the order for a discharge, although no creditors appear in opposition. A decree or judgment of the court during the progress of the cause, determining that the bankrupt has done any act which would prevent the discharge, will operate as an estoppel. In some cases the party may be allowed to explain an act, and to show that while it was fraudulent in law it was not so in intent.

2. If a debtor is guilty of fraudulently suspending the payment of his commercial paper, proceedings may be immediately taken by his creditors to have him adjudged a bankrupt without waiting for the lapse of fourteen days. The bankrupt act [of 1867], § 39 [14 Stat. 536], provides for two classes of cases—a fraudulent suspension, and a suspension of payment for fourteen days without resumption—for either of which a merchant or trader may be adjudged a bankrupt.

[Cited in Baldwin v. Wilder, Case No. 806; Re Hercules Mut. Life Assur. Soc. Id. 6,402.]

A petition in involuntary bankruptcy was filed by creditors, alleging that the debtor, "being a merchant, had fraudulently suspended payment of his commercial paper, and had not resumed within fourteen days." The debtor appeared and confessed the charge, and a decree was passed adjudging him a bankrupt, upon which he filed his schedules and surrendered his property, and complied with all the provisions of the statute. Upon an application for a final discharge, the register reported him entitled thereto, no creditors appearing in opposition, but the court, upon examining the record, decided that he had been guilty of a fraud upon the act, and could not be discharged. The bankrupt filed his petition for a re-hearing, based upon a fidants, stating, that in confessing the act of bankruptcy, he had not supposed himself to be doing anything more than confessing that he had stopped payment of his commercial

[1] [Reprinted by permission.]

paper for fourteen days, and was unable to resume, and that he did not intend to admit that he had been guilty of any actual or intentional fraud. The court granted the motion for re-hearing, and the creditor being called to the stand testified, that he did not know of any fraud committed by the bankrupt in his suspension, except the non-resumption within fourteen days, and that he had made the proof under the advice of counsel, supposing that the non-resumption within the time limited was a fraudulent suspension.

TREAT, District Judge. The act, section 39, provides for two classes of cases: First, the fraudulent suspension by a merchant or trader of the payment of his commercial paper; and second, the suspension of payment for fourteen days without resumption. In the former case the debtor is supposed to be guilty of suspending fraudulently, with a fraudulent intent, and proceedings may be immediately commenced to have him adjudged a bankrupt without waiting for the fourteen days to elapse, for if that time was granted him he might complete his fraudulent act, and remove his property beyond the jurisdiction of the court. In the latter case, if he is unable to resume payment of his commercial paper within the fourteen days, the law considers the merchant insolvent, and declares him a bankrupt. In this case, as it appears that no fraud was intended by the bankrupt, and the creditor testifies that the only fraud known to him is the mere non-payment of the debtor's commercial paper, the discharge will be granted.

SOLARIS v. RAMSAY. See Case No. 7,099.

Case No. 13,163.

In re SOLDIERS' BUSINESS MESSENGER AND DISPATCH CO.

[3 Ben. 204; 2 N. B. R. 519 (Quarto, 162); 2 Am. Law T. Rep. Bankr. 87.] [1]

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

BANKRUPTCY—RECORDING MORTGAGE—PROPERTY IN DIFFERENT STATES.

Where a mortgage of goods and chattels, made as security for a debt, in good faith and for a present consideration, within the 14th section of the bankruptcy act [of 1867 (14 Stat. 522)] and not invalid as made in violation of any law of the state of New York, or of the United States, was duly executed, covering property partly in New York and partly in New Jersey, and was duly recorded in New York, but was not duly recorded in New Jersey: *Held*, that, the property in New Jersey must be regarded as not embraced in it, but, that that fact did not affect its validity as regarded the New York property.

This was a question as to the payment by an assignee in bankruptcy of the amount of a mortgage upon certain personal property of the bankrupts. The validity of the mortgage was contested by the creditors.

James A. Seaman, for assignee.
Strahan & Root, for mortgagee.
C. F. Hill, for general creditors.

BLATCHFORD, District Judge. I think that the mortgage in question in this case is, within the 14th section of the bankruptcy act, a mortgage of goods and chattels, made as security for a debt, in good faith and for a present consideration, and not invalid, as having been made in violation of any law of the state of New York or of the United States. I do not think, from the evidence, that the mortgagee, or the persons for whom he acted, had reasonable cause to believe that the mortgage was made with a view or intent to prevent the property of the mortgagors from coming to their assignee in bankruptcy, or from being distributed under the bankruptcy act, or to defeat the object of, or in any way impair, hinder, defeat, impede or delay the operation and effect of, such act, or to evade any of the provisions of such act, or reasonable cause to believe, that a fraud on the act was intended. Nor does the evidence establish that the mortgage was made with any such view or intent. The making of it was duly authorized by the company and it was properly made. The only difficulty in the case is, that the mortgage was not duly recorded in New Jersey, according to the laws of that state, so as to make it operative, as against the creditors of the mortgagors, in respect to such of the mortgaged property as was, at the time of the delivery of the mortgage, situated in New Jersey. It was duly recorded in the proper office in the city of New York, so as to make it operative, as against the creditors of the mortgagors, in respect to such of the mortgaged property as was, at the time of the delivery of the mortgage, situated in the city of New York. As respects such New Jersey property, the mortgage must be regarded as if such property were not embraced in it. But that fact does not affect its validity as regards such New York property.

The testimony and the report of the register furnish no means by which to determine what portion of the property was, at the time of the delivery of the mortgage, situated in New York and what portion in New Jersey. Unless that question can be determined by agreement of the parties, or unless it be agreed that the nett proceeds in the hands of the assignee arising from such New York property are sufficient to pay the amount due on the mortgage, namely, $4,750, with interest, there must be a reference to the register, to take testimony and report as to when the mortgage was delivered and as to what portions of the mortgaged property were severally in New York and New Jersey

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 2 Am. Law T. Rep. Bankr. 87, contains only a partial report.]

when the mortgage was delivered, and as to what are the nett proceeds in the hands of the assignee, resulting from the sales of such portions severally. The question of costs is reserved.

SOLEY (MOFFAT v.). See Case No. 9,688.

Case No. 13,164.

The SOLIDAD COS.

[Blatchf. Pr. Cas. 94.] [1]

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

PRIZE—ENEMY PROPERTY—VIOLATION OF BLOCKADE.

Cargo condemned as enemy property, and also for an attempt to violate the blockade.

In admiralty.

BETTS, District Judge. This vessel was captured September 11, 1861, off Galveston bar, by the United States vessel of war South Carolina, ostensibly bound on a voyage from Vera Cruz to Matamoras or Key West. The owners of the cargo resided in Texas or Louisiana, and went out and returned on board the vessel. They sailed with her from Galveston in August previous, owning the outward cargo of cotton she carried. The vessel was in charge of her owner, who acted as mate. He had resided six years in Texas with his family. A sham sale was made by him of the vessel in Tampico, in order, as it appeared, upon the proofs in preparatorio, to put her in the name of a Mexican owner, for the proposed voyage or adventure. No consideration was paid by the purchaser, and he took an engagement from the vendor, that, on the return of the vessel to him at Tampico, his notes for the purchase money should be restored to him, and the vessel be returned to her American owner. All on board the vessel knew that the Gulf ports were blockaded when they left Galveston, and the vessel ran the blockade, in going out, by avoiding the main channel, and making her exit through a different and obscure one. The mate testified, on his examination, that the vessel, at the time of her capture, had received no notice of the war, or of the blockade at that port, and that he had pursued his voyage for Matamoras or Key West, and had not attempted to enter any blockaded port. Another of the ship's company proved that the vessel had passed Matamoras when she was taken, and had not attempted to enter that port, and did not steer for it or Key West, but made a course to enter some of the American Gulf ports. The vessel, when captured, was found unseaworthy, or so feeble that she could not be safely sent to a northern port, and her cargo was taken out and transmitted on the United States brig Delta to this port, where it has been libelled.

Upon the facts in proof, this cargo was manifestly enemy property when arrested, and is liable to condemnation as such. It was also intended, by the master of the vessel, to take it into some one of the blockaded ports, and this endeavor must be presumed to have been known and acquiesced in by the owners of it on board, if not directed by them. Upon either ground, accordingly, that the cargo is enemy property, or that it was intended to carry it into a blockaded port, in violation and fraud of the blockade, the cargo is subject to forfeiture. Jecker v. Montgomery, 18 How. [59 U. S.] 110. The pretence of the actual owner of the vessel that he was ignorant of the blockade at Galveston, because he had not been warned off or had personal notice of the same, or of the existence of the war, is shown by the other proofs, to be deceptive and untrue. Judgment of condemnation of the property seized.

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

Case No. 13,165.

In re SOLIS.

[4 Ben. 143; [1] 3 N. B. R. 761 (Quarto, 186); 4 N. B. R. 68 (Quarto, 18).]

District Court, S. D. New York. May, 1870.

BANKRUPTCY — EXAMINATION OF BANKRUPT—APPLICATION FOR DISCHARGE—ASSETS.

1. On March 26, 1870, an order was made requiring creditors to show cause on April 21st, why a discharge should not be granted to a bankrupt. On April 7th, the register granted an order for the examination of the bankrupt. The application for the order was not in writing nor under oath, nor was any cause for issuing the order stated, except that the applicants were creditors. The bankrupt appeared under the order and objected that the application was insufficient, and that the time to examine him had expired: *Held*, that the time to examine the bankrupt did not expire with the making of the application for his discharge; that the granting of the order by the register was a matter of discretion; and that nothing appeared to show that his discretion was improperly exercised.

[Followed in Re Vetterlein, Case No. 16,926. Cited in Re Jones, Id. 7,449.]

2. An order to show cause why a discharge should not be granted to a bankrupt may be made after the expiration of sixty days, and within one year, from the adjudication of bankruptcy, on a petition stating that no assets have come to the hands of the assignee; and such order will not be set aside merely on proof that a small sum of money has been offered to the assignee for some of the assets, there being strong evidence that they are absolutely worthless.

[Cited in Re Van Riper, Case No. 16,874.]

[2] [I, Isaac Dayton, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was

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

[2] [From 4 N. B. R. 68 (Quarto, 18).]

stated and agreed to by the counsel for the opposing parties, to wit: Mr. Lord, of counsel for Andrew J. Solis, the bankrupt above named, and Mr. Robert Sewell, of counsel for Manning and DeForest, creditors of the said bankrupt. On the 26th day of March, 1870, an order was made in this bankruptcy, requiring the creditors of the said bankrupt to show cause, on the 21st day of April, 1870, why a discharge should not be granted to the bankrupt. On the 7th day of April, 1870, on the application of Manning and DeForest, creditors of the bankrupt, by Mr. Robert Sewell, their counsel, the undersigned granted and issued the order for the examination of the bankrupt hereto annexed. The application for the order was not in writing nor under oath, nor was any cause for issuing the order stated, excepting that the applicants were creditors of the bankrupt. On the 15th day of April, 1870, the said creditors of the bankrupt, by Mr. Robert Sewell, their counsel, attended before the undersigned. The said Andrew J. Solis, the bankrupt, did not attend, but his counsel, Mr. Lord, appeared before the undersigned and made the following objections: That the order for the examination of the bankrupt was not obtained on petition or affidavit duly verified, showing good cause for granting the same. That the bankrupt having applied for his discharge, the time to examine him has expired. And the said parties requested that the questions arising upon the said objections should be certified to the honorable the judge of the district court of the United States, for the Southern district of New York, for his opinion thereon.] [2]

BY ISAAC DAYTON, Register:

[2] [The statute declares that "the court may, on the application of the assignee in bankruptcy, or of any creditor, or without any application, at all times, require the bankrupt, upon reasonable notice, to attend and submit to an examination." [14 Stat. 517.] The undersigned cannot perceive any necessity for obstructing the right here given to a creditor by exacting from him, when making the application, a petition or affidavit duly verified, showing good cause for the granting of the order. The words, it is true, are "the court may require the bankrupt to attend," etc., which, it may be considered, gives the court a discretion, and perhaps warrants a register in calling for a formal petition or affidavit. This has been understood by the undersigned to be all the meaning of the Case of Adams [Case No. 39]. But all that the statute demands to give the court jurisdiction to make the order, is that the applicant shall be the assignee or a creditor. Anything beyond this is outside of the statute, and encumbers the proceedings with requirements not in any way essential to its purpose.

[The supreme court has prescribed several forms of petitions, requests, and applications, but omits any form for an "application" in this case. And the "order for bankrupt's examination," prescribed by the supreme court (form No. 45), recites an "application," but does not say anything of a petition or an affidavit showing good cause for granting the order.

[In the Case of Brandt [Case No. 1,813], the court says: "If a creditor desires to examine the debtor, the proper way to do it is by petition to the court, otherwise the court could know nothing of the desire of the creditor." Nothing is said of showing good cause for granting the order.

[In the Case of Lanier [Id. 8,070], the following opinion of the register: "It is my opinion that the application of the assignee for the examination of the bankrupt need not be verified by his affidavit. I do not think that the law intends that any reason shall be stated by the assignee in his application," is approved by the court. The right of a creditor to the order of court is by the statute put upon the same footing as the right of the assignee; and the register in that case sustains the opinion just quoted by the following argument, which seems to the undersigned to be very cogent, and forcible upon this question, and applicable alike to the case of an application by a creditor, and to the case of an application by the assignee in bankruptcy, for the examination of the bankrupt. "That this is the meaning of the 26th section [of the act of 1867 (14 Stat. 529)] is evident from the context. A bankrupt may be required to submit to an examination regarding his bankruptcy at any time, on the application of the assignee, or of a creditor; but in order to obtain an order for the examination of the wife of the bankrupt, 'good cause' must be shown before it can be granted, or she required to attend. The maxim 'Expressio unius est exclusio alterius,' applies with great force here, as the proper rule of construction. The intent of the legislature is clearly expressed in making 'good cause shown' a condition precedent to the examination of the wife of the bankrupt, while the bankrupt himself may be examined at any time, on the application of the assignee, or, without any application, by the court 'mero motu.' Bankr. Act, § 26. No fact then appearing in the application of the assignee, and no reason being given except what the law clearly sanctions and implies in the demand itself, no verification is necessary to be made by the assignee, in thus invoking the assistance of the court to enable him to perform his duties under the law."

[The point was decided the same way in respect to an application by an assignee for the examination of the bankrupt in the Case of McBrien [Case No. 8,665], in this court. As has been seen, the statute does not make any distinction between an assignee and a creditor in this provision, giving the right to examine the bankrupt; and all the reasoning of the register in his opinion in this case, ap-

[2] [From 4 N. B. R. 68 (Quarto, 18).]

plies with equal force to the case of an application by a creditor as to the case of an application by an assignee for the examination of the bankrupt.

[Where the creditor has proved his debt against the bankrupt, and, either in person or by his attorney, makes a verbal application to the register in charge of the case, who knows of the fact of the proof of his debt by the creditor, for an order for the examination of the bankrupt, and the order is granted and issued, the absence of a formal petition in writing for the order, ought not to defeat the creditor in his attempt to examine the bankrupt, and exempt the bankrupt from the duty of submitting to an examination. The manner of the application, whether verbally or in writing, so far as the bankrupt is concerned, is immaterial, so long as an application was actually made, which was the case in the present proceeding, as the fact of the application is recited in the order. To say that an application in writing would give validity to the proceeding, when the same words expressed verbally to the court or register would be insufficient, would be to give effect to a ceremony at the expense of the substance.

[The register is of the opinion that the creditor is entitled to an order for the examination of the bankrupt, notwithstanding the bankrupt has applied for his discharge.

[The register will probably require greater diligence on the part of the creditor in the prosecution of his examination, where, in case no objections are filed, the bankrupt will soon be entitled to his discharge, than in a case where the application for the examination of the bankrupt has been made at an early period of the proceedings in bankruptcy. But the creditor is not to be absolutely precluded from examining the bankrupt because he has not made his application for the examination until after the bankrupt has applied for his discharge.] [2]

BLATCHFORD, District Judge. My decision in the Case of Adams [Case No. 39], was, that the creditor in that case, in order to obtain an order according to form No. 45, for the examination of the bankrupt, under section 26 of the act, must apply to the register for such order by petition or affidavit duly verified, and show good cause for the granting of the order. The register had so held in that case, on a verbal application to him, without a petition or affidavit, and had refused to grant the order. The effect of the decision was merely that the register had a discretion, under section 26, to require good cause to be shown for granting the order, by a petition or affidavit duly verified, and, as he had exercised such discretion, I saw no reason in the papers for interfering with his decision. In the Case of McBrien [Case No. 8,665], the register granted an order for the examination of the bankrupt on the written application of the assignee, not supported by an oath. The bankrupt moved before the register to vacate the order, because it was not founded on an affidavit showing good cause for granting it. The register denied the motion, and I confirmed his decision, and concurred in his view that it was discretionary whether to grant an order, and what cause should be shown for it. In the present case, the register, in the exercise of his discretion, thought proper to grant the order, without requiring a petition or affidavit duly verified, showing good cause for granting the same. Nothing appears to show that that discretion was improperly exercised, and the order must stand. The time to examine the bankrupt does not expire with the making of his application for his discharge.

[3] [The undersigned, register in bankruptcy for the Southern district of New York, in charge of the proceedings in this bankruptcy, to whom, by an order of this court, made in this bankruptcy, upon the petition of Andrew J. Solis, the bankrupt above named, on the 26th day of March, in the year 1870, it was referred to make an order to show cause upon the said petition, and to sit in chambers on the return of the said order, and to pass the last examination of the bankrupt if there be no opposition, hereby certifies to the honorable the district court of the United States for the Southern district of New York: That, pursuant to the said order of reference, an order of this court was made and entered in this bankruptcy on the 26th day of March, 1870, providing that all creditors who had proved their debts, and other persons in interest, might appear on the 21st day of April, 1870, before this court at chambers, before the undersigned, at his office, and show cause, if any they had, why a discharge should not be granted to the bankrupt. That on the said 21st day of April, 1870, the undersigned was attended upon the said reference and order in the said bankruptcy by Andrew J. Solis, the bankrupt, by Mr. George D. F. Lord, his counsel; Manning & DeForest, creditors of the bankrupt, by Mr. Robert Sewell, their counsel. That by consent the hearing of the application of the bankrupt to be discharged from his debts, and all proceedings upon the said order to show cause why a discharge should not be granted to the bankrupt, were adjourned to Friday, the 22d day of April, 1870, at 11 o'clock in the forenoon, at the office of the undersigned, reserving to every creditor on such adjourned day, every right which he had on this day, and as if an adjournment had not been had. That on the said 22d day of April, 1870, the undersigned was attended on the said reference and order by Andrew J. Solis, the bankrupt in person, and by Mr.

[2] [From 4 N. B. R. 68 (Quarto, 18).]

[3] [From 3 N. B. R. 761 (Quarto, 186).]

Daniel Lord, and Mr. George D. F. Lord, his counsel; Manning & DeForest, creditors of the bankrupt, by Mr. Robert Sewell, their counsel; James S. Hollinshead, the Phœnix Insurance Company, the Insurance Company of North America, the Putnam Fire Insurance Company, and the Insurance Company of the State of Pennsylvania, creditors of the bankrupt, by Mr. Nathaniel Hoxie, their counsel.

[On behalf of the creditors thus attending before the undersigned, it was objected that the order of reference aforesaid to the undersigned to make the order to show cause aforesaid, and the said order to show cause so as aforesaid made by the undersigned, had been irregularly made, because assets had come to the hands of the assignee in bankruptcy of the estate and effects of the bankrupt, and six months had not elapsed from the adjudication of bankruptcy. In support of this objection, the creditors, by their counsel, read the pages, a copy of which is hereto annexed from Schedule B, annexed to the first petition of the bankrupt in this proceeding. The undersigned stated his opinion that the order of reference and the order to show cause would not be set aside on the ground of irregularity. The said creditors then filed with the undersigned the copy hereto annexed of the sworn petition of Manning & DeForest, the said creditors of the said bankrupt, and the deposition attached to the same and thereto annexed, of Robert Sewell, Esq., counsel as aforesaid of the said creditors, and again read the portion aforesaid, a copy of which is hereto annexed of Schedule B, annexed to the first petition of the bankrupt in this bankruptcy. The bankrupt then filed with the undersigned the return hereto annexed of the assignee in bankruptcy, of the estate and effects of the bankrupt, and the deposition hereto annexed of Andrew J. Solis, the said bankrupt.

[The counsel for the creditors claimed that the order of reference aforesaid to the undersigned to make the order aforesaid to show cause, and the said order to show cause, ought to be discharged on the ground that at the time of the application of the bankrupt for a discharge from his debts, six months from the adjudication of bankruptcy of the bankrupt had not expired. The questions whether the order of reference aforesaid to the undersigned to make the order to show cause aforesaid, and the said order to show cause were irregular, and whether the said order of reference and the said order to show cause ought to be discharged on the ground that six months from the adjudication of bankruptcy of the bankrupt had not expired, are, at the request of the parties, certified to the judge for his opinion thereon.

[Dated at the city of New York, the 22d day of April, 1870.][3]

ISAAC DAYTON, Register.

[3] [From 3 N. B. R. 761 (Quarto, 186).]

The register thereupon certified the matter to the court, giving the following opinion: "The petition of the bankrupt of the 26th March, 1870, praying that he may be decreed to have a discharge from his debts, alleged that no assets had come to the hands of the assignee of his estate. No objection is made that this petition was not under oath. The allegation brought the case within the provision of the 29th section of the act, that 'if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year, from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts,' and gave the court jurisdiction to make the order of reference, and an order to show cause. In re Bellamy [Case No. 1,266]. Those orders were, therefore, not irregular. Nor should those orders be set aside upon the facts. Certificates of stocks, or claims against debtors of the bankrupt which, up to the time of the application of the bankrupt for discharge, have not actually produced anything, and for which the only offer made is an offer of a small sum of money, whilst there is strong evidence that these stocks and claims are absolutely worthless, may very justly be said not to be assets at the time of the application for discharge, whatever they may have become or may become afterwards. The bankrupt was, therefore, entitled to make his application for discharge at the expiration of sixty days from the adjudication of bankruptcy."

BLATCHFORD, District Judge. The order of reference and the order to show cause were regular, and the order to show cause ought not to be discharged on the ground stated. I concur in the views stated by the register in his opinion.

Case No. 13,166.

In re SOLOMON.

[2 Hughes, 164;[1] 10 N. B. R. 9; 3 Am. Law Rec. 226; 1 Am. Law T. Rep. (N. S.) 351.]

Circuit Court, E. D. Virginia. June, 1874.

HOMESTEAD—WAIVER—CONSTITUTIONAL LAW—BANKRUPTCY.

Under those provisions of the constitution of Virginia which allow a homestead exemption to any householder or head of a family, and of the act of assembly which prescribes in what manner and under what conditions the exemption may be set apart and held, it is competent for a claimant to waive his right to the exemption, that provision of the act of assembly on the subject which allows a waiver being constitutional.

For contrary view of a state court, see [Thomas v. M'Cahan] 1 Va. Law J. March, 1877, p. 187.

[Cited in Linkenhoker v. Detrick, 81 Va. 52. Cited in brief in White v. Owen, 30 Grat. 53.]

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

[In review of the action of the district court of the United States for the Eastern district of Virginia.

[In the matter of Joseph Solomon, a bankrupt.]

R. Courtney, for bankrupt.

John Dunlop, for creditors.

WAITE, Circuit Justice. On the 31st January, 1873, the bankrupt executed to Glazebrook & Thomas, at Richmond, Va., his note for the payment to them, or their order, of the sum of $234.50 at sixty days after date. It contained the following clause: "I hereby waive the benefit of the homestead exemption as to this debt." Glazebrook & Thomas indorsed this note to Gibson & Crilly. Solomon was adjudged a bankrupt, on his own petition, upon the 1st of May, 1873. Gibson & Crilly made proof of their claim against the estate on the 24th May. An assignee was appointed, who on the 16th of February, 1874, set off to the bankrupt his homestead exemption under the laws of Virginia, without regard to the waiver expressed in the note of Gibson & Crilly. They thereupon filed their petition in the district court, the object of which was to set aside this action of the assignee, so far as it operated to prevent their subjecting the property set off to the payment of their debt in case the remainder of the bankrupt's estate should prove insufficient for that purpose. Their claim for this relief is predicated entirely upon the waiver of the exemption which is contained in their note. We are therefore called upon to consider the effect of this waiver.

By section 1, art. 11, of the constitution it is provided that every householder or head of a family shall be entitled to hold exempt from levy, etc., property to the value of not exceeding $2,000, to be selected by him; by section 3 it is further provided that nothing in the article should be construed to interfere with the sale of property exempted, or any portion thereof, by virtue of any mortgage, deed of trust, pledge, or other security thereon, and by section 5, that the general assembly should at its first session under the constitution prescribe in what manner and on what conditions the said householder or head of a family should thereafter set apart and hold for himself and family a homestead out of the property thereby exempted, and might, in its discretion, determine in what manner and on what conditions he might thereafter hold for the benefit of himself and family such personal property as he might have, and coming within the exemption thereby made, but that said section should not be construed as authorizing the general assembly to defeat or impair the benefits intended to be conferred by the provisions of this article. By section 7 it was provided that the provisions of the article should be construed liberally, to the end that all the intents thereof might be fully and properly carried out. In June, 1870 [Laws Va. 1869-70, p. 198], the general assembly passed an act such as was required by section 5, and its third section provided that in all cases where a debtor or contractor shall declare in the body of the bond, note, or other evidence of the debt or contract that he waives as to such debt or contract the exemption from liability of the property which he may be entitled to hold under the provisions of said act, the property whether previously set apart or not, should then be liable to be subjected for such debt or contract under legal process in like manner and to the same extent as other estate of the said debtor or contractor; provided, that when such debtor or contractor is possessed of other estate than that which he may be entitled to hold exempt in the county in which suit is brought against him, or the property set apart under the provisions of this act may be, then such other estate shall be subjected and exhausted before that which is exempt can be sold. The words employed in the note held by Gibson & Crilly are declared by the act to be sufficient to operate as such waiver. If this provision of the act is constitutional the waiver can be enforced.

Every statute is presumed to be constitutional. It cannot be declared by the courts to be otherwise, unless it is made clearly so to appear. If the case is doubtful the expressed will of the legislature should be sustained. Keeping these familiar principles in mind, we proceed to consider the constitutionality of the act in question. The constitution grants the exemption as a privilege to the householder. It declares that he shall be entitled to hold property to be selected by him. No specific property is set apart, but he can select such as he desires to have, and when selected it is to be set apart. If he fails to select, the process of the law can be executed, and the sale made. The right of selection must be exercised before the sale. If the householder fails in this, his right of exemption in the property sold is gone. The privilege, so far as it is given by the constitution, is personal to the householder. The language is, "to be selected by him." If he neglects to act, no one is authorized by the constitution to act in his place. The case is entirely different from what it would have been if it had been declared that certain specific property should not be sold under execution, etc. In that case the constitution or a law containing similar provisions would execute itself, and as it would be a part of the public policy of the government to exempt that particular property absolutely from forced sale, its provisions could not be waived. It would be beyond the legal power of an officer to levy upon and sell such property. Here, however, the policy is not to exempt absolutely, but the householder has a right to claim an exemption. Whether he will make his claim or not is optional with him. If he does not claim, he cannot have; and it is difficult to see why, if he may waive at the time of the sale by refusing to select,

he may not before. If he can waive at all, it seems to us it follows necessarily that for a good consideration he may make a contract to waive such as the courts will enforce.

But it is further provided that nothing in the article of the constitution referred to should be construed to interfere with the sale of the property or any portion of it by virtue of any mortgage, deed of trust, pledge, or other security thereon. Thus it is made expressly to appear that it was not the intention of the framers of the constitution to prevent the householder from contracting for the sale or incumbrance of the property. He was not required to hold it absolutely for himself and family. It was to remain entirely under his personal control, to be dealt with in such manner as he saw fit. His right to sell and incumber is as distinctly given as his right to select. If he sells or incumbers before he selects, his power of selection as against such sale or incumbrance is gone. No particular form of incumbrance is specified—that is left to the discretion of the legislature. Now, a waiver of the right to select is, in effect, an incumbrance on the property which might be selected. True, in the absence of a statutory provision to that effect, one cannot ordinarily mortgage or otherwise incumber his future to be acquired property, but it is no doubt within the power of the legislature to authorize him to do so. If it does, his incumbrance upon such property is binding, the same as upon any other.

The legislature of Virginia has in this case attempted in effect to authorize a householder to incumber in a particular manner his exemption interest in his property, as well that which he has acquired as that which he may acquire. It seems to us that in so doing it has not in any manner impaired the benefits which it was the object of the constitution to confer. The object was to give the householder full power and control over his property; to permit him to use it in such manner as in his judgment would best promote the interest of himself and his family, and if he had not by some voluntary act of his own deprived himself of the right, to allow him to select and hold a certain specified amount, not description, of property free from the process of the law to enforce the payment of his debts. The amount thus exempted was large, in many instances, no doubt, more than the value of all the property the debtor owned. Unless he could in some form make this property available for the purposes of security he and his family might not unfrequently be reduced to want. A mortgage, or pledge, or deed of trust, might not always furnish the security required. Take the facts of this very case as an example. The bankrupt appears to have been a merchant, and purchased his goods on credit. One of the classes of property which he wishes set off to him consists of his stock of goods remaining on hand. So far as appears from the papers submitted to us, his whole unincumbered property will not be sufficient to give him the full amount which the constitution would permit him to hold. The note of these creditors was given for goods purchased on credit to keep up his stock. Unless, therefore, he could in some manner give security upon his exempted property, it is fair to presume he could not have obtained his credit. A mortgage upon property held for sale would be precarious security, if valid at all, as against creditors, and a pledge would be inconsistent with the retention of the possession by the owner for the purpose of sale. The only real security that could be given in such a case would be by a waiver of the right of exemption in favor of that particular debt. This the legislature has authorized the debtor to make, and we think in so doing it acted within the scope of its constitutional powers. Whether such a waiver could be enforced without legislative authority for making it, we are not called upon now to consider. It is sufficient for this case that this authority has been given.

The judgment of the district court that the provisions of the act allowing a waiver of the exemption are unconstitutional is reversed, and the court is directed to proceed to hear and determine the cause upon the other issues made by the pleadings.

Case No. 13,167.

In re SOLOMON.

[2 N. B. R. 285 (Quarto, 94);[1] 6 Phila. 481; 25 Leg. Int. 364; 1 Chi. Leg. News, 77, 107.]

District Court, E. D. Pennsylvania. 1868.

BANKRUPTCY—OMISSION TO KEEP BOOKS—INTENT—DISCHARGE.

The provision of the bankrupt law of 2d March, 1867 [14 Stat. 517], that no discharge shall be granted if the bankrupt, being a merchant or tradesman, has not, subsequently to the passage of the act, kept proper books of account, applies whether the omission to keep them has been with fraudulent intent or not.

[Cited in Re Jorey, Case No. 7,530; Re Gay, Id. 5,279; Re Bellis, Id. 1,275; Re Brockway, Id. 1,917; Re Archenbrown, Id. 505; Re Frey, 9 Fed. 379, 384; Re Graves, 24 Fed. 554.]

[Cited in Re Good, 78 Cal. 402, 20 Pac. 861. Cited in brief in Re Howard, 59 Vt. 595, 10 Atl. 719.]

In bankruptcy.

Before CADWALADER, District Judge, assisted by GRIER, Circuit Justice.

The bankrupt was a furrier, whose purchases were few and of small amount. They had mostly been made in bulk. After working up the materials purchased, he had sold a portion of the produce of his manufacture at auction, and had sold a greater portion by retail, in a store of his own. The invoices or bills of his purchases, and the vouchers or memoranda of his payments, had been filed in regular order of time, and preserved with the

[1] [Reprinted from 2 N. B. R. 285 (Quarto, 94), by permission.]

auctioneer's accounts of sales. The bankrupt had an account in a bank, where his book had been settled; and he had preserved the bank-book and the paid checks, but had kept no check-book. Of the receipts in cash from the sales in his store, he had made a daily memorandum on a slate, but had from day to day rubbed out the previous day's entries. No other account of such receipts had been made. In this, and in some other cases, a question arose upon the effect of the provision of the twenty-ninth section of the act of congress of 2d March, 1867, that no discharge shall be granted if the bankrupt, being a merchant or tradesman, has not, subsequently to the passage of this act, kept proper books of account. The question was whether this enactment applied when the omission to keep them had not been with intent to defraud his creditors.

The district judge was of opinion that English decisions threw no light on the subject, because the words of the English statute were altogether different. He thought that in business of some kinds, any contemporaneous written memorials, formal or informal, of a tradesman's transactions, whether in a bound volume, or in detached sheets, might answer the definition of proper books of account, if they had been preserved, and so arranged as to present an intelligible and substantially complete exposition; but that the absence of such written memorials could not be excused merely because it had not occurred with a fraudulent intent. The judge observed that if such a qualification had been intended by congress, there was no reason to limit the provision to cases occurring after its enactment; that in the absence of proper books of account, it was ordinarily impossible to form a safe opinion whether the bankruptcy of a merchant or tradesman was fraudulent or not; that the enactment was therefore founded in motives of commercial policy; that it was in substance a repetition of a like provision of the act of 1841 [5 Stat. 440]; and that, in the act of 1867, the omission of words, like those of the British act, was doubtless intentional. But, as it was, perhaps, questionable whether there could be an appeal from such a decision, he said that he would ask the circuit judge to sit with him on a re-argument of the question. It was accordingly argued before both judges.

Mr. Kimball, for the bankrupt, did not dispute that he was a tradesman, but contended that he was, according to the intent of the act of congress, entitled to a discharge, although books had not been kept, unless the omission to keep them was fraudulent; and that even if this were not the meaning of the act, he should be discharged, because the true state of his business had been sufficiently exhibited, and the phrase "proper books of account," in the act, excluded the requirement of books beyond such as were necessary for this purpose, and impliedly dispensed altogether with books where they were altogether unnecessary for it, as in this case.

GRIER, Circuit Justice, after quoting the words of the enactment, said: The provisions of the bankrupt act of 1867, § 29 (14 Stat. 532), are that "no discharge shall be granted," if, inter alia, etc., "or if, being a merchant or tradesman, he has not, subsequently to the passage of the act, kept proper books of account." We cannot, by any latitude of construction, interpolate "with intent to defraud his creditors." It is the policy of this clause of the act, that after its passage every merchant or tradesman, should keep such "books of account," as, considering the business and condition of the debtor, would enable any competent person to determine from the books and invoices, &c., &c., the real condition of the debtor's affairs. It is not necessary that these books of accounts be kept according to the forms taught in the schools, or in ledgers and day-book, bound in leather. Could any competent person, from the invoices, bank-books, checks, and other papers kept, without any cash accounts of receipts and expenditures, "determine the real condition of the debtor's affairs?" It seems to me that the question should be answered in the negative.

SOLOMON (ANDREWS v.). See Case No. 378.

SOLOMON (PAYNE v.). See Case No. 10,-856.

SOLON, The (ANDERSON v.). See Case No. 363.

SOMBORN (APOLLINARIS BRUNNEN v.). See Case No. 496.

Case No. 13,168.

SOMBOY v. LORING.

[2 Cranch, C. C. 318.] [1]

Circuit Court, District of Columbia. May Term, 1822.

PARENT AND CHILD—TRESPASS FOR LOSS OF SERVICE—FORCE—KNOWLEDGE BY DEFENDANT.

In trespass vi et armis for taking away the plaintiff's son per quod servitium amisit, the plaintiff must either prove actual force, or knowledge on the part of the defendant that the young man was under age.

Trespass vi et armis [by negro Sampson Somboy against Solomon Loring], for taking away the plaintiff's son and servant per quod servitium amisit. Demurrer to the evidence.

Mr. Taylor, for defendant, contended that the action should have been trespass on the case—not vi et armis; but that if trespass vi et armis will lie, the plaintiff must prove either actual force, or that he seduced the boy knowingly, that is, knowing the plaintiff's right to his service. But the evidence shows that he did not know it. 2 Chit. Pl. 237, 238. The father has no right to the per-

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

sonal service of his son under age. His only right of possession of his son is for nurture and education. Upon habeas corpus, at the request of the father, if the child be of years of discretion, the court will not order him to be delivered to the father contrary to the will of the child. It is not a question of property.

Mr. Wise, contra. In trespass the scienter is not material. Taylor v. Rainbow, 2 Hen. & M. 423; Knapp v. Salsbury, 2 Camp. 500; Bennett v. Allcott, 2 Term R. 166; 1 Chit. 95, 124; Tullidge v. Wade, 3 Wils. 18; Fitzh. Nat. Brev. 89, 90; Weedon v. Timbrell, 5 Term R. 357; Macfadzen v. Olivant, 6 East, 387; Bac. Abr. tit. "Master and Servant."

THE COURT (THRUSTON, Circuit Judge, absent) rendered judgment for the defendant, upon the demurrer to the evidence, on the ground that it was necessary for the plaintiff, in this action of trespass vi et armis, to prove either actual force, or a knowledge on the part of the defendant that the young man was under age.

SOMERS (BRICE v.). See Case No. 1,856.

Case No. 13,169.

SOMERS v. The JERSEY BLUE.

[2 N. J. Law J. 359.]

District Court, D. New Jersey. Nov. 4, 1879.

SEAMEN—WAGES—ASSIGNMENT OF.

A pilot purchased a share in the boat on which he was serving, and, having paid part of the purchase money, stipulated with the other owners that they should retain yearly, out of his wages, such sum as he was able to spare until the residue of the purchase money should be paid. *Held*, that this was not an assignment of unaccrued wages, within the meaning of section 4536, Rev. St., and that this agreement gave no authority to the owners to apply any part of the wages to the purchase money without further directions from the pilot.

Exceptions to the claim for wages overruled. Libel in rem.

J. Warren Coulston, for libelant.
Samuel H. Grey, for claimant.

NIXON, District Judge. The libel is filed in this case by William P. Somers for the balance due to him on account of his wages as pilot on board the steamboat Jersey Blue, for the years 1876 and 1878. He acknowledges that he has been paid in full for the year 1877. The defense interposed is that the libelant was one of the owners of the steamboat; that, at the time of her purchase by him and the respondents and some other parties, he stipulated and agreed to pay the sum of $2,000 for four twenty-seconds of the said steamer; that he paid in cash $350, and made an arrangement with the other owners that he should serve as pilot in running the said boat, and that, from his earnings as pilot, there should be yearly retained by the other owners such sum of money as he was able to spare, until the residue of the consideration of his purchase should be paid; and that, in accordance witn such agreement and understanding, the sum of $318, which he now claims as wages, was retained and credited on his indebtedness at the close of the year 1876, and the further sum of $485.08, also claimed by him, was appropriated and credited at the end of the year 1878. It appears in the case that, during the intervening year of 1877, he sold to his brother, James Somers, the one-fourth of his interest in the boat, to wit, the one twenty-second part, for $500, which sum was paid by the purchaser, and credited on the libelant's account for that year.

The case was referred to Commissioner Belville, to take testimony upon the issues raised by the libel and answer, and report thereon to the court. He has made his report, sustaining the whole claim of the libelant, to which two exceptions have been filed by the proctor of the respondents: (1) Because the commissioner finds that the weight of the testimony in regard to the alleged agreement is in favor of the libelant. (2) Because he finds that the alleged agreement by the libelant to allow a portion of his wages to stand for a specific purpose, to wit, for the payment of the debt incurred by the libelant in the purchase of a share of the said steamboat, was in fact an assignment thereof before the wages were earned, and contrary to the provisions of sections 4535 and 4536 of the Revised Statutes of the United States.

1. I think the first exception is well taken. It is true that the libelant denies under oath any such arrangement or agreement, but he is contradicted by Hiram S. Bright, the master, with whom the contract is alleged to have been made, and Cyrus Simmons, a former owner, but now having no interest in the controversy, and Henry Allen, who became responsible for and paid the libelant's share of the purchase money, and for whose benefit the wages were to be retained; the first named testifying that he made the arrangement with the libelant at the time of the purchase; and the remaining two affirming that Somers admitted to them, severally and at different times, that such an agreement had been entered into. The circumstances also support this view of the case. At the close of the season of 1876 the sum of $318 was due to the libelant above all amounts received by him on account. It does not appear that he ever sought to collect this sum, or to claim it, until 1879. None of the earnings of 1877 were retained, for the apparent reason that he had paid $500 on account of his indebtedness by a sale of one-fourth of his interest in the boat. I con-

strue his long acquiescence in the retention of the balance of his earnings in 1876 into an admission on his part that the sum had been or should be applied to the payment of the consideration due from him on the purchase of the steamboat, and a recognition by him of the understanding or arrangement that the surplus of his wages, above his necessary living expenses, should be thus applied.

2. I have more difficulty in regard to the second exception, and the trouble arises from two sources: First, from a doubt whether the transaction falls within the prohibition of section 4536 of the Revised Statutes, and, second, if it does not, whether, in view of the indefinite terms of the agreement, there is any authority, without the express or implied assent of the pilot, arbitrarily to apply all that remains due of the earnings of 1878 to the payment of his debt. With regard to the first, is the case under consideration an assignment or sale of wages, in the sense in which these phrases are used in the section? It may come within the letter of the statute, but it does not fall within its spirit and intent. The legislation is for the benefit of seamen, who are the wards of the admiralty courts, and no interpretation should be given to it which would work to their injury. It will hardly be affirmed that the construction invoked by the proctor of the libelant would advance the interests of, or result in benefit to, the seamen, as it deprives them of all opportunity of buying a share in vessels and applying their future services on board in their navigation toward the payment of the purchase money. I must therefore hold that there was no such assignment or sale of wages by the libelant as rendered the contract or agreement void; and that the respondents are entitled to withhold such portion of his earnings as he could spare from his living expenses for the payment of his indebtedness. But it does not follow, from the foregoing construction of the agreement or of the law, that the respondents are entitled to retain the balance of the wages of 1878 in controversy without the assent of the libelant. As soon as the season closed he demanded the residue of his earnings. His monthly wages had been reduced, and there is no proof that he ever acknowledged that it did not take the whole for his support. Under the contract and arrangement set forth and admitted in the answer, the respondents had no right to retain any sum, large or small, without his consent, as he was the sole judge of the necessary living expenses; and no such acquiescence can be inferred in regard to the earnings of 1878 as must be inferred from those of 1876.

The exceptions to the report must be sustained, and a decree be entered in favor of the libelant for the balance due for his services in 1878, as found by the commissioner, to wit, the sum of $297.68, with interest from the 1st day of January, 1879, to the date of signing the decree.

Case No. 13,170.

SOMERS v. TAYLOE.

[2 Cranch, C. C. 138.] [1]

Circuit Court, District of Columbia. April Term, 1817.

EVIDENCE—WRITTEN CONTRACT—PAROL—DEMAND—WAIVER.

1. If a written contract between A. and B., for the delivery of corn, contain allusions to C. and D. tending to show their interest in the contract, parol evidence may be given to show that A. was the agent of C., and that B. was the agent of D., and that the contract was made by A. and B. for and in behalf of their respective principals; and the contract may be admitted in evidence in an action by C. against D. for the nondelivery of the corn which was the subject of the contract.

2. If the defendant positively refused to deliver the corn according to the contract, such refusal dispensed with the necessity of a demand on the part of the plaintiff, and of proof of averment that he was ready at the landing to receive the corn.

This was a special action of assumpsit, for not delivering corn according to a written contract between Greenlow and Raymond. The declaration avers that Greenlow was the agent of Daniel Somers, and Raymond the agent of John Tayloe.

Mr. Swann, for defendant, objected to the contract being read in evidence on this declaration, because the agreement does not show the agency of the parties, and no parol evidence can be given to explain the written contract.

Mr. Taylor and Mr. Lee, for plaintiff, observed that the contract was not under seal, and was offered in connection with the letters of Mr. Tayloe acknowledging the contract as his, and as made with Mr. Somers.

THE COURT (nem. con.) was of opinion that as, in the contract, the corn is said to be the corn upon Colonel Tayloe's plantation called "Oaken Brow," and as there are several other references in the contract to Colonel Tayloe and Mr. Somers, the plaintiff might give parol evidence of the agency of the parties.

Mr. Swann, for defendant, moved the court to instruct the jury that the plaintiff must prove a demand of the corn.

Mr. Taylor, contra. The defendant, by his letters of the 12th and 24th of June, declares that he will not deliver it. This absolved the plaintiff from his obligation to demand it.

THE COURT (nem. con.) decided that the demand was waived by the defendant's declaration that he would not deliver the corn.

One count of the declaration averred that the plaintiff was ready at the landing to receive the corn; and Mr. Swann prayed the court to instruct the jury that, upon that count, it was necessary that the plaintiff should prove that fact.

But THE COURT decided that the plaintiff need not prove that averment, if he proves that the defendant waived the demand, by de-

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

claring that he would not deliver the corn if demanded.

Verdict for the plaintiff, $375.

SOMERSET & K. R. CO. (CHILDS v.). See Case No. 2,682.

Case No. 13,171.

SOMERVILLE v. The FRANCISCO.

[1 Sawy. 390.] [1]

District Court, D. California. Dec. 1, 1870.

SEAMEN—WAGES—AGREEMENT TO RENOUNCE.

An agreement made between the master and the cook of a fishing vessel by which the latter agreed to renounce his wages, earned and to be earned, and to accept in lieu thereof the catch of one of the seamen, pronounced unequal and unjust and to be disregarded by a court of admiralty.

[This was a libel for wages by Frederick Somerville against the brig Francisco.]

Daniel T. Sullivan, for libellant.
Milton Andros, for claimant.

HOFFMAN, District Judge. The libel in this case is filed to recover wages alleged to be due the libellant for services as cook on the above vessel, on her late fishing voyage from this port to the Okhotsk Sea. The shipment of the libellant as cook and the rate of wages agreed to be paid him are not disputed.

The defense set up is, that the libellant was incompetent and negligent. That the crew became discontented with the manner in which he discharged his duties, and demanded of the master that some change should be made. That the master thereupon proposed to the libellant to take the place of one Peterson, a fisherman on board, to relinquish to him the wages already earned by libellant as cook, and to receive in lieu thereof the fish already caught by Peterson, and the same share which Peterson was to receive of the fish, which he, libellant, might subsequently catch during the voyage.

That the libellant agreed to this arrangement, and that there is now due him only a share of the proceeds of the voyage, such as Peterson would have been entitled to.

In reply, the libellant alleges that he assented to the captain's proposition through fear and under duress.

By the terms of the articles each of the crew was to receive three tenths of the fish which he might individually catch, subject to certain specified deductions and charges. The vessel sailed on the tenth of April, 1870. The alleged agreement was made on the eighteenth of July. The voyage proved unprofitable. The amount which would be due to the libellant under the alleged agreement is an inconsiderable sum, far less than the amount of his wages.

The allegations of the answer, and the proofs offered at the hearing, leave it somewhat uncertain whether the defense relied on is the incompetence and neglect of the libellant, and the consequent right of the master to withhold his wages in whole or in part, or a voluntary renunciation by him of his contract as cook, and the acceptance of a new employment on the same terms and conditions as those on which Peterson had contracted.

There can be no doubt that whenever an officer or mariner proves incompetent to discharge the duties he has contracted to perform, the master may degrade him, and the amount of his compensation will be determined not by the contract but by the value of the services he has actually rendered.

But, in this case the proofs of incompetence or negligence on the part of the libellant are wholly insufficient. Some dissatisfaction was manifested by the crew at Honolulu, but this seems to have been on account of the quantity rather than the quality or mode of cooking the food supplied them. If the latter was the case, it is by no means clear that it was occasioned by the fault of the cook. The captain himself appears to have assured the men that the libellant was a good cook, but offered to procure another if one could be had, provided the men would pay the three months extra wages required to be deposited on the discharge of a seaman in a foreign port. This the men declined to do, and the vessel proceeded on her voyage. On the eighteenth of July, some time after the vessel had arrived on the fishing grounds, the men were not furnished coffee as was usual when first called out in the morning, and no breakfast was prepared at the customary hour. They thereupon proceeded aft in a body, and informed the master that they could not and would not work unless their coffee was served to them and their breakfast prepared. The master then called the cook, or went to the galley and spoke to him, as the latter alleges, in a very violent and threatening manner. The excuse given by the cook was that the breakfast had been overturned by the heavy rolling of the ship, and that one of his hands was so sore from the effects of a splinter as to deprive him of its use.

Shortly afterwards the cook was called into the cabin, and the arrangement to take Peterson's place was entered into. It is proved that the ship was rolling very heavily, and that some of the dishes or pans on the stove were capsized. It is also proved that the cook's hand was and had for some days been sore and festered, so as greatly to interfere with the performance of his duties.

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

. None of the crew who were examined allege any incompetence on the part of the cook. Some of them testify to his great desire to get through his work, and to his depriving himself of sleep for many consecutive hours. The coal on board also appears to have been nearly or quite unfit for use, and the drift wood used as fuel was wet and difficult to kindle. It was, moreover, necessary to saw or split it, which the cook, with a sore hand, found very difficult.

This, and the incident at Honolulu, are the only instances of alleged neglect mentioned by the witnesses. The master states, however, that almost every week during the voyage from here to the Okhotsk Sea he was obliged to speak to the cook about not giving the men enough, and that the crew were continually grumbling. But the men who were examined as witnesses make no serious complaints of an insufficient supply of food by the cook's fault. Some of them seem to consider that there was as much reason for dissatisfaction after as before the substitution of Peterson as cook in place of the libellant.

In view of all the testimony, I cannot consider that the incompetence or negligence of the libellant was such as to justify the master in disrating him, rescinding the contract, and depriving him of the opportunity of earning the wages agreed to be given him.

It need scarcely be observed that if the condition of his hand prevented him either wholly or partially from performing his duties, that circumstance affords no reason either for disrating him or denying him wages. A seaman disabled without his own fault, in the service of the ship, is entitled to be cured at the expense of the latter, and this without diminution of his wages.

The libellant, then, is entitled to recover, unless, by a voluntary and fair agreement, he has renounced his right to his wages earned and to be earned, and has entered into a new contract.

The courts of maritime law, mindful of the ignorance, the credulity, and the thoughtlessness of seamen, "have been in the constant habit," says Mr. J. Story, "of extending towards them a peculiar protecting favor and guardianship. They are emphatically the wards of the admiralty, and, though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees. * * * As they have little of the foresight and caution belonging to persons trained in other pursuits of life, the most rigid scrutiny is instituted into the terms of every contract in which they engage. If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side not compensated by extraordinary benefits on the other side, the judicial interpretation of the transaction is that the bargain is unjust and unreasonable, that advantage has been taken of the weaker party, and that pro tanto the bargain ought to be set aside as unjust and unreasonable." Harden v. Gordon [Case No. 6,047].

In the celebrated judgment of Lord Stowell in The Juliana (2 Dod. 504), the same principles were declared and vindicated. In that case it was held that where a voyage was divided by various ports of delivery, a proportional claim for wages attached at each of such ports, and that all attempts to evade or invade this right of the seamen by renunciations obtained from them without any consideration by collateral bonds, or by contracts inserted in the body of the articles, were ineffectual and void.

To the same effect are numerous American authorities. 3 Kent, Comm. 194, and cases cited; Mayshew v. Terry [Case No. 9,361]; Knight v. Parsons [Id. 7,886]; The Brookline [Id. 1,937]; The Rajah [Id. 11,538]; Relf v. The Maria [Id. 11,692]. Thus, it has been held that a stipulation in the articles to pay for all medicines and medical aid further than the medical chest afforded, was void as being grossly inequitable (Harden v. Gordon, ubi supra), and generally, that though the articles are conclusive as to the wages and voyage, yet, on all collateral points, the court of admiralty will consider how far the stipulations are equitable and just. 2 Hagg. Adm. 394. If the seaman contracting on shore and before the commencement of the voyage, is considered "as placed under the influence of men who have naturally acquired a mastery over him," by how much more must the seaman making an agreement with the master at sea, and subject to his absolute and arbitrary authority, be deemed to be acting under an undue and almost irresistible influence. To avoid a contract made under such circumstances, it is not necessary to show duress or compulsion. It is sufficient if it appear to be unequal and injurious to the weaker party. If it be unjust, it will be deemed to have been obtained by oppression or fraud. "No man," says Lord Stowell, "willingly submits to injustice knowing it to be such; and if he does submit to injustice it is upon advantage taken of his ignorance, or his weakness, or, in other words, by oppression or fraud." The Juliana, 2 Dod. 516.

What, then, are the circumstances of this case? An accident, coupled with a partial inability to work, owing to the condition of his hand, had prevented the libellant from preparing breakfast for the crew. The latter had complained in a body to the master. The master had harshly rebuked the libellant, and had threatened, as he says (and his testimony on this point is corroborated by that of other witnesses), to confine him and his son under the forecastle for the remainder of the voyage. Very shortly afterwards, and before there was time for his natural excite-

ment and alarm to subside, he was summoned to the cabin, and, in the presence of the two mates, the master proposes to him to renounce his rights under his contract, and to enter into a new one. He states that he objected, on the ground that he was no fisherman, and that his hand was too sore to permit him to fish. The master replied that his hand would soon be well. Not daring, as he says, further to oppose the master's will, he assented to the new agreement.

The libellant is an old man, and evidently not fitted to offer a determined resistance to oppression, or make a vigorous assertion of his rights. Few cases can be imagined short of actual or threatened violence where the parties to an agreement would stand upon more unequal grounds. On the one side authority and absolute power to compel obedience. On the other old age, weakness, and entire dependence.

Was then the agreement thus entered into in all respects fair and just to the libellant? If it was not, it is clearly void. By it he renounced three months' wages at $40 per month, already earned, together with all future earnings during the voyage. For this he received Peterson's share of the fish already caught by him, and was to receive a similar share of the fish he himself might thereafter take. It is doubtful whether he was exactly informed as to the number of fish which had, up to that time, been taken by Peterson, but it is quite clear that he had little idea either of the share which Peterson was to receive or what deductions were to be made and charges allowed on the settlement of the voyage. His hand was so sore as to disable him from work. It continued in nearly the same condition up to the end of the voyage.

In fact the number of fish caught by him was insignificant. On the final settlement of the voyage little or nothing was found due him under the new contract. He had no experience in or knowledge of fishing. The new duties he was required to undertake bore no analogy to the service he had contracted to perform.

Under these circumstances, can it be believed that the libellant voluntarily assented to the new agreement into which he entered? Or, if he did, can it be pronounced so fair, equal and just, that a court of admiralty should sustain and enforce it? To these questions, and especially to the last, a negative answer must be given.

But, in coming to this conclusion, I do not desire to be understood to impute to the master any wilful design to oppress or defraud the libellant.

He was probably somewhat dissatisfied with his performance of his duties. He knew that the condition of his hand disabled him from fully discharging them, and he probably felt at liberty to propose, perhaps to insist upon, an arrangement which would throw the consequences of that disability on the libellant, and not on the ship.

He perhaps forgot that the disability of the libellant even though it had been total, yet incurred, as it was without his fault and while in the service of the ship in no respect impaired his right to his wages. That the expense of procuring a substitute was an expense to be borne by the ship, and neither directly nor indirectly to be thrown upon the libellant; and that he had no right, in the relation he bore to him, to propose, still less to insist upon an unequal and injurious bargain of which the almost certain operation was to deprive the libellant of his wages for the entire voyage. For he must have known that three tenths of any fish the libellant might thereafter catch could not, after deducting the stipulated charges, by any possibility be equivalent to the monthly wages he renounced.

A decree must be entered in favor of the libellant for the amount of his wages for voyage, deducting his advance and the bill for articles furnished, produced by the master.

Case No. 13,172.

SOMERVILLE v. LEE.

[1 Hayw. & H. 30.] [1]

Circuit Court, District of Columbia. April 3, 1841.

DEED—CONSIDERATION—PAROL EVIDENCE.

A justice of the peace before whom a deed was acknowledged will be allowed to give parol evidence to explain whether an amount received at the time the deed was executed was a part of the consideration named in the deed.

This is a bill brought by the complainant [Rebecca Somerville, executrix of Henry V. Somerville] to enjoin the defendant [C. C. Lee] from advertising and selling under a deed of trust in which the defendant is trustee, and praying a release from said trust. The facts, as stated in the bill, and not denied by the defendant in his answer, are as follows: Henry Lee owed Henry V. Somerville $12,000. For the purpose of paying this debt Lee conveyed, on the 19th day of June, 1829, an estate situated on the Potomac river, called Pope's Creek, to Somerville, for $20,000, as stated in the deed of conveyance. On the same day Lee covenanted with Somerville, reciting the sale, that $8,000 was yet unpaid, but was not to be paid before the expiration of seven years; that he would look to the land sold as the sole means of obtaining the said sum of $8,000. At the earnest request of Lee, Somerville drew a draft on his father-in-law in Baltimore, Maryland, in favor of Lee, for $1,000, payable in one year. These transactions, viz., executing the deed, the covenant, and the draft, transpired on the 19th day of June, 1829. On the 20th of June, Somerville executed a deed of trust, reciting that he was indebted to Henry Lee,

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

in the sum of $8,000; and to secure this debt executed a deed of trust to C. C. Lee, as trustee, conveying the same estate as was conveyed in the deed from Lee to Somerville, to said trustee. That $7,000 had been conceded as having been paid, and was credited on the note secured by the said deed of trust. The only controversy was as to whether the draft of $1,000 should be credited as part payment of the $8,000, or not. The complainant claimed that it was to be credited when the amount was received, and it having been received, it ought to be credited. The defendant held that it was no part of the $8,000, that the draft was drawn by Somerville before the deed of trust was executed, and could not have been received as part of the amount stated in the deed of trust. A letter was exhibited from Henry Lee to Somerville in which was recited a letter from C. C. Lee, that he (Somerville) claimed that the $1,000 should be credited on the amount due, but referred him to his brother, C. C. Lee, who was his attorney, having his power of attorney to do what he should think right and proper. The deposition of one of the justices of the peace who were present at the execution of the deed of trust and witnessed its execution, and being one of the justices of the peace before whom the deed was acknowledged, was offered as evidence, and it was allowed to be given notwithstanding the objection of the defendant, who contended that it was an attempt to contradict a deed by parol testimony. He deposed as follows: "I understood from both Lee and Somerville that the sum of $8,000 was the only sum to be paid by Somerville. The sum Lee owed Somerville was $12,000, and $20,000 was the price required for the Pope's Creek estate. The $1,000 was an after matter, and insisted on after the deeds were executed, and the whole business stopped. Somerville said he could not raise it, but he would consult Mr. Truman, his father-in-law, and find out whether he would permit him to draw on him for it, and that the $1,000 was in part of the $8,000, and not an additional $1,000; that after the deeds were executed Mr. Lee said he could not do without $1,000 to bear his expense to Algiers, which he said must be advanced out of the $8,000. I understood from both the parties the demand of the $1,000 was made and negotiated as proposed; that it was to be in part of the $8,000 when paid; no other sums were ever spoken of."

F. S. Key for complainant.

BY THE COURT. This cause having been set for hearing, by consent of parties, on bill, answer, replication, and proof, and the court, having heard the arguments of counsel, and duly considered the same, doth hereby, on this 3d day of April, in the year of our Lord 1841, adjudge, order and decree that the defendant be, and he hereby is, perpetually enjoined from all and every proceeding under the said deed of trust filed as an exhibit in the said cause; to make any sale of the said land and premises mentioned in the said deed of trust, for payment of any part of the said sum of money mentioned in said deed, and from compelling in any way the payment of any money on account of the purchase money intended to be secured by said deed of trust; and that he execute and deliver to the complainant a good and sufficient release of and from the said deed of trust, and pay the costs of this suit.

Case No. 13,173.

SOMMERVILLE v. FRENCH.

[1 Cranch, C. C. 474.] [1]

Circuit Court, District of Columbia. Dec., 1807.

WITNESS—FAILURE TO ATTEND—ATTACHMENT.

The court will send attachments into Maryland for witnesses who reside within one hundred miles of Washington, if they fail to attend according to summons.

W. W. Berry having been summoned by the marshal of the District of Columbia, to attend as a witness for the plaintiff in this cause, and failing to attend when called,—

THE COURT, on motion of Mr. Morsell, for plaintiff, ordered an attachment, directed to the marshal of Maryland; it being suggested that the witness resides in Maryland. DUCKETT, Circuit Judge, absent.

Several other attachments were issued in the like case at this term.

SOMERVILLE WATER-POWER CO. (MARTIN v.). See Case No. 9,165.

SOMMERS (SOFIELD v.). See Case No. 13,157.

Case No. 13,174.

In re SON.

[2 Ben. 153; [2] 15 Pittsb. Leg. J. 242; 1 N. B. R. 310 (Quarto, 58).]

District Court, S. D. New York. Feb. 15, 1868.

BANKRUPTCY—DISCHARGE—OBJECTIONS.

1. Specifications of objections to a discharge must not be vague and general. If they are such, they furnish no ground for refusing a discharge.

[Cited in Re Condict, Case No. 3,094.]

[2. Cited in Re Clark, Case No. 2,807, to the point that a third meeting of creditors, not being a final meeting, should not be called except for cause shown.]

[In the matter of Nathan A. Son, a bankrupt.]

In this case, a creditor filed five specifications of the grounds of his opposition to the

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

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

discharge of the bankrupt. They were as follows: (1) That the bankrupt has concealed part of his effects and his books relating thereto, and has not delivered to the assignee all the property belonging to him at the time of presenting his petition, with intent to defraud his creditors. (2) That, since the passage of the act [of 1867 (14 Stat. 517)], he has made fraudulent transfers of his property, and has lost portions of his property in gaming, and has admitted false and fictitious debts against his estate. (3) That he has not, subsequently to the passage of the act, kept proper books of account. (4) That he has, in contemplation of becoming a bankrupt, made transfers for the purpose of preferring creditors, and for the purpose of preventing his property from coming into the hands of his assignee, or of being distributed in satisfaction of his debts. (5) That he has been guilty of fraud in other respects, contrary to the true intent of the act, and has, since its passage, mutilated his books or securities.

S. E. Swain, for bankrupt.

Merchant, Conable & Elliott, for creditors.

BLATCHFORD, District Judge. Nothing could well be more general than these allegations. They are merely the language of section 29 of the act. They are all of them so vague that it is impossible for the court or the bankrupt to ascertain from them what specific acts or omission are relied on as grounds for withholding a discharge. The case stands as if there were no opposition to the discharge and no specifications filed, and, it appearing that the bankrupt has in all things conformed to his duty under the act, a discharge is granted to him.

[2] [I perceive, from the papers in this case, that the order to show cause against a discharge, made by the register December 30, 1867, did not contain a provision for the holding of the second and third meetings of creditors, and for giving notice thereof. The original petition in bankruptcy shows no assets except the wearing apparel of the bankrupt, and the petition for discharge, filed on the 26th of December, 1867, stated that no assets had come to the hands of the assignee. On the 3d of January, 1868, the assignee, acting under section 27 of the act, presented a request to the register, according to form No. 28, to order the second general meeting of the creditors of the bankrupt, and the register, on the 4th of January, 1868, made an order in the form of the order of form No. 28, ordering such second general meeting to be held at the same time and place fixed for the hearing on the application for a discharge, and directing notices of such meeting to be sent to creditors and to be published. They were sent and published, and the register certifies that such second meeting of creditors was held, and that the assignee then and there made due return according to form No. 35, that no assets had come to his hands, and the deposition of the assignee to that effect, sworn to before the register on the day appointed for the hearing on the application for discharge, and for such second general meeting, is among the papers. The order for the second meeting of creditors was made before the promulgation, by this court, of the rule of January 23, 1868, directing that in case of orders to show cause, made according to form No. 51 on petitions for discharges, no meeting of creditors except the first shall be ordered or had, unless some assets shall have come to the hands of the assignee. Why the special request by the assignee was made in this case, or why the third meeting of creditors was not called as well as the second, does not appear. No second meeting of creditors under section 27, and no third or other meeting under section 28, ought to be called, and no request for any such meeting ought to be made by an assignee, unless he has in his hands some moneys out of which a dividend can be made; otherwise the whole proceeding is a useless expense and formality. It is not a prerequisite to the discharge of the bankrupt, and no creditor can in any way be benefited by it.] [2]

[2] [From 1 N. B. R. 310 (Quarto, 58).]

SONACHALL (UNITED STATES v.). See Case No. 16,352.

SON AND HEIR, The (LAKE ERIE & B. STEAMBOAT CO. v.). See Case No. 7,995.

Case No. 13,175.

SONDERBURG et al. v. OCEAN TOW BOAT CO. WOODS et al. v. SAME. GARITY et al. v. SAME.

[3 Woods, 146.] [1]

Circuit Court, D. Louisiana. April, 1878.

SALVAGE—TIME ENGAGED IN SERVICE—APPORTIONMENT AMONG SALVORS—RULE—DISTRIBUTION AMONG PARTIES.

1. The rule adopted in this circuit for the apportionment of salvage is to give one-half to the salving vessel and the other half to her officers and crew, in proportion to their rates of wages.

[Cited in Markham v. Simpson, 22 Fed. 745.]

2. It is usual also to allow the salving vessel any extra expenses incident to the salvage service which she may have incurred over and above her ordinary outlays.

3. The fact that salvors were engaged but a short time in the salvage service, is entitled to but little weight in fixing the amount of their salvage.

[Cited in The Connemara, 108 U. S. 357, 2 Sup. Ct. 756.]

4. Salvage is a reward for meritorious services in saving property in peril on navigable waters, which might otherwise be destroyed, and is allowed as an encouragement to persons engaged in business on such waters, and others, to bestow their utmost endeavors to save vessels and cargoes in peril.

[Cited in The Lee, 24 Fed. 48; Stone v. The Jewell, 41 Fed. 104.]

[2] [From 1 N. B. R. 310 (Quarto, 58).]

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

5. Salvage is awarded in such measure, proportioned to the value of the property salved, as to secure the object intended, namely, that seamen and others may have the strongest inducement to face danger and incur personal risk to save that which is in peril of being lost, whether vessel or lives or cargo.

[Cited in Stone v. The Jewell, 41 Fed. 104.]

6. As a general rule, it is much better for all parties that the apportionment of salvage among the salvors should be made by the court rather than by the parties themselves.

7. Owners of salving vessels in making distribution of salvage between themselves and the officers and crew of the vessels, should do so with great caution and after the fullest explanation of all the facts to the parties interested.

8. If done otherwise, the court will set the distribution aside.

9. When the petty officers and crew of a salving vessel, who have sued her owners for their share of the salvage, did not know the amount of salvage that had been received by the owners until just before the bringing of their suit, delay in bringing the suit could not be set up as a defense.

10. A libel in personam brought by salvors to recover their share of salvage against another salvor who, two years before, had received and still held the money belonging to libelants, could not be defended against on the ground that the claim was stale.

[Cited in Coburn v. Factors & Traders Ins. Co., 20 Fed. 646.]

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

In January, 1875, the ship Princeton, laden with 4,000 bales of cotton, was set on fire by lightning, near the Southwest Pass of the Mississippi river, and saved by libelants, composing the crews of the steam tugs Rio Grande and Ocean, belonging to the Ocean Tow Boat Company, and the steam tug Rochester, associated with the Ocean Tow Boat Company, and in their associated capacity engaged in the towing business upon the waters of the Mississippi river and the Gulf of Mexico. For the services of these three boats and their crews, in saving ship and cargo, the Ocean Tow Boat Company received at one time $30,000 for salvage, and subsequently $4,600 in addition thereto, as they claim, for towage, barge hire, guarding cotton, etc. The tow boat company distributed less than one-fourth of this sum among the officers and crews of the salving tow boats. These libels were filed about two years after such distribution by [Peter Sonderburg and others, J. Woods and others, and John Garity and others] the petty officers and crews of the tow boats to recover of the tow boat company what they claimed to be the residue of their share of the salvage.

E. D. Craig and R. De Gray, for libelants, on the question of proper division of salvage between the owners of the salving vessels and her officers and crew, cited The Henry Ewbank [Case No. 6,376]; Evans v. The Charles [Id. 4,556]; Mason v. The Blaireau, 2 Cranch [6 U. S.] 240; The Galaxy [Case No. 5,186]; The Charles Henry [Id. 2,617]; Union Tow Boat Co. v. The Delphos [Id. 14,400]; The Saragossa [Id. 12,335]; The Bolivar v. The Chalmette [Id. 1,611].

Joseph P. Hornor and W. S. Benedict, for respondent, on the same question, cited The C. W. Ring [Id. 3,525].

BRADLEY, Circuit Justice. The first question in this case relates to the proportion of the salvage money which should be awarded to the vessels engaged in the salvage service, on one side, and the officers and crews of said vessels on the other, supposing no binding agreement between them had been made on the subject. It is the province of the court, where the parties themselves cannot agree, not only to award the amount of salvage, but to apportion it amongst those who have contributed the salvage service. And whilst the court never loses its power to make this apportionment according to the equity and justice of each case, it is desirable to have a general rule to be followed in all ordinary cases.

I perceive nothing in the present case that should take it out of the general rule which has been adopted in this circuit, of allowing one-half of the salvage money to the vessels, and the other half to the officers and crews in proportion to their rates of pay. It is usual to allow to the owners any extra expenses which they may have been at, over and above the ordinary expenses of the salving vessels, whilst engaged in the salvage service. I am satisfied that the sum of $4,650 which the owners received in addition to the sum of $30,000 will cover the whole amount of such extra expenses, except the $2,000 which was paid to the master of the Princeton. This, I think, may also be properly allowed, as it was paid for the common benefit, and was an extra expense. This will leave the sum of $28,000 to be divided between the vessels and the officers and crews respectively, or $14,000 to each.

The plea that the men were actually engaged in putting out fire but a few hours, and all other considerations of that sort, have very little to do with the case. For that matter, it might also be said that the tug boats were engaged in throwing water into the burning ship but a very short time, and that the remuneration they receive is greatly disproportioned to the actual amount of service rendered. This is not the principle on which salvage is allowed. It is not the principle on which the amount was settled upon in this case. Salvage is a reward for meritorious services in saving property on navigable waters, in peril, and which might otherwise be destroyed, and is allowed as an encouragement to all persons engaged in business at sea or on navigable waters, and others, to bestow their utmost endeavors to save vessels and cargoes which are in imminent peril. Viewed in this light, it is awarded in such measure, proportioned to the value of the property sav-

ed, as to secure the object intended, namely, that mariners and sea-faring persons and others may have the strongest inducements to face every danger and to incur every personal risk in order to save that which is in peril of being lost, whether ship, or lives, or cargo.

The next question is, whether the libelants are bound by the agreement which they made with George McClelland, to take the several amounts which he paid them, when he settled with them in February, 1875. As a general thing it is much better for all parties that the apportionment of salvage money should be made by the court than by the parties themselves. There is such a strong temptation for the owners of the salving vessels to speculate upon the improvidence of the men (who are always easily satisfied with a handful of ready cash), and to work upon their fears of losing their situations, that they will be exposed to the suspicion of doing these things even when they have intended to act with perfect fairness. The men are placed at a disadvantage anyhow. If they are firm in standing up to their rights (supposing they fully understand them), they are naturally looked upon by their employers as animated by a spirit of opposition and pertinacity, and the result often is that they are unjustly discharged. But it oftener happens that they do not understand their rights, and that they are easily persuaded to accept a less proportion than they are justly entitled to. For these reasons owners should be very cautious about making such settlements with their men. It should never be done except with the fullest explanation of all the facts, so that every thing may be transacted understandingly and above board. If done otherwise the court should not hesitate to set the arrangement aside. This is the general course pursued in all cases of attempted settlements with seamen. They are regarded as incompetent to take care of their own interests, and they are therefore looked upon as wards of the court.

I think the settlement made with the men in the present case ought not to be binding upon them. It is manifest, from the evidence, that they were not informed, and did not know, when they made the settlement, that an allowance of $30,000 salvage money had been agreed upon by the parties. Yet this had been agreed upon nearly or quite a week before. Without looking any further, it seems to me that the suppression of this important fact is sufficient to deprive the arrangement of all binding force and validity.

It has been suggested that if the crews were competent to empower George McClelland to represent them in settling the amount of salvage money with the owners of the ship and the agent of the underwriters, they should be regarded as equally competent to settle for their own proportion of the money, and should be equally bound by their own acts. But the two things stand on an entirely different footing. They might well intrust George McClelland, or any other person, with power to co-operate with the owners of the tugs in making a settlement for the salvage service, for they might be well assured that the owners would look sufficiently well after their own interests to protect that of all parties concerned in the salvage. Besides, in that matter, George McClelland would have no interest opposed to theirs. But when it came to a settlement of their proportion of the money, George McClelland really represented the owners of the tugs. This was the necessary relation of the parties. The less he could get them to take the more the owners would receive. The money which he actually paid to the men was afterwards refunded to him by the owners, out of the $30,000 received by them.

It has been suggested that this $30,000 was not all for salvage, but partly for towage, lading and unlading, etc. This plea can hardly be sustained. In the first place, if there is any such admixture of moneys and considerations, it is the fault of the owners for making it. No separate account of any such towage or loading and unloading is presented; and it is fair to infer that all service of that kind was amply covered by the extra sum of $4,650 which was subsequently received.

The only other point is the question of delay in bringing these suits. On that I have no difficulty. It is not shown that the libelants knew of the settlement which had been made, and the amount of salvage money which had been received, until the suit was brought; on the contrary, the evidence is that they did not know of it. This, of itself, would sufficiently account for the delay, if there were any delay to be accounted for. But I do not see that an action in personam, such as this is, against those who have received and still hold moneys fairly belonging to the libelants, can be said to be a stale demand, in the admiralty sense, by reason of any lapse of time which has taken place in this case. At all events it is unnecessary to pursue the subject, since I am perfectly satisfied that under the circumstances of this case the exception ought not to prevail.

The decree of the district court will be affirmed, except as to the allowance to the respondents of the sum of $2,000 paid by them to the master of the Princeton, which is first to be deducted from the $30,000 before the division is made. The respondents (the appellants in this court) will be decreed to pay the costs. Let a decree be made accordingly. (The decree can be modified by deducting one-fifteenth part from the amount decreed to each libelant in the court below.)

Case No. 13,176.

SONNEBORN v. STEWART et al.

[2 Woods, 599.] [1]

Circuit Court, M. D. Alabama. May Term, 1875.[2]

MALICIOUS PROSECUTION — BANKRUPTCY — PROBABLE CAUSE — EXEMPLARY DAMAGES — ACTUAL MALICE.

1. An action for the malicious prosecution of a proceeding, to have plaintiff declared a bankrupt, is based on the supposed malice of the defendant, and want of probable cause for the prosecution of the bankruptcy proceeding.

2. A want of probable cause is evidence of malice sufficient to sustain the action, and will entitle the plaintiff to recover the actual damage sustained by him.

[Cited in Jerman v. Stewart, 12 Fed. 271.]

3. In order to a recovery of exemplary damages the plaintiff must show actual malice, that is, that the defendants willfully instituted and carried on the bankruptcy proceedings when they knew there was no ground therefor.

4. In order to justify a party in instituting proceedings in bankruptcy, he must be a creditor of the alleged bankrupt. He cannot justify himself by saying he had probable cause to believe himself a creditor, and also probable cause to believe his debtor had committed an act of bankruptcy.

5. Proceedings to put a debtor in bankruptcy should not be resorted to as proceedings in terrorem to collect a debt.

6. Where it had been adjudicated by the highest court of law in the state, that the petitioner had no claim against the party whom he sought to put in bankruptcy, and the bankrupt court had refused to make a decree adjudicating the alleged debtor a bankrupt, in an action for malicious prosecution, the latter was, beyond question, entitled to recover the damages he had sustained by the unlawful attempt to put him in bankruptcy.

7. In such a case, the measure of damages stated.

8. If the defendants had reason to believe that the plaintiff was indebted to them, and had probable cause to believe that he had committed an act of bankruptcy, they cannot be charged with actual malice, and cannot be made to pay exemplary damages.

9. Where a decision of the supreme court of the United States declared a certain act to be an act of bankruptcy, a party reposing on such decision is protected from the charge of actual malice in a proceeding to put his debtor in bankruptcy, based on the ground that he had committed such act, even though such decision were afterwards modified, provided the creditor had probable cause to believe his debtor had committed the act charged.

This was an action at law, [by Meyer Sonneborn against Alexander T. Stewart and others.]

Thomas H. Watts, Samuel F. Rice, and James L. Pugh, for plaintiff.

E. S. Shorter and J. T. Holtzclaw, for defendants.

BRADLEY, Circuit Justice, charged the jury as follows:

This action is brought to recover damages sustained by the plaintiff in consequence of bankruptcy proceedings instituted against him by the defendants, on the 15th day of August, 1873, and the charge in the complaint is, that the defendants on that day not having any debt or demand against the plaintiff, or any other reasonable or probable cause therefor, but wrongfully, maliciously, vexatiously, recklessly and oppressively filed their petition against him in the district court of the United States at Montgomery, wherein they falsely alleged that they were creditors of plaintiff to the amount of over $3,000, or other large sum, and among other things, also falsely alleged that plaintiff was insolvent and a bankrupt, and also falsely alleged that he, in view of bankruptcy, had committed an act of bankruptcy in violation of the bankrupt laws of the United States, and prayed that he might be adjudged a bankrupt, he never having committed or been guilty of any act of bankruptcy; and also for a writ of injunction restraining him from managing or controlling his estate; which injunction was issued and served and obeyed; that the defendants in said petition also prayed for a warrant or writ of seizure, to issue from said district court, which writ was also issued, and by virtue thereof the marshal of the district seized and took possession of the entire stock of goods belonging to plaintiff, in the city of Eufaula, on the 16th of August, 1873, and deprived the plaintiff of the possession thereof, and his store was closed and his business was suspended, broken up and destroyed; and his said property was not restored to him until September, 1874, after the proceedings in bankruptcy were dismissed, and that said goods were packed up and greatly injured during the period between the said seizure thereof and restoration to the plaintiff, to at least two-thirds of their value. The petition further states that when said bankruptcy proceedings were commenced, an action was pending in the circuit court of Barbour county, brought by the defendants to recover the claim or debt which they alleged that he owed to them, and on which they founded their said proceedings in bankruptcy, and that this suit was afterwards determined against the defendants, and a judgment rendered in favor of the present plaintiff; thus determining that the defendants had no legal claim or demand against him. The petition further alleges that the bankruptcy proceedings were nevertheless continued, but were finally dismissed by said district court.

The plaintiff claims damages for the injury done to his goods, his business, and his credit as a merchant, and for his loss of time and expenses for lawyers' fees, and charges in defending himself; and also asks for exemplary damages for the willful and malicious proceedings of the defendants.

We instruct the jury that the action is based on the supposed malice of the defendants, and want of probable cause for the prose-

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

[2] [Reversed in 98 U. S. 187.]

cution of the bankruptcy proceeding complained of. The plaintiff cannot recover damages against the defendants for the mere wrongful prosecution of the proceedings in bankruptcy; but it must also be shown that they had no probable cause therefor. A want of probable cause is evidence of malice sufficient to sustain the action, and will entitle the plaintiff to recover the actual damage which he has sustained. If the plaintiff desires to recover exemplary damages, or smart money (as it is called), he must show that the defendants were guilty of actual malice; in other words, that they willfully instituted and carried on the bankruptcy proceeding, when they knew that there was no ground therefor.

It is necessary, however, in this case, to qualify the foregoing remarks by the further statement that, in order to justify a party in instituting proceedings in bankruptcy, he must be a creditor of the alleged bankrupt. There must be a legal debt or demand as the basis of the petitioner's right to proceed. If the defendants in this case were actual creditors of the plaintiff, they could defend themselves from the charge of maliciously instituting bankruptcy proceedings against the plaintiff, by showing that they had probable cause to believe that he had committed an act of bankruptcy. Though the court of bankruptcy decided against them, and dismissed the proceedings, they could still plead that they had such probable cause for their action. But if they had no legal claim or demand against the plaintiff, then, whether they had such probable cause or not, they had no right to institute the proceedings. They cannot go back and allege that, though they had not a legal debt or claim against him, they thought they had; in other words, that they had probable cause to believe they had such a demand. Unless they had a debt they cannot allege probable cause for proceeding in bankruptcy at all. Their defense cannot stand upon two probable causes, one on the top of the other. They had no right to petition that the plaintiff be declared a bankrupt unless they were his creditors. Their right so to do depended on this fact; and they took on themselves the risk of having such legal demand.

Throwing a man into bankruptcy is a serious proceeding, and should not be lightly resorted to; and ought never to be resorted to, as a proceeding in terrorem to collect a debt. The petition of the defendants may have been sufficient to give the district court jurisdiction of the bankruptcy proceedings, and to validate a decree of bankruptcy, had one been made; because all the creditors of the bankrupt would have been interested in the decree. If such a decree had been made, the plaintiff could not probably have sustained this action. But as no such decree was made, and as the proceedings, on the contrary, were dismissed, and as it has been adjudicated by the circuit court of Barbour county, and affirmed by the state supreme court, that the defendants never had a legal claim against the plaintiff, and therefore had no right to institute proceedings in bankruptcy against him, the plaintiff is entitled to recover in this action the damages he has sustained by those unlawful proceedings. The court, therefore, rules that the defense in this case cannot be sustained by proving that the defendants had probable cause to believe that the plaintiff had committed an act of bankruptcy; but, it being shown by judicial determination that they had no legal debt or claim against the plaintiff, and had, therefore, no right to institute the bankruptcy proceedings, they are liable for the damages sustained by the plaintiff thereby, and the only question for the jury will be the amount of those damages under the circumstances of the case.

If, however, the plaintiff seeks to recover exemplary damages, he can only do so on the ground of actual malice on the part of the defendants. Sharpe v. Hunter, 16 Ala. 765. And on that question the whole conduct and motives of the defendants are open to examination; and if they had probable cause for believing that their claim against him was valid, and that he had committed an act of bankruptcy, they are not chargeable with exemplary damages.

We charge you, therefore, that the plaintiff is entitled to recover his actual damage, or the loss he has actually sustained, at all events, but that you cannot award exemplary damages also against the defendants, unless you believe from the testimony that the defendants were guilty of actual malice.

I. The damages to be allowed the plaintiff, are:

1. The actual damage to his goods, which, as he testifies, were finally sold for only $3,650; and which, when seized, he swears were worth at invoice or cost prices, some $13,000 or $14,000. His clerks corroborate this statement; but two other witnesses, who examined and measured the goods at the time or shortly after they were seized by the marshal, and who estimated their cost value by the same marks, say they amounted to only $8,042. This discrepancy is notable. The evidence is to be weighed by the jury, and the true value of the goods when seized is to be estimated by them. It is to be noted that the latter witnesses, or one of them, think that the goods looked like a lot of auction goods.

2. Damages are to be allowed the plaintiff for the breaking up of his business and the destruction of his credit. His business was estimated by himself at from thirty-five to forty thousand dollars a year, and sometimes more, with a gross profit of thirty-three and a third per cent. From this, however, are to be deducted his expenses and the value of his own time. To this, you are to add the loss of the rent of his store in Texas, if he lost anything therefrom; though of this he has not offered any proof. The value of his

own time is also a fair charge, as he has been obliged to give his attention to the proceedings instituted against him, and has not been able to pursue any business.

3. His expenses for lawyers' fees in following up and setting aside the proceedings in bankruptcy are also a fair item of charge to be allowed in your estimate of the damages sustained by the plaintiff.

It has been claimed that the destruction of the plaintiff's credit is a distinct item of damage; but perhaps this is to be considered as incorporated with his business, and the injury thereto as included in the damage for breaking up said business. The jury will judge whether any separate allowance should be made therefor.

II. On the question of express malice, the whole conduct of the parties and circumstances of the case are to be taken into consideration. If the defendants had reason to believe that he was liable to them for the debt claimed, and if they had probable cause to believe that he had committed an act of bankruptcy, they cannot be charged with actual malice, and cannot be made to pay exemplary damages.

1. As to the reason which the defendants had to believe that they had a legal demand against the complainant: That the defendants had a claim to the amount sued on by them against the firm of E. Leitziger & Co. (whoever that firm was when the debt was contracted) is not disputed. The question was, whether Sonneborn was a member of that firm and therefore liable. That he had been a member of the firm in 1865 and 1866, is conceded. The debt was contracted in the early months of 1867, January, February and March. It is clearly proved that on the 19th of March the defendants were informed that Sonneborn was no longer a member of the firm. The question in dispute between the parties is, whether they had been notified before that time of his retirement. They allege that they had not. The complainant alleges that they had. The importance of this question arises from the principle of law, that if a man is known to be a member of a firm once, he will be deemed to continue a member until notice is given to the contrary. Parties dealing with the firm and giving the credit have a right to consider all the partners as remaining in the firm until they are notified that any of the partners have retired. Now Sonneborn contends that he himself gave the notice; but he only gave notice to one of the selling clerks. It may be questioned whether such notice, if given, would be sufficient. It is contended that notice was given by the clerk of the firm of Leitziger; also that a young gentleman called in their store and said he was from Stewart's, and that notice was given to him. The witnesses on the part of the defendants are very positive that no notice was ever received. The somewhat varying and conflicting evidence is before you, and it is for you to judge whether any such notice ever was given. If not given, Sonneborn was liable for the debt. It is for you to judge whether the defendants had reason to believe that it had never been given. If they had, then the fact that they failed to recover a judgment against Sonneborn would not be conclusive evidence that they commenced the proceeding in bankruptcy in bad faith and with actual malice.

2. As to probable cause for believing that the complainant had committed an act of bankruptcy: The ground for supposing that the complainant had committed an act of bankruptcy was not without evidence to support it. The judgment recovered against him by his brother on the 12th of June, 1873, in a suit commenced just thirty days previous, a few days after getting a continuance of the defendant's action, without defense, without an effort to get delay, brought by the complainant's own attorney, were circumstances well calculated to induce the belief that the defendant contemplated bankruptcy. The fact that the complainant had issued handbills to advertise the sale of his whole stock of goods was calculated to give intensity to the supposition. Then, the fact that the defendants, before proceeding, consulted their counsel and did not undertake the proceedings in bankruptcy until advised that there was good ground therefor, may also be taken into consideration on this question.

All these circumstances may be taken together, and weighed by the jury in deciding the charge that the defendants were governed by actual malice against the complainant.

The law as it stood at that time, adjudged by the supreme court of the United States, was almost conclusive against the complainant on the question of his liability to be put into bankruptcy. In the case of Buchanan v. Smith, 16 Wall. [83 U. S.] 277, that court held that when an insolvent debtor suffers a judgment to be obtained against him, whereby the judgment creditor obtains a preference, it is an act of bankruptcy. That was what occurred in this case. Sonneborn suffered such a judgment to be recovered against him, large enough to absorb a large part, if not the whole of his goods, if sold on execution. This was considerable proof of insolvency as well as of an act of bankruptcy. The decision referred to has been modified since, it is true, by a decision in a later case; but it was a sufficient declaration of the law for the time being to protect persons from a charge of actual malice in reposing upon its authority.

You have two questions to decide: (1) The actual damages sustained by the complainant. That you will give him a verdict for at all events. (2) Whether the defendants were guilty of actual malice in prosecuting the proceedings in bankruptcy, and

if they were, what exemplary damages should be awarded against them.

Such exemplary damages, if any are allowed, are to be added to the actual damages in the amount of the verdict to be rendered.

[NOTE. Pursuant to the above directions, the jury brought in a verdict for plaintiff. The case was taken by writ of error, to the supreme court, where the judgment of this court was reversed, and a venire de novo ordered. 98 U. S. 187.]

SONORA, The (BAILEY v.). See Case No. 746.

SONORA, The (SPARKS v.). See Case No. 13,212.

SONTAG (HYDE v.). See Case No. 6,974.

SOPER (UNITED STATES v.). See Case No. 16,353.

SOPHIA, The (ADAMS v.). See Case No. 65.

SOPHIA, The ANNIE. See Case No. 424.

Case No. 13,177.

SORTWELL et al. v. HUGHES.

[1 Curt. 244.] [1]

Circuit Court, D. New Hampshire. Oct., 1852.

SALE—LIQUORS—STATUTORY PROHIBITION—ACTION FOR PRICE.

1. A statute inflicting a penalty on a sale, extends only to executed sales, by which the property passes from the vendor to the vendee, and not to mere executory contracts, especially if they are declared void, by another statute of the same state.

[Cited in Lang v. Lynch, 38 Fed. 490.]

[Cited in Abberger v. Marrin, 102 Mass. 72; Herron v. State, 51 Ark. 133, 10 S. W. 25. Cited in brief in Lewis v. McCabe, 49 Conn. 147; Orcutt v. Nelson, 1 Gray, 540. Distinguished in Webber v. Howe, 36 Mich. 154.]

2. A mere sale in one state or country, made with knowledge that the vendee intended to use the property, to violate some positive law of another state or country, can be the foundation of an action in the state or country whose law was intended to be violated.

[Cited in U. S. v. Martin, Case No. 15,729. Approved in Green v. Collins, Id. 5,755. Cited in Buchanan v. Drovers' Nat. Bank, 5 C. C. A. 83, 55 Fed. 226.]

[Cited in Adams v. Coulliard, 102 Mass. 173; Almy v. Greene, 13 R. I. 353; Frank v. Hoey, 128 Mass. 264. Disapproved in Graves v. Johnson, 156 Mass. 213, 30 N. E. 818. Cited in Hill v. Spear, 50 N. H. 279.]

This is an action for goods sold and delivered [by Daniel R. Sortwell and others against Peter Hughes]. An auditor, appointed by consent of parties, having made a report, it was agreed that his report should be taken to be a statement of facts. The material facts found by him were, that the defendant was engaged, at Dover, N. H., in the sale of spirituous liquors without a license; that one of the plaintiffs, being from time to time at the defendant's place of business in Dover, received verbal orders from him for these liquors, promised to send them to him, and on his return to Boston, did deliver them, either at the Boston & Maine Railroad, or on board some vessel, consigned to the defendant, at Dover, who, upon their reception, paid the freight. One parcel was ordered by the defendant, personally, in Boston, and sent in the same manner as the others.

Mr. Hackett, for plaintiffs.

Mr. Christie, for defendant.

CURTIS, Circuit Justice. The statute law of New Hampshire, in force when these transactions took place, inflicted a penalty upon any person, not licensed, who should sell any spirituous liquor or wine. The first question is, whether the sales, for which this action was brought, were made in the state of New Hampshire. If they were not, that statute, which can have no extraterritorial operation, did not subject the plaintiffs to any penalty. A sale has been defined to be, "a transmutation of property from one man to another, in consideration of some price, or recompense in value." 2 Bl. Comm. 446. Was enough done between these parties, in the state of New Hampshire, to pass this property to the defendant? In the first place, it does not appear that the orders given by the defendant, and assented to by the plaintiff, in New Hampshire, pointed to any particular casks or packages. The kind, the quantity, and the price, are all the particulars found by the auditor to have been agreed on. It remained for the vendors, after the return of one of the plaintiffs to Boston, to fix on the particular liquors to be sent to answer the order, either by separating them from larger quantities, or by designating and setting apart particular casks or packages. Indeed, it does not appear that the liquors actually sent were even owned by the plaintiffs when the orders were given. Besides, under the statute of frauds, the oral contract of sale was not sufficient to pass the property. It is true it passed afterwards, by the delivery to the carrier, that mode of delivery being the one found by the auditor to have been agreed on by the parties. Hart v. Sattley, 3 Camp. 528. But this act was done in Massachusetts.

To test this question, suppose the plaintiffs had been indicted in New Hampshire for violating this penal law, and the jury had found specially the facts reported by the auditor, it seems to me the plaintiffs could not have been convicted, because it would not appear that a complete sale had been made in the state of New Hampshire. I am aware that there is a decision by a highly respectable court, Territt v. Bartlett, 21 Vt. 184, that a similar statute in the state of Vermont was violated by acts not distinguishable from those in the case at bar. If this had been so decided in New Hampshire, by the highest

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

court of law, I might have felt bound to yield to the exposition of a statute of that state, by that court. But I cannot construe a penal statute, which punishes a sale, so broadly, as to hold, that it applies to a mere executory contract for a sale. In my judgment, it extends only to executed sales, by which the property passes from the vendor to the vendee; and, in the absence of any decision to the contrary in New Hampshire, I must so hold in this case. And if the acts done in New Hampshire were not sufficient to subject the plaintiffs to a penalty, there is no implication that those acts are forbidden by statute; and so there is no ground to argue that, for this cause, the action cannot be sustained: I understand the doctrine of the highest court of law in New Hampshire to be, that if a penalty is affixed to an act, this carries with it an implication that the act itself is forbidden; and if forbidden, it cannot be the ground of an action. But if what was done, in this case, at Dover, is not by implication forbidden, and if what was done at Boston cannot be within any statute of New Hampshire, the cases decided in that state can have no application. 10 N. H. 377; 14 N. H. 294, 431.

The other ground of defence is, that if there was not a sale in New Hampshire, the property was sold by the plaintiffs, with a knowledge that the defendant intended to sell it, in violation of the law of New Hampshire; and no recovery can be had, according to the law of that state. Having come to the conclusion that these sales were not made in New Hampshire, and it not appearing that the plaintiffs in any way participated in the defendant's illegal sales, or did any thing, except to sell the property in the usual course of their business, the case of Holman v. Johnson, Cowp. 341, is directly in point, to show that a recovery may be had. I am not aware that this case has been overruled in England; though the extension of the principle, to a sale in England, in the case of Hodgson v. Temple, 5 Taunt. 181, has been much questioned. Cope v. Rowlands, 2 Mees. & W. 149; Langton v. Hughes, 1 Maule & S. 593; Cannan v. Bryce, 3 Barn. & Ald. 179. And in the case decided in Vermont, although Holman v. Johnson is said to go to the verge of the law, it is assented to, as not in itself wrong. I am inclined to the opinion, therefore, that I should take the same view of this case, if I were to decide it according to my own judgment of what the law is, as was taken in Holman v. Johnson; but I am relieved from this necessity by the decision of the supreme court of the United States, in Harris v. Runnells, 12 How. [53 U. S.] 79. This decision goes even further than Hodgson v. Temple, and holds, that where the sale was an offence by reason of a statute, but the act itself was not immoral, and the sale itself was not declared void by the statute, there was no implication, from the mere infliction of the penalty, that the contract was forbidden, and so void. I found myself unable to unite in the opinion in that case, but I am bound by it. A fortiori, upon the principles of that decision, there is no implication that the statute forbids a sale in another state, to a person who intends to bring the property into New Hampshire and there sell it, contrary to the law of that state, and no principle of the common law which renders such a sale illegal and void.

But I more than doubt whether the defendant has, in point of fact, brought himself within the principles on which he relies. The auditor has not found, that at the several times when these sales were made, the plaintiffs, or either of them, knew that the defendant had no license, and intended to sell these liquors in violation of the law of New Hampshire. He finds that one of the plaintiffs was in the defendant's store, several times while the account was accruing, and saw persons there drinking, and was aware that the defendant had no license to sell intoxicating liquors, and asked him, at the time he first proposed to sell to him, if he was not afraid of being prosecuted for selling liquors, and he said that he was, and had been prosecuted, and the plaintiff said he must be careful. Certainly these facts would justify the inferences of fact on which the defendant relies; but a statement of facts is like a special verdict, and the court can draw no inferences of fact. Now, the material facts found are, that several times, while the account was accruing, one of the plaintiffs knew the defendant had no license. How can the court apply this to any particular sales? He asked him, at the time he first proposed to sell to him, if he was not afraid of being prosecuted; but it is not said he did in fact then sell any thing; and how can I infer the fact that this property was sold, for the sole purpose of being retailed by the defendant in New Hampshire, he neither having, nor intending or expecting, to obtain a license? It may all be true; the facts found, unexplained, would lead me to believe so; but I have no right to act upon the inferences which I might draw, the parties not having conferred upon me any authority to draw any inference of fact whatever.

Let a judgment be entered for the plaintiffs, for the balance found by the auditor, and interest from the date of the writ.

SOTO (UNITED STATES v.). See Cases Nos. 16,354–16,357.

SOUDERS (UNITED STATES v.). See Case No. 16,358.

SOUDER, The EMILY B. See Cases Nos. 4,454–4,458.

SOULE (HENDY v.). See Case No. 6,359.

SOULE (HOWLAND v.). See Case No. 6,800.

SOULE (LONG v.). See Case No. 8,483.

Case No. 13,178.

SOULE v. RODOCANACHI et al.

RODOCANACHI et al. v. The OREGON.

[Newb. 504.][1]

District Court, E. D. Louisiana. March, 1855.

SHIPPING—DAMAGE TO CARGO—BURDEN OF PROOF—ACTS OF MASTER—PLEADING—GROUND OF DAMAGE NOT SET UP IN LIBEL.

1. Where a cargo is received on board a ship in good order, and on delivery it is found in bad order, the onus probandi is upon the master of the vessel to show it was not through his fault or negligence the injury was sustained.

2. The case presented by the pleadings in a cause is the only one to which testimony can be directed, and the only one upon which the court can be called to adjudicate.

3. In a case of damage to cargo where the libel alleges the fault of the master to be, first, that he falsely represented his vessel to be tight, staunch and seaworthy; and second, that the danger resulted from the master's carelessness, negligence and improper conduct, the libelant cannot claim another specific ground of complaint not set up in the libel, as that the danger was caused by the fault of the master in not putting into some other port to repair his vessel and take measures to preserve his cargo.

4. In view of all the facts within his knowledge the master of a vessel will be justified, if in the exercise of a sound discretion he pursues the course he deemed most expedient for the benefit of all concerned.

In admiralty. The first libel [by Cornelius Soule, master of the bark Oregon, against Rodocanachi & Franghiadi] is for freight. The second libel [by Rodocanachi & Franghiadi against the bark Oregon] is for damages to cargo.

Durant & Hornor, for master of Oregon.
P. E. Bonford, for shippers.

McCALEB, District Judge. Some time in the month of October, 1854, the master of the bark Oregon, being then in the harbor of Rio de Janeiro, entered into a contract for freighting and chartering his vessel, with the shippers Rodocanachi & Franghiadi, by which he agreed to transport for a consideration stipulated in the charter party, a cargo of coffee from Rio de Janeiro to this port. The coffee was delivered in bad order, which the master of the Oregon contended was the result of the tempestuous weather he encountered on the voyage. The freight stipulated to be paid under the charter party, was refused by the shippers, upon the ground that the damage sustained by the coffee resulted from the fault of the master and the fact that the vessel was unseaworthy. The libel for freight was filed by the master on the 19th of March, 1855, against the shippers, who on their part filed their libel on the 24th of the same month, against the vessel, claiming damages for loss arising from the injury sustained by the coffee on the voyage. These cases have been, by consent of the proctors engaged, consolidated. The law and evidence by which the court must be guided in its judgment, are equally applicable to both.

The master of the bark Oregon, as part owner and as agent of the said bark, alleges in his libel that some time in the month of October last, that vessel being then in the port of Rio de Janeiro, he (the libelant) made and concluded a charter party, by which in consideration of the covenants and agreements therein set forth to be performed by the respondents, he did covenant and agree on the freighting and chartering of the said bark to the respondents for a voyage from the port of Rio de Janeiro to the port of New Orleans, on the terms set forth in the charter party. In pursuance of the provisions of this charter party, the respondents shipped on board of the bark 7,145 bags of coffee to be transported to the port of New Orleans. The bill of lading shows that the coffee was received on board in good order, and the master of the bark binds himself to deliver the same in like good order and condition at the port of New Orleans. The coffee arrived at this port in a damaged condition. About 5,000 bags were musty and much injured, and about 800 bags were thrown away as valueless. There were 2,731 bags which were pronounced good. Only a very small portion of these were affected by the salt water. The witnesses bear unequivocal testimony to the effect that it was the worst damaged cargo of coffee, which has to their knowledge arrived at this port from Rio de Janeiro. It is quite unnecessary to comment at length upon this testimony, inasmuch as the material fact to which it relates is admitted by both parties. There are other facts which are fully established, and which it will be only necessary to refer to. The most important of these are: First, That the bark upon which this cargo was shipped was a tight, staunch, well equipped and in all respects seaworthy vessel when she received the cargo in the harbor of Rio de Janeiro: that a preference was given to her over all other American vessels then there waiting freight, and that she obtained a higher rate than was allowed to other vessels of her class, in consequence of her acknowledged superiority.

The defence set up to the claim of the shippers for damages is, that the delivery of the cargo in a damaged state was the result of the injury sustained from the perils of the sea; and the evidence leaves no doubt upon my mind that the stormy weather encountered by the bark has not been exaggerated even by the protest. The facts set forth in that protest are substantially proved by the log-book and the depositions of the mate and seamen who were on board the vessel. The particular dates mentioned in the pro-

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

test were, it is true, not remembered by the seamen; but they testify to the correctness of the general statement of facts therein set forth. The mate certifies that when the bark first left Rio she encountered very heavy weather; the sea ran heavy at the time. "We shortened sail," says he, "as fast as we could until we got under a close-reefed maintopsail. At the same time the vessel shifted her cargo over on to her beam ends, the ship laying over on one side unmanageable. Her yard arms were in the water a part of the time and part out. We went below with all the men and shifted the cargo so as to right her. We then came upon deck and got the bark around on another tack. She was on her beam ends about three hours. This caused her to make water and strain very heavily. On trying the pumps we found that she had made eighteen inches water. It also stove in two or three casks of fresh water on deck. Everything was floating on deck at the same time. The còffee was damaged: all the water in the hold of the vessel, instead of being in the bottom, was on one side of the ship—the lee side. When by shifting the cargo, the bark was got off her beam ends, the water went over on to the other side and damaged the cargo there." The witness thinks the water may have penetrated one or two tiers on the starboard side. On the lee side it must have caused damage to three or four tiers. The weather became more moderate. There were two other slight gales, but not so heavy as the first. The cargo was again shifted, and the crew went below and trimmed it over to the other side to bring the ship upright. The ship was laboring very heavily, and there was a very heavy sea. The pumps were kept constantly going. On the 9th of January the main staysail and the foretopmast staysail were lost. The greatest leak the vessel had during the voyage was that causing 400 strokes an hour—eleven inches an hour. The least she made in fine weather was four or five inches in four hours. In fine weather the pumps were worked every half hour; in rough weather constantly.

The principle of law which throws the onus probandi upon the master to show that it was not through his fault or negligence that the injury was sustained, has called forth all the facts upon which the court is required in this case to adjudicate upon the rights of the parties. These facts most satisfactorily establish the causes of the injury. The previous good condition of the vessel and the care with which the cargo was placed on board, leave room for no other conclusion than that the damage to the cargo was caused by the tempestuous weather which the bark was compelled to encounter. The effect of salt water and heat in the hold of a vessel on a cargo of coffee, is too well established to admit of a doubt.

But on behalf of the shippers it is contended that the master failed in the discharge of his whole duty in not either putting back to the harbor of Rio, or running into some other harbor along the coast of South America, and there having his vessel refitted and the cargo removed and dried. This is the important point in the cause, or rather the point to which the argument of the proctors for the shippers was particularly directed. Much difficulty may be saved, however, by looking attentively to the pleadings. The case as presented by the pleadings is doubtless the only one to which the evidence has been directed, and the only one upon which the court can be called upon to decide. By a reference to the libel filed on behalf of the shippers, it will be seen that the failure on the part of the master to turn back to Rio or to run into a port of necessity on the coast of South America, is not made a specific ground of complaint; nor is there any allegation which would lead the court to presume that the refusal to satisfy the freight in this instance arose from any such omission on the part of the master. The libel referred to, clearly places the fault of the master upon the grounds: First, that he falsely represented his vessel to be tight, staunch and strong and every way suited for the transportation of the cargo; and, secondly, that the damage resulted from the carelessness, negligence and improper conduct of the master, his mariners and servants.

The evidence adduced on the part of the master has, as we have already seen, very satisfactorily shown that the representations of the master in reference to the seaworthiness of his vessel, were justified by her real condition and the preference shown for her by the shippers; and there is nothing in the testimony to prove either carelessness, negligence or improper conduct on the part of either the master or the crew. On the contrary, I conclude from the evidence of those on board, that the vessel was managed with all due care and skill, and that everything that could be done was performed by the master and those under his orders to prevent any further injury than that which was sustained in consequence of the vessel being thrown upon her beam ends and being otherwise strained from the violence of the wind and the waves.

The proctor for the shippers has relied upon the authority of Fland. Shipp. § 270, to support the principle, that if damage be done by a peril insured against or within the exceptions of the bill of lading, but the master neglects to repair that damage, and in consequence of the want of such repairs the vessel is lost, or the goods injured or destroyed, the neglect to make repairs, and not the sea damage, is treated as the proximate cause of the loss. In such a case, it is contended, that the insurers are discharged, but the carrier is liable to the shippers, and upon the ground of his neglect to make the req-

uisite repairs. But we have seen that there is nothing in the pleadings which involves this principle; and if there were, there is nothing in the evidence which shows that the master of the bark was aware of any such want of repairs as would have rendered it proper or expedient on his part, in the exercise of a sound discretion, to put back to Rio Janeiro, or to go into any other port. Are we at liberty to say that he knew immediately after the first tempestuous weather, to which his vessel was exposed, that she was so badly injured as to render probable the loss of the cargo of coffee on board? While the evidence is full to the effect that a great deal of bad weather was experienced, and that thereby the vessel made water both on her sides and about her rudder casing, there is nothing to show that any great injury had been sustained by the vessel herself. The evidence, on the contrary, shows that all the necessary repairs were made on her in this port for the sum of $95 for caulking, and $ for repairing the rudder casing.

It is impossible to say, in view of the facts which have been adduced in evidence, that the master was bound to know the extent of the damage which the cargo had sustained. The latest gales were experienced in the month of January, and it must have been, therefore, near the close of the voyage that the full extent of the injury was sustained. The injury to the rudder casing of the vessel was only ascertained by an examination in this port. It is fair to presume that the master, in the exercise of a sound discretion, pursued the course which under all the circumstances was deemed most expedient, to promote the interests of all concerned. In view of the amount of damage actually ascertained, it is easy to say what might have been done to avoid it. But as it is now impossible for us to place ourselves in a position to appreciate all the difficulties encountered by the master, all our speculations upon the propriety of his conduct, must necessarily prove unsatisfactory. "The contract of the ship owner," says Mr. Justice Story, in the case of Jordan v. Warren Ins. Co. [Case No. 7,524], "is to carry the cargo to the port of destination; but he by no means warrants the state in which it shall arrive, as it may be affected by the perils of the seas or other perils, against which his contract does not bind him. It is no answer to say, that if the cargo is carried on in a damaged state, it will be ruined. The true reply is that the ship owner has nothing to do with that; and that the shippers have no right to throw the loss of freight upon him, because the cargo is in danger of ruin by a calamity against which he did not warrant them."

After a full and attentive consideration of this case, I am of opinion that the master is entitled to the freight, and that a decree must be entered in accordance with the prayer of his libel. It is further decreed that the claim for damages be dismissed, with costs.

Case No. 13,179.

SOULT v. L'AFRICAINE.

[Bee, 204.] [1]

District Court, D. South Carolina. May 28, 1804.

COURTS—TERRITORIAL JURISDICTION—MARINE LEAGUE FROM SHORE.

Jurisdiction of district courts of the United States ascertained by act of congress of 1794 [1 Stat. 381] to extend to a marine league from the coasts or shores, extending to low water mark. Shoals covered with water are not part of the coast or shore.

[Cited in United States v. New Bedford Bridge, Case No. 15,867; Re Metzger, Id. 9,511; The Hungaria, 41 Fed. 111.]

In admiralty.

This suit is instituted on behalf of the French republic, by their agent of commercial relations [John Francis Soult], to pray restitution of the corvette L'Africaine, her tackle, furniture and apparel; and also compensation for damages sustained by her detention. To the libel filed in this cause, a claim and plea are interposed by William Pindar, commander of the brig Garland, a British privateer, on behalf of himself and crew, stating that this court ought not to have cognizance of the several matters mentioned in the libel, because they did not take place within the jurisdiction of this court; the corvette having been captured on the high and open seas, not within a marine league of any coast or shore, of the state of South Carolina, or of any coast or shore of the United States. From the pleadings and evidence produced, it appeared that the corvette L'Africaine had met with a gale of wind at sea, on the 22d April last, in which she lost her mizzenmast, and sixteen of her crew; and was obliged to throw overboard six of her guns and a quantity of provisions. That, in this situation, she was boarded on the evening of the 3d of May, off the bar of Charleston, by a pilot, who brought her to anchor in six fathoms water, her draught of water being too great to permit his carrying her over the bar, until the next tide. It was proved, that early the next morning, 4th May, the brig Garland, with a ship in company, bore down on the corvette as she lay at anchor; and that, on a gun being fired from the privateer, the corvette struck her colours, was taken into possession, and brought in here, as stated in the libel.

BEE, District Judge. The single question for the consideration of the court is, whether this capture was made within the waters of the United States, or within a marine league of the coasts or shores thereof: it being within those limits only that this court can take cognizance of captures between belligerent powers. In determining this point, it will be proper first to fix precisely the place where this vessel lay at anchor when she was captured, which, from the evidence of pilots,

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

and a chart of the coast produced in court, was done with great accuracy. All the witnesses agree that the corvette was anchored in six fathoms water, on the outside of the Rattlesnake shoal; the nearest land to this shoal appears to be the south end of Long Island. From thence to the spot where the corvette lay at anchor, is, by measurement, nearly six miles. The Rattlesnake shoal, is, itself, four miles from land at least. Some of the witnesses say it is four and a half; others six or seven miles distant from land: and as this shoal lay between the corvette and the nearest land, the distance is ascertained with sufficient precision.

In the case quoted from Robinson's Admiralty Reports, Sir William Scott remarks, that "an exact measurement cannot easily be obtained; but that, in cases of this nature, the court would not willingly act with unfavourable minuteness towards a neutral state, but will be disposed to calculate the distance liberally." On similar principles, I am also disposed to calculate liberally and impartially between the parties; which the position of the Rattlesnake shoal between the nearest land and the vessel enables me to do. As that is acknowledged on all hands to be four miles at least, the question of distance as to the marine league from shore is settled. But it is contended by the counsel for the French republic, that the words "coasts" or "shores" being both found in the act of congress, the jurisdiction ought to extend beyond a marine league from the shore, and ought to be measured from the coast, which includes all the shoals thereon: and this ground was much insisted on.

It was also said that this capture was contrary to the law of nations, the laws of humanity, and the treaty with France. Much time was occupied in reading a number of cases from the law of nations; and reference was made to the correspondence of Mr. Jefferson, when secretary of state, with Messrs. Genet and Hammond, the ministers, respectively, of France and England. It is only necessary for me to remark here, that this correspondence was prior to the 4th June, 1794, when the law of congress was passed. As to the cases adduced, they shew that the line of jurisdiction has varied as the several nations referred to thought fit. I believe the United States are the only power who have fixed, by law, the limits of their maritime jurisdiction. It was argued that this law of congress was passed on the spur of the occasion, and was intended only as an experiment. It may be so. But though the act was originally limited to two years, it was extended afterwards to four years; was finally revived without any limitation, and continues to be, at this day, the law of the land. It is not for this court, exercising a jurisdiction of this nature, to take into consideration the laws of humanity. A vessel, however distressed, may lawfully be captured on the high seas; and the present question must be decided not by the law of humanity, but by the law of congress.

As to the treaty with France, I have examined it, and find that it does not at all relate to a case like the present. The 18th section does indeed mention "sailing along the coasts," but is, nevertheless, totally irrelevant to the question now before us. But, in order to prove that "coasts" and "shores" have a different meaning, reference is made to the 7th section of the act of 1794, where it is said: "And in every case of the capture of a ship or vessel within the jurisdiction or protection of the United States, as above defined," &c. and it is contended that in this clause the word "jurisdiction" relates to coasts, and the word "protection" to shores. In answer to this I would observe, that by recurrence to the 6th section, we shall find that "jurisdiction," as there defined, must relate to captures within the waters of the United States, about which there could be no dispute, and "protection" to the marine league. With this distinction the several clauses are perfectly reconcilable, which they could not, otherwise, be.

Two witnesses were produced to explain the meaning of the word "coast," among mariners. They said the coast included all the shoals, stretching out to any distance whatever; and a critical inquiry was made into the distinction between the expressions "off the coasts" and "on the coasts." But the act by which we must be guided uses neither. It says, "from the coasts;" and this signification differs, in my opinion, from both the others. If the construction contended for should obtain, the marine league would vary with every shoal that could be found. At one time, it would be three miles from the shore or land; at another, ten or twenty miles, according to the extent of the shoal. It would be impossible to fix any boundary of jurisdiction; no two district courts of the United States could determine alike, because the shoals lying off the coast or shore of each would be found to differ in extent; in cases of appeal, the judges of the superior courts would be unnecessarily perplexed; and "the glorious uncertainty of the law" would be established indeed.

Much stress was laid on the vessel's having taken a pilot on board. Had the law of congress not defined the distance, and the evidence fixed it so clearly, I should have been inclined, in a case of this sort, as I have already said, to reject unfavourable minuteness, and to give a liberal construction. A vessel that has taken a pilot near our shores, ought, prima facie, in my opinion, to be protected by our neutral jurisdiction. But, as I am bound by the law as I find it, and not by what it ought to be, I can only express a wish that it may be so amended by the legislature as to embrace, in future, every bona fide case of this sort.

This is said to be a new case, and one of great importance. I view it as such in both

lights, and have, therefore, given it very mature consideration: and after a full investigation of the matter, with reference to consequences both as respects ourselves and foreign powers, I am of opinion that the words in the sixth section of the act of congress "a marine league from the coasts or shores of the United States," must have been intended and must be construed to the land bordering on and washed by the sea, extending to low water mark.

I, therefore, adjudge and decree that the plea in bar filed in this cause is relevant, and that the libel must be dismissed. But, as it appears that the agent of commercial relations of the French republic considered himself bound, in his public capacity to prosecute this suit, I order that each party pay his own costs.

SOUTER v. LA CROSSE & M. R. CO. See Case No. 6,760.

Case No. 13,180.

SOUTER v. LA CROSSE RAILROAD.

[1 Woolw. 80.][1]

Circuit Court, D. Wisconsin. April, 1865.

PRACTICE IN EQUITY—PERFORMANCE OF DECREE—SURETIES—SUPERSEDEAS—BOND—MORTGAGE—RIGHT OF POSSESSION.

1. The practice in the courts of equity of the United States, does not require that an order be made, limiting the time within which the decree rendered in the cause shall be performed, before a party may be proceeded against, for non-performance of its directions.

2. When litigants in the federal courts are required to give security, their sureties need not be residents of the state in which the suit is pending.

3. Owners of the equity of redemption are entitled to possession until foreclosure.

[Cited in Teal v. Walker, 111 U. S. 251, 4 Sup. Ct. 425.]

4. If the unsuccessful party to a decree does not give a supersedeas bond, he cannot complain if the decree be enforced, notwithstanding any injury to which he may be thereby subjected.

This was a motion to attach the officers of the Milwaukie and St. Paul Railway Company, for disobedience of the order of the court in respect of the delivery of certain property therein mentioned.

MILLER, Circuit Justice. The motion before us is for an attachment for contempt, against the president and directors of the Milwaukie and St. Paul Railway Company, for refusing to deliver the rolling stock mentioned in the order of this court of July 18, 1865. To enable us to understand the merits of the motion, it is necessary to recount the proceedings on which that order was founded. At the April term of this court, 1864, the mandate of the supreme court was filed in this case, directing a decree in favor of plaintiffs, for the full amount of their bonds and interest, less whatever sum might be in the hands of the receiver, with provision for one year's time for the defendant to pay the remaining amount. If this sum was not then paid, a sale of the road and its appurtenances was directed. The Minnesota Railroad Company, which owned the equity of redemption, thereupon offered to pay into court the sum due the plaintiffs, on condition that the receiver should be discharged, and the road and all its rolling stock be placed in its possession. A motion to this effect was made, and was resisted by many parties; among others, by the Milwaukie and St. Paul Railway Company, which had the actual possession of the road and rolling stock. The judges of this court being divided in opinion on that motion, it was overruled; and the cause was carried to the supreme court on other matters involved in the final decree. Pending that appeal, the Minnesota Company filed a bill in this court against the St. Paul Company, setting forth its own title to the rolling stock in question, under certain orders and decrees of this court, and the claim of the latter company thereto; and praying that its title might be established, and the possession delivered. There was a demurrer to this bill, and on a hearing, the judges of this court were again divided in opinion, and the bill was dismissed. An appeal was taken from this decree also.

Both these appeals came on to be heard in the supreme court at the same time; and that court held, in the latter suit, that the proceedings in chancery, under which the St. Paul Company claimed the rolling stock, conferred no right of possession; and that, upon the allegations of the bill, the Minnesota Company was entitled to the relief prayed. As the case had been decided on demurrer, it was sent back with leave to the St. Paul Company to answer. This they have done, and that case is now at issue. In the other case, the supreme court reversed the order overruling the motion of the Minnesota Company, and sent down its mandate directing that an order be entered, discharging the receiver, and letting the Minnesota Company into possession, if, within a time to be fixed by the court, it should pay all that was due on the mortgage, to foreclose which the suit was brought. On the 18th of July last, the order was made by this court according to the directions of the mandate. On the 1st of January last, the Minnesota Company paid the full amount, interest, and costs that was then due on said mortgage; and demanded of the receiver and of the St. Paul Company, that they should deliver possession of all the property which the order of the court called

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

for. The receiver delivered the road and all the stock that was in his possession. The St. Paul Company delivered a part of the rolling stock,—all, as they claim, that was necessary to enable the Minnesota Company to work their road profitably,—but refused to fully obey the order of the court by the delivery of all the property. An attachment is now asked in order to the punishment for contempt in this disobedience. A part of this rolling stock had been purchased by the receiver, and was conceded to belong to the Minnesota Company and to the St. Paul Company, in certain proportions which had been fixed by the court. But these proportions had reference to the entire value of such stock, and no partition thereof had been made. The respondents in this motion have delivered very nearly that proportion, in value, to which the Minnesota Company is entitled; and have accepted a proposition made by the receiver, to appoint two competent persons to make a complete division, by whose action they profess a willingness to abide. I do not think any order of this court authorizes the receiver solely to enter upon or to execute any such arrangement; nor do I think the respondents are in contempt in respect of their action here complained of.

As to the remainder of the stock not delivered, they set up several grounds of justification for their refusal. One of these is, that according to the English Chancery practice, another order in addition to the main decree is necessary, fixing a time within which the decree must be performed, before a party can be in contempt for non-performance. However this may be in the English chancery, which is always in session, and can always issue such orders on short notice, I am satisfied that, in our practice, where the courts hold stated terms of short duration, and where the intervening vacations are very long, such a rule is inapplicable. If the English practice were to obtain here, the execution of many orders of the court would be delayed until they became useless, and yet no punishment attach. Besides, in this case, the time became fixed with sufficient definiteness by the payment of the money to the clerk; and the very fact that the respondents partly obeyed the order, shows that they labored under no difficulty because the order, which they here insist upon, was not made. It is said that certain bonds, taken to meet the requirements of the court before the property should be delivered into the custody of the Minnesota Company, were not sufficient. The order of the court provides that these bonds should be approved by the clerk. He has approved them.

It is objected that the sureties live in other states. This objection can have no force in the federal courts. It would be great injustice to require parties, who, in order to litigate in the federal courts, must generally be non-residents, to give resident sureties in large sums. The discretion confided to the clerk, I am satisfied, was well exercised. Moreover, as these bonds are for the protection, not of the St. Paul Company, but of certain creditors of the La Crosse and Milwaukie Company, their sufficiency is of no consequence to these respondents. The respondents, as a further excuse for not delivering all of the property to the Minnesota Company, say, that since the order was made, they have discovered a mortgage of the rolling stock, made long ago to Bronson, Souter, and Knapp, which is a paramount title. This company, however, being owners of the equity of redemption, are entitled to possession until foreclosure, so that the alleged mortgage confers upon the respondents no right of possession, much less does it furnish any justification for disobeying the decrees of this court. Several other technical, and, as I think, frivolous excuses are given why the respondents should not be compelled to perform the decree. These I shall not notice.

There is one reason for their conduct, however, of which I will speak. I apprehend it is the only one on which they have acted. They say that they are the real owners of the property in dispute; that the same is still in litigation, as they are prosecuting appeals from all the judgments deciding against their claims; and that it would be oppressive to take the property from them pending the litigation, especially as it would leave them without stock enough to work their road. I am quite sensible of the force of these positions, and have given them all the consideration which I think they deserve. If I could see that I have any just power to interfere, I might endeavor to mitigate the immediate hardships complained of. It is to be observed, however, that this claim of respondents to the property is the very matter which was passed upon in the decree now to be executed. No supersedeas bond was filed to stay the execution of the decree, until the appeal could be heard in the supreme court. Besides, this very decree was entered in pursuance of the mandate of that court. The only title to the property yet set up, so far as I know, by the respondents, has been declared by the supreme court to be invalid; for, as I have already shown, the mortgage to Bronson, Souter, and Knapp may never ripen into an absolute title in any one; and under it the St. Paul Company have no title whatever. That company is not the mortgagee therein, nor the assignee thereof. This court has decided, at least three times, that the St. Paul Company has no title to the property. The presumption is in favor of the correctness of those decisions. Certainly, in this court, I am bound by them. Now, if they be sound, it follows, that for nearly four years the St. Paul Company has had wrongful possession of this stock. Is it not time it should be given up? Suppose, however, that these decisions are wrong, and

will be finally reversed. Then the property will be restored to the respondents in less than half the time during which, if they are right, it has been wrongfully withheld from the plaintiffs.

Under the decree which is here complained of, the Minnesota Company, on the faith of obtaining possession of this property, paid nearly half a million of dollars. They had demanded this decree as a condition precedent for investing so much money in an already heavily encumbered road. How can this court, with any pretence of justice, now say to them, we will not enforce the decree by which we assured you protection? Every decree of a court which takes property from one man and gives it to another, involves a hardship in the mind of the person dispossessed. In the present case, while that hardship may be a very heavy one, and work a temporary injury not easily repaired, I see no way, consistent with my judicial duty to administer law and justice, to avoid enforcing this decree. Were I to refuse this motion, I do not see how I can ever hereafter attach any person, to compel the performance by him of a decree which he may be reluctant to obey. I do not think the parties have intended any personal disrespect to the court, and would impose no fine or penalty for what is past. I conceive it to be the duty of the court now, however, to compel obedience to its order by this process of attachment, and, if necessary, by imprisonment.

MILLER, District Judge, delivered an opinion, which he did not file, in which, among other things, he said: "I propose that some competent person be appointed to ascertain the quantity of stock necessary fully to operate the road between Milwaukie and Portage, and report thereon; and on such report made, the St. Paul Company shall furnish such additional stock as may be required, and give additional bond in the penal sum of say $200,000, with sureties to be approved by the court, and conditioned for the proper use of the stock in their hands, and to pay for the use of such stock to such corporation as may be entitled thereto, on the decision of the court on the supplemental bill, and such other matters as may be in issue between them. That an attachment be now granted, but not to issue or be served, if these conditions are complied with, within a time to be named."

MILLER, District Judge, refusing to concur in the issuance of an attachment, except upon the terms of the above proposition, the motion was denied.

SOUTH AMERICA, The (TYLER v.). See Case No. 14,311.

SOUTH AMERICA, The (WARNER v.). See Case No. 17,190.

Case No. 13,180a.

The SOUTH AMERICA v. WARRAN.

[21 Betts, D. C. MS. 137.]

District Court, S. D. New York. 1853.

COLLISION—DAMAGES—DEMURRAGE DURING REPAIRS.

[Demurrage for detention of vessel injured in collision cannot be calculated on the basis of what she was earning per day at the time, not being under hire or charter. The proper basis is the market value of the hire of the vessel for the time of detention. Williamson v. Barrett, 13 How. (54 U. S.) 101, followed.]

[This was a libel for demurrage by the steamboat South America, Millan and others, claimants, against Sylvester Warran.]

BETTS, District Judge. The commissioner reported $20 per day for 22 days demurrage during the reparation of the sloop, for injuries received from the steamboat in the collision with her. The valuation is placed upon the proof that the sloop at the time of the collision was earning $20 per day. The crew and master remained with the sloop during the time she was undergoing repairs, and no allowance for that expense or charge was made the libellant in the report, other than through that valuation of the demurrage The libellants except to the demurrage, because it represents the probable profits and earnings of the sloop and not the proved value of her time during the detention. The exception is well taken for that cause. In The Rhode Island [Case No. 11,745], this court held that in estimating damages sustained by a collision, the current or supposed earnings of the injured vessel could not be taken as the measure of loss, during the period she was under repair. That decision was affirmed on appeal. The supreme court lay down the rule for the estimation of damages in like cases, when the vessel is not on charter, to be the market price of the hire of the vessel for the term. Williamson v. Barrett, 13 How. [54 U. S.] 101, 112. The judges who dissented from the opinion placed their objection on the ground that no valuation of damages was allowable beyond the actual damages received at the time and place of the injury, and could not be computed forward beyond that limit. Both branches of the court repudiate the idea of giving profits or losses following the injury, as part of the indemnity, and accordingly, that rule ought not to be regarded as open to any equitable enlargement which might amount to the same thing. Even should it be found that the mode of valuation adopted by the commissioner would lessen the charge upon the colliding vessel in this case, that consideration will not bar her owners the right of requiring the report to be made in conformity to the rule of law. With all respect it does not appear to me that the doctrine admitted by the dissentient judges is contravened by an allowance ex parte of the actual loss sustained by the injured vessel, for the time she is devoted to being made what she was when

the tort was committed. The illustration of the doctrine may seem exaggerated, but the principle would be clearly involved by supposing the sloop was under day hire and had been sunk by collision, and by the application of instant means of relief and great exertions had been raised and repaired the same day, but with the loss to her of that day's hire. It seems to me the last item would go into the amount of damages to the owner, under the same principle that gives him the cost of raising her, and it is not easy to perceive, what principle of law would compensate him for her detention a day at the bottom of the river which would not equally apply when the detention is in a ship-yard.

Whether or no the views of the members of the supreme court are susceptible of reconciliation, with each other, the law must be taken from the doctrine declared by the majority. The commissioner ought to have taken proof of the market or merchantable price or value of the sloop with her equipments in the employment in which she was engaged, and have allowed the libellant that price for the period she was delayed in receiving her necessary repairs, as she was not at the time under a charter or stipulated hire. Exceptions allowed, with costs, and a re-reference ordered to estimate the damages on this principle.

Case No. 13,181.

The SOUTH AMERICAN.

[See Case No. 14,311.]

SOUTH & N. A. R. CO. (VAUGHAN v.). See Case No. 16,901.

SOUTHARD (LYMAN VENTILATING & REFRIGERATOR CO. v.). See Case No. 8,633.

Case No. 13,182.

SOUTHARD v. RAILWAY PASSENGERS' ASSUR. CO.

[34 Conn. 574; 1 Bigelow, Ins. Cas. 70.]

District Court, D. Connecticut. July 6, 1868.

ACCIDENT INSURANCE—VIOLENT AND ACCIDENTAL MEANS—MAXIM "EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS."

[1. A rupture effected by the insured's jumping from cars, or by running to see if they were coming, where he acted for his own convenience, and not from perilous necessity, and without stumbling, slipping, or falling, is not an injury caused by "violent and accidental means," within the condition of an accident policy.]

[2. The exception in a policy insuring against injuries effected by "violent and accidental means" of certain causes named, does not broaden the policy so as to include injuries not effected through forcible and accidental means.]

On submission to SHIPMAN, District Judge, as arbitrator.

[This was an action on a policy of insurance by William L. Southard against the Railway Passengers' Assurance Company.]

SHIPMAN, District Judge.[1] This is a claim made by William L. Southard against the above-named company, for bodily injuries alleged to have been received by him, and by reason of which he avers that he was totally disabled for a considerable time, and prevented from the prosecution of any and every kind of business. The claim is founded upon a policy of insurance, issued to the claimant by an agent of the company, dated the 21st day of February, 1867, and having three months to run. The company not agreeing to the claim made upon them, both parties have submitted the following questions to the undersigned as arbitrator: (1) Did the alleged injury result from an accident within the meaning and intention of the contract? (2) Was the disability a consequence of disease existing prior or subsequent to the contract? (3) Is it a case of total disability from all kinds of business?

The contract of insurance made with the claimant is as follows: "The Railway Passengers' Assurance Company of Hartford insures William L. Southard, of Portland, Maine, against accidental loss of life, in the principal sum of five thousand dollars, to be paid to his family, or their legal representatives, within ninety days after sufficient proof that the insured, at any time within the term of this policy, shall have sustained bodily injuries, effected through violent and accidental means, within the intent and meaning of this contract and the conditions hereunto annexed, and such injuries shall have occasioned death within ninety days from the happening thereof; or if the insured shall sustain bodily injuries, by means as aforesaid, which shall absolutely and totally disable and prevent him from the prosecution of any and every kind of business, then, on satisfactory proof of such injuries, he shall be indemnified against loss of time, in a sum not exceeding twenty-five dollars per week, for a period of continuous total disability not exceeding twenty-six consecutive weeks from the time of the accident and injuries as aforesaid."

To this main clause of the policy there are attached certain provisions and conditions, among which are the following: "Provided always, that this insurance shall not extend to any injury of which there shall be no visible sign, nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease, existing prior or subsequent to the date of this contract, or by the taking of poison, or by any surgical operation or medical treatment for disease. And no claim shall be made under this policy, when the death or injury may have been caused

[1] Though this case was one of arbitration, it was argued and decided wholly upon legal principles, and the opinion, which was written by Judge Shipman, will be regarded by the profession as having the authority of a judicial decision.

by dueling, fighting, or wrestling; or by over-exertion, or lifting (except in cases of perilous necessity); or by suicide (felonious or otherwise, sane or insane); or by sun-stroke; or by concealed weapons, carried by the insured; or when the death or injury may have happened in consequence of war, riot, or invasion, or of riding or driving races, or of unnecessary exposure to danger or peril, or of violation of the rules of any company or corporation; or when the death or injury may have happened while the insured was, or in consequence of his having been, under the influence of intoxicating drinks, or engaged in any unlawful act." Also, "The party insured is required to use all due diligence for personal safety and protection."

Upon the evidence submitted to me, I find the following facts: In February, 1867, the claimant, Mr. Southard, was temporarily sojourning, with his family, in Philadelphia, and occasionally passing over the railroad, to and from Baltimore, Newcastle, and perhaps other places, purchasing and shipping corn and flour. On the 20th of that month, while on the road from Baltimore to Philadelphia, he was handed an advertisement, purporting to be of this company, and had some conversation with the person who gave him the advertisement about insurance of this character in which the company was engaged. The next day (February 21st) he went to the office of the company's agent in Philadelphia, made a contract for insurance, paid the premium of ten dollars, and took a receipt. The policy he received at a subsequent time, and to that we must look for the precise contract upon which the present claim is founded. The same evening Southard went by train to Newcastle, Delaware, on business, and made an engagement to meet a man at the depot the next morning, before 8 o'clock, at which time the train started. He went to the depot as agreed, but did not find the man whom he expected. He went on board the train, which passed out from the depot, and switched back on a side track, when he went to the rear end of the train, to inquire of the conductor if he would know the man he was looking for. The conductor informed him that there were two depots at that place, one about three-quarters of a mile distant, and that there was probably some mistake between Southard and the man he had agreed to meet, as to which depot the interview was to take place at. At this point Southard concluded to leave the train, and, somewhat excited, as he says, jumped off from the rear end of the train. He felt no shock, and walked briskly to the other depot, where he found the man he was in search of. He remained there till about time for the next train, and then returned to the other depot. While going back, he heard what he supposed to be the train coming in, started suddenly, and ran to where he could see, and found that it was not the train, when he walked the rest of the way to the depot, took the cars, and returned to Philadelphia. Some time during the journey from Newcastle to Philadelphia, and on the same day, he felt pain about one knee, but did not refer it to his movements at Newcastle. After he arrived at Philadelphia, and had transacted some business, he called on a physician, and consulted him about dyspepsia, an old complaint with which he had for some time been more or less afflicted. The physician, while examining his person, found a partially developed rupture on his right loin. Southard then referred it to his jumping off the cars, or to his running at Newcastle. This rupture increased, and finally, for several weeks, disabled him from business. For this disability he claims a weekly compensation, under his policy, for the time it continued. The company deny that it is within the scope of their contract.

All the facts in regard to the alleged cause of the injury are derived from the statements of the insured. I assume their correctness, and that he was totally disabled for several weeks in consequence, and proceed to consider whether or not the contract of insurance covered the injury from which he suffered.

The policy is one of indemnity against "bodily injuries effected through violent and accidental means, within the meaning of this contract, and the conditions hereto annexed." Had the terms of the contract stopped at the words "violent and accidental means," there would be no difficulty, in my judgment, in disposing of the questions; for there was no accident, strictly speaking, in the means through which the bodily injury was effected. It would not help the matter to call the injury itself—that is, the rupture—an accident. That was the result, and not the means through which it was effected. The jumping off the cars, or the running, was the means by which the injury was caused. Both were done by the claimant voluntarily, in the ordinary way, with no unforeseen, accidental, or involuntary movement of the body whatever. There was no stumbling, or slipping, or falling. There was nothing accidental in his movements, any more than there was in his passing down the steps of his hotel, or in his walking on the street, during each of which he might have had a stroke of apoplexy, or a hemorrhage, a rupture of a blood-vessel in the head or the lungs. True, in jumping from the cars and running there was more violence, or, properly speaking, more force; but there was no more accident than in any ordinary movements of the human body. How, then, admitting the rupture to have been effected by jumping from the cars, or by running to see if they were coming, can it be said that it was caused by accidental, as well as violent, means? All the accident there was, was the result of ordinary means, voluntarily employed, in a not unusual way.

But the words "violent and accidental means" are followed in the policy by the words "within the intent and meaning of this contract and the conditions hereunto an-

nexed." Now, we are to consider how far the former words are qualified by the other parts of the contract, or by the conditions thereto annexed. I have cited from the policy all that can have any bearing on the question. The provision which I have cited from the policy excludes from indemnity death or injury when caused by dueling, concealed weapons, when carried by the insured, fighting, wrestling, over-exertion and lifting (except in case of perilous necessity), suicide, sunstroke, and also "death or injury happening in consequence of war, riot, invasion, riding or driving races, unnecessary exposure to danger or peril, or violation of the rules of any company or corporation." It also excludes "death or injury happening while the insured is, or in consequence of his having been, under the influence of intoxicating drinks, or engaged in any unlawful act." Now, it may be said that this specific exclusion from the scope of indemnity of death or injury happening from causes and under circumstances expressly set forth leaves, by fair implication, death or injury from any other causes, and under all other circumstances, included in the contract of indemnity; thus logically inverting or complementing the maxim, "Expressio unius est exclusio alterius." But in applying this well-known rule of construction, reference must be had to the main body of the contract, and to its subject-matter. It is not, nor does it purport to be, a contract of indemnity against death or injury effected by all means. The cause of the death or injury must, in all cases, be "violent and accidental," or the event is without the scope of the contract. The instrument, by its terms, embraces only cases where the elements of force and accident occur in effecting the injury. The cases excluded are only those which belong to the same class. The contract declares to the insured that, though he may be killed or injured through violent and accidental means, yet, if the calamity occurs under certain circumstances, the insurers will not be liable. Violent and accidental death or injury might occur, and often does occur, under the circumstances enumerated in the excluding clause. The contract, as I have already intimated, in its broadest scope only embraces within its indemnity personal injuries effected through forcible and accidental means; and the proviso simply excludes from this class of injuries all that occur under the circumstances enumerated. All others of this class are included.

The degree of violence or force is not material; and had the insured, in this case, in jumping from the car, lost his balance and fell, or struck upon some unseen object, and wounded himself, or, in running, had stumbled, or slipped on the ice, his injury might be attributed to accidental as well as violent means, and, assuming that there was no want of due diligence on his part, his misfortune would have been covered by the policy. But, as I have already stated, the injury which he received was in no sense the result of accident. He jumped from the car with his eyes open, for his own convenience, and not from any perilous necessity. He encountered no obstacle in doing so. He alighted erect on the ground, just as he intended to do. So in running. He ran from no peril or necessity, but for his own convenience, voluntarily, and, from all that appears, without stumbling, slipping, or falling. In both cases he accomplished just what he intended to, in the way he intended to, and in the free exercise of his choice. No accident of any kind interfered with his movements, or, for an instant, relaxed his self-control. All that he claims is that, some hours after, it was discovered that a muscle in the walls of the abdomen had given way under the strain to which he had voluntarily put it, under circumstances free from all peril or necessity. Assuming that this rupture was caused either by his jumping or running, or both does not help the matter, unless we call running and jumping accidents.

I therefore am of opinion that the alleged injury did not result from an accident, within the meaning of the contract. This disposes of the whole case; and it follows that Mr. Southard has no valid claim on the company.

Case No. 13,183.

In re SOUTH BOSTON IRON CO.

[4 Cliff. 343.] [1]

Circuit Court, D. Massachusetts. May, 1876.

BANKRUPTCY—REVIEW—MATTERS DEHORS PETITION—PARTNERSHIP—ASSETS—PARTNERSHIP AND INDIVIDUAL DEBTS—HOW CLAIMS PROVED.

1. A resolution adopted by the creditors of a bankrupt, accepting a certain per cent for his indebtedness to them, is a question which is subject to review under the revisory power of the circuit court, of cases in bankruptcy.

2. Law and fact may be reviewed, in this case, under a petition in due form, if seasonably filed, according to the requirements of the bankrupt act [of 1867 (14 Stat. 517)], but the petition must state specifically the errors complained of in the ruling or order of the district court.

3. Nothing is open for review but the assignments of error set forth in the petition.

4. Although separate creditors of each partner, as well as the creditors of the company, may prove their respective debts when the partnership is adjudged bankrupt, yet the net proceeds of the joint estate is to be appropriated to pay the copartnership creditors, and the proceeds of the separate estate of each partner is to pay the separate creditors.

5. Balances of the separate estates are to be added to the joint estate, for the payment of the joint creditors, and, after the payment of the partnership debts, the balance, if any, is to be divided among the several partners.

6. Creditors of the separate partners have no right to participate in a meeting of creditors of

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

the partnership, notified and held to determine whether an offer of compromise proposed by the bankrupt partnership shall or not be accepted.

7. Claims against the bankrupt estate may be proved by attorney.

8. Each of several bankrupts received a sum out of the partnership fund; but the facts were known to the creditors at their meeting, when they accepted the debtors' proposition, and the resolution to accept the proposition ought not to be set aside on that state of facts.

9. Assignments of errors must be explicit.

[In the matter of Edward O. Holmes and John W. Blanchard, bankrupts, the South Boston Iron Company, petitioners for review.]

Proceedings in conformity to the conditions prescribed in the bankrupt act, relative to a composition proposed by a debtor, and accepted by the creditors as satisfaction of the debts due from the debtor to them, took place in the court. Due notice was given, and the creditors met and voted to accept the offer of composition, forty per cent, as proposed by the debtors in satisfaction of the debts due to them from the debtors. They not only agreed to accept the offer proposed by the debtors, but they adopted a resolution accepting the same, and reported the resolution to the court. Objections to the resolution were filed by the petitioners as one of the creditors, whereupon the court referred the case to one of the registers of the court for hearing and report. Hearing was accordingly had, and the register reported that the resolution adopted by the creditors ought to be recorded. Both parties were again heard, and the court, on the 27th of March, 1876, directed that the resolution should be recorded. Dissatisfied with that adjudication, the opposing creditor, on the 11th of April following, filed this petition in this court, under the first clause of section 2 of the bankrupt act, asking this court to review and reverse those proceedings. Proper notice, it was suggested, was not given of the intention to seek such a review; but the court was of the opinion that the objection was not well founded, and the motion to dismiss the petition upon that ground was overruled. Objection was also made that the question involved was not one which was subject to review in this court, under the section of the bankrupt act giving the circuit court a general superintendence and jurisdiction of all cases and questions arising in the district court when sitting as a court of bankruptcy, but the court here was of a different opinion, and that objection was overruled.

E. Avery and L. M. Child, for petitioners.
Elias Merwin, for bankrupts.

CLIFFORD, Circuit Justice. Creditors of a bankrupt may, under the conditions prescribed in the bankrupt act, resolve that a composition proposed by the debtor shall be accepted as satisfaction of the debts due to them from the debtor. Such resolution, however, in order that it may be operative, must be passed by a majority in number and three fourths in value of the creditors of the debtor, assembled at the meeting notified for the purpose, either in person or by proxy, and must be confirmed by the signatures thereto of the debtor and two thirds in number and one half in value of all the creditors of the debtor. For the purpose of such a composition, creditors whose debts amount to sums not exceeding $50 shall be reckoned in the majority in value, but not in the majority in number. Debts of secured creditors, above the amount of such security, are to be estimated in the same way; but the provision is that creditors whose debts are fully secured shall not participate in the proceedings without first relinquishing such security for the benefit of the estate. Unless prevented by sickness, the requirement is that the debtor shall be present at the meeting, and that he shall produce a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts, respectively, are due.

Law and fact may both be reviewed here under a petition in due form, if seasonably filed in this court in compliance with the requirements of the bankrupt act; but such petition must state specifically the errors complained of in the ruling, order, or decree of the district court.

Errors specifically pointed out are open to review, and no others. Authority for that proposition is found in the twenty-fourth rule of the court, and, in the opinion of the court, delivered long before the rule was adopted. Littlefield v. Delaware & H. Canal Co. [Case No. 8,400]. Apply that rule of decision to the case before the court, and it is clear that nothing is open for review except the several assignments of error set forth in the petition. Errors are assigned in the petition as follows:

That each of the bankrupt partners has individual property and individual creditors, and that the resolution of compromise refers only to the partnership property; but the assignment fails to point out any error of law or fact committed by the creditors or by the register or by the district court. Separate creditors of each partner, as well as the creditors of the company, may prove their respective debts, where the partnership is adjudged bankrupt; and the act provides that the net proceeds of the joint estate shall be appropriated to pay the creditors of the copartnership, and that the net proceeds of the separate estate of each partner shall be appropriated to pay its separate creditors. Balances, if any, of the separate estates of the respective partners, it is provided, shall be added to the joint stock for the payment of the joint creditors; and the balance of the joint stock, if any, after the payment of the joint debts, shall be appropriated to and be divided among the separate estates of the several partners according to their respective right and interest therein, as it would have been if the partnership had been dissolved

without any bankruptcy. Grant all that, and still it by no means follows that the creditors of the separate partners have any right to participate in the meeting of creditors notified and held to determine whether the offer of compromise proposed by the bankrupt partnership shall or shall not be accepted. Instead of that, the act of congress justifies the conclusion that the creditors of the individual debtors have nothing to do with that consultation. Suppose it were otherwise, still the better opinion is that the petitioners in this case would have no right to complain, as they are partnership creditors, and not creditors of the individual partners. Nor is it contended that the creditors of the individual partners have any right to participate in that meeting; but the argument is, that the estate of one of the individual debtors is greater than what is required to pay his individual debts, and that the balance of the same, beyond what is required for that purpose, should have been added to the joint assets. If that were the fact, it does not follow that there was any irregularity in the meeting of the creditors to consider the question of compromise, as it did not appear that any such balance would ultimately be found, nor that any creditor was excluded from the meeting who had any right to be present.

That all the claims proved at the first meeting, except one, were proved by an attorney, only three of the creditors besides the petitioners being present. Claims in such cases may certainly be proved by an attorney; and if so, it follows that the matters alleged in that assignment do not afford any ground to reverse the decision of the district judge.

That each of the bankrupts received a large sum out of the partnership fund, and that the same was concealed by them, and was not exhibited by them as a part of the partnership assets. Evidence was introduced upon that subject which, it appears, was fully considered by the register and by the district judge. Sufficient appears to satisfy the court that the facts were known to the creditors at their meeting, and that the resolution accepting the offer of compromise was understandingly passed with a full knowledge of what had been done in that regard by the partners. Certain sums had undoubtedly been withdrawn by each partner from the partnership funds; but the explanations given as to the circumstances repel every presumption of fraud, and fully justify the action of the creditors and the ultimate decision of the district court.

That the assets of the partnership are much greater than shown by the bankrupts. Support to that view is attempted to be derived by showing that a balance would be left from the separate estate of one of the partners after the payment of his individual debts; but, in the judgment of the court, the assignment of error is not sufficiently explicit and comprehensive to open that question to review in this case.

Conclusive proof of that proposition is found in what follows in the same assignment, which shows that the real complaint is that the assets of the partnership exhibited are valued too low; that "if the same were sold by an assignee, there would be realized a sum sufficient to pay much more than forty per cent of the debts." Beyond all doubt, the petitioners must be confined to errors specifically pointed out in the petition. Properly construed, the complaint in the fourth assignment amounts to nothing more than that the assets of the partnership, as exhibited, would sell for a greater sum than the estimated value; and the court is clearly of the opinion that the complaint, when so construed, is not supported by the evidence.

Attempt is made in argument to show that the partnership debts are not as great as the estimate; but no such error is assigned in the petition, which is all that need be said upon the subject.

Fraudulent concealment of assets is the next charge; but the court is of the opinion that the decision of the district judge, to the effect that the charge is not proved, is correct.

That it is not for the best interests of all concerned that the resolution should be recorded. Enough appears to show that the majority of the creditors, and the register and the district court, were of a different opinion; and the court here, after a pretty full consideration of the subject, concurs without hesitation in the conclusion of the district court.

Three other errors are assigned; but, inasmuch as they were not pressed in argument and are believed to be without merit, they will not be separately considered. Finding no error in the record, the petition for review is denied.

SOUTH BRANCH DISTILLING CO. (UNITED STATES v.). See Case No. 16,359.

SOUTH CAROLINA, The (LINDSEY v.). See Case No. 8,368.

SOUTH CAROLINA, The (MOITEZ v.). See Case No. 9,697.

SOUTH CAROLINA, The (UNITED STATE v.). See Case No. 16,360.

SOUTH CAROLINA PHOSPHATE & PHOSPHATIC RIVER MIN. CO. (BRADLEY v.). See Case No. 1,787.

SOUTH CAROLINA R. CO. (SAYLES v.). See Case No. 12,425.

Case No. 13,184.

In re SOUTHER.

Ex parte TALCOTT.

[2 Lowell, 320;[1] 9 N. B. R. 502.]

District Court, D. Massachusetts. March, 1874.

BANKRUPTCY—PROOF OF DEBT—NOTE—PART PAYMENT BY INDORSER.

1. If the indorser of a note pays a part of the money due upon it to the holder, after the bankruptcy of the maker, for a full release of his (the indorser's) own liability, the holder may prove the note in full against the estate of the maker, because he is, in law, trustee for the indorser to make such proof, and must hold for the benefit of the indorser any dividends he may receive above the balance remaining due him on the debt.

[Cited in Ex parte Harris, Case No. 6,109; Re Hollister, 3 Fed. 455; Re Pulsifer, 14 Fed. 249; Chemical Nat. Bank v. Armstrong, 50 Fed. 805; Stewart v. Armstrong, 56 Fed. 171.]

[Cited in Re Meyer, 78 Wis. 622, 48 N. W. 55; Ex parte Nason, 70 Me. 368; National Mt. Wallaston Bank v. Porter, 122 Mass. 310.]

2. Such a payment is not a discharge of the promisor, pro tanto.

This was a question upon evidence certified by the register, concerning the debt offered for proof by Frederic Talcott, and called for a decision whether the amount paid by an indorser of a note, after the bankruptcy of the maker, and after an affidavit in due form had been made by Talcott for proving the debt, but before the first meeting of the creditors, and therefore before the debt could be admitted to proof, should be deducted from the debt as a payment pro tanto. The case was not argued.

LOWELL, District Judge. The general rule undoubtedly is, that the holder of a note may prove against all the parties for the full amount, and receive dividends from all until he has obtained the whole of his debt with interest. It is likewise the general rule, that what he has received from one party, or from dividends in bankruptcy of one party, to the note, are payments which he must give credit for if he afterwards proves against others. Sohier v. Loring, 6 Cush. 537; Ex parte Wildman, 1 Atk. 109; Ex parte Royal Bank of Scotland, 2 Rose, 197; Ex parte Tayler, 1 De Gex & J. 302. I am of opinion that this latter rule must be confined to cases in which the payment has been made by the person primarily liable on the note or bill. The two cases last above cited cover the whole ground of this inquiry. In the former, it was held that such credit must be given for dividends received after a claim had been made in bankruptcy, but before the debt was actually and formally proved; and in the latter, that when such payments had been made by the drawer of a bill of exchange, and the proof was offered against the acceptor, still the credits must be given. One of the learned justices, however, in giving judgment, reserved his opinion whether the rule would apply if the holder offered his proof as a trustee for the drawer, or for the estate of the drawer. The theory of this decision is, that no creditor can prove for more than his actual debt, as it exists at the time of proof, without obtaining an undue advantage over other creditors. The answer attempted to be maintained by the creditor in that case, was, that a holder may sue for the whole debt at law against the party primarily liable, and hold the money for whom it may concern. For this position he cited Jones v. Broadhurst, 9 C. B. 173, then recently decided. The court of appeal in bankruptcy expressed doubts whether Jones v. Broadhurst stated the true rule at law, and decided that the rule in bankruptcy, at all events, was well settled against it, unless, perhaps, the holder proved that he was acting as trustee for some one whose liability was subsequent to that of the bankrupt.

It seems to me, however, that the argument in favor of the proof in full was sound. The better opinion at common law is, that payment by a drawer or indorser does not exonerate the acceptor or maker, unless the promise of the latter was for the accommodation of the former, or there is some other equity which makes the note or bill the debt of the party who has made the payment, or unless he has made it at the request or for the benefit of the acceptor or maker. Byles, Bills (10th Ed.) 221, and cases there cited. If this be not the rule at law, still I consider it to be so in bankruptcy. The statute, sect. 19, adopting the equities of the case, declares that if a surety, or other person liable for a bankrupt (and this undoubtedly includes indorsers), pays or satisfies the debt, or if he remains liable for the whole, or any part of it, he may prove it in bankruptcy, or require the creditor to prove it, in order that he may have the benefit of the dividends. This law does not expressly meet the present case, because the indorsers here have neither satisfied the debt, nor do they remain liable to pay it, but they have taken an intermediate course, by paying a part for a full release of their own liability. Under these circumstances, in the absence of any stipulation one way or another about the maker of the note, who was already a bankrupt, the law will imply that the holder is to prove the whole debt; and, if the dividends are more than enough to pay him in full, after crediting to the surety what he has received from him, the creditor will hold the surplus for the benefit of the surety. This, though not within the exact language of section 19, is fully within its spirit. It is not, however, as a construction of that section that I find the law, but merely that the section recognizes a familiar equity, and

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

takes for granted that a creditor may prove the debt notwithstanding payment in whole or in part by a surety, because he in fact proves as the trustee of the surety. The payment made by the indorser after the maker of the note was a bankrupt, cannot be proved by the surety as money paid, unless it comes precisely within section 19, because it had not been paid at the time of the bankruptcy. It must either be provable as part of the note in the hands of the holder, and for the benefit of the indorser, or not provable at all, and in the latter case it would not be barred by the discharge. This was one of the motives for the enactment that the surety may compel the creditor to prove, and it takes for granted, as I have said, that the creditor might prove voluntarily. [It has long since been decided that an endorser or drawer may prove on the note or bill if he has taken it up at any time before the final dividend, and that being provable the debt will be discharged. Joseph v. Orme, 2 Bos. & P. N. R. 180; Mace v. Wells, 7 How. [48 U. S.] 272][2] The case of Jones v. Broadhurst, and those which follow it on the one side, or differ from it on the other, deal merely with the fact, or the presumption, whether or not the payment is intended to discharge the debt of the principal debtor; if not, the right of action remains good. The fact in this case is, that the surety gave a certain sum for what is equivalent to a covenant not to sue him, and it is not for the bankrupt to say that his debt is thereby paid, when he has not furnished the means to pay it. In re Ellerhorst [Case No. 4,381]; Downing v. Traders' Bank [Id. 4,046]. Proof admitted in full.

Case No. 13,185.

SOUTHERN & A. TEL. CO. v. NEW ORLEANS, M. & T. R. CO.

[2 Cent. Law J. 88.][1]

Circuit Court, S. D. Mississippi. Nov., 1874.

CORPORATIONS—FOREIGN—LEGISLATIVE ACT—"INHABITANT OF DISTRICT"—FEDERAL JURISDICTION.

1. An act of the legislature respecting a corporation originally created by another state, will be construed to be a license, or an act of incorporation, according to what appears to be the true legislative intent, without regard to the particular language employed.

2. The defendant corporation not being a corporation created by the state of Mississippi, is for that reason not an inhabitant of, nor is it found in the district.

3. The circuit court of the United States cannot acquire jurisdiction of the person of a defendant corporation of a state, other than that in which the corporation was created? by a resort to a state statute licensing the corporation on the condition of its submission be sued in such state.

[Cited in Stillwell v. Empire Fire Ins. Co., Case No. 13,449. Cited in brief in Schollenberger v. Phœnix Ins. Co., Case No. 12,-476.]

[2] [From 9 N. B. R. 502.]

[1] [Reprinted by permission.]

In equity.

Gaylord B. Clark and A. J. Johnston, for complainant.

W. P. Harris and J. Z. George, for defendant.

HILL, District Judge. This is a bill filed by the complainant, against the defendant, to enjoin the defendant from interfering with complainant's agents and employees in erecting and operating its line along and over defendant's right of way, within this state, and also to compel defendant to transport complainant's employees and materials for the construction of said line, upon payment of the usual fare and charges.

The questions now presented for decision are purely jurisdictional. By consent the defendant's counsel is permitted to oppose the jurisdiction without entering an appearance, so as to waive service of process; process having only been served upon defendant's agent appointed to receive service of process from the courts of this state.

It is insisted on behalf of the defendant, that it is a corporation under the laws of this state, and that complainant also being a corporation of this state, both are citizens of the state, and consequently this court has no jurisdiction of this cause; and that if defendant is not a corporation, created by the laws of this state, and not a citizen thereof, the service of process on the agent of defendant, appointed to receive process from the courts of the state, is not sufficient to give this court jurisdiction of the defendant. These questions are of vital importance in this case, and the latter of general importance, as affecting the liability of foreign corporations to be sued in the national courts. They will be considered in the order stated. On the 24th of November, 1866 [Laws Ala. 1866-67, p. 6], the legislature of Alabama passed an act incorporating the New Orleans, Mobile and Chattanooga Railroad Company, of which defendant is the successor, to extend from New Orleans to Chattanooga, passing through this state, Alabama and Georgia, under such restrictions and with such privileges as the states through which the road was to pass might see proper to grant and impose, and conferring upon the corporation the usual powers and privileges and under the usual restrictions. The company was duly organized under the powers conferred. In furtherance of this object, the legislature of this state passed an act, approved February 7th, 1867 [Laws Miss. 1866-67, p. 332], recognizing said corporation as created by the legislature of Alabama, and approving and adopting the provisions of the Alabama act of incorporation, and conferring the powers and privileges granted by it, and authorizing the company to construct its line of road over the territory of this state, granting all the privileges, and

imposing all the restrictions deemed necessary to protect the state and its citizens.

The question to be determined, is, did the legislature intend to create this corporation, or only to recognize it as created by the legislature of Alabama, and grant it such rights as were necessary to enable it to construct and operate its road over the territory of this state, under the restrictions imposed, either of which the legislature had power to do? The title of the act, to which we have a right to look, in determining its object and purpose, shows that it was intended not to create the corporation, but only to recognize it as created and then existing, and to grant it the necessary rights and privileges under the proper restrictions imposed. This purpose is more clearly shown by the 13th section of the act, which provides that the company can only sue and be sued in such courts of the state as are courts of record, and in such manner and form as corporations of this state can be sued. Also that service of process shall be on the president, secretary, treasurer, or any other member of the board of directors, or upon an agent of the company resident in this state, and designated to receive such process, and requiring the company to designate such an agent. These provisions and restrictions are pretty much the same as those required of other corporations, chartered by the laws of other states, and doing business in this state. If I had any doubts on the question, they would be removed by the decision of the supreme court of the United States in the case of Baltimore & O. R. Co. v. Harris, 12 Wall. [79 U. S.] 65. I, therefore, must hold that defendant does not exist as a corporation created by the laws of this state, but only operating its road, and doing business in this state, under the powers, rights, privileges and instructions conferred by the laws of this state.

This brings us to consider the last and most important question presented. The jurisdiction of the courts of the United States is derived alone from the constitution and laws of the United States, both as it relates to the subject-matter, and the person sought to be brought under their jurisdiction; indeed the whole machinery of the federal judiciary system is separate from, and independent of, state legislation, and necessarily so. [Toland v. Sprague] 12 Pet. [37 U. S.] 300; Day v. Newark India-Rubber Manuf'g Co. [Case No. 3,685;] Pomeroy v. New York & N. H. R. Co. [Id. 11,261.] It is true, that by different acts of congress, certain laws of the states in which the national courts are holden, are, for convenience, adopted in relation to the qualification of jurors, process, practice and modes of proceeding, but, in all such cases, it is the act of congress which gives validity to it, and it is no more than if congress had, in terms, enacted such provisions. In order to give this court jurisdiction in suits between citizens (and corporations are held to be citizens for this purpose), the opposing parties must be citizens of different states, and the party against whom the suit is brought, must be an inhabitant of, or found within, the district in which the suit is brought, provided, that in some states embracing more than one district, and the defendants reside in different districts, a counterpart of the writ may be sent into the district in which the court is not holden, to bring in the defendant or defendants residing in such district, but at least one defendant must reside in, or be served with process in the district in which the suit is brought. Congress has, by a recent act, authorized, in special cases, the bringing in of non-residents in equity cases to litigate their rights to property interests, situate in the district in which the suit is brought. This is an exception to the general rule. Whilst corporations are now treated as citizens in the national courts, for the purpose of suing and being sued, they are confined, in the latter case, to the state of their creation, except where a voluntary appearance is entered, which they may at all times do; and when they submit to the jurisdiction of the courts of other states, are as much bound by their judgments and decrees as if created by the laws of such state, or as if sued in the state of their own creation. A corporation created by one state, and doing business in another, is comparable to an individual residing in one state and doing business by his agent in another state. A very large portion of the commerce and business of this country is carried on and done by corporations extending their operations in other states, and which is generally done by express legislative license, under such restrictions as may be deemed necessary for the protection of the state and its citizens, thus granting the license in the same way that they would be protected were such corporation one of its own creation, a very important one of which is the liability to be sued, and that a judgment or decree, when obtained in such suit, shall have the same force and effect as if rendered by the courts of the state in which the corporation was created. A corporation may be created by the legislatures of two or more states, and when so created, will have a legal existence in each state so creating it, and may be sued in the federal courts of each, provided the plaintiff is a citizen of another state. But this is different from the present case, or one in which the corporation exists in one state, and by express legislative license, or general comity, is doing business in another state.

The agreement to be sued in the courts of this state is not an agreement to be sued in this court, and cannot, by implication, be extended beyond its terms. It is true that when sued in the courts of the state, either

party may, upon complying with the requirements of the acts of congress, remove the cause into this court if the amount in controversy be sufficiently large, so that that which cannot be done directly, may, in this case, contrary to the general rule, be done indirectly. Congress may, by its legislation, shorten the road and provide that in all cases in which corporations created by one state doing business in another state, agree to be sued, and to receive process on a designated officer or agent in such state, that such corporation shall be liable to be sued and to have its process served on such agent in the courts of the United States. Such legislation, it seems to me, is necessary, but it has not been made, and this court has no power to supply it. The defendant might appear voluntarily, and if so, the jurisdiction would be complete, but by agreement the appearance of counsel in opposition to the jurisdiction, was not to have that effect. The result is, that the restraining order heretofore granted, must be set aside, and the cause dismissed at complainant's costs, unless the defendant shall voluntarily enter an appearance.

I would be remiss, were I not to express my thanks to the able and learned counsel on both sides for their extensive research and able presentation of the questions presented, and my regret that the pressure of judicial duties has given me so little time to consider the questions, and to refer to the numerous authorities read and commented upon in the argument; but I am content with the conclusions reached.

Case No. 13,186.

SOUTHERN BANK v. The ALEXANDER McNEIL.

[20 Int. Rev. Rec. 176.]

Circuit Court, S. D. Georgia. Nov. 25, 1874.

MARITIME LIENS—LOANS TO MASTER FOR "DISBURSEMENTS"—WAIVER OF LIENS.

[1. Where money was loaned to the master in a foreign port after investigation which showed the need of it to pay expenses necessary to enable the vessel to leave port, and upon the master's representation that he needed the money for "disbursements," *held*, that the lender was entitled to a lien, though he did not ask the master what particular payments he intended to make, and though the master in fact applied part of the money to satisfy claims which constituted no lien.]

[2. A loan of money to the master in a foreign port to pay overdue seamen's wages results in a maritime lien, whether seamen's wages may or may not be included within the terms "repairs" or "supplies."]

[3. A maritime lien is not lost by suing out an attachment in a state court, and causing the same to be levied on the vessel, where the sheriff does not maintain possession, and the action in the state court is voluntarily discontinued before filing the libel in admiralty.]

[4. A maritime lien is not waived by taking drafts on the owner, where the credit of the vessel was expressly relied on, and libellant offers to surrender the drafts at the trial.]

In equity.

Mr. Mercer, for libellant.

Messrs. Jackson, Lawton and Basinger, for intervenors.

ERSKINE, District Judge. This is a suit in rem, instituted by the Southern Bank of the State of Georgia against the bark Alexander McNeil and all persons intervening, for advances made, in the city of Savannah, to G. W. Leach, master of said bark, to pay off existing encumbrances and liens upon her to enable her to procure supplies; the master alleging that he was without funds, or other available means to procure them; and upon these representations, and at the request of the master, the libellants, on the 27th of March, 1874, advanced to him, on the credit of the bark, as well as of the owner and the master, $3,000; said bark being a foreign vessel, and then lying in the port of Savannah. And that on the 16th of May, 1874, the bark still continuing at said port and receiving cargo, the master represented to the libellant that further advances of money would be actually necessary to enable him to procure supplies for the bark, and to discharge and pay off certain encumbrances and liens, to enable her to get ready and proceed to sea; and in pursuance of such representation and request, and after investigation, the libellants did furnish to the master the further sum of $2,176—making, in the aggregate, $5,176—on the credit of the bark, as well as the owner and master thereof, for the purposes set forth. And that the advances were suitable, and necessary and proper to accomplish the objects for which they were alleged and declared to have been, and that the said sums of money are unpaid.

Petition was filed by Thompson and Walter, libellants, and proceedings were had therein; and the bark was sold by order of this court, and the proceeds—$10,500 less the marshal's costs—brought into the registry, on the 10th of August. After this libel was filed, but before the sale of the bark, F. Schuchardt and Sons, of New York, filed in this court their claim, intervening for their own interest, to the libel of the Southern Bank of the State of Georgia against the bark Alexander McNeil, alleging that Kate Jaquenot, of the city of New York, then owner of the bark, did, on the 16th of April, 1870, at said city, being then indebted to intervenors $30,000 for money lent and advanced by them to her, on the bark, her tackle, etc., and to secure them made a mortgage of said bark to them, with power, in case the mortgage money or any part of it, should remain unpaid after one year from the said date, to take possession of and sell the bark, at public auction, without any proceedings in court, or otherwise, said Kate covenanting to make bill of sale to perfect title, and which mortgage was duly recorded on the 16th of April, 1870, in the office of the collector of customs, at the

port of New York, where the bark was registered; that the Southern Bank of the State of Georgia, the libellant, "does not show any sort of lien on the bark, nor has it in fact any lien;" that a sale of the bark has been ordered in another cause now pending, and they pray that the proceeds of such sale may be adjudged to them exclusive of said bank. The intervenors also insist that the libellants instituted certain proceeding, in a state court, by attachment, against the owner of the bark, and caused her to be levied upon. And although the sheriff did not maintain his possession, nevertheless, the attempt being made, it must be taken as conclusive evidence that the bank either did not consider it had a lien, or abandoned it for what it considered the better remedy.

The evidence of Mr. McMahon, the acting president of the bank, Mr. Graybill, the consignee of the bark, and Leach, the master, shows that the master, accompanied by the consignee on the 27th of March last, called at the office of the bank, the libellant, and told McMahon that he wanted some money. Being asked what sum, he replied, "About $3,000," stating that the bark had been out from home for two years, and during that time the crew had not been paid, and that he wanted the money to pay them and the other necessary expenses of the vessel. McMahon told him to draw his draft either on the charterer or the owner, specifying that it was for "disbursements," and have it endorsed by the consignee; that it must be drawn in that way, as Mr. Graybill's credit was not good. The latter concurred in the statement made by the master, adding that the money was necessary for the vessel. McMahon further testified that the money was lent upon the credit of the vessel. Afterwards, on the 16th of May, $2,176 was advanced upon the master's representations, that this additional sum was necessary for the vessel's expenses, of same character as the first, and, as in the former case, a draft was given for this sum. Graybill, the consignee, was present at the time, and confirmed the statements of the master. The whole amount loaned was $5,176. McMahon also swore that the money was paid to the master himself, and solely on the credit of the vessel; that none of it had been repaid, and that the libellant is ready to surrender the drafts for cancellation and does not look to them for payment; the drafts were indorsed by Graybill, the consignee; one was transmitted, and returned protested. Further, that the master told him he had no other means of getting the money, and had been compelled to borrow some from the officers of the bark to get to this port; that he had tried to communicate with the owner, but could get no reply. McMahon also testified that he did not know, until after suit, how the money had been applied; regarded bills of ships as best security, because "we look to the ship." Upon cross-examination by proctor for intervenors, he said the master gave him no statement of the particular amount he expected to pay; did not ask him that question; asked him, generally, what he wanted with the money, and he said for ship's disbursements. The testimony of the consignee corroborated, and was to the same effect as McMahon's. Inter alia, Graybill said that he had previously endeavored to borrow the money himself for the bark from the libellant, but could not effect a loan; that the bank lent the money in good faith and upon the credit of the vessel. Nor is there any real discrepancy between the evidence of McMahon and the master in regard to the manner of obtaining the money, and the representations he made to procure the loans. Answering an interrogatory, he says: "I borrowed $5,176 in currency, from the Southern Bank of the State of Georgia, representing to the bank, at the time I got it, that it was necessary for the vessel's disbursements and to pay the crew off, the wages having accumulated during this long voyage. By 'disbursements,' I mean such outlays as were necessary to enable the ship to get ready and proceed on her voyage from this port." Elsewhere, he says: "The money was advanced upon the faith of the vessel to pay her bills;" and he further states that he made efforts to get the money from the owner, as it was his purpose to pay it before the vessel sailed. The consignee also testified that the bark could not have gone off without paying her bills, for which purpose this money was borrowed from the bank. He further said, that the master had no means of getting money here, save in the way he did; he had none for him, nor could he get him any; that the master had tried to communicate with the owner, who, according to the ship's papers, was a woman, and who, it was said, was in Switzerland.

Before passing to the principal question, I deem it proper to notice the response of the master to a question or two propounded by the proctor for the mortgagees as to what disposition he made of the $5,176. His reply was, that he paid $1,600 to the old crew; $341 to the old crew remaining by the vessel; $75 for shifting berth; $1,492 to his own wages; $300 to Coyne, the stevedore; $40 for storing deck load; $473 for consignees' commissions; $173 for hotel expenses; $62 for expenses to and returning from New York to consult mortgagees; $15 for telegram, attempting to communicate with owner and charterer; $262 for custom house; $14 for harbor fees; $40 carpenter and cooper; $15 telegram to charterer; $90 discharging ballast; $28 for custom house and hospital fees; $74 for telegrams to mortgagees, charterer, and owner; $10 for meat, and $27.48 still due by consignees. Pausing to look over these items, it will be discovered that he applied about $2,500 to pay claims strictly maritime or privileged.

The other demands paid,—stevedore's account, commissions to consignees, his own wages and board, etc.,—were not maritime liens. This morning I have rendered decrees in favor of several libellants, for seamen's wages and expenses of board, pilotage, supplies, etc., amounting in all to over eighteen hundred dollars, to be paid from the proceeds of the bark in the registry. The greater portion of these privileged debts was either due or current when the master received the money from the libellants. If the master had discharged these liens in addition to those of the same rank he did pay, it would have shown a proper expenditure of over $4,300 of the money advanced by the libellants.

Assuming, for the present, as a fact established, that the loan was lawfully made to supply wants of necessities of the vessel, and upon her credit alone, then the presumed hypothecation must be upheld and the maritime lien—which is a kind of proprietary interest in the thing—asserted against the vessel, or, necessarily in this particular case, by reason of her sale, against the fund in the registry. And, as the lender upon hypothecation must not only act throughout in good faith, but must also use reasonable precautions to satisy himself that the hypothecation is necessary, and having done so, if, after the advancement of the money to the master himself, he squanders it, or applies it to purposes for which loans of this description cannot lawfully be made, the rights of the lender are not thereby imperilled or affected; for, in such case, he is not responsible for any abuse or misappropriation of the funds. What I have just said is sustained by Sir William Scott, in the case of The Jane, 1 Dod. 461. "The master," observed that eminent judge, "is a person selected by the owners themselves; they repose trust in him, and hold him out to others as trustworthy." This reasoning is not confined to persons employed in this capacity only, it is common in most situations of life; if a domestic servant employed by his master to purchase necessaries for the use of the house, misapplies goods obtained under that pretence, though the authority is abused, the master is still liable for his acts. The tradesman who supplied the goods is not to be a sufferer, unless it could be shown that there was collusion with the servant for the purpose of defrauding the master. It will be remembered that Mr. McMahon, the agent, and who, as acting president of the bank, the libellant, negotiated the loan or loans with the master, swore positively that he did not know until after suit how the money advanced and in the possession of the master had been applied. Therefore, resting upon the postulate with which this immediate subject began, it would follow that a decision should be for the libellant. The Fortitude [Case No. 4,953]; The Virgin, 8 Pet. [33 U. S.] 538. That sovereign necessity, good faith between man and man, is visible throughout this case, so far, at least, as the agent of the libellant and the consignee are concerned. And as to the master, so far as he acted pending the negotiation, the same commendation would seem to be applicable to him also; but his conduct afterwards, more especially in appropriating to himself for his wages and hotel bills, nearly seventeen hundred dollars, closely approaches the borderland of suspicion, if, indeed, it does not indicate ill faith; for, in his office of master, he must have known that he had no lien upon the vessel for his wages or board. The veracity of McMahon, the truth of the statements and representations of the master, to obtain the money, nor the evidence of the consignee of the bark, independent, or confirmatory of, the other two witnesses, has not been questioned by the intervenors, or by any one else. That McMahon believed the loan created a maritime lien upon the vessel is beyond controversy. But, notwithstanding his belief, still the law requires that a lien or privilege be established by proof: by proof that the loan was necessary for the vessel—necessary, in the sense in which that word is used, to create an implied hypothecation; or the lender must have believed, upon due inquiry and credible representation, the loan to be necessary; and when proof is made of necessity for funds raised, by the master to pay for supplies, and of credit given to the ship, a presumption will arise, conclusive, in the absence of evidence to the contrary, of necessity for credit; or the ordering by the master of repairs or supplies upon the credit of the ship, is sufficient proof of such necessity to support an implied hypothecation in favor of the ordinary lender to meet the wants of the ship, who acts in good faith. See The Grapeshot, 9 Wall. [76 U. S.] 129, 141. It would be but mere pedantry and waste of time to attempt any enquiry into the origin of, and reasons given for, the nice distinctions which may be said to exist between implied hypothecation and hypothecation by bottomry; for it is only with the former kind of maritime liens or privileges I have to deal at present. So I may at once proceed to apply one or more of these clauses or (if not inaccurately speaking) propositions to the proofs before me. And if any one of these clauses or propositions is satisfied, there must be a decree for the libellant; otherwise not.

The testimony in this case is quite voluminous. I have given a pretty full and substantial recital of it in a former part of this opinion. I will now look to it in connection with the present question alone, directing the mind to the more extended statement just referred to. The master stated to McMahon, the consignee (who had seen the bark's papers) being present, and who concurred in the representations and statements of the master, that the bark had been out from home for two years, and that during that time the crew had not been paid, and he wanted about $3,000 to pay them and the other expenses of the vessel. At the time of the second advancement, the

master—the consignee also being there, and confirming his statements—represented that this further sum was necessary for the expenses of the bark, of the same character as the first. He said he had no other means of getting money; had borrowed some from his officers to get the vessel to this port; had tried to communicate with his owners and failed in his efforts. The consignee, in his evidence before the court, testified that he himself had endeavored to borrow money from the libellant for the bark, but had been unsuccessful; that the money was advanced, by the libellant upon the credit of the vessel, and in good faith; that the vessel could not have gone off without paying her bills, and for which purpose this money was borrowed; that the master had no other means of getting money, nor could he himself procure any. The master, in his depositions, said that at the time he borrowed the money he represented that it was necessary for the vessel's disbursements; that by disbursements he meant such outlays as were necessary to enable the bark to get ready and proceed on her voyage from this port, and that the money was advanced upon the faith of the vessel to pay her bills. McMahon, in replying to a question put to him by the intervenors, said that the master gave him no statement of the particular sum he intended to pay; did not ask him that question; asked him generally what he wanted with the money, and he said, for ship's disbursements.

Argument or illustration is unnecessary, in applying the legal principles announced as governing the present question to the proofs adduced, to satisfy the common or legal mind that if there be a doubt (and I do not, after a careful perusal of the entire testimony, think there can be) that the evidence does not directly and conclusively prove there was a necessity for the money to provide for the maritime wants of the vessel, there can be none that it has been clearly established that McMahon, the agent for the libellant, believed upon due inquiry and credible representations the loan to be necessary. At each interview between McMahon and the master, Graybill, the consignee of the vessel, was present; heard all that passed; was acquainted with the wants of the vessel, and knew the contents of her papers; had previously endeavored to effect a loan for her from the libellant; and reasserted and corroborated the master's statements and representations. Had the consignee himself, under the facts and circumstances developed in this case, advanced the money on the credit of the vessel, he could, I apprehend, have lawfully accepted an implied hypothecation or a bottomry bond upon the bark. In The Hero, 2 Dod. 139, it was ruled that a consignee who had given credit for disbursements for the vessel, and who, finding that the disbursements amounted to more than he expected, could take a bottomry bond upon the vessel. See The Oriental, 3 W. Rob. Adm. 243, 2 Eng. Law & Eq. 546. Writers on maritime law generally speak of hypothecation in connection with repairs and supplies only. These are terms of large import; and, if taken in their strict literal and physical sense, it is probable that neither the word "repairs" nor "supplies" can be said to include "seaman's wages." Potentially, one or both may. But the subject is not worth a philological pursuit. As money may be advanced upon the credit of a vessel to make repairs, purchase supplies or pay pilotage, why cannot she be pledged for money loaned to pay seaman's wages? Are seamen not as essential to the vessel as cables, anchors, provisions or pilots? Moreover, their lien for wages is the foremost privilege, and adheres to the last plank of the ship.

As to the question discussed concerning the attachment, on the 20th June last the bank (the libellant) sued out an attachment under the state Code against Kate Jaquenot, alleging that she owed the bank $5,176 and interest, and that she "resides out of the state." The writ commanded the sheriff "to attach and seize the property of Kate Jaquenot;" and on the 23d of June the bark was levied upon as her property; but the sheriff did not maintain his possession, and on the 11th of July the whole proceedings were voluntarily dismissed. This took place prior to the filing of the libel here. And the question is, whether the bank, by thus levying, waived its privilege upon the vessel. The proofs disclose the fact that when the master got the money from the bank he drew two bills or drafts for "disbursements." These were endorsed by Graybill, the consignee. One went forward and was returned protested, the other remained with the bank. The amount claimed as an account in the attachment is the same that the drafts call for. McMahon, in his evidence, said that the libellant did not look to the drafts for payment, and offered to surrender them. The general rule is that the drawing of a bill or draft or the giving of a promissory note does not amount to a waiver of the maritime lien or privilege and will be enforced against the vessel if the bill or note is surrendered at the trial. The Nester [Case No. 10,126]; Sutton v. The Albatross [Id. 13,645]; The Active [Id. 34.] See, also, The Guy, 9 Wall. [76 U. S.] 758. And whether there is a waiver is a fact for the court to settle on all the evidence. In the case of The Chusan [Case No. 2,717], it was held that such a bill or note, except in Massachusetts, was not prima facie a waiver of the lien upon the vessel, unless proved to have been so intended from all facts. And see The Emily Souder, 17 Wall. [84 U. S.] 666. There is not any evidence before me, which tends, even in the remotest degree, to indicate a waiver. Indeed, on the contrary, the testimony is directly the opposite. The attachment alleged the debt to be due on account; but had the matter come to a trial the two drafts would, necessarily, have been the evidence to establish the account. But should it be said

that it might have been a debt other than that represented by the drafts; if so, then it had no reference to the libellant's transactions with the bank. Pursuing this question any further would be quite unnecessary. See The Kalorama, 10 Wall. [77 U. S.] 204, where the court says: "Suggestion is also made that the lien was waived by the commencement of an action for the advances in the state court, but the record shows that the action is still pending, and it is well settled law that the pending of such an action is no bar to a suit in a federal court." See, also, Leon v. Galeeron, 11 Wall. [78 U. S.] 185, and Code, § 3203, and 46 Ga. 592.

There must be a decree for the libellants for $5,176, with interest thereon from the time of the filing of the libel to be paid to the libellant by the clerk out of the proceeds of the sale of the bark in the registry. The clerk will also tax the cost for the libellant. The mortgage upon the bark for $30,000, held by F. Schuchardt and Sons, who, as often observed, intervened here and claimed the proceeds in the registry, was denied to be valid by Mr. Mercer, for the Southern Bank of the State of Georgia, and by Mr. Guerard for other libellants; while Jackson, Lawton and Basinger, for intervenors, insisted that it was valid and subsisting mortgage. I have given the question careful consideration, and I am of the opinion that the instrument is a good and valid mortgage, and entitled to the surplus remaining in the registry, after the payment of all the costs arising out of the subject-matter of the several libels filed, and after all claims superior in dignity to the mortgage, shall have been paid and discharged.

SOUTHERN BELLE, The (CULBERTSON v.). See Case No. 3,462.

SOUTHERN EXPRESS CO. (BLAND v.). See Case No. 1,526.

SOUTHERN EXPRESS CO. (CALDWELL v.). See Case No. 2,303.

SOUTHERN EXPRESS CO. (ST. JOHN v.). See Case No. 12,228.

Case No. 13,187

The SOUTHERN HOME.

[16 Blatchf. 447;[1] 8 Reporter, 389.]

Circuit Court, S. D. New York. June 30, 1879.

COLLISION—INEVITABLE ACCIDENT—LOOKOUT—DISABLED CREW

1. A vessel bound to keep out of the way of another vessel, and having no lookout, was, in this case, held to be not in fault for a collision between the two vessels, because the case was one of inevitable accident.

2. The yellow fever having disabled most of her crew, which was adequate, it was proper for her to pursue her voyage, without putting back or seeking an intermediate port or anchoring, her precautions, with the remaining crew, being reasonable.

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

This was an appeal from a decree of the district court, dismissing the libel, in a suit in rem, in admiralty. This court found the following facts: "About four o'clock in the morning of the 22d of September, 1875, a collision occurred between the German bark Bremen, owned by the libellants, and the British schooner Southern Home, three or four miles to the eastward of the light ship, off Sandy Hook. The Bremen was bound on a voyage from Bremen to New York, and the Southern Home from San Domingo to New York. The wind was somewhat west of north, and both vessels were beating in to New York, the Bremen being on her starboard and the Southern Home on her port tack. Both vessels were steering by the wind, and close hauled. The weather was fine, and the moon shining brightly. The sea was tolerably smooth, and the wind steady, at a five or six knot breeze. Both vessels had their regulation lights set and burning brightly. The Bremen was well manned and found, and her lookout, who was on duty, discovered the green light of the Southern Home off his port bow, when the vessels were a long distance apart. He promptly reported it, and the Bremen was kept steadily on her course. There was no fault whatever in her navigation. She had taken a pilot on board about noon of the previous day, to bring her into New York, and he was, at the time, in charge. The Southern Home left San Domingo on the 31st of August. She was staunch, strong and well equipped. Her crew consisted of eight men, all told, to wit, the captain, first and second mates, three able seamen, one ordinary seaman, and a steward. This was sufficient. The steward was not well when the vessel sailed and off duty, but he kept around until about half an hour after they got over the bar, when he went to his bunk. When the vessel was well outside and had everything set, the captain left the wheel and went below, to see him. He appeared to have a fever, but the captain did not then know it was yellow fever. It afterwards proved to be such, and the steward died the seventeenth day out. The ordinary seaman was taken down the evening after the vessel sailed, and the captain the day after. On the fourth day out, two of the able seamen were taken, and, on the 13th of September, the mate. The last seaman was attacked the day after the steward died. The disease was yellow fever. The second mate was then the only well man on board, and he navigated the vessel alone and in safety until the night of the collision. No attempt was made to put into any port on the way, or to go back to San Domingo. No vessel was signalled on the voyage, within signalling distance, and no signal of distress had been displayed. On the night of the collision, the second mate was alone on deck until about three o'clock in the morning. All sails were set, except

the outer jib, and the foresail had a reef in it. The second mate set the gaff topsail alone two days before. The foresail was reefed before the mate was taken sick. With the exception of the gaff topsail, all the other sails had been set a long time. About three o'clock in the morning of the 22d, the second mate, who had been thirty hours continuously on deck, navigating the vessel alone, went below and called one of the seamen, who appeared to be better than the others, to come up and steer, while he went into the cabin to get a little sleep. The man had strength enough to keep the vessel steady on her course, with the weather as it was, but could do but little more. He was instructed to call the second mate at daybreak, or before, if he saw anything, and to keep the course she was then on, steering by the wind. The second mate then went into the cabin, and lay down on the floor to sleep, about twelve feet from the man at the wheel. It was too cold to lie down with safety on the deck. The captain was in his berth in the cabin, at the time, unable to sleep on account of his anxiety about the vessel. After the second mate had been asleep about half an hour, he was awakened by a faint call from the man at the wheel, and went immediately on deck. When he got there, the man at the wheel called his attention to a vessel near by, pointing with his finger. He was too weak to speak so as to be understood. The mate went to the leeward, and saw a vessel and her red light a few lengths away, and immediately ordered the wheel to port, and ran to help put it over, as the man was too weak to do it alone. As soon as the wheel was over, he ran and let go the main sheet, but, notwithstanding this, the collision occurred. All was done that could be to avoid the accident, after the second mate came on deck, and no fault was committed. The captain heard the call to the second mate from the man at the wheel, and crawled on his hands and knees to the deck, but was too weak to sit up or render any assistance. All the men were on deck who were able to be there. The Southern Home was kept steadily on her course until the second mate came on deck. A collision was then unavoidable. The second mate heard a hail from the Bremen after he got on deck. About an hour before the collision, the vessel had reached good anchorage ground on the New Jersey coast, but, if the anchor had been let go, it could not have been raised, in case of necessity, for want of a sufficient crew. When the second mate went below there were no vessels in sight, and there was, apparently, nothing to prevent an early completion of the voyage in safety. The Southern Home struck the Bremen almost head on, at the mizzen rigging, doing much damage. After the collision, a tug was procured, and the Southern Home towed to the quarantine. All on board, except the captain, second mate and one seaman were taken to the hospital. The captain remained on board. The three seamen were discharged cured, September 30th; and the mate, October 4th. One of the men went back again October 13th, and was again discharged October 22d."

William Allen Butler, for libellants.
Robert D. Benedict, for claimant.

WAITE, Circuit Justice. There is here no dispute as to facts. The simple question is, whether, upon the facts as they are substantially conceded to be, a case of inevitable accident has, in law, been made out. As between the two approaching vessels, it was the duty of the Southern Home to keep out of the way, and the collision was, no doubt, due solely to the fact that she had no lookout. The burden of excusing this fault is on her.

It is said, by the supreme court, in the case of The Grace Girdler, 7 Wall. [74 U. S.] 196, 203, that "inevitable accident is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable, under the circumstances." The Southern Home was pursuing a lawful avocation. She sailed from a sickly port, bound for a more healthy one, having on board what appeared to be a sufficient crew. While the steward was complaining, there was nothing in his case to indicate special danger. A vessel once out of port, with a full complement of men, is not always required to put back if sickness afterwards appears. Neither must she, under all circumstances, seek an intermediate port for relief. All such matters are left to the considerate judgment of those in command at the time, and, if they act with reasonable prudence, in reference to the preservation of life and property, they are not to be charged with fault simply because an accident afterwards happens, that might have been avoided if another course had been pursued. In this case, the vessel was bound for a northern port, where there was every reason to believe the disease with which her crew was afflicted could be treated under more favorable circumstances than at the one she had left, or any other she could have entered on her way up. That there was no absolute necessity for putting back when the sickness broke out, is shown by the fact, that the vessel was safely navigated with her disabled crew until she had almost reached her port of destination, and that only one of her crew died on the way. All those who reached New York recovered soon after their arrival. It is not reasonable to suppose that more could have been accomplished in the way of saving life, if anything else had been done. An attempt to enter another port would have exposed the vessel to dangers similar to those she encountered while approaching New

York. A collision with the Bremen would have been avoided, but another might have occurred. To my mind it is clear, that, under the circumstances, it was not a fault to continue the voyage without putting back or turning aside for relief.

The whole case, as it seems to me, depends upon what occurred at or immediately before the collision. The vessel was then nearing her port of destination. The weather was fine, the sea smooth, and the wind such as to make it easy to navigate her. This is shown by the conceded fact, that the sick man at the wheel, too weak to speak aloud and scarcely able to sit up, could keep her steady on her course. All sails were set, but they were no more than could easily be carried. All she actually needed, more than she had, was a lookout. Had there been one at his post, it is almost certain there would have been no collision. If she had anchored or hove to in that unusual place, a lookout would have been as necessary as if she had been sailing. In short, so long as she could be steered, it was nearly or quite as safe for her to go on without her lookout, as it would have been to lie still. If she had come to anchor, there was no crew to raise it, should that become necessary. But, in all cases like this, some attention must be paid to the natural instincts of mankind. The second mate, almost exhausted by his days and weeks of watching and anxiety, was where he saw relief nearly at hand. It would be inhuman to charge him with fault in keeping on instead of anchoring or heaving to, in the midst of the circumstances which then surrounded him. There was no other vessel in sight when he went below, and he left strict orders to be called if anything appeared. He was prompt to answer the call as soon as it came, and, in seeking his expected hour or two of sleep, he was but preparing himself for the more active work which would probably be required of him when he got nearer the entrance of the harbor. He displayed no signals of distress, because, until the Bremen appeared, there was no one to see them, and, when she did appear, there was no one to make the display, any more than there was to notice her light when it was near enough to be seen. When the second mate came on deck he did everything that could be done. As soon as he found out why he was called he put the wheel to port and let go the main sheet. It was not seriously contended, on the argument here, that this was wrong, or that anything else could have avoided the collision which was then imminent.

I am entirely satisfied with the correctness of the decree below, and an entry may be prepared dismissing the libel, with costs.

SOUTHERN HOME, The (BRAUER v.). See Case No. 13,187.

SOUTHERN LIFE INS. CO. (KNOTT v.). See Case No. 7,894.

Case No. 13,188.

In re SOUTHERN MINN. R. CO.

[10 N. B. R. (1874) 86.][1]

District Court, D. Minnesota.

BANKRUPTCY—CORPORATIONS—COMMERCIAL PAPER

1. A railway corporation may be adjudged bankrupt for failure to pay its commercial paper within the period prescribed by the act [of 1867 (14 Stat. 517)].

2. An obligation given by an officer of a corporation, signing his own name and affixing his official position as descriptio personæ, may be shown by parol to be the obligation of the corporation.

The petition of Danforth W. Blanchard and Samuel D. Arnold, as partners, was filed, praying that the Southern Minnesota Railroad Company be adjudicated a bankrupt. The corporation made a motion to dismiss the petition on exceptions filed to the petition.

G. E. Cole, for petitioners.

Bigelow, Flandrau & Clark, H. J. Horn, and Gilfillan & Williams, for respondent.

NELSON, District Judge. The company files exceptions to the allegations of the petition, charging acts of bankruptcy, and asks that the proceedings be dismissed. It is alleged that this corporation, being a railroad company, is not amenable to the bankrupt law.

I think the decision of Judge Clifford, in the first circuit, in the case of Sweatt v. Boston, H. & E. R. Co. [Case No. 13,684], fully establishes the character of such companies as commercial corporations, and affirms the jurisdiction of the district courts in bankruptcy over them. The circuit court, in this district, has followed this decision in the case of Winter v. Iowa, M. & N. P. R. Co. [Id. 17,890]. The petition charges as one act of bankruptcy, that this company, being insolvent, did make a sale, gift, or transfer of certain property, rights, privileges, and franchises, with intent to delay, hinder, and defraud the creditors of the corporation. This is certainly, under the bankrupt law, if true, an act of bankruptcy; but it is claimed that the specific act or acts as they appear set forth in detail, do not sustain the sweeping charge preferred.

Briefly, the petition charges that the Southern Minnesota Railroad Company, by act of the legislature of the state of Minnesota, approved March 4, 1864 [Sp. Laws 1864, p. 148], was authorized to create and issue in such manner and on such terms as it might deem expedient, special stock on any part of its railroad or branches, and to make such arrangement as it might deem proper with the holders of any special stock for the appropriation of the net earnings of any portion of the said road which it may construct or otherwise acquire to the payment of dividends on such special stock as may be issued in respect

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thereto; which appropriation, as made by such agreement, shall be effectual to secure to the said and future holders of said stock the application of such net earnings as in the said agreement provided, against any future act of said company or any of its general liabilities, and that the company might make such agreements as it might deem proper with the holders of any such special stock as to the administration of the portion of said railroad and the land grant appertaining thereto, to which the special stock might pertain, or for the separate organization of the stockholders, and enabling them, or directors chosen by them, to exercise all the powers of said company in respect to the portion of the road to which such special stock may pertain, etc.

It is also alleged, that among the valuable rights, properties, and franchises held and owned by the company, it has the right to construct and operate a railroad bridge across the Mississippi river, and to extend its track over the same, so as to connect its road with La Crosse, and with railroads running thence east; that the right to construct this bridge, etc., was conferred by act of congress, February 21, 1868 [15 Stat. 37], and by act of the legislature of Minnesota, March 5, 1868 [Sp. Laws 1868, p. 2], and by act of the legislature of the state of Wisconsin, approved April 8, 1867 [Laws Wis. p. 947]. It is charged that the company, being insolvent, on July 23, 1873, did transfer and assign, with intent to hinder, delay, and defraud creditors. the franchise of constructing and operating this railroad bridge, and did create and issue to certain persons named in the petition, to their use, and that of their survivors and their associates, special stock upon so much of its railroad and appurtenances as should comprise the bridge so authorized to be built and the railroad over the same, and all proper and necessary approaches on each side of the river, with the machinery, rolling stock, fixtures, franchises, appurtenances, and other real or personal property belonging to, or which may hereafter belong to the same, to the amount of one million of dollars, consisting of ten thousand shares of one hundred dollars each; and also that the company did make an agreement with the grantees and special stockholders. conferring upon them all the rights specified in the act of the legislature of the state of Minnesota, of March 4, 1864, in regard to separate organization, etc. It is further charged that this assignment, conveyance, and agreement, were without consideration, and were made wholly for the benefit of the president of the company, and to enable him to hold the franchise, as set forth above, free and clear of all debts or claims against the company.

Now, without examining the pétition further, I think, that conceding the truth of the matters above stated, the corporation has committed an act of bankruptcy. The creation of special stock, and the transfer of the same, with all the privileges granted to the company by the act of March 4, 1864, was a valuable right and property, and conferred the authority to exercise a certain unincumbered franchise which it was not possible for any one but the company to do, except when transferred by it in accordance with the above act of the legislature. The transfer and assignment carried with them all the rights and benefits resulting from a contract which the company had entered into, and to which the trustees of the bondholders, and the receiver in possession of the road, were granted permission, by the United States circuit court of this district, to become parties, so far as to bind the interests represented by them under certain mortgages issued upon the road; which contract makes any final decree for a foreclosure subject thereto. The effect of the agreement was to exempt this property by the express terms of the act from the general liabilities of the company, and place it to that extent beyond the reach of creditors. While it may be conceded that the naked franchise to build a railroad or a railroad bridge cannot be reached by an execution issued upon a judgment obtained in an action at law, it by no means follows that where the right to transfer such franchise has been granted by the legislature, it is impossible for a court to compel their subjection to the just demands of creditors, when an appeal is made to its equitable powers. But inasmuch as the corporation is subject to all the provisions of the bankrupt act, it is certainly possible for the district court, or the register, to make a transfer of all of its property, including its franchises, and administer its assets in the same manner as is provided in respect to natural persons.

In regard to the point urged that it does not appear that the petitioners are creditors of the corporation, for the reason that they aver that their demand is on a certain promissory note, which upon its face is not the note of the corporation, but of one Benjamin G. Lennox, although he signs himself as secretary and acting treasurer of the Southern Minnesota Railroad Company, I think it will be found that the rule is settled by the supreme court of the United States, in several well-considered cases, that parol evidence is admissible to show that a note executed by an officer of a corporation was intended as the promise of the corporation, and that he acted within the sphere of his duty,—[Mechanics' Bank of Alexandria v. Bank of Columbia] 5 Wheat. [18 U. S.] 326; [Baldwin v. Bank of Newbury] 1 Wall. [68 U. S.] 241, and cases cited,—and that in such cases a suit may be maintained in the name of or against the corporation, as the case may be. The exceptions are therefore overruled and the motion to dismiss denied.

SOUTHERN MINN. R. CO. (RUGGLES v.).
See Case No. 12,121.

Case No. 13,188a.

SOUTHERN PAC. R. CO. v. ORTON.

[See 32 Fed. 457.]

SOUTHERN PULLMAN PALACE CAR CO. (BLUM v.). See Case No. 1,574.

SOUTHFIELD (BULL v.). See Case No. 2,-120.

Case No. 13,189.

SOUTH FORK CANAL CO. v. GORDON.

[2 Abb. U. S. 479;[1] 8 Am. Law Reg. (N. S.) 279.]

Circuit Court, D. California. Oct., 1868.

APPEAL—REVERSAL OF JUDGMENT—RIGHTS OF PURCHASER.

1. The mandate of the supreme court, upon a writ of error or appeal, must be promptly and implicitly enforced by the court below, except so far as the enforcement may be modified or restrained by events occurring subsequent to the period covered by the record in the supreme court.

[Cited in The Sabine, 50 Fed. 217.]

2. Such events may often modify the manner of enforcing the mandate.

[Cited in The Sabine, 50 Fed. 217.]

3. If, pending a writ of error or appeal, no stay of proceedings having been obtained, proceedings are taken to enforce the judgment, and property of the defendant is sold under them, the purchaser acquires a good title.

[Cited, but not followed, in Robinson v. Alabama & G. Manuf'g Co., 67 Fed. 193.]

4. This rule is not a measure of protection afforded to strangers bidding at judicial sales only, but extends to the parties or their privies. It rests upon the principle that a judgment of a court having jurisdiction is, however erroneous, efficacious until reversed.

5. The rule governing the restoration, after reversal, is this: that the party unsuccessful in the court below is to be restored by reversal to all things which he lost by the erroneous judgment or decree, if the title to them has not passed by the previous enforcement of the judgment or decree; and if it has, he is, in such case, to have a right of action for a money equivalent.

[Cited in Hays v. Griffith, 85 Ky. 381, 3 S. W. 431, and 11 S. W. 306; Kessel v. Zeiser, 102 N. Y. 119, 6 N. E. 574; Smith v. Zent, 83 Ind. 87; Thompson v. Reasoner, 122 Ind. 457, 24 N. E. 223.]

6. In an action in the circuit court, brought to foreclose a lien upon a canal for labor and materials furnished in constructing it, the court, having jurisdiction of the parties and the subject matter, passed upon the amount of the indebtedness of the South Fork Canal Company to the complainant; upon the existence of the lien asserted, and its extent, and adjudged that the lien extended to the entire flume and canal; and it decreed the sale of the property in case payment of the complainant's demand was not made by a day designated. The payment was not made, and the sale took place, the master following, in all particulars, the direction of the decree. His report of his proceedings was not excepted to, and was confirmed. The complainant was mentioned in the decree as a possible bidder, and provision made for crediting his bid on the amount adjudged due to him. The master reported that H., the assignee of the complainant, became the purchaser, and when the report was confirmed, the master was directed to execute to him a deed of the property. *Held*, that the purchaser acquired a title to the premises which could not be divested by a reversal, in the supreme court, of the judgment; although such reversal proceeded upon the ground that the lien established by the complainant extended to a portion of the canal only, and that the judgment was erroneous in directing the whole to be sold.

Motion for entry of a decree to carry into effect the mandate of the supreme court upon an appeal.

This suit was in the nature of a bill in equity by George Gordon against the South Fork Canal Company, and others, to enforce a lien, claimed under the statutes of California, for labor and materials furnished by the complainant in the construction of that portion of the company's canal which extended from section seventeen to section twenty-five inclusive; a distance of about nine miles. On March 16, 1853, the complainant and one Kinyon contracted with the South Fork Canal Company, for the construction of the canal proposed by the company. By the agreement the work was to be completed by July 1, 1853; and it was promptly commenced by the contractors. The contract called for monthly estimates and payments. The first installment was paid by the company but they were unable to pay those which afterwards accrued. By this failure the contractors were rendered unable to pay hands, and were compelled to abandon the work. They thereupon filed a notice, pursuant to a statute of the state of California, claiming a lien upon the canal for the sum of one hundred and six thousand four hundred and eighteen dollars, then due for their labor and materials; and afterwards filed a similar notice claiming a further lien. To enforce this lien, the present suit was brought, Kinyon having released his right. The defendants demurred to the bill, as originally filed; and the demurrer was sustained, for want of proper averments to give jurisdiction. The bill being amended in that respect, a plea was interposed contesting the validity of the lien claimed by the complainant; and this issue, having been argued before McAllister, Circuit Judge, was determined in favor of the complainant. His opinion is reported, Gordon v. South Fork Canal Co. [Case No. 5,621].

The cause was afterwards brought to hearing upon pleadings and proofs, when an interlocutory decree was rendered at October term, 1864, by which it was adjudged that the demand of the complainant for the work performed and materials furnished in the construction of the canal of the defendants, from section seventeen of the canal to section twenty-five inclusive, under the contract of March 16, 1853, was, to the extent of reasonable value, a lien upon the portion of the canal constructed paramount to all other liens set forth in the pleadings; and it was referred

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

to a master to take and state an account of the value of such work and materials, and to ascertain the amount paid to the complainant, and report the same to the court. The master was also directed to compute the amount of interest due on the estimated value of the work and materials, from June 13, 1853, to the date of the computation, at the rate of ten per cent. per annum. In December, 1864, the master made his report; and no exceptions being taken to it by any of the parties, it was confirmed. The master found the value of the work bestowed and the materials furnished in the construction of the canal, from section seventeen to section twenty-five inclusive, to be seventy-six thousand five hundred and ninety-eight dollars and eighty-nine cents, and the amount paid to the complainant upon the contract to be six thousand two hundred dollars, and he computed the interest due on these sums up to November 30, 1862. The master also found the value of what he termed preliminary work and materials, that is, for work done and materials furnished in preparation for the construction of the canal; but the circuit court held, on the motion to confirm this report, that no lien could be claimed for these, but it must be limited to work and materials which actually entered into the thing constructed; and it would therefore be allowed only for the amount of seventy-six thousand five hundred and ninety-eight dollars and eighty-nine cents, with interest, deducting the amount paid, as above stated.

Upon the motion to confirm this report, however, the question was urged upon the court, whether the lien to which the complainant was entitled was restricted to those sections of the canal upon which his labor and materials had been particularly bestowed, or whether it extended to the entire work. The following is so much of the opinion of the court as relates to this question:

FIELD, Circuit Justice (after reciting previous proceedings and determining the amount for which a lien might be decreed). The more important question for determination is whether the lien shall be declared to extend upon the entire line of the canal, and be enforced against the whole, or be declared to exist upon the sections actually constructed under the contract, and be enforced only against that portion.

In the interlocutory decree a lien was only declared to exist upon the sections named. Our attention in considering the case had been especially directed to the question of the existence of any lien, and little had been said by counsel on either side as to the extent of the canal upon which the lien, if declared, would attach. Upon the final hearing our attention has been particularly called to this matter, and from the reading of the statute we are satisfied that we erred in limiting the lien to the particular sections named. The canal is to be regarded as an entire thing—as a building is to be regarded to which additions or repairs are made. The lien is obviously not restricted to the wing added, or the chamber or roof repaired, but extends to the whole structure. The statute of April 12, 1850, provides that "all master-builders, mechanics, lumber merchants, and all other persons performing labor or furnishing materials for the construction or repairs of any building or wharf, shall have a lien, separately or jointly, upon the building or buildings or wharf which they may have constructed or repaired, or for which they may have furnished material of any description, to the extent of the labor done, or materials furnished, or both." Laws 1850, c. 87, § 1.

And the statute of May 17, 1863, declares that the previous act of 1850 "shall be so extended as to include in its provisions bridges, ditches, flumes, or aqueducts constructed to create hydraulic power or for mining purposes; and all master-builders, mechanics, contractors, journeymen, or laborers, and all other persons performing labor or furnishing materials for or employed in the construction or repair of any bridge, ditch, flume, or aqueduct aforesaid, shall have the same lien, subject to the same provisions and regulations as in and by said act is provided for liens upon buildings and wharves." Laws 1853, c. 148, § 1.

As will be perceived, by this last act, the lien is given upon the bridge, ditch, flume, or aqueduct,—that is, upon the whole of each work, not upon a part of either,—where labor is performed or materials are furnished for or employed in their construction or repair. It is not essential to create the lien that the labor or materials should cover the entire work; the lien goes upon the whole for the construction or the repair of any portion.

The statute leaves no room for doubt on the question presented, but determines it in favor of the complainant.

And there is nothing in the adjudication of the interlocutory degree, which prevents the extension of the lien on the final hearing. A court of equity can, at such hearing, or at any time before, enlarge or restrict or otherwise modify the provisions of its interlocutory orders or decrees, either upon the petition of the parties, or upon its own further consideration of the law and the evidence. The whole case is under its control until the final decree is rendered. Calk v. Stribling, 1 Bibb, 123; Cook v. Bay, 4 How. (Miss.) 485.

A decree will be entered extending the lien, and directing a sale of the entire canal, and the application of the proceeds to the payment of the demand of the complainant, as stated in this opinion.

From the decree entered in conformity to this opinion the defendants appealed to the supreme court. A bond for costs on appeal was executed; but no supersedeas was obtained or asked. Proceedings under it were

therefore prosecuted; a sale was made, and a report thereof confirmed.

The appeal being brought to a hearing in the supreme court, that court, while holding the decree below correct in other respects, adjudged it erroneous in extending the lien of the complainant to the entire canal; holding that such lien must be restricted to the particular sections constructed by the complainant. It therefore reversed the decree appealed from, and remanded the cause to this court, with directions to enter a decree in conformity with its opinion. The decision is reported, 6 Wall. [73 U. S.] 561. Justices Field, Grier, and Miller, dissented.

The defendants now apply for the entry of a decree pursuant to this decision.

FIELD, Circuit Justice, after stating the proceedings in the cause, proceeded as follows: The defendants have filed the mandate, and now ask not only obedience to its commands, but also that the sale made under the decree reversed be set aside, and the property sold be restored to them. The purchaser at the master's sale and his vendee appear in opposition to the latter application.

Obedience to the mandate of the supreme court will always be rendered by this court. It will be a prompt and implicit obedience; but we trust it will be, as it should be, an intelligent, not a blind obedience. The judgments of that tribunal are founded upon the records before it, and those judgments will be unhesitatingly enforced, except as their enforcement may be modified or restrained by events occurring subsequent to the period covered by the records. That such events may modify, and often do modify the mode and manner of enforcement, is well known to all members of the profession. The death of the parties, partial satisfaction, changes of interest subsequent to judgment, and sales upon the judgment pending the appeal, are instances where this result is frequently produced.

The decree which this court will enter under the mandate of the supreme court will, like the previous decree, adjudge, as the amount due, the sum reported by the master, with interest; but it will declare that it is a lien only upon that portion of the canal which is embraced between sections 17 and 25 inclusive, which were constructed by the complainant. Whether it will go further, and order the enforcement of such lien by directing a sale of the particular sections, will depend upon the effect of the reversal of the decree upon the previous sale; and this brings us to the second part of the defendant's motion.

There is some contradiction in the adjudged cases as to the effect of a reversal of a judgment or decree upon rights acquired under it. This contradiction has arisen principally, if not entirely, from not distinguishing between the effect of the reversal upon the rights of the parties with respect to the subject matter in controversy, and its effect upon rights acquired on proceedings taken for its enforcement; and yet the difference in the operation of the reversal in the two cases is obvious, and need only be stated to be recognized.

For instance, it is adjudged that the defendant is indebted to the plaintiff in a certain sum of money, and that the plaintiff recover the same. Here the operation of the judgment is to determine the fact of indebtedness, as well as to authorize the use of the means provided by law for its collection. The reversal of the judgment changes the entire relation of the parties; it recalls the affirmation of indebtedness, and denies its existence. If such supposed indebtedness has been collected whilst the judgment remained in force, the reversal necessarily requires that restitution should be made.

On the other hand, if whilst the judgment remains unreversed proceedings are taken for its enforcement, and property of the defendant is sold under them, the purchaser acquires a good title. The judgment being valid, and its enforcement not being stayed, all persons relying upon it are protected; for it is a general principle that a judgment rendered by a court having jurisdiction of the parties and subject matter, however erroneous, is, until reversed, as efficacious for all purposes as though approved by the highest tribunal of the land. To the errors which the court may have committed in its rendition, persons trusting to its protection need pay no attention. Were it not so, the judgment would be of no avail to the successful party until it has been approved by the highest appellate tribunal, or until the time to appeal has expired. The doctrine in this respect is well expressed in Gray v. Brignardello, 1 Wall. [68 U. S.] 627. In that case it appeared that certain real property had been ordered sold by one of the district courts of California, in a suit brought to settle an alleged copartnership between certain parties, one of whom had died intestate. The court adjudged that a copartnership had existed between the parties named, and that the real property in question belonged to such copartnership, and directed its sale. The property was accordingly sold. Subsequently, the supreme court of the state reversed the decree, holding that the alleged copartnership was not established by the proofs. The heirs of the deceased party then brought ejectment in the circuit court of the United States, for parcels of the property sold. In that court and in the supreme court, where the case was subsequently carried, it was contended by their counsel that the decree authorizing the sale having been reversed, the sale fell with it; but the court in reply, said: "It is a well settled principle of law, that the decree or judgment of a court which has jurisdiction of the person and subject matter, is binding until reversed, and cannot be collaterally attacked. The court may have mistaken the law or misjudged the facts, but its adjudication, when made, concludes all the world until set aside by the proper appellate tribunal. And, although the judgment or decree may be re-

versed, yet all rights acquired at a judicial sale while a decree or judgment was in full force, and which it authorized, will be protected. It is sufficient for the buyer to know that the court had jurisdiction, and exercised it, and that the order on the faith of which he purchased was made, and authorized the sale. With the errors of the court he has no concern."

But whilst this doctrine is admitted to be in general correct, it was contended on the argument that it applies only to strangers to the judgment or decree, and does not extend to parties or their privies. And expressions were cited from various opinions of different judges, to the effect that by the reversal the defendant or unsuccessful party in the court below is to be restored to all things which he lost by the erroneous judgment or decree, and that protection is afforded to strangers at judicial sales in order to encourage bidding. Expressions of this kind may be very just and appropriate in connection with the particular facts of the special cases in which they are used; but they do not express a rule applicable in all cases, or furnish the true reason for the protection extended to purchasers at judicial sales. The principle that the defendant or unsuccessful party in the court below is to be restored to all things which he lost by the erroneous judgment or decree, cannot apply to those things the title of which may be transferred by proceedings taken for the enforcement of the judgment or decree when its enforcement is not stayed pending the appeal. The restoration in specie in such cases being impossible without infraction of the principle by which judgments of courts are upheld and enforced, it follows that the right which the reversal gives must be that of action to recover an equivalent for the lost thing. And perhaps the rule may be stated thus: That the defendant or unsuccessful party in the court below is to be restored, by reversal, to all things which he lost by the erroneous judgment or decree, if the title to them has not passed by the previous enforcement of the judgment or decree; and in such case he is to have a right of action for a money equivalent. The rule, as thus stated, would leave the parties to take advantage of the proceedings for the enforcement equally with third persons. There is no reason why they should not have the same protection extended to them as to strangers. The judgment or decree is equally binding upon all, and should be equally efficacious for protection. When the judgment or decree directs a sale of property of the defendant, it may be regarded as a power of attorney to the officer charged with its execution created by the law, and, like any other power, sufficient to give validity to the acts of the officer until the power is revoked by the reversal. There is no prohibition in the law, or objection in the reason of the thing, against a party taking advantage of the proceedings had for the enforcement of the judgment which he has recovered. Strangers are protected, not because a contrary rule would discourage bidding, but because they have a right to rely upon the validity of the judgment, and invoke its protection for all acts done under it whilst it is in force, and for the rights they have acquired thereby. That the rule also has the effect of encouraging bidders at the sale is evidence of its wisdom, but is not the reason of its establishment. In Parker v. Anderson, 5 T. B. Mon. 455, real property belonging to one Parker had been sold under a decree of a court of equity which was subsequently reversed. At the sale one Anderson became the purchaser; and after reversal, in a suit brought by the heirs of Parker against the heirs of Anderson, the court below refused to compel a surrender of the title of the property. The court of appeals of Kentucky, where the case was taken, held the ruling correct.

"The decree," said that court, "under which both the legal and equitable title was derived, it is true has since been reversed by the decision of this court; but neither from analogy to legal proceedings, nor the principles and usages of equity, can the reversal of the decree under which the lot was sold and the title conveyed authorize a court of chancery to decree a reconveyance of the title so obtained. The doctrine is well settled at law, that an estate sold under a writ of fieri facias will be retained by the purchaser, though the judgment upon which the execution issued may be afterwards reversed; and the rule is the same in equity, where land is sold under the decree of a court of equity, and the decree is afterwards reversed. After the reversal of a judgment at law, or the decree of a court of equity, the person prejudiced by the decree is entitled to the proceeds of the estate sold, either under execution upon the judgment, or in obedience to the judgment, or in obedience to the decree; and it would, no doubt, be competent for a court of law or equity to compel restitution of the money for which the estate sold. But both law and equity guard, with great circumspection, the interest derived by purchasers under the processes of courts of law, or the decrees of courts of equity; and unless there be unfairness in the transaction, the title which the purchaser acquires, either by the sale of an officer acting under a fieri facias at law, or the sale of a commissioner acting under the decree of a court of equity, will never, upon the reversal of a judgment or decree, be disturbed.

"The rule was, in argument, admitted to be, in the general, correct; but it was attempted to limit its application to purchasers who are neither parties nor privies to the judgment or decree under which the sale is made. The reason for such a limitation of the principle is not, however, perceived by us, and we have met with no adjudged case, either at law or equity, wherein any

such exception to the rule has been made. The parties to a judgment or decree are, equally with all others, at liberty to bid and purchase property exposed for sale under the authority of a judgment or decree, and there is the same reason for protecting the same interest acquired by a party under a purchase as that of a stranger."

With the views thus forcibly expressed we fully concur.

The only case which at all conflicts with it to which we have been referred, is that of Reynolds v. Harris, decided by the supreme court of this state (14 Cal. 667). The circumstances of that case are peculiar. Separate parcels of real property, consisting of mining canals and ditches, had been mortgaged by different parties to secure the same indebtedness. The decree of forclosure directed the sale of the property upon terms variant from those prescribed by the statute, and in such a manner as to defeat the right allowed by the law of the state of some of the mortgagors to redeem the separate parcels mortgaged by them.

At the sale, the mortgagee and complainant in the foreclosure purchased the entire property—two of the parcels mortgaged being struck off together upon one bid—and received the officer's certificate of the sale—a certificate which would entitle him to a deed at the end of six months, if no redemption were made in the mean time; but which redemption, from the manner of sale, was impossible with reference to one of the parcels. The amount to be paid to redeem the separate parcels could not be ascertained, as they were sold together. The certificate of sale and the decree were subsequently assigned to Harris. Afterwards the decree was reversed so far as it directed the sale, and on petition of defendants the sale was set aside, and the credit allowed for the amount bid vacated.

It will be thus seen that the sale was not perfected when the proceedings were set aside, and upon this fact, together with the departure in the sale from the directions of the statute, the action of the court may be sustained. But there is much in the opinion which we think requires qualification, and which, without qualification, we are satisfied, from the extended examination we have given to the authorities, is unsupported by any well considered adjudication. We find no case which draws the distinction there taken between parties and strangers, and makes the upholding of a judicial sale, after reversal of the judgment or decree under which it was made, depend upon the character of the purchaser.

If now we test the question presented by the application before us, we shall find it one of easy solution. This court, in rendering its decree of September, 1865, had jurisdiction of the parties and of the subject matter. It passed upon the amount of indebtedness of the South Fork Canal Company to the complainant, upon the existence of the lien asserted, and its extent. It adjudged that the lien extended to the entire flume and canal, and it decreed the sale of the property in case payment of the complainant's demand was not made by a day designated. The payment was not made, and the sale took place, the master following in all particulars the direction of the decree. His report of his proceedings was not excepted to, and was confirmed. The complainant was mentioned in the decree as a possible bidder, and provision made for crediting his bid on the amount adjudged due to him. The master reported that the assignee of the complainant, Hosmer, became the purchaser, and when the report was confirmed, the master was directed to execute to him a deed of the property. If Hosmer and his grantee cannot, under these circumstances, trust to the title thus acquired, it is difficult to imagine any case of judicial sale which may not be vacated upon a subsequent reversal of the judgment or decree under which it is had. We are clear that the purchaser took a title to the premises which cannot be disturbed. That part of the motion, therefore, which asks that the sale be set aside, and the property sold restored to the defendant, is denied; and the decree to be entered on the mandate of the supreme court will contain the provisions already mentioned, without directing the enforcement of the lien upon the sections named.

The defendants are entitled to have the costs incurred by them in the supreme court credited on the amount found by the master as due the complainant.

Counsel of the complainant will prepare a draft of the decree, and present it for settlement, upon notice, to the counsel of the defendants. Decree accordingly.

SOUTH FORK CANAL CO. (GORDON v.). See Case No. 5,621.

SOUTHMAYD (UNITED STATES v.). See Case No. 16,361.

SOUTH PARK COMMISSIONERS (KERR v.). See Case No. 7,733.

Case No. 13,190.

In re SOUTH SIDE R. CO.

[7 Ben. 391;[1] 10 N. B. R. 274.]

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

CONTEMPT—VIOLATION OF INJUNCTION—ATTORNEY.

1. On November 12th, 1873, a petition in bankruptcy was filed against a railroad company. On February 13th, 1874, C., a member of the law firm of H. & C., commenced an action in the supreme court of the state of New York against the company. C. had knowledge of the pendency of the bankruptcy proceedings. H. & C. appeared as attorneys for the plain-

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

tiff in the suit, and having obtained judgment against the company, they, on the 11th of April, 1874, gave notice of an application to the supreme court of the state, returnable on April 20th, for the appointment of a receiver of the property of the company. On April 18th, on motion of the attorney for the petitioning creditors in the bankruptcy proceedings, a temporary injunction was issued by the bankruptcy court, restraining C. and his attorney from proceeding with his application to the supreme court for a receiver, with an order to show cause why the injunction should not be made perpetual. The preliminary injunction was served on both H. and C. on the morning of April 20th. It was served on C. when he was already on his feet before the justice of the supreme court, engaged in making the application. He did not withdraw the application, but stated to the justice that he was enjoined from further proceedings, and handed up to the justice his motion papers, with a draft of an order for the appointment of the receiver, and the justice subsequently made the order appointing the receiver. H. having been served with the preliminary injunction, did nothing himself in the suit of C., and took steps to inform C. of the issuing of the injunction. On the return of the order to show cause before the bankruptcy court, the injunction was, on consent of C., made permanent. An application was then made to this court to punish H. & C. for a violation of the injunction: *Held*, that the excuse presented by H. was sufficient to exonerate him from punishment.

[Cited in Re Cary, 10 Fed. 627.]

2. C. was guilty of contempt in violating the injunction, and a reference must be had to ascertain the amount of the loss and expense caused by it, to enable the court to determine the proper punishment.

BENEDICT, District Judge.

This is a proceeding against Edgar A. Hutchins and Edward S. Clinch, for an alleged contempt in violating an injunction issued out of this court in the matter of the South Side Railroad Company of Long Island, bankrupt, against which company a petition of bankruptcy was filed on the 12th day of November, 1873. The parties proceeded against are attorneys at law, composing the law firm of Hutchins & Clinch, one of whom, Edward S. Clinch, as party plaintiff, on February 13th, 1874, with knowledge of the pendency of the proceedings in bankruptcy above referred to, commenced an action in the supreme court of the state of New York against the South Side Railroad Company, and, having obtained judgment in such action, by notice of motion dated the 11th of April, 1874, and returnable April the 20th, 1874, at 10 a. m. sought to obtain from the supreme court of the state the appointment of a receiver of the property belonging to the bankrupt. On the 18th day of April, and before this application to the supreme court came on to be heard, upon motion of the attorney for the petitioning creditor in the bankruptcy proceedings above mentioned, an injunction was issued out of this court restraining the said Clinch and his attorneys from further proceeding with his application to the supreme court of the state for the appointment of a receiver of the estate of the bankrupt—which injunction, it may here be remarked, was accompanied with an order to show cause why it should not be made perpetual, upon the return of which, by the consent of Clinch, the injunction was made permanent.

The preliminary injunction so issued was served on both Hutchins and Clinch, on the morning of April 20th. On the same day the application for a receiver, expressly forbidden by the preliminary injunction, was made by Clinch, the plaintiff, in person; and, on such application, a receiver of the bankrupt's property was appointed by the supreme court of the state. The injunction of this court having thus been rendered inoperative, proceedings are now taken, by the attorney for petitioning creditors, to punish the said attorneys for their acts in violation of the injunction; and they are, in this proceeding, charged with having been guilty of contempt, in that, with knowledge of the injunction of the court, and in violation of it, they made the application to the state court for the appointment of a receiver of property then in this court, as the property of a bankrupt, since adjudged so to be, and in the procuring such appointment to be made. The attorneys complained of have appeared in this proceeding and answered; and, by consent, testimony has been taken, and the matter thereupon submitted to the court for its determination. The answer of Hutchins to the charge made is, that while, as one of the firm of Hutchins & Clinch, attorneys of record in the action brought by Clinch, he is, in a certain sense, responsible for anything done in the suit brought by Clinch, he should not be subjected to punishment, because it appears that he had no personal charge of the action of Clinch; and that, when notified of the existence of the injunction issued by this court, he took steps at once to inform Clinch of its existence, and, for himself, took no action whatever towards the procuring of the appointment of the receiver. This answer on the part of Hutchins is borne out by the evidence, and can be taken as sufficient to exonerate him from liability to punishment.

On the part of the other member of the firm of Hutchins & Clinch, who was also the party plaintiff in the action brought in the supreme court, the defence interposed is based upon the fact that he was not served with the injunction until he was upon his feet, before the justice of the supreme court, engaged in making the application for a receiver; and, when so informed of the existence of the injunction, he stated to the justice that he was enjoined from further proceeding, and that he took no further action, except to hand up to the justice his motion papers, with a draft order for the appointment of the receiver asked for.

It also appears that Clinch, when served with the injunction, omitted to withdraw his application or to make any application for leave to withdraw it. On the contrary,

with knowledge of the existence of the injunction admitted and stated by him, he submitted his application to the justice for his determination, and the application so made was thereafter granted, and a receiver actually appointed by the court in his cause, in accordance with the application. The facts disclose no defence but make out a clear case of deliberate contempt. It is not easy to see what more Clinch could have done to disobey the order of this court than he did do; and the weight of the evidence is that he coupled his action with a statement, that he intended to disregard the order.

So deliberate a disregard of an order of court, by an attorney at law in his own suit, is properly brought to the attention of the court, and cannot be permitted to pass unpunished. What the extent of the punishment should be cannot well be determined, in the absence of information as to the expense and loss, caused by the act of the attorney now under consideration. I shall therefore go no further at present than to direct that an order be entered, dismissing the proceeding against Hutchins, and adjudging Clinch guilty of the contempt charged; and to direct that a reference to the register, in charge of the bankruptcy case, be had to ascertain and report to this court, the amount of expense and loss occasioned by the violation of the injunction in question. The attorney for the petitioning creditor is hereby directed to attend upon such reference, and to submit upon notice to said Clinch, such evidence as may be obtained in respect to the matters so referred.

Case No. 13,191.

The SOUTHWEST.

The L. P. SMITH.

[2 Flip. 79; 9 Chi. Leg. News, 385; 16 Alb. Law J. 167.] [1]

District Court, N. D. Ohio. Aug., 1877.

COLLISION—TOWING—LIABILITY IN CASE OF COLLISION.

If a vessel employ a tug in general terms to tow in and land her at a particular place, the undertaking of the tug necessarily is that it will use the proper skill and ability to perform the service; and it has the right, and it becomes its duty as well, to direct the vessel that is towed, and to manage the helm, to the end that such vessel may aid in accomplishing the task entered upon, viz., making the landing.

In admiralty.

Willey, Terrell & Sherman, for libellants.

C. L. Fish, for defendant tug.

Grannis & Burton, for defendant schooner.

WELKER, District Judge. This is a libel filed by the owners of the schooner Young America. It states that the schooner Young America was lying at Swain's wharf in the Cuyahoga river, and that the tug L. P. Smith had the schooner Southwest in tow, for the purpose of landing her at said wharf alongside of the Young America, and that in landing the schooner Southwest alongside of the Young America, the latter was injured by the collision.

The question raised in the evidence and on the trial is, whether the schooner Southwest, or the tug, is to be held liable for the injury sustained by the Young America. The libel was filed by the owners of the Young America against both of these vessels, and the controversy arises between the tug and the Southwest as to which was at fault, and occasioned the collision by which the damage resulted.

This tug was employed, as the evidence shows, for the purpose of towing into the Cuyahoga river and landing at the wharf, the Southwest. There is no evidence showing that any special arrangement was made as to how the Southwest should be landed. In every enterprise like this, the towing of a schooner from the lake into the harbor, there must be some one of the parties that will be in command, and held responsible for the proper execution of the duty.

The duty to be performed by the tug was to bring in from the lake the schooner Southwest, and land her at the place designated. It is claimed by counsel for the tug that the Southwest was at fault; that she had, to a great extent, the control of the operations of the tug; and it is claimed by counsel for the Southwest that the tug was in command of the expedition, and that the Southwest was under the orders of the tug, and if the tug gave orders that were improper, or orders that were obeyed by the schooner and injury resulted thereby, it was the fault of the tug.

Experts were called, during the trial of the case, for the purpose of enabling the court to ascertain the rule governing this class of crafts in the performance of such duties, and what seemed exceedingly curious, some stated that the tug was the commander of the expedition, and as many stated that the schooner was the commander of the expedition, and it is therefore very difficult to determine the rule from their testimony.

It is conceded on all hands that both of these vessels could not have been in command, because, if the captain of the schooner had the right to his sail, and the captain of the tug had the right to his sail, they might not have agreed in the mode and manner in which, or when, the vessel was to be landed. Some one must have the right to direct and control. I presume that might be regulated by contract; but I am clearly of the opinion that where there is a general employment by a vessel of a tug to tow her in, and land her at the particular place designated, that the tug necessarily undertakes to bring with it the necessary skill and ability to perform that

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 16 Alb. Law J. 167, contains only a partial report.]

service, and that it has the right, and is its duty to direct the schooner in the management of her helm, so that she may aid in making the landing sought to be accomplished. For it will be borne in mind, that a schooner coming into the mouth of the Cuyahoga river, is an entirely helpless thing, excepting the operation she may perform with her rudder, which more or less controls her movements, and she has no motive power, except that which she receives from the tug. But the question is who had the control and direction of the rudder in making that landing?

It is alleged on behalf of the schooner, that she was ordered at a certain place in the river to starboard her wheel, in order to allow the tug to back alongside and fasten on to her, to more easily accomplish the landing; and it is alleged on behalf of the tug, that immediately after the Southwest had starboarded her wheel, and the tug had got alongside of her, the order was given by the captain of the tug to the Southwest, to port her wheel in order to aid in getting at the proper place to land, and that the order was disobeyed. But it is alleged by the schooner that her wheel was ported as directed. If it were true, and sustained by the evidence—the tug having the right to give the order—that the captain of the schooner did not obey the order to port (and the witnesses all said it was necessary to port the wheel at that situation of affairs in the river) and an injury resulted therefrom, then it would not be the fault of the tug. That is a matter of evidence that must be determined from the witnesses examined on the trial of the case. The testimony was somewhat contradictory on that subject; but applying the rules to the testimony that courts apply in the trial of cases, as to the knowledge of the parties that testified, it strikes me that there can be but little doubt that the captain of the schooner Southwest obeyed the order and did port his wheel. He knows all about it, his wheelsman knows all about it, and another party that was on the vessel, knows whether it was ported or not. It is a fact within their observation and knowledge rather than that of outsiders. It is true, that the captain of the tug testified, that he saw the captain of the schooner go to the wheel, at or nearly at the point of the collision, and put his wheel at port. The captain of the schooner denies that, and says that he went there for the purpose of seeing whether it was all right, and he found it was all right. That would hardly be enough to discredit the express and positive statement of the captain of the Southwest, of the fact that the wheel was put at port immediately after receiving the orders. If the wheel of the schooner was put at port as directed, then what else could she do? She was entirely under the control of the tug in her maneuvers for the purpose of landing. It is conceded by all the parties that if the tug had backed within a certain distance of the wharf, after she had fastened upon the vessel, that she could have been sheered so as to have avoided the collision.

The testimony on behalf of the Southwest is pretty strong to show that the tug did not back at all, and the witnesses on behalf of the tug, who were present and of course knew all that occurred, swore that they commenced to back as soon as they had made fast, and that because the helm was at starboard, and not at port, the tug did not get control of the vessel, so as to avoid the collision. I am inclined to think that the evidence justifies me in saying, that the tug did back, but the difficulty about it is, it did not begin to back soon enough.

There is nothing in which witnesses can be easier mistaken than in time and distances on water. From the locality these vessels were in, there was not much space, and there was not much time to lose, in the backing operation in order to avoid the collision. At exactly what point the tug began to back and what effect it had, is a question about which witnesses might very easily be mistaken and might differ very materially.

It was the duty of the tug to back in time to avoid the collision, and the testimony of all the witnesses in relation to that matter is, that if the tug had commenced to back after the wheel was put at port, within a certain distance of the wharf, the collision could have been avoided. The tug having control of the motive power of the vessel, whether pulling the vessel along at a good speed or at a slow speed, is a matter that the tug must control in order to accomplish the landing at a certain place; and if the tug came up too fast, so that they could not land at the proper place without injury to the vessel, it was the fault of the tug.

In viewing this case in the whole, I am very well satisfied that the schooner did nothing that was faulty in her operations, and that the collision, happening as it did, must necessarily have happened by reason of the fault of the tug; and it seems to me that the outside evidence is very satisfactory to show that the tug did not manage the vessel as she ought to have managed her to avoid the collision.

The decree will therefore be against the tug, releasing the schooner Southwest.

SOUTHWESTERN, The (LESASSIER v.). See Case No. 8,274.

Case No. 13,192.

In re SOUTHWESTERN CAR CO.

[9 Biss. 76;[1] 19 N. B. R. 404.]

District Court, D. Indiana. July, 1879.

CONVICTS—HIRING OUT—CONTRACT—DEDUCTIONS—BANKRUPTCY—PREFERENCE.

1. Under the laws in Indiana, convicts may be hired in any number not exceeding one hundred in any one contract. The bankrupt en-

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

tered into four separate contracts with the state for the employment of one hundred convicts under each contract. The contracts were all executed at the same time but were signed by different sureties: *Held*, that the execution of these contracts was not a violation of the letter or spirit of the statute, and that the contracts were valid and binding.

2. By the terms of the contracts the state was to keep the convicts under good discipline and to keep them at diligent and faithful labor for the bankrupt. This was not done: *Held*, that the loss and damage sustained by reason of the failure of the state to perform these stipulations should be deducted from the contract price in estimating the amount due to the state upon the contracts.

3. A claim of the state upon a contract for the employment of convicts is entitled to preference under section 5101, Rev. St. U. S.

In equity.

James B. Meriwether, for claimant.
Alex. Dowling, for assignee.

By NOBLE C. BUTLER, Register: The state of Indiana, by Andrew J. Howard, warden of the state prison (south), filed its claim and proof of debt against the estate of the bankrupt in the sum of twenty-eight thousand, seven hundred and forty-four dollars and thirty-two cents, and asks that it be allowed and paid as a preferred debt under the terms of the third clause of section 5101, of the Revised Statutes of the United States. Objections to the allowance and payment of this claim and proof of debt, or any part of it, were filed by the assignee and, upon his application, a re-examination thereof, under rule 34 of the supreme court of the United States, was ordered and had. The evidence submitted upon this re-examination is herewith returned into court.

The claim is founded upon contracts between the claimant and the bankrupt for the labor of convicts in the state prison (south) and there are three questions presented for consideration by the evidence, viz.: (1) Were the contracts authorized by the laws of Indiana? (2) Have the stipulations of the contracts been fully performed by the claimant, and, if they have not been fully performed, is the assignee in bankruptcy entitled to a recoupment in any sum on account of such partial performance? (3) Is the claim or any part of it entitled to priority of payment?

These questions are now considered in the order in which they are mentioned.

First. As to the legality of the contracts. The acts of the general assembly of Indiana for the year 1857 provide (page 106): "Sec. 10. The convicts may be levied (or hired) in any number not exceeding one hundred in any one contract, in such manner as the directors, in their judgment, may consider to be most conducive to the interests of the state. All contracts for working convicts shall be given to the highest and best responsible bidder. The directors shall cause such notice to be given by publication of the time and place of letting to hire said convicts as they may deem most beneficial to the state. All contractors shall be required to give security to the state for the faithful performance of their contracts in such amount as the directors, in their judgment, may think proper. In allotting convicts whose labor is thus contracted for, the warden shall do it in such manner as he shall consider will give the convict such knowledge of any mechanical art as will be most conducive to his (their) interests after his (their) discharge." The word "one" is omitted from the phrase "any one contract," in Davis's Revision of the Statutes, and the counsel for the assignee seems to have been misled by the omission. There were four separate contracts in this case, which were executed simultaneously, and, although the principal parties thereto are the same, they are not exact counterparts of each other, for they are not subscribed by the same sureties. None of them is for the labor of more than one hundred convicts. In my opinion the execution of these contracts was not a violation or an evasion of either the letter or spirit of the statute. They do not contravene its express terms unless they are to be regarded as together forming a single contract for the labor of four hundred convicts. If this were true the sureties upon one of these contracts would be liable upon all of them, and this is clearly an untenable proposition. The statute does not prohibit more than one contract between the same parties, but the construction given it by the counsel for the assignee would operate as such a prohibition. There is no good reason why the state's contract with one party should be a bar to a subsequent contract with him, and, if separate contracts can be made with the same party a year, a day, or an hour apart, there is no good reason why they should not be made at the same time. To thus limit the authority of the prison officials would be, moreover, very injurious to the interests of the state. By placing restrictions of this sort upon its functionaries, it would not only exclude the larger industrial interests from competition for its convict labor, but, by lessening the number of competitors, it would diminish its value. On the other hand, it was equally for its benefit that the smaller industrial interests should not be excluded from competition for its convict labor, and, therefore, it enacted this statute which limits a single contract to the labor of not more than one hundred men. Without it, the larger and wealthier interests could have controlled the market, as they do almost everywhere; with it, the smaller interests are admitted to a more fair and even-handed competition with them, and the interests of the state are thereby promoted. The legislature was plainly governed, in the enactment of this statute, more by considerations of state policy than by the motives of philanthropy which are ascribed to them by the counsel for the assignee. In the law itself it is ex-

plicitly declared that the contract shall be made with reference to what "is most conducive to the interests of the state," and what "is most beneficial to the state." This is to be the primary object in making the contract, and the state exhibits its regard for the interests of the convicts, secondarily, by directing that, after the contracts are made, the convicts shall be allotted by the warden "in such manner as he shall consider will give the convict such knowledge of any mechanical art as will be conducive to his interest after his discharge." For the foregoing reasons I find the contracts upon which this claim is founded were made according to the laws of Indiana.

Second. As to the full or partial performance of the contracts. The convicts were inexperienced; they had no previous knowledge of the work they were required to do. They were not let to the bankrupt as practical car-builders or chain-makers, or at the price such men can obtain for their work. The contract was for an inferior sort of labor, at a low rate of wages, and the bankrupt relied upon its ability to furnish the convicts with such instruction as would enable them to earn the price to be paid for their labor.

The value of this labor was further depreciated by another consideration. The laborers were lawless and unruly men who had been imprisoned by the state because the ordinary restraints of society had been insufficient to subdue their turbulent and vicious propensities. They could not be instructed in their work, and their work could not be had, without the continuous and vigilant presence and frequent application of physical force.

These were the necessary conditions of the labor that was furnished by the state and they operated to lessen its worth under the most favorable circumstances. Without the aid of the state, to make the convicts docile and tractable, their labor would have been entirely worthless, or, more properly, it could not have been obtained, for it was purely compulsory. Therefore these were important stipulations of the contract, viz.: "7th. The said party of the first part further agrees to keep said convicts under good discipline at the expense of the state. * * *" and, "8th. Said convicts shall be kept at diligent and faithful labor for said party of the second part an average of ten hours a day through each year, Sundays excepted. * * *" This was the undertaking of the claimant and its performance would have been, no doubt, less difficult if the convicts had always been properly instructed and kept steadily at their work, as is urged by the counsel for the claimant and as is shown by some of the testimony. But their instruction and the supply of work by the bankrupt were not duties that it owed under the contract. They were duties to itself merely, by the neglect of which it suffered pecuniary loss as the only penalty. The contract itself provides, "If all or any of said convicts are idle on account of any default of said party of the second part they shall be paid for as though they were employed," and that is the end of it. But the duty of the claimant to repress disorder and turbulence, and to maintain the proper and necessary discipline in the prison was a duty of another sort. It was created by the contract, and it was an absolute duty. The claimant was not entitled to aid in its discharge from the bankrupt, and it was not absolved from its discharge by the bankrupt's acts or omissions. If the idleness of the convicts rendered the maintenance of order more arduous, it was for the claimant to remedy the evil by an appeal to its own resources. If one guard was not enough for the restraint of a given number of men, then its duty was to add more guards, until the force was sufficient for the purposes of its organization.

Now it is very evident from the testimony that the discipline in the state prison (south) during a large part of the time covered by these contracts was not what the contract guaranteed. It was not "good," and the service rendered under it was not "diligent and faithful" when there was work to do. The truth is, it was very bad. This is shown by the positive testimony of many witnesses, and by the excuses which accompanied the reluctant admissions of others. It is shown by a preponderance of the proof, and it is also shown that the bankrupt was injured thereby.

It is a rule of law that one may recover for services rendered or materials furnished under a special agreement which has been partly performed, an amount not exceeding the contract price thereof, when the services or materials have been accepted and applied to the use and benefit of the other party to the agreement. The practical difficulty in such a case is to fix the valuation of what has been done or supplied; to determine the proper rate and method of measurement. According to the weight of authority in this state the amount that ought to be recovered for the partial performance of a contract for a specific undertaking, is the amount that remains after deducting from the contract price for the whole undertaking the sum necessary to complete it. The amount of recovery is not, therefore, the actual value of the services or materials, but it is the remainder, after deducting from the price fixed by the contract for the entire services or materials the loss or damage sustained by the failure to fully render the one or furnish the other according to the terms of the contract, and this loss or damage is the amount necessary to procure other services or materials of the same character and quality. McKinney v. Springer, 3 Ind. 59; Epperly v. Bailey, Id. 72; Manville v. McCoy, Id. 148.

The loss or damage in this case results from the failure of the claimant to perform one of the stipulations of the contract as to

the maintenance of proper discipline, and it consists in a diminished productiveness. It is shown by the testimony that the productiveness of the convict labor was reduced in this way one-third during the greater part of the time included within the terms of the claim in controversy. No other damage being shown, this must be accepted as the sole measure of that sustained by the bankrupt, and the claimant cannot object to this mode of estimating its amount. The claimant thus receives the contract price for as much labor as was actually furnished, and, under the decisions of the supreme court of this state, this is the maximum that may be recovered upon the partial performance of a contract. I find, therefore, that the amount of recovery in this case ought to be a sum one-third less than the contract price for the period of time beginning August 1, 1873, and ending on June 15, 1875; or, in other words, two-thirds of the amount claimed therefor.

Third. As to the rank and priority of this claim. The Revised Statutes of the United States provide: "Sec. 5101. In the order for a dividend, the following claims shall be entitled to priority, and to be first paid in full in the following order: * * * Third. All debts due to the state in which the proceedings in bankruptcy are pending and all taxes and assessments made under the laws thereof."

This is clearly a "debt due to the state," but it is urged by the counsel for the assignee that it is not the intention of the bankrupt law to create priorities; that its intention is to recognize their existence only when they have been already created by the laws of a state or the United States. The bankrupt law does, however, create a priority in this state when it provides, in the same section: "Fourth. Wages due to any operative, clerk, or house-servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy," shall be entitled to priority of payment. According to the argument of the counsel, the provision is applicable only to a state like Pennsylvania, where the wages of operatives are entitled to preference by its own laws; and neither the third nor the fourth clause of section 5101, is applicable to a state like Indiana, where neither debts due the state, of the sort under present consideration, nor the wages of operatives, are preferred by its laws. This special and limited application of the bankrupt law would be destructive to its uniformity, and congress has no power under the constitution to provide any but a uniform system of bankruptcy. Congress has recognized and reaffirmed many existing priorities by this section, no doubt, but it has gone beyond this point, and, in language whose meaning is unmistakable, made them common and universal wherever the law operates. It would have been an act of supererogation for congress to have merely provided that priorities which already exist shall be protected in bankruptcy, for this has been repeatedly held to be the law independently of any express provision of the bankrupt law. It was so held as to the claims of the United States in the case cited by the counsel, and it is upon precisely the same principles of reasoning that priorities created by the laws of the states are protected. The assignee receives the estate of a bankrupt subject to all the liens and equities thereon. It is true that congress has declared that certain priorities created by the laws of the state are violations of the bankrupt law, and that as such they shall be set aside in bankruptcy, but this really proves the rule, for it is only when they are set aside by its express terms that this protection is refused. This rule of law is stated very fully in Re Brand [Case No. 1,809], quoted by the counsel. The court says:

"It is a well settled principle that the assignee of a bankrupt takes his estate subject to all the liens against the same, as well as all the equities existing against it. The assignee merely succeeds to the rights of the bankrupt, and is affected by all limitations imposed by law against the bankrupt's estate antecedent to his accepting the trust. Courts in bankruptcy invariably respect bona fide liens obtained against a bankrupt anterior to his adjudication as a bankrupt, if not within the prescribed period." It may be added that the quotation from this opinion of the court in the brief of the counsel refers exclusively to the laws of West Virginia, and not to the bankrupt law.

In my opinion the debt due the claimant is entitled to priority of payment under the provisions of section 5101, of the Revised Statutes of the United States.

There is no controversy as to the claimant's performance of these contracts for the period of time beginning June 15, 1875, and ending January 10, 1876, and I find that there is due thereon for this period the balance of seven thousand nine hundred and forty-four dollars and sixty-nine cents.

I find upon the whole that the claim and proof of debt of the state of Indiana, by Andrew J. Howard, etc., in the sum of twenty-eight thousand, seven hundred and forty-four dollars and sixty-three cents, ought to be reduced to the sum of seven thousand, nine hundred and forty-four dollars and sixty-nine cents, and that it ought to be allowed and paid in the sum last aforesaid as a preferred debt of the third class under the provisions of section 5101, Rev. St. U. S.

GRESHAM, District Judge. The register's report is in all things approved.

Case No. 13,193.

SOUTHWESTERN R. R. BANK v. PARSONS et al.

[Cited in Hugh v. McRae, Case No. 6,840. Nowhere reported; opinion not now accessible.]

SOUTHWICK, Ex parte. See Case No. 18,-063.

SOUTHWICK (CLARKE v.). See Case No. 2,863.

Case No. 13,194.

SOUTHWORTH v. ADAMS et al.

[11 Biss. 256.] [1]

Circuit Court, E. D. Wisconsin. May, 1882.

SECONDARY EVIDENCE ADMISSIBLE TO ESTABLISH LOST WILL—DECLARATIONS OF TESTATOR—CHARACTER OF EVIDENCE NECESSARY—LOST WILL—PRESUMPTION OF DESTRUCTION BY TESTATOR—EVIDENCE—WEIGHT OF TESTIMONY.

1. In a suit to establish a lost will, secondary evidence of the existence and contents of the will is admissible; and the declarations of the testator concerning the will may be shown, as well to establish its contents, as to show the probability or improbability of its destruction by him.

2. The burden is on a party setting up a lost will to prove its execution and contents by strong, positive and convincing evidence.

3. Where it is proved that a will was made, and the testator thereafter had custody of it, if it cannot be found after his death the presumption is that he destroyed it animo cancellandi; but such presumption is not conclusive, and may be rebutted and overthrown by circumstantial proof.

[Cited in Re Ladd's Will, 60 Wis. 199, 18 N. W. 740.]

4. To justify a settled belief that the statements of a witness are willfully fabricated, the court should not rest its judgment upon possibilities, but there should be strong circumstances and tangible facts plainly pointing to such a conclusion.

5. The court, after a full and exhaustive review of the extended facts and circumstances of this case, holds that the testator did not destroy his will animo cancellandi, but that it was accidentally lost from his possession shortly before his death, and should be established.

In equity. Bill to establish a lost will by Sarah Southworth against Jane N. Adams and others. Decree for complainant.

For former report, see 4 Fed. 1.

This was a suit in equity, brought originally in the state court, and duly removed to this court, to establish an alleged lost will of Richard De Forest, deceased. A statute of the state of Wisconsin, in force when the action was commenced, provided that "whenever any will of real or personal estate shall be lost or destroyed, by accident or design, the circuit court shall have the same power to take proof of the execution and validity of such will, and to establish the same, as in the case of lost deeds." And the action, when commenced, was one authorized by this statutory provision, which, however, has since been somewhat changed.

In order to obtain a correct understanding of the situation of the deceased at the time of making the alleged will, and of the relations which during his life the parties in interest bore to the testator and to each other, reference to certain leading facts is necessary. During most of the years of 1876 and 1877, Richard De Forest was a resident of Whitewater, Wis. He had previously resided in Rochester, N. Y., where, in 1853, he contracted a second marriage. His wife at that time was the mother, by a previous marriage, of two daughters, one of whom was then nearly 17 years of age, and is now the wife of Rev. E. Southworth, and is the complainant in this case. The other daughter at the time of her mother's marriage to Mr. De Forest was nearly 11 years of age, and is the wife of the defendant James M. Case. Mrs. Case was married in 1865, and Mrs. Southworth in 1866, and from 1853 to the time of their respective marriages their home was with their mother and stepfather in Rochester. At the time of his second marriage, Mr. De Forest had a daughter, Mrs. Jane N. Adams, then and now the wife of Walter E. Adams, and who is the sole heir at law of her father, and the principal defendant herein. Mr. and Mrs. Adams reside in Detroit, Mich., and have long resided there. At the time of the death of Mr. De Forest both Mrs. Southworth and Mrs. Case resided in Whitewater, Wis. The property constituting the homestead of Mr. and Mrs. De Forest in Rochester was acquired and mostly paid for by Mr. De Forest at a cost, including improvements, of about $5,000, and on its purchase he caused the title to be taken in the name of his wife. Mrs. De Forest died in 1876. The Rochester home was then broken up, and thereafter, during most of the time until his death, which occurred November 20, 1877, he lived with his stepdaughter Mrs. Case, at Whitewater. He had been in active life a clergyman, but was now retired from his profession, and was shown to have been a man of reserved manners and of reticent habit in speech. After the death of his wife, he sold the Rochester homestead for $8,000, and the proceeds of the sale were divided between himself, Mrs. Southworth, and Mrs. Case, each receiving one third. In May, 1876, and after he had established a residence in Whitewater, he made a will, which, however, was subsequently destroyed, and the contents of which were not disclosed by the proofs. The attorney who drew that will testified that he thought he drew for Mr. De Forest a second will, which was also afterwards destroyed. It was claimed in behalf of the complainant that in June, 1877, Mr. De Forest made still another will of the following tenor and effect:

"In the name of God, Amen. I, Richard

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

De Forest, of the town and village of Whitewater, Walworth county, and state of Wisconsin, and being of sound mind and memory, for which I thank His holy name, and being seventy-four years of age, do make, publish, and declare this my last will and testament in manner following, that is to say: First. It is my will that all of my just debts and funeral expenses should be paid as soon after my decease as may be. Second. I do hereby give and devise unto my daughter, Jane N. Adams, the interest on $3,000 for and during her life, and at her death I do hereby give and devise the same, said $3,000, to my two grandsons, Romain De Forest Adams and John P. Adams, to be divided equally between them, share and share alike. Third. I do hereby give and devise unto my stepdaughter Mrs. Ellen S. Case, wife of James M. Case, the sum of $300. Fourth. I do hereby give and devise unto my stepdaughter Mrs. Sarah Southworth, wife of Rev. E. Southworth, the sum of $300. Fifth. I do hereby give and devise unto my namesake Charles De Forest Case, son of James M. and Ellen S. Case, the sum of $200 and my gold watch and chain. Sixth. I do hereby give and devise unto my namesake Chester De Forest Southworth, son of Rev. E. and Sarah Southworth, the sum of three hundred dollars. Seventh. I do hereby give and devise unto my grandsons, Romain De Forest Adams and John P. Adams, the sum of four hundred dollars each. Eighth. I do hereby give and devise unto the American Bible Society of Astor Place, New York, the sum of five hundred dollars. Ninth. I do hereby give, devise, and bequeath unto Mrs. Sarah Southworth, wife of Rev. E. Southworth, all the rest and residue of my property, that I may die seised or possessed of, both real and personal, and to her heirs and assigns forever. Tenth. I do hereby nominate and appoint James M. Case, of Whitewater, Wisconsin, the executor of this my last will and testament, hereby revoking all former wills by me made. In witness whereof, I have hereunto set my hand and seal this (some day in June) A. D. 1877. Richard De Forest. (Seal.)

"The above instrument, consisting of one sheet of legal cap paper, was, at the date thereof, signed, sealed, published, and declared by the said Richard De Forest as and for his last will and testament, in presence of us, who, at his request and in his presence, and in the presence of each other, have subscribed our names as witnesses thereto. J. H. Page, Whitewater, Wisconsin. George S. Marsh, Whitewater, Wisconsin."

Page & Bishop and James G. Jenkins, for complainant.

Weeks & Steele and W. M. Lillibridge, for defendant Jane N. Adams.

DYER, District Judge. Upon the facts as developed by the proofs several questions arise: First, can secondary evidence be given of the contents of the alleged will? secondly, if so, is the evidence of the execution, contents, and existence of the will adequate? and, thirdly, if the will is duly proven, since it was not found after the death of the testator, was it or not destroyed by him animo revocandi?

1. In this class of cases it was at one time somewhat questioned whether secondary evidence of the existence and contents of a will is admissible, and whether the declarations of the testator concerning the will may be shown, to establish its contents and the probability or improbability of its destruction by him. It is now, however, fully settled, both in England and in this country, that such declarations are admissible, and that secondary evidence may be resorted to for the purpose stated. Colvin v. Fraser, 2 Hagg. Ecc. 266; Sugden v. Lord St. Leonards, 17 Moak, Eng. R. 453; Weeks v. McBeth, 14 Ala. 474; Patterson v. Hickey, 32 Ga. 156, and Betts v. Jackson, 6 Wend. 173.

2. Counsel for the defendant Mrs. Adams dispute the genuineness of the alleged will, or rather deny that adequate proof is made of its contents. The rule is well established that the burden is on a party setting up a lost will to prove its execution and contents by strong, positive, and convincing evidence. Newell v. Homer, 120 Mass. 280. The execution and contents of the will in question are, in my opinion, satisfactorily proved. The attorney who drew the will and witnessed its execution testified upon the subject positively and circumstantially. Another witness of unquestioned character testified that at the time when the will is alleged to have been executed he was called to the attorney's office to witness its execution; that Mr. De Forest duly executed it in his presence, and requested him to sign it as a witness, and that he put his signature thereto as such witness. It is true that the age of Mr. De Forest is stated in the copy of the will now produced to have been 74 years, when in fact he was then 75 years old; and it is also true that the contents of the will are stated by the attorney from memory; but, notwithstanding the error in the statement of the testator's age, and the necessary dependence upon recollection in giving the contents of the will, I cannot reasonably doubt, in the face of all the other facts and circumstances proven, that the will was executed, as claimed by the complainant. The attorney appears to have been aided in his recollection of its contents by reference to a form book containing the form of a will, which he says he uniformly used in drawing wills similar in general form and character to this. Mr. De Forest subsequently exhibited the document, and, as will fully appear when another branch of the case is considered, made declarations to the effect that it was his will. Before the will was drawn he prepared a memorandum in pencil of the different bequests he desired to

make, and it is shown that the will was drawn mainly under his dictation, with the memorandum before him. This paper was found after his death, and, as to amounts and names of legatees, corresponds with the copy of the will now produced, except that the memorandum makes no mention of a residuary bequest in favor of Mrs. Southworth. It is true that a copy of the will was made after the memorandum was found, but the fact of the existence of the memorandum strongly corroborates the claim that a will was drawn and executed; and, as the will is simple in its provisions, and as the memory of the attorney was aided by the memorandum in the handwriting of the deceased, and by such circumstances as are proven to have existed in connection with the transaction, it would seem not to have been very difficult for him to recall the essential parts of the instrument. In Sugden v. Lord St. Leonards, supra, it was held that the contents of a lost will may be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached; and in that case the principal testimony upon which a very complicated will was established was that of one witness, who was a beneficiary under the will. Without discussing at length the testimony bearing on this question, I hold without hesitation that the execution and contents of the alleged will are sufficiently proved, and I may add that I regard this the least difficult question of fact in the case.

3. The remaining and more serious question is, can the will, under the proofs in the case, be established as a lost instrument, and be held operative as a continuing testamentary disposition, or must the conclusion be that it was destroyed by the testator animo revocandi? The problem here presented is one not free from serious difficulty, since the facts which support the opposing claims of the parties stand in strong array against each other. The principle of law involved is a very simple one, namely, that where a will is proved to have been made, and the testator thereafter had the custody of it, if after his death it cannot be found, the presumption is that he destroyed it animo cancellandi. The courts have differed somewhat in relation to the precise nature of this presumption. Whether, properly speaking, it be of law or of fact, it is well settled that the presumption is not conclusive, but may be rebutted and overthrown. In Brown v. Brown, 8 El. & Bl. 886, Lord Campbell said: "After execution, the will was delivered to the testator, and it is never seen in any other custody. The testator said he should take it to his bankers, but he never did so, and on his death, though it has been searched for, it has not been found. It must therefore be considered as destroyed, and I think the presumption is that the testator destroyed it. That is a reasonable presumption, as he had the last custody of it, and it is not forthcoming. Whether this is a presumption of fact or a presumption of law, liable to be rebutted, is not material. These facts give rise to a presumption shifting the onus of proof. As early as 1754, in Helyar v. Helyar, Lee, Ecc. 472, we find a great judge, Sir George Lee, laying down these principles and acting on them, nor have they ever been doubted since. In Welch v. Phillips, 1 Moore, P. C. 299, another very great judge, the present Lord Wensleydale, lays down the principle that this is a presumption of fact to prevail unless rebutted, and the same doctrine is laid down in Cutto v. Gilbert, 9 Moore, P. C. 131, by another great judge, Dr. Lushington, than whom no one has had more experience in such cases." Crompton, J., in a concurring opinion, said: "The main question is whether the second will was destroyed by the testator animo cancellandi. The cases cited establish what the course of evidence is. Frequently a state of facts shifts the burden of proof from one side to the other. For instance, in the case of a bill of exchange, the presumption is that the holder gave value for it till evidence may be given by the other side that shifts the onus and calls on him to prove value. Such cases are not presumptions of law which cannot be rebutted, but instances of the course of evidence shifting the burden of proof."

In Loxley v. Jackson, 3 Phillim. Ecc. 126, it was held by Sir John Nicholl that "when a will is not found on the death of a testator, the presumption of law is that it has been destroyed by him."

In Colvin v. Fraser, 2 Hagg. Ecc. 266, it was held as follows: "A will being executed in duplicate, one part of which was proved to have been in, and was never traced out of, the deceased's possession, and was not found at his death, the prima facie presumptions are —First, that the testator destroyed the part in his own possession; and, second, (if the first is not repelled,) that he intended thereby to revoke the duplicate not in his possession." In the opinion in this case, which is very instructive, the learned judge says, (page 325:) "This presumption of fact and this legal consequence may be rebutted by satisfactory evidence, but the burden of proof lies upon the party setting up the will, whether he sets it up by propounding a draft, a duplicate, or a canceled will; for, whether the paper be found canceled, or whether it be wholly removed and not found at all, still the first presumption, as to the person who did the act, is the same. The force of the presumption and the weight of the onus may be different, according to circumstances; but the court, in order to pronounce for a draft, or a duplicate, or a canceled will, must be judicially convinced that the absence or cancellation of the paper, once in, and not traced out of, the deceased's own possession, was not attributable to the deceased. This negative may be established by a strong combination of circumstances, leading to a moral conviction that the deceased did not do the act;

or it may be established by direct positive evidence in different ways,—such as by proving the existence of the instrument after the testator's death, by proving that he himself destroyed it when of unsound mind, or by error, or under force sine animo revocandi. * * * All these presumptions, if they come to be analyzed, may be resolved into the reasonable probability of fact deduced from the ordinary practice of mankind and from sound reason. Persons in general keep their wills in places of safety, or, as we here technically express it, 'among their papers of moment and concern.' They are instruments in their nature revocable. Testamentary intention is ambulatory till death, and, if the instrument be not found in the repositories of the testator where he had placed it, the common sense of the matter prima facie is that he himself destroyed it, meaning to revoke it."

In Sugden v. Lord St. Leonards, 17 Moak, Eng. R. 511, which is the leading modern will case in England, Cockburn, C. J., stated the principle in this form: "Where a will is shown to have been in the custody of a testator, and is not found at his death, the well-known presumption arises that the will has been destroyed by the testator for the purpose of revoking it; but of course that presumption may be rebutted by the facts. Although presumptio juris, it is not presumptio de jure, and of course the presumption will be more or less strong, according to the character of the custody which the testator had over the will."

In the same case, Jessel, master of the rolls, said, (page 523:) "If you trace the will to the possession of the testator, and it is not forthcoming at his decease, and there is no evidence to show what has become of it, that raises a sufficient presumption of law that he destroyed it with the intention of revocation; but, like all other presumptions of law, it may be rebutted by sufficient evidence."

In Betts v. Jackson, 6 Wend. 173, it was held by Chancellor Walworth, on full review of the English cases, that where a will was duly executed, and in the custody of the testator for five years afterwards, and within ten months previous to his decease, but could not be found after his decease, that the legal presumption was that the testator had destroyed it animo revocandi.

In the case of Idley v. Bowen, 11 Wend. 227, it was held that "a will duly executed, destroyed in the lifetime of the testator, without his authority, may be established upon satisfactory evidence of its contents, and of its having been so destroyed. The presumption of law is that a will proved to have had existence, and not found at the death of the testator, was destroyed animo revocandi; but a party seeking to establish such will may repel such presumption, and show that it was improperly destroyed."

So in the case of Holland v. Ferris, 2 Bradf. Sur. 334, it was said: "If a will proved to have been executed and to have been in the possession of the decedent cannot be traced to the custody of another, or cannot be found, the presumption of law is that it has been destroyed animo revocandi."

But in Legare v. Ashe, 1 Bay, 464, the view of the court was that the nonproduction of a will is only a prima facie presumption that it was canceled, and not a legal conclusion; and in Durant v. Ashmore, 2 Rich. Law, 192, the court use this language in the opinion: "The court below stated this general proposition: that where a testator had taken charge of his own will, and it could not be found among his papers after his death, the presumption of law was that he had voluntarily destroyed it for the purpose of revocation; that it was a mere presumption, however, and might be rebutted by circumstances going to show that the will had been destroyed after his death. That this in words was a little stronger than I think correct is true, but I have no doubt the judge really intended no more than the very position which I maintain. Still, in a case like this, where the merest trifle may have produced the verdict, I think it necessary to qualify the proposition stated. That after the execution of a will has been duly proved it can only be destroyed by showing another will revoking it, or by expressly proving burning or cancellation, is plainly and very properly declared not to be law by Colvin v. Fraser, 4 Eng. Ecc. R. 113, Lillie v. Lillie, 5 Eng. Ecc. R. 67, and the well-considered judgment of the court of errors of the state of New York, in the case of Betts v. Jackson, 6 Wend. 173, overruling the same case, decided in the supreme court under the title of Jackson v. Betts, 9 Cow. 208. That a presumption of revocation arises from the fact that the will is not found is beyond all doubt, and is fully sustained by the cases cited. But I maintain that this is not a presumption of law; it is a presumption of fact merely, and that, I have no doubt, was the idea of the judge below, although he called it a presumption of law, as is often done by the judges in the cases referred to; for he said it might be rebutted by facts showing the existence of the will. Judge Waties struck the true idea in the case of Legare v. Ashe, 1 Bay, 465, when he said: 'The nonproduction of it (the will) is only a prima facie presumption that it was canceled, and not a legal conclusion.'"

In Re Johnson's Will, 40 Conn. 588, it was said:

"The mere absence of the will raises a presumption that it was revoked. Whether that presumption is one of law or of fact is perhaps immaterial, as in either case it must be rebutted by proof. Evidence for that purpose may be direct or circumstantial."

See, also, as asserting the same rule, Davis v. Sigourney, 8 Metc. (Mass.) 487; Newell v. Homes, 120 Mass. 280; Appling v. Eades, 1 Grat. 286; Weeks v. McBeth, 14 Ala. 474; McBeth v. McBeth, 11 Ala. 596; and Daw-

son v. Smith, 3 Houst. 335. In Minkler v. Minkler, 14 Vt. 125, Judge Redfield held that if a testator executes his will, and the will is not to be found at the time of his decease, this raises a presumption of his having destroyed it with intent to revoke it. But this is a presumption of fact merely which may be encountered by contrary proof, and the will thus established.

Whether, therefore, the presumption in such a case be one of law or of fact, it is fully settled, by both the English and American authorities on the subject, that the presumption may be rebutted by proof on the part of the proponents of the will, upon whom the burden rests to show that the will was not destroyed by the testator with an intention to revoke it; so that in the end it really becomes a question of fact for the court or the jury to determine, and in the determination of the question the whole evidence must be looked into.

Recurring, then, to the facts, which are of singular interest, it may be again remarked that the will in question was made in June, 1877. The testator died on the 20th day of November of the same year, under circumstances which will be hereafter stated. After the will was finished in all details of execution, the attorney placed it in an unsealed envelope, which he labeled, "Last will and testament of Richard De Forest," and delivered it to the testator, who then left the attorney's office, taking the will with him. There cannot be much doubt that he took the will to the house of Mr. and Mrs. Case, which was his home. It appears that when he came there to live in April, 1876, he brought with him two trunks, one of which is described as a leather-covered trunk, and the other as a black trunk. The leather-covered trunk was kept in the storeroom of the house, and usually contained articles of clothing that he did not use and some of his books. The black trunk was kept in his sleeping room, and generally contained clothing, books, papers, and such other articles as he did not keep in a bureau, of which he had the use, or in other parts of the room. He had also a small tin trunk, in which he kept what he regarded his most valuable papers, and this tin trunk was sometimes kept in a locked drawer of the bureau, and sometimes in the black trunk. Whether he placed the will, immediately after its execution, in the tin trunk or in the black trunk, or in the bureau drawer,—if he deposited it in either of those places,—is not known. It does not clearly appear that he immediately communicated to Mrs. Case, or any of her household, the fact that he had made a will, but the existence and his continued possession of the will to a time as late as October is satisfactorily proved.

The witness Leland, who is a physician in Whitewater, testifies that in June, 1877, Mr. De Forest came into his office to pay a bill, and there remarked, in substance, that he had been to a lawyer's office "with reference to his will." In view of the nature of the remark, and the time when the witness fixes the occurrence,—between June 1st and 15th,—it is quite apparent that the remark was made immediately or very soon after the will was drawn.

The witness Fay testifies that, in the course of a street conversation, Mr. De Forest said to him, in substance, this: "Your father is remarkably healthy for a man of his age. I almost wished I had fixed my property as your father has his; that is, so that when I die that will be the end of it; it will all be closed; but I have made provisions for Mrs. Southworth. She has been unfortunate, for she has married a minister, and you know they are always poor. My daughter has had as much or more than I can give the rest of them."

Mr. Page, the attorney who drew the will, testifies that about two or three months after the will was drawn, Mr. De Forest called at his office, and inquired about a proper place to deposit a will, and witness told him that "some people sent wills to the county judge for him to keep for them, and some left them with the attorney who drew the will, and some delivered them to the executor named in the will;" and he thinks he also told him that some persons left their wills with a friend. At this time Mr. Page swears that Mr. De Forest took the will out of his pocket, and put it back there at the close of the interview; that he did not then see the will itself, but saw the envelope, and noticed the filing thereon.

Mrs. Ellen S. Case testifies that he occasionally looked over his papers; that she has seen him take them from the tin trunk for that purpose; that at one time he exhibited to her his will, in the presence of her husband, and that she read it, but she is unable to fix the time, or to say whether or not the tin trunk was present on that occasion. Mr. Case states that in May, 1876, Mr. De Forest handed to Mrs. Case, a will and told her to read it. If this be so, the will then shown must have been the instrument which Page swears he first drew, and which was afterwards destroyed. Mr. Case then further states that in June, 1877, he saw a paper purporting to be the will of Mr. De Forest. His testimony in that connection is as follows: "My wife was present, and took the will from the hands of Father De Forest. She read the will at his request. He asked her how she liked it. I think she told him if he was suited with it, she was. He said it just suited him, and he never should change it again. He asked me what I thought about it. I heard it read,—heard my wife read it. I told him I thought he might have bettered it in one place, and that was by selecting a better man for executor. He says, 'You will do as well as you can, won't you?' I told him I would. He said that was all any one could do. I think that was all that was said at the time about the will."

The witness testifies further that he thinks Mr. De Forest took the will at that time from his coat pocket, and that he also thinks that after it had been read it was placed in the tin trunk; but of this he evidently is not certain. Mr. Case also testifies that in October, 1877, as near as he can recollect, he saw Mr. De Forest in the sitting room of the house, with the tin trunk in his lap, looking over his papers; that he then saw the will and the envelope in the hands of Mr. De Forest, the will being out of the envelope, but he does not know what was done with the will, nor did he ever see it afterwards.

Mr. De Forest left Whitewater on the 20th day of November, 1877. A short time before that he announced to the family of Mr. Case and to some other friends his intention to go to Brooklyn, N. Y., stating, in substance, as a reason for leaving, that the winter climate in Wisconsin was too rigorous for him. Shortly before his departure his black trunk was packed by Mrs. Southworth and Mrs. Case. The articles placed in the trunk included his clothing, books, papers, sermons, a satchel, and the small tin trunk, which was locked. The testimony does not clearly show whether the articles packed in the trunk comprised all of his effects or not, but the trunk was full, and the small tin trunk was placed at the bottom, so that the other contents of the trunk were over it. The testimony is that Mr. De Forest remarked at the time, in the presence of Mrs. Southworth and Mrs. Case, that he wished to have the tin trunk packed carefully, as he had important papers in it. It is also proved that, after the large trunk was made ready for removal to the depot, it was securely locked and strapped. On the morning of November 20th a teamster by the name of Chadderdon took Mr. De Forest, Mr. Case, and the trunk to the depot. As Mr. De Forest intended to stop at Detroit, where his daughter resided, he purchased a ticket to New York via the Michigan Central Railroad, but his trunk was checked. probably by mistake, over the Lake Shore & Michigan Southern road. The mistake, however, if it was such, was not then noticed, and he took the check. As the trains ran at that time, Mr. De Forest arrived in Milwaukee at 11 o'clock a. m. of November 20th, and left for Chicago at 1 o'clock p. m., arriving at that city at 4 o'clock, and there is proof that his trunk accompanied him on those trains. On arrival in Chicago, the trunk was taken to the road over which it was checked, and Mr. De Forest proceeded to the house of W. H. Ovington, whose wife was a sister of Mrs. De Forest, deceased, and there he expected to spend the night, and to resume the journey on the following morning. On reaching the house, he almost instantly died. On his person were found certificates of stock and indebtedness of the West Division Railway of Chicago, amounting in value to several thousand dollars, two portemonnaies, and a purse containing about $150 in money, a letter of dismissal and recommendation from the Congregational Church of Whitewater to a Congregational Church in Brooklyn, a photograph of his deceased wife, his railroad tickets, and in one of his portemonnaies were his trunk check and key, and also a key of the small tin trunk. He had brought with him, in addition, a satchel, which contained articles of clothing, but his will was neither on his person nor in the satchel. Mr. Case was immediately notified of the death of Mr. De Forest, and he and his wife arrived in Chicago on the morning of the 21st. On that day Mr. Case informed Mr. and Mrs. Adams by telegraph of the death of Mr. De Forest, stating that he should leave for Rochester with the body on Thursday, the 22d, via the Michigan Central Railroad, and asked the Adamses to accompany him to Rochester to attend the burial services. On the evening of the 22d Mr. Case left Chicago with the body of the deceased, and on the following morning met Mr. and Mrs. Adams on the train at or near Detroit, and they proceeded together to Rochester to attend the burial, which occurred on Saturday, November 24th. Mr. and Mrs. Adams returned to Detroit, and Mr. Case returned to Chicago at about the same time. Meantime, Ovington, by dispatch to the baggage agent at Buffalo, had intercepted the trunk at that place, and it was immediately returned to him, and was in his possession on the arrival of Case from Rochester. The trunk was found to be strapped, apparently as when it left Whitewater, but the hasp of the lock was broken or severed from the top of the trunk. The contents were in some disorder, but, according to the testimony of the witnesses Ovington and Blodgett, not more so than the handling of the trunk while in transit would occasion. The small tin trunk was in its place at the bottom of the large trunk, securely locked. It was opened, and found to contain various papers, including the envelope in which the will was originally placed by the attorney, Page, with the filing thereon, "Last will and testament of Richard De Forest," but the will was not in the envelope, nor was it found either in the tin trunk or in the large trunk. The witness Ovington testified that some loose papers were lying in the large trunk near the place where the tin trunk stood, and it appears that the memorandum before referred to in Mr. De Forest's handwriting, which was used by him when the will was drawn, was found among these papers after the return of the trunk to Whitewater. The body of the deceased was soon afterward exhumed, and further examination of the clothing made, but the will was not found, and, after prolonged search in all places where it has been thought possible to find it, it has never been discovered.

From all the testimony, it is quite apparent that the last time the will was ever seen by any person other than Mr. De Forest was in October, 1877, about a month before he died, when Mr. Case testifies the deceased was

looking over his papers, and had the will in his hand. The question now is, must the presumption that the testator destroyed the will be held to prevail, or is that presumption overcome by the proven facts and circumstances of the case? It can hardly be questioned, I think, that Mr. De Forest, by his outward acts, manifested a strong desire to make a testamentary disposition of his property, and not to die intestate. The very specific designation of the bequests he wished to make, as shown in the memorandum prepared by himself, and which really constituted the basis of the will as finally drawn, the personal directions he gave and care he exercised when the will was put in form, his previous execution of a will, which he now wished to change, his subsequent declarations that the will drawn in June, 1877, suited him, and that he should never change it, his evident desire to provide for Mrs. Southworth, as evidenced by his remark to the witness Fay, his inquiries in relation to a place where the will might be properly deposited for safe-keeping, made several months after the will was drawn, are all circumstances which point to a well-matured intention to make a final testamentary disposition of his property. There is no proof of any expressions by him of dissatisfaction with the will subsequent to the time when he declared that he should never change it; and, in view of all the circumstances existing both before and after the death of his wife, it is not difficult to believe that he naturally desired, in the final distribution of his estate, to bestow it in the manner expressed in the will. He certainly intended at the time he executed the will thus to dispose of his property, and there is no affirmative evidence that he afterwards changed his mind. He was an old man. He knew that he had not many years of life before him. It is quite evident that he had been devotedly attached to his wife. Her children had grown to womanhood under his parental care, and it was most natural that he should be drawn to them by ties of strong affection, especially after the death of their mother, while at the same time his affection for his own daughter and her offspring suffered no abatement.

It was argued by the learned counsel for the defendant Mrs. Adams that Mr. De Forest's departure from Whitewater was probably occasioned by family disagreements, which were hidden from public view, and have never been revealed. There is no testimony that lends support to even a conjecture of that character. There is no proof whatever that furnishes ground for even a suspicion of any severance of the domestic connection between the deceased and either of his stepdaughters or their families. It is in proof that he cherished both for Mrs. Southworth and Mrs. Case the kindliest feelings, spoke of them in affectionate terms, as if they were his own children, and of his home with them as one of comfort, and it is also shown that this feeling was reciprocated by them, and that they uniformly addressed him as if he were their own father. One of the witnesses testifies that Mr. De Forest often spoke of Mrs. Southworth in connection with Mrs. Case. He said: "They were like his own children to him; they had done for him what no one else could do but their mother. In speaking of his home being broken up, and being left alone, it was the greatest comfort he could have was a home with them; that they had done everything for him, and seemed as willing to do for him as though he were their own father."

It is at the same time apparent that Mr. De Forest's parental affection and regard for his own daughter, Mrs. Adams, was steadily maintained. There is some testimony which indicates that there had once been business relations between Mr. De Forest and Mr. Adams, which involved the former in some pecuniary losses and which were therefore unsatisfactory, and there appears to be some ground for the belief that his feelings towards his son-in-law were not those of entire confidence and satisfaction. It is shown, however, that on one or more occasions Mrs. Adams was the recipient of presents from her father, and it appears that in August, 1876, he went from Whitewater to Detroit to attend the marriage of one of his grandsons, and at that time procured his life to be insured in the sum of $2,000 for the benefit of Mrs. Adams, who, it is understood, received the avails of the insurance after her father's death. The witness to whose testimony reference has just been made further testifies to a conversation she had with Mr. De Forest a short time before he went to the wedding of his grandson, in which he said that he had "spared no money in educating his daughter; that he had done a great deal for her in many ways, but that she would never be able to do anything for him"; that "on account of his grandson he should go to the wedding, although it was no comfort for him to go there." The attorney who drew the will also testifies that Mr. De Forest directed him to omit the name of Mr. Adams from the will, but to insert the names of Mr. Case and Mr. Southworth as the respective husbands of the legatees Mrs. Case and Mrs. Southworth, and it is observable that in the pencil memorandum in the testator's handwriting, before referred to, the name of Mr. Adams does not appear, and that the names of Mr. Case and Mr. Southworth are written therein in conjunction with the names of their wives. Too much stress, however, is not to be laid on this circumstance, for the reason that Mrs. Adams is mentioned in the memorandum as his daughter, and he may not, therefore, have thought it necessary to insert therein the name of her husband for further description; and, as Mrs. Case and Mrs. Southworth were not of blood kin to him, he may have deemed it important to name their husbands in that

connection, for the purpose of full identification.

In support of the claim that Mr. De Forest's departure from Whitewater was occasioned by family dissensions, it is urged that his whole conduct indicated an intention not to return. The testimony does not support this conclusion. On the contrary, the weight of the evidence is that he left only because of the severity of the winter climate in Wisconsin. Allusions that from time to time he made to his health very clearly show this to have been the fact. On one occasion he remarked that he was going east on a visit, at another time he said he should remain away until spring, and on other occasions he said nothing of the length of time he should be absent. In September previous he stated to a friend in Chicago that he should not stay in Whitewater long; the winters were too severe for him. To another witness he remarked that "he was going east on account of his neuralgia; that if he was not better there he should return. Mr. Case made it very pleasant for him here, but that on account of the severe weather it made his trouble worse"; and in a conversation with Rev. G. W. Wells in relation to his proposed departure, he said that he had settled matters for this life and the life to come.

It is contended further on the part of the defense that there is affirmative proof that a few days before the deceased left Whitewater he destroyed the will. In support of this theory the testimony of Mrs. Lucinda Case, the mother of James M. Case, is relied on. She was an aged lady, whose home was with her son, and she testified that on the Friday before Mr. De Forest went away, which was November 16th, he was writing at a desk in her son's room; that she was sitting in the kitchen, where there had been a fire; that "he came in after he got through writing, and he had a paper in his hand. He took off the cover to the kitchen stove. * * * He had a paper in his hand that he twisted around; he poked up the coals and put it on the coals, and put the cover on." She described the paper burned as white writing paper, "twisted around the middle and the ends stuck out," and says that when he burned the paper he said nothing, and at once went out of the room. From the circumstances under which this act was done, especially when considered in connection with the fact that he was already preparing to go away, it is strongly contended that the paper Mr. De Forest then burned was the will in question. I do not think this conclusion is maintainable upon the testimony. In the first place it seems highly improbable that he would thus destroy the will in the presence of an inmate of the house. So far as the proofs show, he had given no signs of an intention to revoke or destroy it, and, if he had secretly resolved to destroy it, it would have been natural for him to make the act of destruction as secret as the thought which prompted the act. But it appears, further, that on the day when he burned the paper, November 16th, he wrote a note in pencil to Mr. and Mrs. Adams, stating that he hoped to arrive at their house on the 21st inst.; that he was as well as usual, except that he was troubled with a tremor, which he thought was owing to the climate; that he wished to leave "this section of the country" as soon as he could, and designed to go East, and would stop over one day with them to rest. In this connection the complainant has introduced evidence tending to show that he at first attempted to write the letter to the Adamses with a pen, but that the tremor of his hand was such that he could not use a pen, and that he finally wrote the letter with a pencil. It is further shown that the deceased was a man of orderly habits, and that it was his custom to destroy waste papers by burning them, and it is claimed, upon proof of all the circumstances, that the paper he burned on the occasion referred to was undoubtedly that upon which he had attempted to write the letter to the Adamses with a pen. Moreover, the attorney who drew the will testifies that it was drawn on a sheet of legal cap parchment paper, of a yellow tinge, and longer and wider than ordinary legal cap paper, and, if this be so, it is quite clear that the paper which Mrs. Case saw the deceased destroy does not answer the description of that on which the will was drawn. Giving due weight to all the proof we have on this question, it is, in my judgment, inadequate to establish the claim that the deceased then destroyed the will. In the light of all the circumstances it seems much more probable that the paper he burned was that which he had attempted to use in writing to Mr. and Mrs. Adams. This being the conclusion of the court, it must be held that there is no affirmative proof in the case that the testator destroyed the will. At the same time it is to be observed that there is no evidence of its destruction by any other person whose interests were adverse to the will. Mr. and Mrs. Adams did not see Mr. De Forest after he made the will, until his death; they had no access to his papers or trunks at any time when the will could have been abstracted therefrom, nor do they appear to have known that he had made the will now sought to be established, until they learned it from Mr. Case when on their way to Rochester to attend the burial; and at that time they seemed to have supposed that the will then spoken of was that which Mr. De Forest had made in 1876. This, I think, is a fair inference from the testimony.

On the whole, looking at this case in all its aspects and in the light of all the circumstances that surround it, I am constrained to believe that the will was at some time after it was last seen in October, 1887, accidentally lost from the custody of the testator. Undoubtedly many wills once deliberately

executed are afterwards secretly destroyed by the persons who made them; but the circumstances here are such that they seem strongly inconsistent with the theory that such was the fact in this case. The envelope in which the will was originally placed and the memorandum made by the testator himself, from which the will was drawn, were preserved, and were found in the place where it was most natural to look for the will. It certainly seems very improbable that the deceased would secretly destroy the will, and at the same time preserve the envelope and the memorandum. These papers must have been deposited by him in the place where they were found, and it is reasonable, I think, in the light of all the circumstances, to believe that he supposed the will was there also.

As is apparent from the statement of the facts heretofore made, Mr. De Forest on more than one occasion carried the will in his pocket, and was seen to have it in his hand out of the envelope, from which it is not unreasonable to infer that the will may, at one of these times, have been mislaid and lost, while he may have supposed that it was in the envelope, and securely deposited in the tin trunk. Moreover, I have not been able to resist the belief that it was not impossible for the loss to have occurred during the various examinations of the trunk after its return to Chicago, though I must admit that this can hardly be said to be more than a possibility. It is proven that at the time the trunk of the deceased was being packed, and when he remarked that he wished to have the tin trunk packed carefully, as he had important papers in it, Mrs. Southworth said to him that she supposed the will was in that trunk, and that he made no reply. From his silence when thus addressed, it is argued that the inference is that the will had been destroyed. But this does not follow. He may not have cared to make any reply. He may have chosen to evade a reply. For a man of his character and temperament, his silence may have been entirely natural. He may have thought it unnecessary to make any reply, as he had just remarked that the trunk contained important papers; in other words, this silence may have been just as consistent with the continued existence of the will as with any other theory. Moreover, the evidence is that he was so deaf that he sometimes used an ear trumpet, and he may not have heard Mrs. Southworth's remark, although she states that he could hear some persons very much better than he could others, and that he always said that he could hear her very readily. Nevertheless, it is not at all improbable that he did not then hear what she said.

The testimony of the witness Chadderdon, the teamster who carried Mr. De Forest and his trunk to the railroad depot in Whitewater, if true, fully sustains the theory that the deceased supposed his will was in existence on the very day he died. Speaking of what transpired at the depot, he testifies as follows: "After we had set down the trunk, he (meaning Mr. De Forest) walked up where they checked the trunks. Directly he returned to me, and I said to him, 'Father De Forest, I am sorry to have you go away.' He said it wouldn't be for long; if nothing happened he should be back in the spring; and I then said to him, 'I am sorry to see you go away alone; you are a pretty old man to travel alone.' He answered that he was used to traveling alone, and it didn't matter, he said, where he fell. He said, 'I have my business all settled, and I have my will here with me in the trunk.' Our conversation then was broken off; the train arrived."

The proof is that no one was present at this conversation, if it occurred, except Mr. De Forest and the teamster. This testimony is severely attacked, as stating not only an improbable, but a corruptly manufactured, story. After such a lapse of time, there should, of course, be taken into account, in considering the testimony, the liability of the witness to be mistaken in his recollection of just what was said, and the possibility that from the infirmities of memory he may now be unable to state the conversation with accuracy; but I do not think the claim that his testimony is a corrupt fabrication is established by the evidence. To justify a settled belief that the statements of the witness are willfully fabricated, the court should not rest its judgment upon possibilities; it should have strong circumstances and tangible facts plainly pointing to such a conclusion.

As to the question of the credit to be attached to this testimony upon the theory that it is honestly given, but that it may still be inaccurate and unreliable, and therefore of doubtful value, I do not deem it necessary to discuss it, since I am of the opinion that, treating the testimony of this witness as only in a limited degree corroborative, the conclusions of the court upon the merits of the case must be as already indicated.

It has been argued that it was unnatural for the deceased to make a will diverting the larger portion of his estate from his sole heir at law, and she his daughter. Nevertheless, that he made such a will cannot, in the face of the evidence, be reasonably denied, and, in view of his relations to the various legatees in the will, and of the circumstances of his situation in the last years of his life, and of all the facts, I do not deem the will so devoid of reasonableness as the counsel for the defendant claim it to be. By the will he remembered all persons bound to him by ties of kinship or affection. He disinherited none. His estate at the time of his death, as I conclude from the testimony, amounted to about $9,-

000, although, in consequence of subsequent appreciation in value, it may now amount to $12,000 or more. He gave to Mrs. Adams by the will the use of $3,000 for life, and took care that at her death her children shall have the principal of that bequest. Then he gave to them $800 more. In considering the question of the reasonableness of the will, it is also to be borne in mind that he had secured to Mrs. Adams $2,000 in the shape of insurance on his life. Then he gave to Mrs. Case and her son only about $600, and, after giving to Mrs. Southworth's son $300 and to the Bible society $500, he bequeathed the residue to Mrs. Southworth, evidently because he considered her in greater need of such a provision than were the other recipients of his bounty. Looking at this will as nearly as we may from the standpoint he occupied when he made it, taking into consideration, as we must, the relations in which he stood towards all upon whom he wished to bestow his estate, it can hardly be maintained that the will is repugnant to such a sense of justice as a person in his circumstances might well be supposed to naturally feel and act upon.

In view of all the considerations stated, it is the opinion of the court that a decree should be entered declaring that the deceased died testate, and establishing the will.

Case No. 13,195.

SOUTHWORTH et al. v. The A. E. DOUGLASS et al.[1]

District Court, D. Connecticut. May, 1859.

INSOLVENCY PROCEEDINGS—APPOINTMENT OF TRUSTEE—IRREGULARITIES.

[1. An order appointing a trustee to take possession of an insolvent's estate, and purporting to have been entered on the petition of a creditor for that purpose, cannot be considered as an order made under an assignment for the benefit of creditors, although such assignment was pending in the probate court at the same time with the creditor's petition, and some of the subsequent proceedings seem to go upon the idea that the order was made under the assignment.]

[2. The fact the appointment of a trustee to take possession of an insolvent's estate is made by the probate court at a date subsequent to a date fixed by previous order for a hearing in regard thereto, and without any formal order of postponement, does not render the appointment void; for probate courts have no particular terms, and hence there are no continuances, and, if the appointment was irregular, it was an error for correction by appeal.]

[3. An order appointing such a trustee is not invalid merely because it does not show that the necessary facts have been found by the court, when the petition on which the order is made alleges the facts, and the insolvent, by failing to appear and answer thereto, has admitted them to be true.]

[4. The provision of the Connecticut statute (Act 1855, art. 7; Laws 1855, p. 7) requiring public notice in a newspaper of the time when such a trustee is to be appointed, is directory merely, and the omission thereof is an irregularity to be corrected by an appeal, and does not affect the validity of the appointment.]

[This was a libel by Southworth, Miller & Co. against the schooner A. E. Douglass and others.]

INGERSOLL, District Judge. The question in this case is, do the libellants own the 9/32 parts of the schooner A. E. Douglass which formerly belonged to one Albert Gaines? If they do, they are the major owners of the vessel, and the decree must be in their favor. If they do not, they are not the major owners of the vessel, and the decree must be against them. It will not be necessary to consider many of the points which have been presented on the trial, as the view taken by the court of one of the points made by the respondents will be decisive of the case, and settle the question that the libellants do not own the abandoned portion of the vessel which formerly belonged to Gaines. On the 31st of October, 1856, Gaines did own 9/32 parts of the vessel. On the 14th of December, 1857, a creditor of Gaines issued a writ against him, and caused whatever interest he (Gaines) then had in the vessel to be attached. Subsequently a judgement was obtained, an execution issued, and whatever interest was attached was sold on the execution to the libellants. In reply to this, the respondents allege that neither on the 14th of December, 1857, nor at any subsequent time, had Gaines any interest in the vessel; that, before the attachment, whatever interest he owned in the vessel, had been transferred to Horace Cornwall, by virtue of certain proceedings which took place in the court of probate for the district of Hartford, and that Cornwall has transferred the 9/32 parts of the vessel which passed to him, by virtue of such proceedings, to the respondent Smith. On the 31st of October, 1856, Walter Harris, a creditor of Gaines, presented a petition to the court of probate for the district of Hartford, praying for the appointment of a trustee to take possession of the property of Gaines for the benefit of his creditors, he being insolvent. That petition was regular on the face of it. And it is admitted, if Cornwall was regularly appointed by said court of probate a trustee upon that petition, that the 9/32 parts of the vessel now in question did pass to him, and that consequently the libellants acquired no right by the purchase which they made on the sale upon the execution. On the day that petition was filed, the court of probate issued a citation to the said Gaines to appear before said court on the 6th day of November, 1856, to show cause why the prayer of the same should not be granted; which citation was legally served on the said Gaines. But he did not appear in pursuance of the requirements thereof. On the third day of November, 1856, Gaines, being insolvent and unable to pay his debts, made an assignment in

1 [Not previously reported.]

writing of all his property, real and personal, except such articles situate without this state, one hundred dollars in cash, and such property as was by law exempt from execution, to Cornwall, in trust for the benefit of his creditors in proportion to their respective claims, to be proceeded with according to the insolvent laws of Connecticut, which assignment on the same day was lodged in the probate office for the district of Hartford.

The court of probate, on the 6th day of said November, passed an order, upon the said assignment, appointing the 11th day of said November as the time for the hearing relative to the acceptance and approval of the trustee named in the assignment, and directed that public notice of said hearing be given by advertisement in a newspaper in Hartford, in the manner in said order mentioned; which order was complied with. On the 12th day of November, 1856, the court of probate passed the following order, to wit: "Upon a hearing of the application of Walter Harris, for the appointment of a trustee of said estate, and the order of notice upon the assignment, this court doth appoint Horace Cornwall trustee of said estate, who appeared in court and accepted said trust, and gave bond jointly with Erastus Smith in the sum of $5,000, which is accepted and approved by the court." If this was a valid appointment of Cornwall as a trustee on the petition of Harris, to have the estate of Gaines settled as an insolvent estate, then it is clear that whatever property Gaines had in the schooner A. L. Douglass on the 31st of October, 1856, was passed to the trustee, and that the libellants acquired no right to any portion of her by virtue of the sheriff's sale on the execution.

The libellants claim that this was not a valid order appointing a trustee on the petition of Harris; that it was not intended to be an order for the appointment of such trustee; but that it was intended to be an order only for the appointment of a trustee on the assignment; and that it was made for such purpose, and at the time of the assignment the petition of Harris was pending to force Gaines into insolvency. They claim, also, that if the order was intended to be an order for the appointment of a trustee on the petition of Harris, that it was void for such purpose, as on the records of the court of probate there does not appear to have been any continuance of the time of hearing, which had been fixed for the 6th day of November to the 12th of November. It appears clear by the order of the 12th of November that it was an appointment of Cornwall as a trustee upon the petition of Harris. It is so expressed to be. It must be so considered, although some subsequent proceedings of the court would seem to go upon the idea that it was intended also to be an order for the appointment of a trustee on the assignment. But such subsequent proceedings cannot be made to change the clear import of the order. An order of the court of probate, like the order of any other court, must speak for itself, when it can speak clearly and understandingly.

The question, then, is, was it valid for such purpose? The chief reason urged against its validity is that the hearing for the appointment of such trustee, which was by the order of the 31st of October, 1856, fixed for the 6th of November, following, does not expressly appear by an order to have been continued to the 12th of November. The appointment for this cause assigned cannot be considered as a void order, but must be considered sound and valid until appealed from. Courts of probate have no particular terms. They are always open. There is no continuance of a case from one term to another term. There may be a postponement of a case from one day to another, but no continuance from one term to another term. There is but one term of a court of probate. If, when a suit is brought to a court which is not always open, but which has particular terms, a judgment should be rendered on a day of the term subsequent to the day that the process was returnable, it would be a fruitless attempt to attack such judgment, on the ground that no formal order had been entered postponing the hearing from the day when the process was returnable to the day when the judgment was entered. When a process founded on a petition has been served and returned, the case is in court; and while in court, the case may be disposed of by the court. If there is any just cause of complaint that the case has been improperly disposed of, the party complaining can have relief by appeal. If any one had any cause of complaint, of the order of the 12th of November, he could have had relief by appeal. But that order must be considered a valid order, until it has been appealed from. An erroneous order merely, is not a void order.

It is said further that the necessary facts are not found by the court in the order of the 12th of November to have authorized the court of probate to appoint a trustee upon the petition of Harris. The allegations stated in the petition are sufficient, if they were true, to authorize such appointment. Gaines did not appear to contest such allegations. He therefore, by his default, admitted them to be true; and, being admitted to be true, the order was rightfully made.

It is said, further, that the appointment was void, for the reason that no public notice in a newspaper, of the time when a trustee would be appointed, was given, as required by the seventh article of the act relating to insolvent estates passed in 1855. See Acts of that year, page 87. The requirements of that act on this subject are merely directory. A non-compliance with them does not make the appointment a void one. Such non-compliance may be a good reason for setting aside the order on an appeal. But the order, until it is so set aside, must be considered valid. Besides, by the act of the legislature passed in 1858, errors of this description are remedied.

With this view of the case, it is not neces-

sary to consider the other points which have been presented to the consideration of the court. The decree must be that the libel be dismissed, with costs.

SOUTHWORTH (STRONG v.). See Case No. 13,545.

SOWERS (UNITED STATES v.). See Cases Nos. 16,362 and 16,363.

SPADER (DE CASSE v.). See Case No. 3,-720.

Case No. 13,196.

In re SPADES et al.

In re MUIR et al.

[6 Biss. 448;[1] 13 N. B. R. 72; 8 Chi. Leg. News, 33.]

District Court, D. Indiana. Sept., 1875.

BANKRUPTCY—COMPOSITION MEETING — CALCULATING MAJORITY—SECURED CREDITORS—PARTNERSHIP.

1. Instructions given to Indiana registers as to manner of calling and conducting composition meetings.

2. The proper construction of the clause as to calculating a majority is that creditors whose debts do not exceed $50, shall be counted in determining the value, but not in determining the number.

3. Secured creditors, are those who hold a lien upon property which otherwise would go into the general fund, not those who have personal security. This latter class may prove and vote as unsecured creditors.

[Cited in The Home, Case No. 6,657.]

4. A composition should not be allowed to work inequality or injustice, as between individual and partnership creditors. If there is no objection, the creditors may direct a general composition, which is the most simple; but if any creditor objects, he has the right to a vote by the separate classes of creditors.

5. The court, before confirming the composition, should see that it works no injustice to any class of creditors, and if it does, should give redress accordingly.

[In bankruptcy. In the matter of Michael H. Spades and others and James W. Muir and others, creditors of the bankrupt.]

Bixby & Norton, for the register.

GRESHAM, District Judge. By the amendment to the 43d section of the bankrupt act, provision is made for the disposition of pending cases by means of a composition between the bankrupt and his creditors.

In certain cases when composition proceedings are pending, application is made to the court to settle questions of practice, and for the better regulation of this method of settlement, the following statement is made for the direction of registers:

Upon an application to the court by a bankrupt whose case is pending, setting forth that he proposes to compound with his creditors an order will be made and certified to the proper register, directing him to call a meeting, and to give notice of not less than ten days to each known creditor of the time, place and purpose of such meeting. These notices will be sent by mail, properly addressed and postpaid, and a memorandum will be entered by the register to the effect that he has received the order of the court and given the notices required.

The record of the register should show that at the time appointed the bankrupt appeared in person, or if from some lawful cause prevented from so appearing, then by another person on his behalf, with a statement of the whole of his debts and assets, showing also the names and addresses of the several creditors.

The proposition of the debtor being submitted, must then be adopted by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting, voting either in person or by proxy.

This alone does not authorize the submission of the composition to the court, for an additional step must then be taken, that is, the resolution must be confirmed by the signature of the debtor and of two-thirds in number and one-half in value of all the creditors of the debtor. If the vote of those assembled at the meeting does not amount to a majority in number and three-fourths in value, the matter is at an end. But should that vote be given in that number and value, of those so assembled, a further step must be taken to confirm it by securing the signature of the debtor to the resolution, and also the signatures of a larger proportion of the creditors, to-wit: two-thirds in number and one-half in value of all the creditors of the debtor. This provision of the law is designed to protect the creditors from the effect of a resolution adopted by a smaller number assembled at such a meeting. The smaller number may adopt the resolution, but the larger number must confirm it, and it is plain from the language of the act that after the adoption of the resolution a reasonable time may be given to secure such additional signatures as may be required to confirm it.

A question arises upon the further provisions of the section as to how this voting and confirming is to be counted. The language of the amendment is: "And in calculating a majority for the purposes of a composition under this section, creditors whose debts amount to a sum not exceeding fifty dollars shall be reckoned in the majority in value, but not in the majority in number."

This language, which directs what shall be counted in the majority, is not free from obscurity. The majority, however, can only be ascertained by making the count, and as the method of making it is to be first determined before the vote is settled, it seems that the reasonable interpretation of this provision is that in settling the composition, whether for or against, creditors whose debts do not exceed fifty dollars shall not count in determin-

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

ing the number, but shall count in determining the value.

As to secured creditors, they are not counted at all unless they satisfy the register that there is an excess due them over the value of the security. That excess being determined by the register, they are admitted to the vote as are the creditors whose demands are unsecured.

If. however, a secured creditor abandons his security, he is admitted to vote as one unsecured.

It is proper here to observe that the secured creditors to whom this exception applies are those who are secured by the pledge, in some form, of property that, apart from their lien upon it, would go into the fund for general distribution. The language is general, to be sure, and construed strictly and without reference to other provisions of the statute, might be made to embrace those creditors who have personal security. But the law makes provision elsewhere for the protection of such sureties, allowing them to prove in full when they have paid the debt, and provides for their subrogation to the right of the creditor, if he shall have proved, and they afterward pay the debt. The provision for the abandonment of the security can only apply to such security as may be surrendered to the general fund, and can have no application to that form of security which could be abandoned only for the benefit of the surety, and not for the increase of the fund. It follows, of course, that a creditor having personal security votes upon composition proceedings as an unsecured creditor.

The question of the effect of partnership relations in making a composition presents more difficulty. The law is silent as to partnerships. It proceeds apparently upon the theory that the debts and assets are all of a single class. It does not provide for a classification of debts and assets as being individual and partnership, and for a several vote and counting among the different classes of creditors. Are the creditors of A, and those of B, and those of the firm of A & B, to be all counted together in determining the required numbers and values in these several stages for settling a composition? Or, are they to be separated into classes and to vote and be counted in such classification before the question of composition can be determined?

The act provides carefully in section 36 for the marshaling of the debts and assets and the distribution of the several individual and partnership funds, according to the well-known equity rules. The creditors being so entitled, it is easily seen that very gross inequality might in some cases result by a vote for composition without requiring a classification. If the personal assets of partners are small and the personal debts large, the personal creditors could expect only a proportionate dividend, and therefore could readily vote for a composition that would be unjust to the partnership creditors, unless a similar ratio existed between their debts and the partnership fund. If their debts were in the aggregate comparatively small and the partnership fund large, they could, by the preponderating vote of the personal creditors, be driven to accept a composition which would be greatly below the amount of their dividends were the cause to proceed to settlement by the assignee.

Congress could not have contemplated and intended any such inequality. The cases, however, to which the attention of the court has been called are cases where the meetings have been held upon general notice to all creditors, both individual and partnership, and where the vote has been made by the creditors who assembled and those who signed the confirmation of the resolution, without any classification and without any objection on that ground from any creditor. The state of the respective debts and funds may be such as to justify this course; and where they are so it simplifies the proceedings very materially. Whether this condition of practical equality of the debts and assets, both individual and partnership, exists, is shown to the creditors at the composition meeting, and it is their province to act upon it as they see proper. They may make the composition by general vote and general confirmation, if they are content with it. Or, if one of any class of the creditors perceives that the other class is about to force upon him an unjust composition, he can demand a separate vote, and so protect himself by calling to his assistance those who compose the class to which he belongs.

It would seem that by this application of the law no injustice can be done. There remains a second meeting to be called by the court, after notice to every known creditor, for the final allowance of the composition by the court, if it shall be found to be fair and to have been conducted according to law. Should it appear at this meeting that the common voting of all creditors, individual and partnership, together worked injustice, the court can then consider if any and what redress should be given.

SPAETH (TURRELL v.). See Cases Nos. 14,267–14,269.

Case No. 13,197.

SPAFFORD et al. v. GOODELL.

[3 McLean, 97.][1]

Circuit Court, D. Michigan. Oct. Term, 1842.

ESCAPE — PROCESS — DEPUTY — FEDERAL PROCESS — MEASURE OF DAMAGES.

1. In an action for an escape, the sheriff cannot take advantage of an irregularity in the process, which does not render it void.

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

2. The deputy of the marshal is a sworn officer, known to the law, and he may return, as deputy, the process served by him. Such has been the uniform practice.

3. A sheriff who receives as jailor, a person arrested by the marshal, is bound to keep the prisoner under all the responsibilities, as if he had been arrested under state process.

4. An escape on final process, subjects the sheriff to damages to the amount of the injury received by the plaintiff.

5. This injury is measured by the amount of property possessed by the defendant, not exceeding the sum named in the execution.

[Cited in Sheldon v. Upham, 14 R. I. 493.]

6. Where the defendant is wholly without property, nominal damages, only, can be recovered against the sheriff.

At law.

Goodwin & Collens, for plaintiffs.
Witherell & Buell, for defendants.

OPINION OF THE COURT. This action is brought against the defendant, as late sheriff of Wayne county, in this state, charging him with an escape. On the 22d June, 1838, a judgment was obtained in this court, against James Hale, by the plaintiffs, for seventeen hundred dollars. A capias ad satisfaciendum was issued on the judgment, the 11th February, 1839, which was returned cepi corpus. An objection was made to the execution, on the ground, that in pursuance of the statute of Michigan (Rev. St. p. 453, § 15) it did not require personal and real property to be taken, before the body; but the objection was overruled. The sheriff who, under the act of Michigan, received the defendant in custody, cannot object to the irregularity of the execution. It was not a void process, and collaterally advantage cannot be taken of an irregularity, which does not show that the process was wholly void. It was also objected that the return on the execution was not made by the marshal, but by his deputy, and 2 Caines, 10, Story, Ag. 139, note 2, were cited. A deputy marshal is an officer known to the law, and it is the general practice, long sanctioned by the courts, for the deputy to make return of process served by him. It might be more technical to return the same in the name of the marshal, but the custom has been otherwise. The deputy is a sworn officer, and the court think that the return is good. They would even now permit the marshal to amend the return, if it were essentially defective. The defendant, as sheriff, was bound to keep the defendant committed to his custody by the marshal, under the same responsibilities, as if the arrest had been made under state process. But on the same evening of the commitment, the sheriff released Hale, on his giving a bond as required by Rev. St. p. 682, c. 8; and this bond was offered in evidence. The act under which this bond was taken, does not apply to the courts of the United States. It was passed subsequently to the act of 1828 [4 Stat. 278], adopting the state laws in regard to the practice of the courts of the United States, and it has not been adopted, expressly, by a rule of court. Even under the statute, the bond is liable to objections, but these need not be considered.

Evidence was offered to show the amount of the property possessed by Hale, the defendant in the execution; and also rebutting evidence, conducing to show that he was embarrassed and owned no property.

The court instructed the jury, that the escape being proved, the plaintiff was entitled to recover from the defendant damages to the extent of the injury which resulted from the escape. That if Hale had property which might have been applied in discharge of the execution, the plaintiffs should recover the full sum called for in the execution. But if the property was not liable to the execution, by reason of prior liens, that the plaintiffs could only recover nominal damages. That the damages could not exceed the property of Hale. That his commitment was a means of coercing payment, and if he were wholly without the means of payment, the damages must be nominal. The jury found for plaintiffs; on which a judgment was entered.

SPAFFORD (WILKENS v.). See Case No. 17,659.

Case No. 13,198.

SPAFFORD et al. v. WOODRUFF.

[2 McLean, 191.] [1]

Circuit Court, D. Michigan. Oct., 1840.

PLEADING AT LAW—PUIS DARREIN CONTINUANCE—HOW MET—MOTION TO SET ASIDE.

1. A plea puis darrein continuance, properly verified and filed, within the rules of the court, will not be set aside on motion.

2. The facts alleged in the plea, show that it has been filed in good faith; and the allegations must be denied by a replication, or admitted by a demurrer.

3. The filing of this plea waives all prior issues.

[Cited in Harding v. Minear, 54 Cal. 505. Cited in brief in Lincoln v. Thrall, 26 Vt. 305.]

At law.

Mr. Goodwin, for plaintiffs.
Mr. Frazer, for defendant.

OPINION OF THE COURT. This is an action of assumpsit, brought against the defendant as the indorser of a note. The general issue was pleaded; and, since the last continuance, a plea puis darrein continuance, which alleged that this action is brought against the defendant as indorser of a note, on which the plaintiffs, who are the holders, since the last continuance of this cause, obtained a judgment against the maker and the first indorser, and that they gave

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

time to the defendant, which operates as a release to the defendant in this action. This plea is sworn to, as the rule of the court requires. And, a motion is now made to set aside this plea, by plaintiffs' attorney, on the ground that it is irregular, and a nullity.

Great certainty is required in pleas of this description. The plea may be in abatement, or in bar of the action, and the matter of defence must be specifically stated, and the time it arose. In these respects, the present plea is not defective, and it is verified by affidavit. Under such circumstances, it is said the court can not set the plea aside on motion, but are bound to receive it. Brown, Abr. "Continuance," pl. 5, 41; Jenk. Cent. 160; Prince v. Nicholson, 5 Taunt. 333; Lovell v. Eastaff, 3 Term R. 554. The interposition of this plea waives all prior issues; nor can the plaintiff, afterwards, proceed thereon. 1 Chit. Pl. (Ed. 1837) 697; 1 Salk. 168; 2 Strange, 1105; 5 Taunt. 333.

The matter set up in this plea, so far from appearing to be fraudulent or evasive, presents a serious question; and the facts should either be traversed by a replication, or admitted by a demurrer. The motion is, therefore, overruled.

SPAFFORDS (WOODWORTH v.). See Case No. 18,020.

SPAIN v. The CONCEPTION. See Case No. 3.137.

SPAIN, CONSUL OF, v. CONSUL OF GREAT BRITAIN. See Case No. 3,138.

Case No. 13,199.

SPAIN et al. v. GAMBLE et al.

[1 MacA. Pat. Cas. 358.]

Circuit Court, District of Columbia. Jan., 1854.

PATENTS — INTERFERENCE PROCEEDINGS — INDEPENDENT INVENTORS—EQUIVALENTS—SWITCHES FOR RAILWAY DRAWBRIDGES.

[1. The fact that an invention is original with the applicant, that he had no notice of prior invention by others, is not sufficient to entitle him to a patent. A patent will issue only to the first original inventor.]

[2. A rod is the known equivalent of an endless chain in machinery, where it can be used for the same purpose and effect.]

[3. Where each of two parties claim to be the first inventor of a machine, and the hearing is upon an interference between them, it is unnecessary to consider whether the machine of one party is superior in form and contrivance to that of the other, or is an improvement thereon.]

[This was an appeal by Edward L. Spain and Isaac Fox from a decision of the commissioner of patents in an interference proceeding, awarding priority to William P. Gamble and John K. Gamble, in respect to an invention relating to safety switches for railroad drawbridges.]

Wm. W. Hubbell, for appellee.

MORSELL, Circuit Judge. The commissioner having decided that the claims in this case were interfering claims, the parties were, according to the rules of the office, allowed to take their testimony and produce all their proofs before him for the trial of the issue before him at a day and place of which they were duly notified; and the same being, with the arguments, duly submitted, the commissioner, on the 16th of June, 1854, determined that, upon an examination of the testimony in this case, it appeared that the said J. K. and W. P. Gamble were the first inventors of the subject-matter of the present interference; that a patent would therefore be granted to them unless an appeal from that decision was taken on or before the second Monday in July then next. The appeal being duly taken, several reasons of appeal were filed, the substance of which appears to be as follows: The first brings into question the truth of what is stated on the part of the appellee by his witnesses as to the time (one day) in which they state that the invention was projected and perfected. This is said to be impossible, being the case of an invention where the mechanism is involved, and where appellees were not acquainted with mechanics. Second and third, that they (the appellants) have proved by their testimony that their discovery was as early as the 15th of May, 1853, and by their own oath as early as the 10th of May, 1853, by which time their invention was perfected and profiles drawn, and that it is superior in movement, simplicity, and durability to that of the Messrs. Gamble. Fourth, that their invention is superior to that of the appellees in the manner in which the connections are made with the switch for moving it by a metallic rod adjacent to the rail, resting on the same sleepers and above ground, with a screw fixture for adjusting the same, while the appellees's device is placed beneath the track in the road between the rails, moved by cog-wheels and chains, which are liable to sway and give, and are not to be relied upon with the same safety as a rod. Fifth, the expense of construction of appellees' device is considerably more than that of appellants'. Sixth, appellees' specification calls for a draw-bridge, while appellants' is for railroad draw, pivot action.

The claim of the appellants set forth in their specification as new and as their own invention is the self-acting or automatic operation of the whole, and the mutual dependence of the one part on the other, and the apparatus for keeping the switches secure in their place after their adjustment to the siding, so as to form a safety draw-bridge, having for its object the security of the passengers and trains in all positions of the draw.

The appellees state in their specification that the nature of their invention consists of combining and arranging the switch-rail

and inclined siding with the draw-bridge, whereby the switch-rails can be unlocked and moved in connection with the inclined siding, and locked simultaneously with the slightest opening of the draw, and again unlocked and thrown in connection with the main track, and locked simultaneously with the closing of the draw, or at the moment it is entirely closed. This combination and arrangement of contrivances, it must be evident, render the draw-bridge perfectly safe. Said arrangement in every respect is self-adjusting. They also say: "What we claim as our invention, and desire to secure by letters-patent, is the contrivances herein described or their equivalents, so arranged and combined as to constitute a safety railroad draw-bridge, substantially as set forth."

The commissioner has laid before the judge his decision in writing, with the original papers and the evidence in the cause, and the same has been submitted by the parties on written argument. I have given the case a full consideration, and will state my opinion on the various points made by the reasons just alluded to.

The ground stated in the first reason does not appear to me to be correct in point of fact. The witness John Gamble, Sr., states that on the evening of the 6th of May, 1853, his son, J. K. Gamble, one of the appellees, came into the counting-house of the deponent and handed him a newspaper to read, in which the accident to the cars at the Norwalk draw-bridge on the day before was stated; that while he was reading it John Gamble and William P. Gamble conversed together, and commenced making rough drawings with chalk upon the counter in reference to this matter, and thought that they had discovered some plan whereby such accidents might be avoided. On the following day they were drawing up the papers he had before referred to—Exhibit B. (This Exhibit B appears to be similar in its appearance and principles to the drawing filed in this cause.) The drawing was completed on the 7th of May, and, with the written specification attached thereto in the handwriting of John K. Gamble, was drawn up and read to him on the 9th of May, 1853, and was sent on the 10th to Munn & Co. to prepare the proper drawings and papers for the patent office. In these facts he is corroborated by Robert B. Gamble, another witness produced on the part of the appellees. Nothing is said by them as to the time within which the model was constructed. They are unimpeached, credible witnesses, and I can perceive no sufficient reason to doubt the truth of what they have stated to have been done.

If, then, this testimony is to be believed, it proves the invention of the appellees to have been discovered by them on or before the 9th of May, 1853. The appellant's witnesses do not prove theirs to have been before the 10th of May, several days, of course, subsequent to that of the appellees. The points raised by the second, third, fourth, and fifth reasons appear to be, first, that the invention of the appellant was original, and that they had no notice of that of the appellees; but this is not sufficient to entitle them to a patent, as the law requires that they should not only be original, but the first original inventors; second, that the construction of their machine is different and superior to that of the appellees. It is true there is a difference in the position and in respect to the rod and the pin in the self-adjustment of the switch in connection with the draw-bridge, according to their contrivance, and the endless chain and lock of the appellees: but it has been properly said by the appellees' counsel that a rod is the known equivalent of an endless chain in machinery, where it can be used for the same purpose and with like effect. Therefore, according to principles of patent law, they are not substantially different. With respect to the pin or lock in the adjustment of the switch, there does not appear any material advantage of the pin over the lock for the purposes of their design. Whether the appellant's machinery in form and contrivance is superior to or an improvement upon the invention of the appellees, and upon that ground entitled to a patent if the claim had been presented in a different shape or not, it is not necessary for me to decide upon the present aspect of the case.

I am therefore of opinion that the decision of the commissioner on each of the grounds stated by him is correct, and ought to be affirmed, and the same is accordingly hereby affirmed.

The patent issued to J. K. and W. P. Gamble (No. 13,258) July 17, 1855.

Case No. 13,200.

SPALDING et al. v. BATON ROUGE.

[10 West. Law J. 461.]

Circuit Court, D. New Orleans. 1853.

Constitutional Law—Power to Regulate Commerce—Police Regulations—Licenses on Theatrical Exhibitions.

A license, issued under the authority of the laws of the United States, to a vessel to carry on a coasting trade, will not exempt the owners of it from the municipal regulations of towns, within whose corporate limits they moor their vessels for the purpose of giving theatrical exhibitions on board. If they there give such exhibitions as are by the town-regulations liable to taxation, their license does not protect them from it.

At law.

McCALEB, District Judge, in delivering the opinion of the court, stated substantially that Spalding & Rogers alleged that they were owners of a barge or vessel, called the Floating Palace, which they caused to be enrolled and licensed under the acts of congress, for a term not yet expired, as a coasting vessel; that they employed it for their lawful business on the river; and that when they were about

leaving Baton Rouge, the corporation caused her to be seized and detained. She was seized, it appears, because they refused to pay forty dollars tax and two dollars license, required by an ordinance of the corporation to be paid by every proprietor of a circus arriving by steamboat or other water craft, for the first exhibition. The ordinance imposes a fine for violation of the above provisions. The seizure was made by order of the mayor, to enforce the payment of the fine. The plaintiffs insisted that, having authority from their license to carry on their business, they were not subject to the license laws of the city of Baton Rouge, and that, so far as the ordinance might extend to vessels licensed by the United States, it was unconstitutional, being an interference with the power of congress to regulate commerce. They also contended that the Palace was not within the jurisdiction of the corporation when the tax or fine was exacted, and claim $2,500 damages. Defendants maintained that the ordinance was constitutional. The barge was constructed for the express purpose of giving circus exhibitions. The word "commerce" is uniformly understood to comprehend navigation, and was so contemplated by the framers of the constitution. The barge was not, however, engaged in commerce, and she was not a commercial vessel. Her navigation up and down the river cannot be regarded as a navigation for commercial purposes, or as a navigation which would necessarily be regarded as an incident of commerce, and included in that term as used in the constitution, which meant navigation as a means by which commerce is carried on. The license set up by the plaintiffs cannot protect them from the tax or fine. Under it they could carry on the coasting trade, convey freight and passengers, and land at Baton Rouge; but if they remain there, and give exhibitions which are liable to taxation, their license cannot protect them. The tax imposed by the corporation of Baton Rouge is a mere police regulation, necessary to the order and welfare of cities and towns, and neither surrendered nor restrained by any provision in the constitution of the United States. The authority of the state is complete, and has been delegated to the corporation of Baton Rouge by statute. The Palace being fastened to the shore, and connected by a bridge, formed as much a part of the shore as if the performance were given on the shore itself. The petition of plaintiffs for damages is therefore dismissed, with costs.

Case No. 13,201.

SPALDING v. KRUTZ et al.

[1 Dill. 414.][1]

Circuit Court, D. Kansas. 1871.

NOTES—NOTICE TO INDORSERS—HOW GIVEN.

1. Where an indorser lives at the same place at which the note is payable and dishonored, notice of protest deposited in the local post office will bind the indorser, if actually received by him on the same day or the next.

2. Where an indorser lives outside of the limits of the city at which the note is payable and dishonored, notice through the post office to such indorser is ordinarily sufficient; but if, in such a case, the indorser has a known place of business in the city, notice of protest should be there given, although if given through the post office it will be sufficient if received in time by the indorser, or if received at his place of business on the day of the dishonor or the next day.

3. Notice of protest given by a notary public to indorsers resident in the same place, partly in writing and partly in print, and which correctly describes the note, and contains all the essentials of such a notice, if actually received in time, is sufficient, although the signature of the notary be printed.

This was a writ of error to the district court, in which the defendants had judgment.

Royce & Hoag, for plaintiff.

B. F. Simpson, for defendants.

Before MILLER, Circuit Justice, and DILLON, Circuit Judge.

DILLON, Circuit Judge. This was an action against the indorsers of a promissory note made payable at a banking house in the city of Paola, in this state. Defence: want of legal notice. Some of the indorsers were residents of Paola, and the notice of protest was deposited in the post office at Paola on the day on which the note was dishonored.

We hold that if the notice of non-payment thus deposited in the post office was actually received by the indorsers on that day, or the next, it would be sufficient to bind them. Whether the notice was thus received, is a question of fact for the jury. The instruction of the district court on this subject stated the law differently, and is erroneous.

1. One of the indorsers lived outside of the city of Paola about two hundred yards from the city limits and a little more than a half mile from the banking house at which the note was payable. There was testimony tending to show that he did not receive the notice of protest, which had been deposited in the post office, until seven days had elapsed, and that "he had a place of business in the city which he generally attended daily."

2. The district court instructed that the notice by the post office was not good, but that it should have been given at the defendant's place of business in the city. If this was a place where his own business was conducted by him,—a place known to be his place of doing business,—we hold, that the notice of protest ought to have been left there, and could not be given through the post office, although if given in the latter mode and actually received by the indorser from the post office on that day or the next, or if within such time it was received from the

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

post office by those in charge of his business house, it would be sufficient.

3. The notice of protest deposited by the notary in the post office accurately and fully described the note by stating the date, amount, parties, when due, demand, &c., and was partly printed and partly written, and signed by the notary public in his official capacity, but his signature was printed. The district court charged that the notice, though actually received in time, was insufficient, and that the written signature of the notary and his seal of office were requisite to convey legal notice to the indorser. This we hold to be erroneous, and are of opinion that such a notice as above described, if actually received in time, would fix the indorser's liability.

It only remains to add that the instruction asked by the plaintiff as to the custom of the bank, was not, for aught that now appears, improperly modified. Reversed and remanded.

SPALDING (LEGIONARY PAYMASTER v.). See Case No. 8,212.

SPALDING (LEWIS v.). See Case No. 8,334.

SPALDING (MEWSTER v.). See Case No. 9,513.

SPALDING (UNITED STATES v.). See Cases Nos. 16,364 and 16,365.

Case No. 13,202.

SPANISH CONSUL'S PETITION.

[1 Ben. 225.][1]

District Court, S. D. New York. June, 1867.

WITNESS—FOREIGN COMMISSION—POWER OF THE COURT TO SUMMON.

1. Where a commission was issued by a judge in Cuba to the Spanish consul in New York to take testimony to be used in a criminal prosecution for swindling, and the consul thereupon applied to the district court for a summons to compel the witness to appear and testify: *Held*, that the only provisions made by congress on the subject of enforcing the giving of testimony in judicial proceedings pending in a foreign country, are found in the acts of March 2, 1855 (10 Stat. 630), and of March 3, 1863 (12 Stat. 769).

2. Neither of those acts applied to this case, and the court had no power to issue the summons asked for.

Coudert Bros., for petitioner.

BLATCHFORD, District Judge. The petitioner, who is the consul of her majesty the Queen of Spain at the port of New York, represents that he has received from the judge of the Southern district of Santiago, in the island of Cuba, a commission, empowering him to take the testimony of certain witnesses named therein, to be used in a criminal prosecution for swindling, a translation of which commission he produces, and he prays that a summons may be issued by me requiring the witnesses to attend and testify. I have no power to issue the summons asked for. The only provisions made by congress, on the subject of enforcing the giving of testimony in judicial proceedings pending in a foreign country, are those found in the act of March 2, 1855 (10 Stat. 630, § 2), and in the act of March 3, 1863 (12 Stat. 769). The former provides that "where letters rogatory shall have been addressed from any court of a foreign country to any circuit court of the United States, and a United States commissioner designated by said circuit court to make the examination of witnesses in said letters mentioned, said commissioner shall be empowered to compel the witnesses to appear and depose in the same manner as to appear and testify in court." The latter act is confined to the taking of testimony to be used in a suit for the recovery of money or property depending in a court of a country with which the United States are at peace, and in which the government of such foreign country is a party or has an interest. The prayer of the petition is denied.

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

SPANN (GAINES v.). See Case No. 5,178.

SPARHAWK (CLARK v.). See Case No. 2,836.

Case No. 13,203.

SPARHAWK et al. v. COCHRAN.

[30 Leg. Int. 233;[1] 5 Leg. Op. 101.]

Circuit Court, E. D. Pennsylvania. May 3, 1873.

USURY—PURCHASE OF NOTE—AGENTS.

Plaintiff drew his promissory note to his own order, endorsed in blank, and placed it with collaterals with certain brokers for negotiation or sale, defendant bought the note from the brokers in the regular course of business, without actual knowledge that they were plaintiff's brokers, at a greater rate than six per cent.: *Held*, that the transaction was not usurious within the meaning of the Act of 1858.

[Error to the district court of the United States for the Eastern district of Pennsylvania.]

This case was tried on December 2, 1872, in the United States district court for the Eastern district of Pennsylvania. The district judge being related to defendant's wife, by agreement of counsel, Samuel Dickson, Esq., sat as assessor. The facts of the case appear in his opinion given below. A non-suit was entered against plaintiffs and on December 30th, 1872, the motion to take the non-suit off was refused, and the following opinion was delivered by Mr. Dickson:

The facts of the case were as follows: On the 13th of October, 1871, the bankrupt drew his promissory note to his own order, and

[1] [Reprinted from 30 Leg. Int. 233, by permission.]

having endorsed the same in blank, placed it, together with $28,000 City 6's as collateral, with Messrs. C. & H. Borie for negotiation or sale. On the same day the Messrs. Borie, who were bankers and brokers, rendered an account as for the sale of the note, and gave their check for the net proceeds less the discount, commissions and other charges. The defendant, William G. Cochran, bought the note from the Messrs. Borie, in the regular course of business, and without any actual knowledge that they were acting as the brokers of Mr. Yerkes, at a greater rate of discount than six per cent., and repaid himself at the maturity of the note by a sale of the collateral. The excess over six per cent. allowed in the purchase of the note was $391.66, and for that amount, with interest from February 1, 1872, the plaintiffs are entitled to judgment, in case the transaction be usurious within the meaning of the act of assembly of 28th May, 1858.

For the plaintiff [John Sparhawk] it was argued that as the Messrs. Borie were the undisputed agents of Mr. Yerkes, and the note was drawn solely for the purpose of obtaining a loan of money, the transaction was in effect a loan by the defendant to the bankrupt at a greater discount than six per cent., and as their business was in part that of note brokers, the defendant was either affected with notice of their agency or at least chargeable with negligence in not having made inquiry. The note, not having had any bona fide existence as a note till after it left their hands, was still the note of the bankrupt when sold to the defendant, and it only acquired validity to the extent to which value was actually paid for it. And this is so regardless of the actual knowledge of the defendant, as the law against usury is based on public policy, and operates without regard to the intention of the parties; while the manner in which the note was drawn might also, perhaps, put the buyer on inquiry. Should it not be so held, the laws against usury may be so easily evaded as to become inoperative. In support of these views reliance was had upon the cases decided in New York, Massachusetts and Maryland, and specially upon Conrad's Case [Case No. 3,126], and without conceding that the Pennsylvania cases established a different rule, it was urged that in the United States courts they were not of binding authority.

For the defendant it was contended that the case fell within the proviso to the second section of the act of 28th May, 1858, which is in these words: "Provided always, that nothing in this act shall affect the holders of negotiable paper taken bona fide in the usual course of business." And that if such operations should be held usurious, it would be impossible to transact the business of the community.

As to any argument drawn from considerations of public policy, it is conceived that little help can be gained. On the one hand it may be said, in the language of Mr. Justice Williams, in Howkins v. Bennett, 97 E. C. L. 506, 553: "Parties are entitled to evade the law,—a man is guilty of no offence, who so conducts his affairs as not to infringe an act of parliament. I see no objection to an evasion of the law in that sense." And on the other hand, if the reasonable construction of the law shall give rise to inconvenience, that is a matter for the legislature. It is clear that in a certain sense a note is not a note till delivery, for, as was said in Conrad's Case [supra], by McKennan, J.: "These notes were drawn, dated, signed and endorsed at Philadelphia, where the drawers and endorsers resided. But had they any efficacy there? Did they there impose any obligation upon these parties to pay the sum stated on their face? Were they there evidence of indebtedness to any one? Clearly not, because, until they had passed out of the hands of the persons who made them, they belonged to them, and did not bind them to pay anything to anybody, and would not sustain any action upon them. They were not contracts because there was only one party to them. Something else was essential to impress upon them the character and qualities of a contract —that was their transfer to some one else for a valuable consideration. They then became, for the first time, promises to pay. Before they had no legal existence: by that fact they were brought into life, and invested them with the obligation and validity of promissory notes." So in the present case, if the question is to be decided without reference to the rights of the defendant as a bona fide purchaser without notice, of a negotiable security, the brokers would be regarded as simply the agents of an undisclosed principal, and the transaction in effect would be the same as if the bankrupt had taken his own note to the defendant for sale, and made the negotiation with him in person. Erie Bank v. Smith, 3 Brewst. 9. It was still the bankrupt's own note at the time it was bought, and had no efficacy or vitality until after it had been taken by the defendant. Hence, in other states, the rule is generally well settled, that if a note made for the purpose of raising money is discounted at a higher premium than the legal rate of interest, and none of the parties whose names are on it can, as between themselves, maintain a suit on the note, when it becomes mature, provided it had not been discounted, then such discounting of the note is usurious, for it is then that it first exists as a contract. Knights v. Putnam, 3 Pick. 184; Munn v. Commission Co., 15 Johns. 55; Powell v. Waters, 17 Johns. 176. Mr. Justice Sharswood, however, in his notes to Byles on Bills, p. 377 (245*), after citing the cases on this point, adds, "It is otherwise, however, if the purchaser is ignorant of the character of note"—referring to Whitworth v. Adams, 5 Rand. (Va.) 333; Ramsey v. Clark, 4 Humph. 244; Creed v. Stevens, 4 Whart. 223; Long

v. Gantley, 4 Dev. & B. 313; Hays v. Walker, 7 Blackf. 540; May v. Campbell, 7 Humph. 450.

In Pennsylvania the decisions have generally followed this latter view. The language of the act of March 2, 1723 (1 Smith's Laws, 156), was: "That no person shall directly or indirectly, for any bonds or contracts to be made after the publication of this act, take for the loan or use of money," etc. In Craig v. Pleiss, 2 Casey [26 Pa. St.] 271, decided in 1856, Woodward, J., says: "The offence consists not in bargaining for more than six per cent., but in taking it on any bond or contract, and the idea of a corrupt contract as indispensable to the offence of usury, is derived from the English statutes, which were never in force here, and the imagined necessity of a corrupt bargain to complete the offence of usury, favored as it no doubt has been by loose expressions of judges, is wholly without foundation in our statute." Even under that act, however, it was resolved in Musgrove v. Gibbs, 1 Dall. [1 U. S.] 236, that a fair purchase might be made of a bond or note, even at twenty or thirty per cent. discount without incurring the dangers of usury, and it was left to the jury "to determine whether on certain facts the defendant had loaned the money or purchased the note in question." What the certain facts were do not clearly appear, but it would seem that Richardson, through the mediation of Shoemaker, borrowed the money from the defendant and gave his note for it. Whether that note was to the order of Shoemaker is not stated, but the note given in renewal thereof was so drawn. It is clear, however, that this second note was no note in the eye of the law, so long as it was in the hands of Shoemaker, who was the mere agent to negotiate the loan, and yet it was left to the jury to say, whether the transaction was not a bona fide sale by him to the defendant. In Wycoff v. Loughead, 2 Dall. [2 U. S.] 92, the third resolution is, that "a man may bona fide purchase any security for the payment of money, at the lowest rate he can without incurring the penalties of usury." This may mean that the bona fide holder or owner may so sell it, and is therefore of no assistance in this inquiry. In Griffith v. Reford, 1 Rawle, 196, it was held, under the rule in Walton v. Shelley [1 Term R. 300], that the maker of a note was incompetent to prove that the defendant was an accommodation endorser, and that the consideration of the note was usurious. Huston, J., dissented, and put his opinion on the ground that the evidence showed that the transaction was, in fact, a loan, and not a bona fide purchase of negotiable paper—conceding that if it had been a purchase, the plaintiff was entitled to recover. Creed v. Stevens, 4 Whart. 223, was an action by the holder of a note, endorsed in blank, against the payee and endorser, who set up in his affidavit of defence that he was only an accommodation endorser, and that "the transaction between the parties really interested in the note was usurious." Sergeant, J., in his opinion, says: "The affidavit states that the transaction between the parties really interested was usurious, but it does not state that the plaintiff was one of these parties, and he certainly may not have been, because a note endorsed in blank passes by delivery, and he may have received it from one who obtained it from the original parties." And the judgment below for the plaintiff was affirmed. In Gaul v. Willis, 2 Casey [26 Pa. St.] 259, decided in 1856, it was held that the holder of a negotiable note, who purchased it at a greater discount than six per cent. may recover from the accommodation maker, though the payee endorsed and sold it, to a person from whom the holder bought it, at a greater discount than six per cent., Lewis, C. J., said: "Neither Drexel & Co." (who bought the note from the payee, in whose hands it was as yet no note), "nor Willis" (their vendee), "had any knowledge of the purpose for which the note was given. They had a right to put faith in the representation on the face of the paper, that it was given for a valuable consideration. As against the parties who made that representation, the note must be held to be as they represented it. * * * Willis neither loaned or intended to loan any money to Rudman (the payee), or to Gaul (the maker), his dealings were with Drexel & Co. There was no intention on the part of the latter to borrow, and no engagement to return the money received, or any part of it, or to pay any sum whatever for the use of it. Nor was there any intention on the part of Willis to lend money to them. It was a clear purchase of the security, and nothing else. Had he a right to purchase it at a greater discount than six per cent.? That he had was fully settled so long ago as 1785. Wycoff v. Loughead, 2 Dall. [2 U. S.] 92; Musgrove v. Gibbs, 1 Dall. [1 U. S.] 236." This case was followed by that of Moore v. Baird, 6 Casey [30 Pa. St.] 138, (Jan. term, 1858), in which the endorsee of an accommodation note, who had bought it from the payee at a greater discount, was allowed to recover the full amount of the note from the maker. So that if the bankrupt had gone through the form of having the note drawn by his clerk or office boy to his own order, he could himself have gone directly to the defendant and made the negotiation in person. In such a transaction, the payee who made the sale, was really the principal, who was getting a loan by the sale of his own note, as the maker was but his surety, and the note has no more vitality than one in the hands of an agent of its maker. Of course, too, it would equally follow that the payee would be obliged to pay in full, as the maker on being compelled to pay would be allowed to recover from his principal. The New York and other cases which allow the purchaser of a note from an endorser to recover the face of the note

from the maker, but only the amount paid from the endorser, being cases in which the endorser is holder for value or owner. Mr. Justice Strong says: "In Gaul v. Willis, 2 Casey [26 Pa. St.] 259, a suit indeed by the second endorsee against the maker, the holder was allowed to recover against the maker of an accommodation note the entire amount according to its tenor, though the discount at each negotiation had exceeded six per cent. He was regarded as not the less a bona fide holder for value, because he purchased for less than upon the face of the note appeared to be due. What has the maker to do with that? He has lent his credit for the sum named in the note. Shall one who received it as collateral, and is not therefore a holder for value at all, be permitted to recover, and a recovery be denied to him who is a holder for value, but happens to have purchased for less than the face of the paper? Such is not the law. In the present case the plaintiff below was not only a holder for value, but he purchased it without knowledge that it was an accommodation note. The defendant had, therefore, according to his own showing, no defence, and the judgment of the court below is right."

From these cases of Musgrove v. Gibbs, Creed v. Stevens, Gaul v. Willis, and Moore v. Baird, it will be seen that the intention and knowledge of the parties were not ignored even under the act of 1723, but the language of the act of 28th May, 1858, is materially different. It is "when a rate of interest for the loan or use of money exceeding that established by law shall have been reserved or contracted for," that its provisions as to the usurious excess apply, and in Fitzsimmons v. Baum, 8 Wright [44 Pa. St.] 32, the same learned judge who delivered the opinion in Craig v. Pleiss, ut supra, says: "I agree with the learned counsel, that the excessive interest must be 'reserved or contracted for' by the parties. These are the very words of the statute." And the ruling of the court below was sustained in leaving it as a question of fact for the jury to find whether the transaction in question was, in fact, a sale or a loan at usurious rates under the guise of a sale. The decisions are therefore now applicable, which hold that to constitute usury "there must be a loan" (Nichols v. Fearson, 7 Pet. [32 U. S.] 103-109), and the ground and foundation of all usurious contracts is the corrupt agreement (Murray v. Harding, 2 W. Bl. 859). Where there has been no loan and no contract for a loan, there can be no usury in the very nature of things. It is true, that if the bargain is in effect a loan, the avowed intention of the parties is of no consequence; but there must be in fact a contract for the use of money, or there can be no interest. So where the transaction is in fact a loan on a conveyance for its security, no contemporaneous agreement can clog the equity of redemption, or make it anything else but a mortgage; but where it can be established that there was no debt, and the transfer of title was not in reality a security for its repayment, a conditional sale may be made, even in Pennsylvania. Spering's Appeal, 10 P. F. Smith [60 Pa. St.] 199; Haines v. Thomson, 11 Am. Law Reg. (N. S.) 680.

Now in the present case the only evidence that the defendant bought the note from the brokers of the bankrupt is contained in the admission that "he purchased the note of Messrs. C. & H. Borie, in the regular course of business, without knowledge of, or communication with, Mr. Yerkes." It is true that he knew they were brokers, but there was no presumption as a matter of law that they were the brokers for the bankrupt. And if he was to be affected with notice, the burden was on the plaintiff to bring it home to him. And if it were the duty of the defendant to make inquiry, what would be the consequence of the broker's making a false representation? In New York a certificate annexed to a note is held to estop the maker from setting up the plea of usury, (Clark v. Loomis, 5 Duer, 468; Bossange v. Ross, 29 Barb. 576), but there is no decision, so far as known, which authorizes the purchaser of a security to rely upon the representation of the seller as a protection against the defence of usury, and if he could not protect himself by the answer, it cannot be his duty to ask the question; while to require the business community to obtain briefs of title to the bills and notes bought in the open market, and to take the risks of misrepresentation by the brokers selling them, would be to destroy the chief value of negotiable paper by impairing its negotiability. Such a note so endorsed in blank, passes from hand to hand by delivery, like coupon bonds or bank notes. With approved collaterals attached, they are always marketable, and never lack for a purchaser, and to facilitate their currency or freedom of transfer is a well recognized policy of the law. Hence, Prof. Parsons, while approving of the New York and Massachusetts decisions before cited, makes the following observations in reference to such a case as the present: "It is admitted that if one knowingly buys a note of the maker, or a bond through the agent of the maker for less than its face, this is a loan to him, and a usurious one. If, for example, a railroad company, makes its bonds payable at a distant period, with interest coupons attached, and sells them by its officers, or a broker or other agent, for less than their face, this must be usury. But does it affect as usury one who purchases them in ignorance of the circumstances? The question we would ask is this—If one purchases such bonds for less than their face, not from the railroad, but from one whom he verily be-

lieves to own them, for value, or if one purchases them without any knowledge or opinion on the subject, but in fact from one not the railroad, can the defence of usury be made against those bonds in his hands, on the ground that the railroad was actually the seller, and the purchaser the first holder? It may not be certain how the courts would answer this question, but we think the authorities favor the conclusions to which we should be led by what seems to us the reasons of the case. They are, that one who purchased for value, in good faith, and in the belief that he did not buy from the railroad, but from some subsequent holder, certainly was not open to the defence of usury. And we go farther, although with less confidence, and say, that the usurious intent must be proved by the party who would profit by it, and therefore if the maker of such bonds or notes would defend against them, in whole or in part, on the ground that they constituted a usurious contract between the plaintiff and himself, he must bring home to the plaintiff the knowledge that the plaintiff bought them of the defendant, in fact though indirectly or at the very farthest, such means of knowledge or reasons for belief as would make his ignorance his own fault."

As to the suggestion of the learned author that means of knowledge may be equivalent to actual knowledge, reference may be made to the late cases of Phelan v. Moss, 17 P. F. Smith [67 Pa. St.] 62; State Bank v. McCoy, 19 P. F. Smith [69 Pa. St. 204], and Bush v. Crawford [Case No. 2,224],—which decided that the holder of a negotiable note bona fide for value, without notice, can recover it, notwithstanding that he took it under circumstances which ought to excite the suspicion of a prudent man, and that nothing but mala fides or actual knowledge can defeat his recovery. So, too, in Mechanics' Bank v. Foster, 44 Barb. 87, it was held: "The sale of a note by a person not the maker for a sum less than its face is not necessarily a usurious transaction, nor is the burden thrown upon the purchaser of inquiring into the character of the note." In Virginia the precise question has been decided in favor of the purchaser. In the case of Whitworth v. Adams, 5 Rand. (Va.) 333, it was ruled (as in Moore v. Baird) that the purchase of an accommodation note from the broker of the payee at a greater discount than the legal rate of interest was not usurious. The remarks of Cabell, J., are pertinent in this connection. "By the law merchant, which has by adoption become a part of the common law of the land, every bill of exchange imports, as before said, a full and fair consideration, and if it was originally made payable to bearer, or has become so payable by having been endorsed in blank, every bearer or holder, be he agent, trustee, finder or thief, has a right to sell it, and to transfer it by delivery. In no case whatever is the person disposed to purchase it bound by the law to make any inquiries as to the right by which the bearer or holder sells it, nor after he has purchased it, can his right to demand and receive its amount from all the parties to it be objected to on the ground that the person who sold it exceeded his authority, violated his trust, or that having only found or stolen the bill, he had no title to it. To compel the purchaser to go into inquiries as to the consideration, or to permit the parties to the bill to object to its payment, on any of the grounds stated, would greatly impair the negotiability of bills and notes; their most distinguishing, most useful and most valued feature. Surely, therefore, a person purchasing such a bill from the holder or bearer, must regard him as the owner, and deal with him as the owner, even if he be a broker; unless indeed he had actual notice of the real owner. And if the purchase of an accommodation bill or note be made in ignorance of the character of the note, and of the person who is the real owner, and be made at a discount greater than legal interest, on what principle can it be said to be a loan, express or implied; without which we have already seen there can be no usury? If it be a loan, there must be a borrower as well as a lender. To whom was the loan made; who was the borrower in this case? Every loan implies, necessarily, an obligation on the borrower to return the money received. But it must be confessed that in this case the transaction imposed no obligation on Belcher, the broker, to return the money he received, nor to be liable for it, in any event, or in any manner whatever. Nor did any of the parties intend that he should be liable. The parties could not, therefore, have intended a loan and borrowing so far as respects the broker. But it is contended that it was a loan to Wilson & Orr. In the case of Floyer v. Edwards, Cowp. 114, Lord Mansfield said, 'that the view of the parties must be ascertained in order to satisfy the court that there was a loan and borrowing.' But how is 'the view of the parties' to be ascertained? From the facts of the transaction, as they were exhibited, and appeared to the parties at the time. It is on this principle that the purchaser of an accommodation bill or note, at a discount greater than legal interest, from the known agent of the party for whose accommodation it was made, is held to be usurious. In such a case, the facts of the transaction as they appear to the purchaser, make known to him that he is advancing his money to the very man whose bill or note he gets, and that the bill or note had no legal obligation whatever, until he received it. The substance and nature of such a transaction is nothing

more than a loan at more than legal interest, and the bill or note a security for it, and that was the real intention of the parties. If the facts of the transaction, as they appeared to the parties at the time, are to be examined for ascertaining 'the view of the parties' in order to satisfy the court that the transaction was, in its 'nature and substance,' different from the form which they have given to it, surely the same examination should be made for ascertaining 'the view of the parties,' in order to satisfy the court that the transaction was, in its 'nature and substance,' that which its form indicates. Applying this test to this transaction, the question as to a loan to Wilson & Orr is at an end. Johnson saw a note importing full consideration and payable to bearer in the hands of Belcher, a broker. He knew that Belcher, as holder or bearer, had the right to sell it, and to transfer it by delivery, and that any person had the right to purchase it from him as holder at any price that might be agreed upon, provided Belcher did not make himself liable to return a greater sum than the sum received, and legal interest. Wilson & Orr appeared not in the transaction; Johnson knew not that they had any interest in it. How, under such circumstances, is it possible that Johnson, in exercising an acknowledged right to purchase the note which Belcher had an acknowledged right to sell, intended to lend to Wilson & Orr the money which he paid to Belcher as the price of the note? If the circumstances of a transaction may be resorted to for ascertaining the 'view of the parties' (and it is certainly a most legitimate source), Johnson intended not to lend his money, but to buy a note. And therefore the transaction is untainted with usury; for, as has been said before, there can be no usury where there is no loan."

Following this authority, it was held in Brummel v. Enders, 18 Grat. 873, that "where the maker of a note names no payee, and places it, in that condition, in the hands of an agent for negotiation, who sells it at a greater discount than the legal rate of interest to a purchaser who does not know that the note is sold for the maker's benefit, and the name of the purchaser is inserted in the note when it is delivered to him by the agent, or subsequently, the transaction is not usurious." In Illinois, also, it has been decided that where a note was drawn to the order of bill brokers employed to raise money for the maker, a sale at any price was not usurious. Sherman v. Blackman, 24 Ill. 345. In Massachusetts a different conclusion was reached in Sylvester v. Swan, 5 Allen, 134; but in that state a bona fide purchaser from a payee of an accommodation note will not take a good title. Whitten v. Hayden, 7 Allen, 407. No reference was made to any other authorities bearing directly upon the point, but in none of the other states are the provisions of the statute of usury so favorable to the purchaser of negotiable securities as in Pennsylvania.

The acts of 1842 and 1856, (Purd. Dig. 561, pl. 4, 5) authorize railroad and canal companies to sell their bonds under par, and the proviso, already quoted, of the second section of act of 28th May, 1858, expressly excepts from the operation of the statute "the holders of negotiable paper taken bona fide in the usual course of business." Without such proviso the new statute would not have affected one purchasing negotiable paper from a holder for value—it has never been thought that the holder of a bond or other security than bills or notes could not sell it just as freely since 1858 as before. Applying then the familiar maxim that force must be given to every word of the law, no meaning has been ascribed to the language of the proviso, unless it be to protect such transactions as in Gaul v. Willis, Moore v. Baird, and the present case. It is admitted by the plaintiffs that as a conclusion of fact the defendant purchased the note in good faith, in the usual course of business, and the only contention is, that in law, upon the facts of the case, he could not have been such a purchaser, but if the very words of the statute exempt him from its provisions, there is no room left for construction. And this is an answer to the suggestion that the decisions of other states should be followed in a federal court, rather than those of Pennsylvania. It is true that in questions of a commercial and general nature, the federal courts are not bound by the decisions of the state courts (Williams v. Insurance Co., 13 Pet. [38 U. S.] 415), but they follow the decisions of the state tribunals on all questions depending on the local statute laws of the states. Suydam v. Williamson, 24 How. [65 U. S.] 427; Leffingwell v. Warren, 2 Black. [67 U. S.] 599.

Whether this contract of purchase was lawful or not, depends on the language of the Pennsylvania statute, and is a question of Pennsylvania law. So regarding it, and putting an interpretation upon the language of the act of assembly of 1858 in the light of the Pennsylvania decisions to which reference has been made, it is believed that the defendant must be held "a holder of negotiable paper, taken bona fide in the usual course of business," and that therefore judgment should be entered in his favor.

The case was taken to the circuit court of the United States by writ of error.

Geo. Junkin, Esq., for plaintiffs in error, among other authorities, cited and relied on Sylvester v. Swan, 5 Allen, 134 (Bigelow, C. J.), and Campbell v. Nichols, 4 Vroom (33 N. J. Law) 81 (Beasley, C. J.).

Jas. W. Paul, Esq., for defendant in error

Before McKENNAN, Circuit Judge.

The judgment of the district court was affirmed. No written opinion was delivered.

Case No. 13,204.

SPARHAWK et al. v. DREXEL et al.

[12 N. B. R. 450;[1] 1 Wkly. Notes Cas. 560.]

Circuit Court, E. D. Pennsylvania. March 5, 1874.

PARTNERSHIP — LIEN — DEPOSITED SECURITIES — POWER TO SELL—BANKRUPTCY—ASSIGNMENT.

1. A partnership is not entitled to retain, towards the payment of its debt, the surplus arising from the securities held by one partner for his debt.

2. Where a creditor has a general lien, and the debtor, on receiving an advance or other accommodation from such creditor, deposits with him a particular security, specially intended, or appropriated, or even pledged to meet such advance, or to cover such accommodation, the security is subject not only to a particular lien for the advance or liability, but also to the creditor's general lien.

3. If two mercantile houses are composed wholly of the same persons they constitute, notwithstanding the difference in their names of association, one and the same joint party creditor, and if the creditors are entitled to a general lien and there is a deficiency in value of the securities deposited with either house, an ulterior general lien does not attach to any surplus in value of the securities deposited with the other house, except under special circumstances.

4. The difference in names implies an intended separation of possession and control, and in order to establish an ulterior general lien in favor of either house, it is only necessary to rebut this implication.

5. If the debtor knows that the two houses are composed of the same persons, and the declarations or acts of the parties pending the business, indicate a belief on each side that either house may control the securities deposited with the other house, there is a general ulterior lien, in favor of either, upon any surplus in the hands of the other.

6. A creditor who is vested with authority to sell securities deposited with him, cannot exercise it otherwise than under a trust for the debtor's benefit.

7. A creditor who holds stocks as collaterals, need not sell them by auction, but may sell them at the stock exchange or brokers' board.

8. If the debtor, though insolvent, acquiesces in a sale of stocks by a secured creditor, his assignee is bound by such acquiescence, although the stocks are sacrificed.

9. The assignee is not bound by the bankrupt's ratification or acquiescence in a sale of collaterals made after the commencement of the proceedings in bankruptcy.

10. An assignment, though voidable at the suit of the assignee, is not void.

[11. Cited in Re Pitts, 9 Fed. 544, to the point that the right of the assignee to recover property transferred in fraud of the bankrupt act can only be enforced by a suit, instituted for that purpose under section 5046 or section 5129, Rev. St.]

Charles T. Yerkes, Jr., traded as C. T. Yerkes, Jr., & Co. While thus engaged in business, he obtained a loan from S. & W. Welsh, and deposited with them certain stocks and other property as collateral security. On October 17th, 1871, Drexel & Co. purchased the claim of S. & W. Welsh, and received the securities. Drexel & Co. sold the securities and realized enough to pay the debt and leave a balance of eight hundred and seventeen dollars and ninety-eight cents. Out of this balance they retained sixty dollars and forty-three cents, on account of a debt due by C. T. Yerkes, Jr., & Co. to them. Francis A. Drexel, Anthony J. Drexel, J. Pierpont Morgan, Joseph W. Drezel, J. N. Robinson, and J. H. Wright, were engaged as partners in the business of bankers and brokers under the firm name of Drexel & Co., in the city of Philadelphia, and under that of Drexel, Morgan & Co. in the city of New York. C. T. Yerkes, Jr., & Co. obtained loans from F. A. and A. J. Drexel, the senior members of these two mercantile houses, and deposited certain collaterals with them to secure the same. On a sale of these collaterals enough money was realized to pay these loans and leave a balance, which was retained by Drexel & Co. on account of a debt due them by C. T. Yerkes, Jr., & Co. C. T. Yerkes, Jr., & Co. also obtained loans from Drexel & Co. and Drexel, Morgan & Co., and deposited securities with each house to secure their respective loans. The collaterals for these loans were deposited with those in charge of the business of Drexel & Co.

C. T. Yerkes, Jr., & Co. failed on the 16th day of October, 1871, and was then indebted to the various parties collectively in the sum of $945,032.76, this sum being inclusive of interest to the 17th of October, 1871. A portion of this sum (inclusive of interest as aforesaid), $186,199.17, being the claim for moneys loaned by S. & W. Welsh, which was on the 17th day of October, 1871, purchased by Drexel & Co. The remaining portion of the first mentioned sum, except the sum of $2,085.00, consisted of balances of moneys which had been originally loaned by Drexel & Co., in thé city of Philadelphia, amounting to the sum (inclusive of interest to October 17th) of $50,691.39, and by Drexel, Morgan & Co., in the city of New York, amounting to the sum (inclusive of interest as aforesaid) of $610,691.36, and by F. A. & A. J. Drexel, amounting to the sum (inclusive of interest as aforesaid) of $95,395.84. The loans by Drexel & Co. and Drexel, Morgan & Co. were demand loans; that by F. A. & A. J. Drexel was payable in sixty days from September 22d, 1871.

All of these loans, as before stated, were secured by pledges of various stocks and other securities. The value of those pledged for the loan originally made by S. & W. Welsh, was in excess of the amount of the sum due.

The value of the securities (as estimated by the subsequent sales made) originally pledged for the loan by Drexel & Co. (of which the sum of $50,691.39 remained due at the time of the bankrupt's failure) in the possession of Drexel & Co. at said time, ex-

[1] [Reprinted from 12 N. B. R. 450, by permission.]

ceeded the said sum by the amount of about $55,687.73. The value of the securities (according to the same estimate) remaining of those originally pledged for the loan by Drexel, Morgan & Co. (of which the sum of $610,691.36 was due) was at said time less than said sum by about the sum of $57,205.04. The value of the securities (according to the same estimate) remaining of those originally pledged for the loan by F. A. & A. J. Drexel (of which the sum of $95,395.84 was due) at said time exceeded said sum by about the sum of $12,297.18.

On the 17th of October, 1871, C. T. Yerkes, Jr., & Co. executed the following paper, to wit:

"Philadelphia, October 17th, 1871. Drexel & Co., Drexel, Morgan & Co.—Gentlemen: You are hereby authorized to sell, at public or private sale, for cash or on credit, all stocks, bonds, and other securities you may hold which belong to me, or in which I am interested, and apply the proceeds to the payment and satisfaction of the claim you hold against me. This is to apply to the amounts heretofore advanced or loaned to me, and also to such claims against me as you may purchase. Until sold, you will hold the securities as collateral. C. T. Yerkes, Jr., & Co."

On the 18th day of October, 1871, another paper was executed by C. T. Yerkes, Jr., & Co., which was as follows:

"C. T. Yerkes, Jr., & Co. in account current with Drexel & Co., for account of Drexel & Co., Drexel, Morgan & Co., and F. A. and A. J. Drexel.

"Please examine and report on this account as soon as convenient.

Dr.		Cr.
To amount due Drexel, Morgan & Co.	$505,802 19	By collaterals:
To amount due F. A. and A. J. Drexel	95,000 00	277 shares Green and Coates Streets Railroad stock.
To amount due Drexel & Co.	186,200 00	299 shares Camden and Amboy Railroad stock.
		100 shares New York Central and Hudson Railroad stock.
		5,000 shares Philadelphia and Erie Railroad stock.
		7,600 shares Lehigh Navigation Company stock.
		1,521 shares Pennsylvania Railroad stock.
		$3,500 United States 5-20 bonds.
		$1,000 Oil Creek and Allegheny Railroad bond.
		$8,000 St. Louis city gold loan.
		$32,050 state of Pennsylvania six per cent. loan (14-25).
		$21,000 Philadelphia and Erie Railroad seven per cent. bonds.
		$271,900 Philadelphia city six per cent. loan.

"Whereas, Charles T. Yerkes, Jr., & Co. have heretofore borrowed from Drexel & Co., Drexel, Morgan & Co., and F. A. and A. J. Drexel, various sums of money, at various times, and deposited with them various stocks, bonds, and other securities as collateral therefor, with the understanding and agreement that such stocks, bonds, and other securities should be held and appropriated as collateral security to and for the amounts due upon any and all of said accounts; and whereas, there are now due to said several parties, on account of such loans and dealings, the sums above mentioned, and they hold the stocks, bonds, and other securities above set out, under the agreement and understanding above mentioned, and they desire further authority to sell and dispose of the same: Now, therefore, this agreement witnesseth, that said Drexel & Co., Drexel, Morgan & Co., and F. A. and A. J. Drexel are hereby authorized to sell and dispose of the stocks, bonds, and other securities held by them, as above set out, at public or private sale, for cash or on credit, and for such prices as they can obtain therefor, and apply the proceeds, when and as realized, to the payment of above loans and advances, according to the agreement and understanding above set out. C. T. Yerkes, Jr., & Co."

On the 23d day of October, 1871, Charles T. Yerkes. Jr., made a general assignment for the benefit of his creditors. On the 10th day of November, 1871, proceedings in bankruptcy were instituted against Charles T. Yerkes, Jr., trading as C. T. Yerkes, Jr., & Co., wherein he was adjudged bankrupt on the 13th day of December, 1871; and John Sparhawk, George J. Gross, and J. Davis Duffield were appointed assignees on the 23d day of January, 1872. The assignees thereupon filed a bill in equity against S. & W. Welsh, F. A. & A. J. Drexel, Drexel & Co., and Drexel, Morgan & Co., for an account. The respondents answered, testimony was taken, and the matter referred to a master. The master made a report, to which the following exceptions were filed, to wit:

Exceptions on behalf of defendants to the report of the master: First. The master erred in finding that the defendants were not entitled to apply the securities originally pledged to secure the loan by F. A. and A. J. Drexel, to the indebtedness due to Drexel & Co. Second. The master erred in not finding that all the collaterals were held as a common security to all the loans. Third. The master erred in reporting that F. A. and A. J. Drexel should account for the surplus of the proceeds of the securities pledged for the loan by them to the bankrupt, viz.: for $4,994.14, with interest from November 19th, 1871.

Exceptions of plaintiffs to the report of the master: First. The master has erred in reporting that there was any merger of the securities of the loans made by "Drexel, Morgan & Co.," and "Drexel & Co." Second. The master has erred in not stating an account of the securities pledged for each loan separately; and in not requiring the defendants to account therefor separately. Third. The master has erred in holding that the defendants had any right to sell the securities pledged to them by S. & W. Welsh, in any

other way than at public sale by auction, after due notice. Fourth. The master has erred in holding that the defendants had any right to sell the securities, pledged to "F. A. and A. J. Drexel," "Drexel, Morgan & Co." and "Drexel & Co.," in any other way than at public sale by auction, after due notice. Fifth. The master has erred in not charging the defendants with the highest market price the securities pledged have reached since the illegal sales thereof by the defendants. Sixth. The master has erred in holding that the defendants had any right to sell the securities pledged, without notice of the time and place of sale to C. T. Yerkes or his assignee. Seventh. The master has erred in holding that the defendants had any right to buy the debt due "S. & W. Welsh," and to sell the securities pledged therefor, in the manner they did. Eighth. The master has erred in not charging the defendants with the sum of $60.43, realized from the sale of the securities pledged for the loan made of "S. & W. Welsh" and not paid over to the plaintiffs.

After the exceptions were filed, the master made a supplemental report, stating that his attention had not been called to the fact that the sum of $60.43 had been retained by Drexel & Co., and recommending that they should be directed to pay that sum to the assignees with interest from November 18, 1871. All the other facts material to this case, will be found in the opinion of the court.

Saml. Dickson and J. C. Bullitt, for defendants.

Geo. Junkin, for complainants.

CADWALADER, District Judge. The right of the complainants to the surplus values of the securities transferred by the defendants, S. & W. Welsh, to the other defendants, beyond the whole amount advanced by Messrs. Welsh to the bankrupt, has not been disputed. The other subjects of the bill have been the only matters in controversy. The two so-called houses of Drexel & Co., at Philadelphia, and Drexel, Morgan & Co., at New York, were composed each of the same six persons. They are here defendants. The bankrupt had certain transactions of distinct business with two only of these persons, namely, F. A. and A. J. Drexel. From these two he received advances, which were more than covered by deposits of distinct specific securities. The other defendants were not, in any wise, interested in these particular securities. Nevertheless, the surplus of their proceeds, after payment of the specific advances upon them, appears to have been received and retained by the six defendants. I concur with the master in opinion that they are accountable for such surplus to the complainants. I do not think that the result could, in this respect, have been changed by anything short of a positive appropriation by the bankrupt, or an agreement of equivalent effect. I believe that the defendants acquiesce in this conclusion. The subjects of the principal contention are other securities which were deposited by the bankrupt with the defendants' New York and Philadelphia houses respectively, to cover several specific advances of large amounts of money made from time to time to him by each house. The relation of the defendants to this debtor was not, at either place, that of brokers. Their principal relation, at each place, was that of his bankers. But they were not simply his bankers. The relation of banker was combined with a relation which was, in a certain legal sense, analogous to that of a factor. Independently, however, of the writings of 17th and 18th October, 1871, which will be separately considered hereafter, this analogy was a qualified one. The general relation of a simple banker to his customer, differs from that of a factor to his principal. Chief Baron Pollock, when at the bar, said in argument, that a banker is a factor for money (2 Barn. & C. 425); but one of the judges to whom the argument was addressed, said only that as to a depositor's ownership of bills remaining in the hands of his banker, the case of customer and banker resembled that of principal and factor; meaning to suggest that the resemblance was not identity—"Nullum simile est idem." Another judge said, on the same question, of the property continuing in the customer, that bankers receive bills, as factors or agents to obtain payment of them when due. The completeness or general truth of the analogy to a factor was afterwards denied in the house of lords. 2 H. L. 28, 36, 37, 43, 44. In an intervening case, bankers were judicially described by Parke, B., as "money factors" (6 Man. & G. 655), but by Lord Denham, C. J., as "a species of factors in pecuniary transactions" (Id. 666). These last expressions were used with reference to a banker's general lien. But the analogy is, in even this limited respect, an imperfect if not a false one.

The existence of a factor's general lien has been established for one hundred and twenty years, and the existence of a banker's for eighty years. They are each privileged creditors; but a factor's general lien is more extended than a banker's. The factor has, for his advances and outstanding liabilities accrued, and also for those accruing but not yet matured, a lien upon even the cash balances, which would otherwise be due and payable to his principal. A banker has no such lien upon the cash balances, which are, from time to time, to the credit of his customer. They can be drawn out for the customer's current use, upon his checks or other orders, though he may be under outstanding immature liabilities to the banker. The difference is, in this case, unimportant, because, upon securities on hand, not converted into actual cash, which alone were here in question, there is no distinction between the lien of a factor and that of a banker. Each has a general

lien upon all such securities while they are in his possession. Authorities in the United States and in England which recognize or establish a banker's general lien, are: [Bank of Metropolis v. Bank of New England] 1 How. [42 U. S.] 234, 239; [Bank of Metropolis v. Bank of New England] 6 How. [47 U. S.] 212; [Bein v. Heath] Id. 229; Sweeney v. Easter, 1 Wall. [68 U. S.] 166; 1 Esp. 67; 5 Durn. & E. [5 Term R.] 491; 15 East, 428; Ryan & M. 271; 12 Clark & F. 805, 806, 810; same case in house of lords, 3 C. B. 531, 532, 535, and in exchequer chamber [6 Man. & G.] 660, 664–666; 8 Ch. App. 41; L. R. 17 Eq. 235, 236. Where a creditor is in a privileged relation, which thus gives him a general lien, and the debtor, on receiving an advance or other accommodation from such creditor, deposits with him a particular security, specially intended or appropriated, or even pledged to meet such advance, or to cover such accommodation, the security is subject not only to a particular lien for the advance or liability, but also to the creditor's general lien. This general lien is a right of retention, which attaches at once, and becomes ultimately available for his benefit, if there is a surplus of the value of the particular security and such surplus is needed in order to cover any deficiencies. If each of the defendants' houses were considered here as a distinct joint party creditor, the lien of each house would thus have been a general one upon all securities deposited by the debtor, with such house. That the defendants had, at each of the two places at which they conducted their business, a general lien to this extent, is unquestionable. The questions to be considered are not as to a general lien of so simple a kind.

The first question will be, whether for any deficiency in value of the securities deposited with either house, an ulterior general lien attached to any surplus in value of the securities deposited with the other house. Composed, as these two houses were, wholly of the same persons, they constituted, notwithstanding the difference in their names of association, one and the same joint party creditor of the bankrupt, or debtor to him. Their accounts with him could, at any time, have been consolidated, in order to ascertain the general balance of all his transactions with them, in both names; and the final balance of all accounts, whether against him, or in his favor, could have been sued for in a single action. These propositions do not suffice to establish the existence of the indiscriminate ulterior general lien, which is now in question. To assume that such a lien upon all the securities, as a common fund, must necessarily attach, as a consequence of the consolidated right of action, would be a mere begging of the question. But the propositions may elucidate it.

Lord Kenyon, the judge who first recognized the general lien of a banker, said that it existed by the general law of the land, unless there was evidence to show that the banker had received any particular security, under special circumstances, which would take it out of the general rule. 5 Durn. & E. [5 Term R.] 491. From the case of Brandao v. Barnett, if the judgment of the court of exchequer chamber (6 Man. & G. 630), and the judgment of reversal in the house of lords (3 C. B. 519; 12 Clark & F. 787), are compared with each other and with Leese v. Martin, L. R. 17 Eq. 224, it will appear that the special circumstances which will prevent the attaching of the general lien, must be such as are incompatible with its intended existence or continuance. Here it may be observed that if the name of the two houses had, in each place, been the same, the mere fact that two or more distinct accounts, differently described or entitled, were kept by them with this customer, would not have prevented the ulterior general lien from attaching. The accounts might, at any time, have been consolidated for the purposes of such ulterior lien. Indeed, the lien would have attached without any actual written consolidation of accounts. The separation of the accounts could have no more operation to the contrary than a specific appropriation of a certain security to meet a particular advance, which is the ordinary case of the general lien attaching to any surplus. The reason is, indeed, stronger than in such ordinary case. The balance of one account being against the defendants, and the balance of the other being in their favor to a greater amount, the general lien would have secured the excess of the latter balance above the former one.

In the case of In re European Bank, the judges of the English court of chancery appeals were of opinion that, "as between banker and customer, whatever number of accounts are kept in the books, the whole is really but one account, and it is not open to the customer, in the absence of some special contract, to say that the securities which he deposits are only applicable to one account." In that case, a debtor bank had three accounts with a creditor bank, which were kept by the latter bank; namely, a loan account, a discount account, and a general account; and was in the habit of receiving, from the creditor bank, accommodation loans, which were entered in the loan account, and of transmitting securities, by way of deposits, to meet these loans. In the course of these transactions, the debtor bank thus transmitted three bills of exchange to the creditor bank in a letter, stating that they proposed to draw upon the latter bank for a greater amount, but that, as their credit would not afford a margin to that extent, they sent the three bills as a collateral security. The drafts for the larger amount were paid by the creditor bank, and the payments charged to the loan account. The avails of the three bills were more than sufficient to cover this loan account; but there was a deficiency, which remained due, on the general account. The decision was that, for this deficiency, the creditor bank had a lien

upon the three bills so far as they were not required to cover any balance of the loan account, though securities thus deposited had never before been applied, as between the two banks, to any balance or accruing liability in either of the other accounts. 8 Ch. App. 41. But, in the present case, the difference was not thus merely in the heading or title of two accounts kept by a banking-house with an indebted customer. The difference was also in the names, under which the defendants carried on their own business at the different places, and in which the respective accounts with him were kept, and the several securities were originally deposited and received. Did this additional difference exclude the ulterior general lien?

Independently of special circumstances, which are to be considered hereafter, I would have thought that it did. It is true that such a private association as an unincorporated banking-house, or a commercial firm, is incapable of any artificial aggregate existence, independent of the natural personality of the members. Their internal and external relations, in this respect, cannot be conventionally modified where any question of continuing succession is involved, or any question of a right of action, or of any established form or mode of judicial procedure. But where no such question, either of representative existence or of judicial personality, is involved, the internal and external relations of the association may, within certain limits, be so determined conventionally as to resemble those which might be contracted by an artificial aggregate person, such as a corporate body. As to the internal concerns of a partnership, we know that their books ordinarily contain debits and credits to each member in account with his firm, in the same form as if he were the stockholder of a corporation; and cases have occurred in which such entries, and those of a different kind, have been judicially contrasted in determining the question whether a debt is joint or several. As to external relations, the illustration is more simple. The business may be conducted at different places in the distinct names of two or more branches or firms, which are nominally different, though, in fact, composed, as in the present case, of the same persons. Now, with reference to such nominally different personalities, liens may, conformably to the laws of property, be conventionally created or extended, excluded or restricted. And this may be done either expressly or by implication. In considering the effect of the difference in the names, it may be observed that no lien can exist in favor of a creditor who has not possession of the subject. It is true that a controlling power is in effect possession, and that the requisite control might conventionally have been given, notwithstanding the difference in the names of the two houses. But this difference in their names might well be understood as implying, unless otherwise explained, an intended separation of possession and control. This would exclude the ulterior lien in question. If an association, composed of the same persons, carries on business in Asia, America, Europe, and Africa, under four different names, the intended separation might, perhaps, in many cases, be almost a simple inference of common sense. On this point I may have overlooked some authority which ought to have been mentioned. In some cases which I have read there might be a supposed analogy; but it fails of applicability to the question. In Haille v. Smith, 1 Bos. & P. 563, the existence of such an ulterior lien was not suggested; but there was an express appropriation, which made the question immaterial. The appropriation would not have been thought necessary if the lien existed. But I have not attributed to the case any bearing upon the question. The rule upon the subject should be sufficiently uniform to be adaptable to the probable cases of most frequent occurrence; and where the names at different places differ, a shifting lien, transposable from one place to the other, could not ordinarily be sustained without practical inconvenience. To avoid injurious uncertainty, the safer rule would seem to be, that even where the same persons conduct their business in the same town under different names, an intended exclusion of the ulterior general lien is ordinarily implied.

Therefore, independently of the special circumstances, I would be of opinion that the defendants had no lien upon a surplus in the hands of one of their houses to cover any deficiency in the securities deposited with their other house. The great fire of the 8th and 9th of October, 1871, at Chicago, caused a sudden depression of the market or nominal value of the securities. The bankrupt, on the 16th of that month, failed in his business, which had been that of a banker and stock and exchange broker. The securities in question were such as he had been in the habit of buying and selling as a broker, and as a speculator on his own account. Until after the fire, no special circumstances had occurred in any wise changing the general aspect of the legal question above stated. The business had theretofore been conducted very loosely on the part of the defendants, but without any apparent irregularity on the part of the bankrupt. The defendants had kept no accounts with him which were entered in their books at either New York or Philadelphia. They had only memoranda of the loans on slips of paper accompanying the securities. The specific securities were, until then, kept separately by, or for, the respective houses. In the bankrupt's books there was always a formal separate account of each house with him, and appended was always a list of the securities. This list was kept by him in such a manner as to indicate the securities which each house had originally received, and what securities were,

at any given time, on deposit, with them respectively.

The occurrences in the week next following the fire were important. On the 10th of October, 1871, or perhaps a day or two later, the defendants made a verbal demand upon this debtor to pay off their loans to him as fast as he possibly could. He assented or submitted. They appear to have been willing that, in order to raise the money, he should himself sell the collateral securities which they held. This demand was made at Philadelphia, by two of the defendants, on behalf either of both houses or of their New York house. One of the defendants testifies that the call for payment was more positive, but that on the result of the interview the positive call was withdrawn. Being pressed to give the language used, he answered, "The language it is impossible for me to recollect further than one point * * * in regard to Drexel, Morgan & Co.'s loan. Upon referring him (the debtor) to them for renewal, his reply was, 'There is no need, it is all one concern, and you can fix it as well as they.' That, to my recollection, is about the words used, and we arranged it accordingly, without reference to them. * * * That is about as much as I can recollect of the actual words, except the agreement to continue the loan. That is not part of the words. * * * There was no change made in the entries, but the collaterals were consolidated." Being asked to explain this expression, he added:—"Previous to that time, the line of distinction had been attempted, in keeping collaterals of Drexel & Co. and Drexel, Morgan & Co.,—that is to say, though in the same receptacle, they were kept separate, probably by a band. Afterwards there was no separation." Recurring to the interview, he said, "I merely continued the loan; extended the time of its payment by making it on demand," and said further, that this was done without any reference whatever to Drexel, Morgan & Co. by Drexel & Co. Another of the defendants and the debtor, concurred in attributing to what passed in the same interview, the effect, as between the defendants' two houses, of an assumption by the Philadelphia house of a responsibility to the New York house for the whole amount of the loans; and the debtor assumed in his testimony, that the business thereafter was between him and the Philadelphia house alone. But this was a mere arbitrary version; and the assumption was unsupported by any written or oral proof. The debtor's testimony on this point, where not indistinct, is, like that of the defendants, merely argumentative. He and they, by constantly introducing alleged mental understandings and asserted usages, have so confused and obscured their testimony, that, independently of certain acts, which will next be mentioned, it would be of no effect.

From the master's report it appears that, in the interval of a week or less between this interview and the debtor's failure, "the physical separation of the collaterals by means of envelopes or gum bands was entirely dispensed with, and they were mingled together in a common receptacle." It further appears that the loan by the Philadelphia house, which amounted, on the 9th of October, 1871, to two hundred and thirty-two thousand dollars, was reduced by the payment of forty-seven thousand dollars on the 12th of that month, when six hundred and fifty-three shares of stock of the Pennsylvania Railroad Company, pledged originally for the loan by the New York house, were taken away by the debtor. The balance due to the Philadelphia house was further reduced by a payment of fifty-six thousand dollars on the next following day, when five hundred shares of the stock of the same company and twenty-eight thousand dollars of the six per cent. loan of the city of Philadelphia, both likewise originally pledged to the New York house, were taken away by him. The payments of these two amounts, together one hundred and three thousand dollars, thus made by the debtor to the Philadelphia house, appear, by their memoranda and by his books, to have been appropriated by him and them in reduction of his debt to them. The master states that a further reduction of the debt to the Philadelphia house was made by a like payment of eighteen thousand six hundred and forty-five dollars, on the 16th of the same month, when about three hundred and thirty-four shares of stock of the Pennsylvania Railroad Company were taken away by the debtor from those which had been originally pledged for the loan by the New York house. This payment, according to the master's report, was credited by the defendants on their memorandum as made on account of the debt to the Philadelphia house, but does not appear to have been so entered on the books of the debtor. If all the members of the two houses had not been the same persons, every one of these appropriations would have been a conversion of securities of the New York house to the use of the Philadelphia house; and every such conversion would have been a fraud upon any non-assenting member of the New York firm, who was not also one of the Philadelphia firm. In that case, restitution of the securities, or of their value, would have been compellable under proceedings in equity at the suit of the non-assenting party. It appears from the master's report, that if such restitution had been made, there would not ultimately have been any deficiency in the value of the securities to cover the whole amount of the loans made by both houses. Now, it might be suggested that although the two houses were composed of the same persons, and therefore no such adversary relation could arise, yet the only reason for excluding them as a single joint creditor from an indiscriminate general lien upon all the securities, considered as a common fund, depends upon the implied conventional analogy

to firms not composed wholly of the same persons, and that we should adhere to this analogy in all its consequences. If the suggestion were fully admitted, it might be supposed to follow that the New York house was equitably subrogated for the Philadelphia house, to the extent in value of the securities diverted by the latter house from their original appropriation. A confused notion of such a right of substitution seems to have been in the mind of one of the defendants while under examination as a witness.

I have not, however, been able to conceive a practical definition of any cognizable equity so founded upon the suggestion as would be applicable to the present case, independently of the question of express or tacit convention. The case must therefore be considered upon the latter question alone. Here the question differs very materially from what it would have been if the persons composing the two houses had not been wholly the same. If there had been a member of either house of the defendants who was not a member of their other house, the two houses or firms would have had separate rights of action against the bankrupt, which could not have been consolidated. Each firm would then have had its own general lien upon the securities deposited with such firm. This lien would have attached for the specific advances and also for the general balance of account of such firm. But to establish an ulterior right of either firm, if thus composed of different members, to retain a surplus in value of securities in order to cover a deficiency in the value of those deposited with the other firm, some positive act of appropriation, or equivalent agreement, would be necessary. Lord Eldon said that "understanding alone, unless in a fair sense amounting to agreement, would not do." 2 Ves. & B. 84. I think that the present evidence would not suffice for the purpose in such a case. Composed, however, as the two houses were in the present case, of the same persons, the question is merely one of rebutting an implication. If the names of the houses had been the same, the ulterior general lien would have attached. The implication of a conventional exclusion of such a lien would arise only from the difference in their names. The question is, whether the special circumstances which have been proved suffice to rebut this conventional implication. In the mere constitution of the two houses, there was nothing whatever incompatible with as extended a lien as if their names had been the same. It is true that, on the question of rebutting the implication, the remark of Lord Eldon applies to a certain extent; but its application is narrowed, because the question is both a different and a more limited one. A mere mental purpose or intention, such as the defendants, in their answer, call an understanding, is no criterion of right. See [Bank v. Kennedy] 17 Wall. [84 U. S.] 20, head note, pl. 8, and pages 28, 29. Testimony of such simple belief or understanding is inadmissible. This rule, which has always been observed, has acquired great practical importance since parties litigant have been examinable as witnesses.

The proper inquiry is, whether the declarations or acts of the parties in the interval which has been mentioned sufficiently indicated that the securities were conventionally commingled, so that they could be shifted at the option of the defendants from one of their houses to the other. I cannot attribute such an effect to the simple fact that the debtor knew the two creditor houses to be composed of the same persons. The intention to separate the possession and control might, with reason, be attributable, notwithstanding such knowledge. But where such knowledge exists, and the declarations or acts of the parties, pending the business, indicate a belief upon each side that either house may control the securities deposited with the other house, the case becomes, in principle, the same as if their business had been conducted at each place in the same name. In that case, if they had kept two distinct accounts with the debtor, this fact would, as we have seen, have been immaterial. We have no sufficient knowledge of any such declarations of the parties in the interview which has been mentioned as can be judicially acted upon. But their subsequent acts directly negative any continuing intended apportionment of the lien, and indicate that, after the interview, all the securities were blended as a common fund, which was treated as the subject of an indiscriminate general lien of the two houses. It is immaterial whether such acts determine the effect of what may, in the previous conversation, have been agreed upon, or constitute independent proof in themselves of a blending of the securities in a common fund. In either view of the subject the effect is the same. The indiscriminate or ulterior lien may, therefore, be considered as having attached to all the securities at each place, notwithstanding the difference in the names of the two houses. This indiscriminate lien attached before the failure of the bankrupt on the 16th of October, and before the defendants had reason to believe that his failure was impending. Had this been otherwise, the bankrupt law would have prevented their agreement with him, made immediately after his failure, from taking effect for their benefit. But inasmuch as their prior lien continued, this agreement was neither actually nor constructively in fraud of the bankrupt law. The agreement is, therefore, available to the extent of placing them on the same legal and equitable footing as if the securities had been originally received by them under a contract enabling them to make sales in such manner as the agreement authorizes.

But such a contract, so far as it enables creditors to extinguish their debtor's right of redemption by a sale, must, like all contracts affecting equities of redemption, be construed benignantly for the debtor,—as benig-

nantly for him as may consist with security of the creditors. It is not necessary to consider how far an agreement enabling them to sacrifice the securities would, if made at such a crisis of insolvency, have contravened the bankrupt law. The inquiry may be dispensed with, because, if bankruptcy had not occurred, the rule of interpretation of the contract would exclude any such unreasonable extension of the power. How far, and on what conditions, if no such posterior agreement had been made, and no prior express authority to sell had been conferred, the defendants might have sold the securities on default of payment by the debtor, is likewise an unnecessary inquiry. The posterior contract has the same effect as if a reasonable authority of the kind had been conferred when the securities were deposited. It is an authority to sell them at public or private sale for cash or on credit, and, as I think, to sell before or after the maturity of the respective advances. But creditors in whom such an authority is vested cannot exercise it otherwise than under a trust for the debtor's benefit as well as their own. They are not to frustrate any just expectations of a surplus by forcing sales for barely enough money to secure themselves. There was thus a trust vested in the defendants for the residuary benefit of the bankrupt and of his estate. And the only remaining question is whether this part of their trust has been duly executed.

The question may be considered as to the mode and as to the times of sale. As to the mode, I am not aware of any reason that the sales should have been by auction. On the contrary, I think that, considering the nature of the securities, this would not have been an advantageous mode of disposing of them if there was a fair market for them at the stock exchange or brokers' board, where the ruling prices ordinarily fix the standard value, from time to time, of such securities. If the times of sale were proper, this mode was unobjectionable. The dates of the sales have not been precisely ascertained. An account with the bankrupt on the defendants' books was opened by them, for the first time, on the 23d of October, 1871, a week after his failure. The first entries in this account are dated on the 17th of October, 1871, the day next after his failure, charging him with several hundred thousand dollars. According to this account, sales of the securities to a very large amount were made at several times before the 24th of that month; other sales were made on the 25th of October and on the 3d of November; others on the 6th, 7th, and 9th of November; and the remaining sales, netting a large amount, on the 18th of November, 1871. One of the defendants testifies, however, that the last sales were made, as he thinks, on the 9th, or it might have been on the 7th, of November, the credits under date of the 18th of that month "being receipts arising from sales made at an earlier date, and prior to the 9th." He adds:—"The city sixes delivered on the 18th of November had been sold shortly subsequent to Mr. Yerkes's failure; but, in consequence of the refusal of the city comptroller to countersign, we were not able to deliver to the parties until the 18th." The possible importance of this discrepancy will be seen hereafter. There is no reason whatever to doubt that all the sales were made at the highest market rates obtainable at the respective times of sale. The only question is whether the sales were unduly precipitated. Another of the defendants testifies as follows:—"We could have sold out the stocks at once and paid the debt had we been disposed to have done so; but we preferred having Mr. Yerkes nurse his stocks along so as to get more for them, and meet the market gradually,—in other words, we did not want to slaughter his stocks." That the witness was mistaken as to the existence of a rightful power to sacrifice them, would be unimportant if they were not in fact sacrificed. He further testifies thus: "A large portion of these stocks were sold on time, in order that a better price could be obtained than a cash sale—a forced sale. If I had not had that judgment that the market was going down further, I could have kept those stocks instead of selling them, and possibly have produced more money, because the market went up afterwards. My idea was that the Chicago fire had destroyed about two hundred millions of dollars, and I could not see any future for speculative stocks. Question.—What was the character of the stocks? Answer.—We had Philadelphia and Erie, Lehigh, Pennsylvania Railroad; most of them were speculative stocks and non-dividend-paying stocks. The Pennsylvania Railroad stock, I thought. would decline from the interruption of the trade with Chicago and the Great West. Had I held similar stocks, even without need of money I should have sold." That a sudden depression of prices, caused by an extraordinary fire, would, in a country like ours, be permanent, or that they would probably fall still lower from the same local cause, was a somewhat arbitrary theory. The sales in question were in fact made on a rising market, and they were made for not more than just about enough to cover the debt. If there had been a little further delay, there would have been a surplus from a rise in prices, which would not have been properly called speculative. If the stocks were rightly described by him as speculative, the course pursued was not the less disastrous. In the absence of ratification, express or implied, I would pause long before deciding that the sales were such as would have been made by a prudent owner of the securities in order to raise, within a reasonable time, from the sale of them, a fair surplus above the amount of the defendants' advances. There would

seem to have been no thought of a prospective surplus in value.

But if this were a right statement of the question, it could not be decided without considering another question. It is that of ratification or acquiescence. The assignment to the complainants gave them, for general purposes, a title, by relation to the commencement of the proceedings in bankruptcy on the 10th of November, 1871. On 24th of October, 1871, the bankrupt had made a voluntary general assignment for the equal benefit of his creditors. That assignment was recorded on 4th November, 1871. Though voidable, and afterwards avoided at the suit of the complainants, it was not, in the meantime, void.

I fully concur with the master in opinion that the mere insolvency of the debtor, before his voluntary assignment, did not supersede or affect his residuary ownership of the securities which were subject to the defendants' advances. The defendants must have been aware of the precariousness of this ownership. But while it continued, they were not the less entitled to any benefit derivable from it. Now, it is distinctly proved that if the sales were not made through his own agency, he was fully apprised of and acquiesced in all of them. It is true that he seems to have supposed himself at the mercy, in this respect, of the defendants. But I cannot discover anything in the evidence, before his voluntary assignment, which diminishes the legal or equitable effect of his ratification or concurrence, I think that the complainants, therefore, cannot have any relief as to the sales made before the 24th of October, 1871. But the mistakes in law of these parties may affect the question as to subsequent sales. As to the sales made between the 24th of October and the 10th of November, 1871, I am not quite sure that the complainants are bound to prove notice of the voluntary assignment. I do not think it clear upon the evidence that none of the defendants knew of this assignment. There seems to be some reason to believe, though there is perhaps no distinct proof on the subject, that the voluntary assignee, in relation to all the securities unsold at the date of the assignment to him, confided the execution of the trust to the bankrupt, who was formally or informally that issignee's agent as to these dependencies. It might not, in an ordinary case, have been culpably unsafe to rely thus upon the judgment of the bankrupt where his experience must have been greater than that of the assignee. But the truth may, perhaps, be that the assignee gave himself no concern whatever about the matter. If so, as he would, upon inquiry, have learned that the bankrupt had incorrect notions of the powers and rights of the defendants, the interests of the general creditors were not properly guarded. This part of the case, perhaps, requires further development. If any sales were made after the 10th of November, no ratification of, or acquiescence in them, can be imputable to the complainants. But it may be questionable whether the title of the voluntary assignee was abrogated from that date, and may also be doubtful whether all the sales were not made before it.

The case may be argued before a full court. If a further reference to the master shall become necessary, definite instructions to him will probably be given.

NOTE. The case was subsequently argued before the circuit court, and the exceptions were dismissed and a decree made in accordance with the master's report; the costs to be paid by the defendants. No additional opinion was delivered.

Case No. 13,205.

SPARHAWK et al. v. RICHARDS et al.

[12 N. B. R. 74; 1 Wkly. Notes Cas. 510.] [1]

Circuit Court, E. D. Pennsylvania. April 24, 1875.

SALE—TRANSFER—FAILURE OF VENDOR—BANKRUPTCY—ACTION BY ASSIGNEE.

The defendants, brokers, purchased from another broker certain shares of stock, the transfer and payment to be made on the next day. On the next day the vendor sent to the vendees a bill of sale of the stock, and notified them thereby that the stock had been or was about to be transferred. Payment was thereupon made by the vendees. The vendor failed later in the day, without having made the transfer, but within a few hours after his failure, upon importunity of the vendees, who had knowledge of his insolvency, he gave to them a certificate of a certain number of the shares agreed to be sold, with power of attorney to make the transfer, and procured a debtor of his to make the transfer of the remainder, which was done within a few days subsequently. The assignees in bankruptcy of the vendor, by a bill in equity, sought to restrain the vendees from transferring or selling the said shares of stock, and to enforce a delivery thereof to the assignees, alleging that the receipt thereof was a preference, and in violation and fraud of the bankrupt act. The court dismissed the bill.

[Cited in Bush v. Boutelle, 156 Mass. 170, 30 N. E. 607.]

[This was a bill in equity by John Sparhawk, George J. Gross, and J. Davis Duffield against Samuel A. Richards and William Richards.]

By F. MASON, Master:

To the Honorable the Judges of the Said Court:

The master appointed in the above entitled suit in equity, respectfully reports: That after due notice, I was attended at my office, No. 131 South Fifth street, Philadelphia, on the 18th day of March, 1874, at one o'clock, p. m., and at other times, by George Junkin, Esq., for the plaintiffs, and Samuel G. Thompson, Esq., for the defendants, by whom arguments were made as to the questions involved in said suit.

[1] [Reprinted from 12 N. B. R. 74, by permission. 1 Wkly. Notes Cas. 510, contains only a partial report.]

The following is a statement of the material facts:

On the 14th day of October, 1871, the defendants, being brokers in the city of Philadelphia, purchased from Charles T. Yerkes, Jr., trading as C. T. Yerkes, Jr. & Co., (also brokers,) of whom the plaintiffs are assignees in bankruptcy, sixty-seven shares of the stock of the Pennsylvania Railroad Company, for the sum of three thousand eight hundred and ten dollars and sixty-three cents. The purchase was what is known among brokers as "regular," the transfer of the stock and the payment therefor to be made on the day succeeding the day upon which the contract is made. The 14th day of October, 1871, was Saturday; consequently the execution of this contract was to be completed on Monday, the 16th day of October, following. About noon on that day the defendants gave to C. T. Yerkes, Jr. & Co. their check on the First National Bank of Philadelphia for the amount of the purchase, upon receiving from said C. T. Yerkes, Jr. & Co. a bill for said stock, in the following form:

"Office of C. T. Yerkes, Jr. & Co.
"20 South Third Street,
"Philadelphia, 16, 1871.
"Sold R. & Thompson,
"——67 Pa——@ 56⅞——$3810.63.
"Transfer'd. C. T. Yerkes, Jr. & Co.,
"Per J. P. Y."

The check was duly paid. Shortly afterwards, on the same day, sometime during the afternoon, Mr. Richards, one of the defendants, went to the office of C. T. Yerkes, Jr. & Co., and inquired whether the stock had been transferred. He was informed that it had not been transferred. What induced the visit of Mr. Richards he does not clearly state, but it is evident that his suspicions had been aroused as to the financial condition of C. T. Yerkes, Jr. & Co., from information he had received at the board of brokers. He then inquired whether C. T. Yerkes, Jr. & Co. had the stock, and was informed that they had not the amount which had been purchased by his firm, but that they had thirty-three shares. For this he demanded the certificate, with a power of attorney to transfer, which was given to him. Subsequently, a few days afterwards, by an arrangement previously made between the firm of Bowen & Fox, who were, on the 16th day of October, indebted to C. T. Yerkes, Jr. & Co., the remaining shares of the sixty-seven were transferred to Richards & Thompson. This arrangement appears to have been made by Mr. Fox, of the firm of Bowen & Fox, with Charles T. Yerkes, Jr., Mr. Fox, hearing of his trouble with Richards & Thompson, volunteering to make the delivery of the stock for him. Bowen & Fox accordingly credited themselves with the amount thus delivered on behalf of C. T. Yerkes, Jr. & Co., in their account subsequently rendered.

C. T. Yerkes, Jr. & Co. failed on the said 16th day of October, 1871, between two and three o'clock in the afternoon, and did not afterwards resume payment. Proceedings in bankruptcy were commenced against them, and, on the 13th day of December following, adjudication of bankruptcy was made, and subsequently the plaintiffs were appointed assignees. The present bill was brought by them to restrain the defendants from transferring or selling the said shares of stock, and to enforce the delivery of the same to the plaintiffs, or, if they have been sold, to obtain an account thereof, the plaintiffs alleging that the receiving and procuring of the said shares of stock by the defendants, under the circumstances narrated, was a procurement of a preference to themselves over the other creditors of the bankrupt, and in direct violation and in fraud of the provisions of the act of congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867 [14 Stat. 517].

The theory of the plaintiffs' bill is, that when the defendants paid the sum stated to C. T. Yerkes, Jr. & Co. upon the faith of the representation that the stock had been transferred, or was about to be then presently transferred to them, they gave a credit to C. T. Yerkes, Jr. & Co., and, upon the failure by the latter to make the transfer, they became merely creditors for the amount which they had paid, and that being such, and having reasonable cause to believe that C. T. Yerkes, Jr. & Co. had become insolvent, their demand for the transfer and subsequent receipt of the stock was a procurement of a preference, as contemplated in the first clause of the 35th section of the bankrupt act—in other words, that the failure of C. T. Yerkes, Jr. & Co. to make the transfer immediately after the payment, was a failure to execute a contract with the defendants, and that before its execution the insolvency of C. T. Yerkes, Jr. & Co. intervened, the existence of which the defendants had reasonable cause to believe, and that, therefore, the insolvent had no right, under the provisions of the act referred to, to fulfill the contract, either directly or indirectly, and the defendants must account for and return that which they received.

It is answered on the part of the defendants that the bill received by them from C. T. Yerkes, Jr. & Co., and their payment of the consideration of the purchase, effected an equitable assignment of the stock, and that although the actual transfer on the books of the railroad company had not then been made, yet the property became vested in the defendants, and that, consequently, the subsequent transfer could not be one obnoxious to the provisions of the act of congress referred to. This position is not destitute of authority to support it, at least as to the thirty-three shares, (see Add. Cont. 204, and the cases there cited,) but I prefer to consider the transaction from another point of view. The contract for the purchase and sale

on the 14th of October, was that on the payment of the money on the 16th, C. T. Yerkes, Jr. & Co. would transfer to the defendants the stock so purchased and sold. No credit was intended to be given by either party to the other. The act of the vendor—the transfer—and the act of the vendee—the payment—were to be synchronous. If the vendor did not transfer the stock, the vendee was not bound to make the payment; and if the vendee did not make the payment, the vendor was not bound to make the transfer. The defendants, therefore, awaited the signification by their vendor of his readiness to do his part, and when the bill referred to was received, it was, according to the custom of brokers, a notification by the vendor that he was then presently ready to make the transfer and would immediately do so. Thereupon the defendants made the payment. The vendor then discovered that he had not a sufficient quantity of this particular stock then in his possession to enable him to fulfill this and other contracts which he had made. His duty was clearly, then, to immediately return the money paid, and if he had done so I do not think it could be contended that his assignees in bankruptcy could recover it from his vendee. If the vendor had said to the vendees, "I cannot do that which I have just told you I was ready to do, and I therefore return that which was given to me upon the faith of my promise of immediate performance of my part of the contract," could it be pretended that the vendees, by its acceptance and rescission of the contract, would receive a preference, though they should be informed at the same time of the insolvency of their vendor? It seems to me that to hold that the clause of the section of the act referred to contemplates such a result and such an application of its provisions, would be a monstrous distortion of the language and intention of congress.

The vendor, however, did not make the tender of return suggested, but, on the same day, gave the defendants a certificate with power of attorney to make the transfer of thirty-three of the shares purchased, and within a few days transferred the remaining shares by availing himself of the offer of a debtor of his to make it for him, crediting the value of the stock on the debt.

Now, was the course of the vendor any more a violation of the provisions of the bankrupt act than the one just supposed? Are the interests of the creditors of the bankrupt any more injuriously affected in the one case than in the other? Can it be that the defendants, who would not have parted with their money unless they had believed that they would immediately receive the stock, and who would have been entitled to receive an immediate return of their money, though their vendor had become insolvent, can be required to give up the stock after the vendor has actually transferred it to them—part of it on the day when he should have done so by the terms of his contract, and the remainder within a day or two subsequently? I think that the clause of the section referred to cannot be construed to apply to transactions with an insolvent, or one about to become so, where, by the terms of the contract, a present adequate consideration is intended to be paid for a present delivery or transfer of property, although the necessities of the ordinary convenient conduct of business may require a trust to be reposed by both parties in each other, and either fails, before his unexpected insolvency occurs, (the knowledge of which is communicated to the other,) to perform his part, but does so shortly afterwards; provided, of course, that the rights of bona fide purchasers for value be not affected. For how can a transfer or payment, under such circumstances, be said to be made with a view to give a preference? Where a credit is intended to be given, though but for a day or an hour, or even a shorter time, if such may be the case, as where that which is to be done is, by a proper construction of the contract, to be performed subsequent to and not simultaneous with the payment of the consideration, then an intention to give a preference, within the meaning of the statute, may be attributed to a performance, after the intervention of insolvency, of one such contract, and not of others of the same nature. Before commencement of proceedings in bankruptcy, but after insolvency, the insolvent may sell his property for a present adequate consideration, because his estate receives value and no diminution thereof takes place. Cook v. Tullis [18 Wall. (85 U. S.) 332.] Can the circumstance that insolvency happens between the payment of the consideration and the delivery of the property, render the transaction less innocent, or one to which creditors can object as an injury to their interests? It is to be observed that I have taken as proved that the defendants, at the time they received the stock, had reasonable cause to believe that C. T. Yerkes, Jr. & Co. were insolvent. The only one of them examined has denied that such was the case, but such denial is evidently to be attributed to his misunderstanding of what, in contemplation of law, is meant by insolvency. To further illustrate the view which I have taken, it has occurred to me that the transaction cannot be distinguished from the purchase of coupon bonds payable to bearer, over the counter of a broker, where, after the money has been handed, and in the instant intervening between its receipt and delivery of the bonds, in consequence of unexpected demands, he becomes insolvent, and the fact is made known to the purchaser. Surely the broker would not be giving a preference to a creditor or person having a claim against him by then delivering the bonds.

I have not been able to find any case in point sustaining the conclusion to which I have arrived; but the doctrine that advances made on the faith of a security presently to

be given will be protected,—notwithstanding changes in the condition of the borrower pending the consummation of the agreement, by actual delivery of the security,—is analogous in principle to the reasoning which I have adopted. See Ex parte Ames [Case No. 323]; In re Perrin [Id. 10,995].

I have not considered the applicability of the second clause of the 35th section of the bankrupt act, because, apart from the question of alleged preference, there is not the slightest evidence that the sale was made out of the ordinary course of the business of the debtor, or with a view to prevent his property from coming into the hands of the assignees, or to defeat or delay the object of the act or impair its operation. I recommend that the bill be dismissed.

Exceptions to master's report:

First. Because the master has reported that there was no preference obtained by the defendants in fraud of the bankrupt law.

Second. Because the master has reported that the defendants should not be required to account for the stock transferred to them by the bankrupt after both he and they were fully aware of his insolvency.

Third. Because the master has reported that the bill should be dismissed.

George Junkin, Solicitor for Plaintiffs.

McKENNAN, Circuit Judge. Upon the above exceptions by the plaintiffs to the master's report, the court confirmed the report and dismissed the bill.

Case No. 13,206.

The SPARK v. LEE CHOI CHUM.

[1 Sawy. 713.] [1]

Circuit Court, D. California. Feb. 29, 1872.

AMBASSADORS AND CONSULS — COURTS — APPEALS FROM—CITATION—PARTIES—IN NAME OF VESSEL—OF FIRM—CLAIM.

1. In cases of appeal from the consular and ministerial courts of China and Japan to the circuit court of the United States for the district of California, the record on appeal must show an allowance of the appeal.

[Cited in Tazaymon v. Twombley, Case No. 13,810.]

2. A citation is necessary unless the appeal is allowed in open court. Query: whether a citation is not always necessary, if the consular court has once adjourned after rendering a decree, there being no terms of such courts.

[Cited in Tazaymon v. Twombley, Case No. 13,810.]

3. An appeal, or writ of error, in the name of a steamboat, or any other than that of a human being, or some corporate or associated aggregation of persons, cannot be sustained.

4. So, also, appeals in the name of a firm without stating the names of the individuals composing the firm, are nugatory.

5. No one but a party, in some form, to the action can appeal, or can be heard in any stage of the proceedings in the court below.

6. The party seeking to defend, in a proceeding in rem, in instance causes in courts exercising admiralty jurisdiction, must file a claim to the property libelled.

7. The claim must be filed by the owner, or some authorized agent, and must state the facts in a direct issuable form, and not by way of recitals. Course of proceedings indicated.

8. The consular court is a court of limited jurisdiction, and all the jurisdictional facts must be alleged in the libel or petition, otherwise it will be insufficient.

[Cited in Kentucky Silver Min. Co. v. Day, Case No. 7,719.]

Motion to dismiss appeal from a decree of the consular court of Canton, in the empire of China, in a case of collision.

Milton Andros, for appellant.

B. S. Brooks, for appellee.

SAWYER, Circuit Judge. This is an appeal from a judgment of the consular court of Canton, in the empire of China, in a proceeding in admiralty against the steamer Spark, for damages resulting from a collision with a Chinese junk owned by the petitioners, or libellants. The proceedings were had, and appeal taken, under the act of congress of June 22, 1860, and the amendatory act of July 1, 1870, giving to this court appellate jurisdiction in certain cases from the consular and ministerial courts of China and Japan. 12 Stat. 72; 16 Stat. 183, 184. The fifth section of the latter act, is as follows, to wit:

"Sec. 5. And be it further enacted, that where the matter in dispute, exclusive of costs, exceeds the sum of two thousand five hundred dollars, an appeal shall be allowed to the circuit court for the district of California; and upon such appeal a transcript of the libel, bill, answer, depositions, and all other proceedings in the cause shall be transmitted to the circuit court; and no new evidence shall be received on the hearing of the appeal; and the appeal shall be subject to the rules, regulations and restrictions prescribed in law for writs of error from district courts of the United States." A judgment having been entered by the consular court against the steamer Spark, for the sum of $6,005.32, an appeal has been taken on behalf of the defendant.

The appellees move to dismiss the appeal for numerous irregularities, only three or four of which will be noticed. It is objected, that the record shows no order allowing the appeal, and no citation to the appellees. The section cited, it will be seen, provides, that, "appeals shall be subject to the rules, regulations and restrictions prescribed in law for writs of error from district courts of the United States."

The twenty-second section of the judiciary act of 1789 (1 Stat. 84) provides, that final

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

decrees and judgments of the district courts in civil actions, "may be re-examined, and reversed or affirmed in a circuit court, * * * upon a writ of error, whereto shall be annexed and returned therewith, at the day and place therein mentioned, an authenticated transcript of the record, assignment of errors and prayer for reversal, with a citation to the adverse party signed by the judge of such district court, or a justice of the supreme court, the adverse party having, at least, twenty days notice." The same section has a similar provision for writs of error from the supreme to the circuit court to review the judgments and decrees of the latter. And the twenty-fifth section has provisions in similar language for reviewing the decisions of the highest state courts in certain cases by the supreme court of the United States. The construction of these latter provisions, and, consequently, the construction of the similar provision relative to writs of error from the circuit to the district courts, has been settled by the supreme court of the United States. Thus, in the very late case of Gleason v. Florida, 9 Wall. [76 U. S.] 783, the supreme court say: "But on looking into the record, we find no allowance of the writ. And this has been repeatedly held to be essential to the exercise by this court of reviewing jurisdiction over final judgments or decrees by the courts of the states."

So, in Hartford Fire Ins. Co. v. Van Duzer, the writ was dismissed because no allowance of the writ appeared in the record, the chief justice, delivering the opinion of the court, "that such allowance was indispensable to the jurisdiction of the court in error to review the judgment of the highest court of the state." 9 Wall. [76 U. S.] 784. So, an appeal from the supreme court of the District of Columbia was dismissed by the supreme court of the United States, because there was "no evidence in the record of any allowance of appeal; and without an allowance this court cannot acquire jurisdiction." Pierce v. Cox, Id. 787. See, also, Edmonson v. Bloomshire, 7 Wall. [74 U. S.] 312. This settles the construction of the act of congress relating to writs of error, and appeals from the United States district courts, and as the same rules and regulations are made applicable to appeals from the consular courts of China, it settles the point in this case. The record shows no allowance of an appeal, and no citation, the latter being necessary also, if the order allowing an appeal is not made in open court. This is implied, at least, from the case of Pierce v. Cox, supra, if a citation is not waived by appearance of the appellee. And it is expressly required by the provisions of the statute quoted.

It is claimed, also, that this appeal, if taken at all, must have been taken out of court, as the petition for an appeal bears date several days after the date of the judgment; and it is claimed, that there are no terms in the consular court, under the statute, and that as soon as judgment is entered, and the court for that occasion has adjourned, it is no longer an open court, with reference to that case, and all subsequent allowances of appeals, must, necessarily, be made out of court with respect to that case. Numerous authorities are cited to the point, but it is unnecessary now to determine it, upon the view taken, upon other objections. It will be the safer practice to issue and serve a citation.

Another formidable objection is, that no appeal has been taken in the case; that the appeal, if any there is, is taken in the name of the steamer Spark—the only defendant in the case; and that no appeal can be taken in the name of an inanimate object—the res when the action is in rem.

The supreme court of the United States in the recent case of "The Burns," held, that a writ of error, or appeal, cannot be sustained in the name of a steamboat, or any other than a human being, or some corporate or associated aggregation of persons. 9 Wall. [76 U. S.] 237–240. The writ of error was dismissed on the ground indicated.

The petition for an appeal in this case is entitled, Lee Choi Chum v. The Spark, and it proceeds: "And now comes the said defendant in the above entitled cause, by George B. Dixwell, his agent, and files this petition on appeal, and sheweth, that the said consular court did, on the twenty-fourth day of August, A. D. 1871, enter a judgment in the cause against the defendant, in favor of the plaintiff for the sum of $6,005.32, and the said defendant appeals from the judgment of the said consular court to the circuit court of the United States, for the district of California, etc. * * * Wherefore the defendant prays that proceedings," etc. This is an appeal by, and in the name of the ship and nothing more. The ship purports to be the appellant, and it is in fact the only defendant in the case. The case cited is conclusive on this question. The petition for an appeal is signed, "Geo. Basil Dixwell, for self, and the firm of Augustine Heard & Co.," but this does not make either of these persons parties to the appeal, or even to the action. The body of the petition shows that it is, "the defendant in the above entitled cause by George B. Dixwell," that files the petition, but neither Dixwell nor Augustine Heard & Co., was a defendant.

They were not sued, and they never put in a claim as owner, or otherwise, so far as the record shows, and never filed any pleading in the case by which they became parties. They do not purport to appeal, nor were they in a condition to entitle them to appeal. If they had been parties, and had appeared as such in the name of "Augustine Heard & Co.," they would still be met by another decision of the supreme court, that an appeal in that name, style and form would be nugatory. In the case of The Protector, 11 Wall. [78 U.

S.] 82, an "appeal was dismissed" because taken in the name of "William A. Freeborn & Co.," without setting out the names of the parties constituting the firm, the court holding, that "no difference existed between writs of error and appeals, as to the manner in which the names of parties should be set forth," and that this defect had always been held fatal in cases of writs of error. But the appeal is not taken by these parties or any other, except "the steamer Spark," the only defendant in the case.

In fact there is no other party to the record, and, consequently, none other, who could take the appeal. A person, who is not a party in some form, cannot interfere by way of appeal, or otherwise. There was, in this case, no answer to the libel or petition, as the parties designate the pleading filed by the complainants. There is no issue taken upon the allegations of the libel, or petition, and nothing to try except to ascertain the amount of damages. Neither Captain Brady, Mr. Orm, Mr. Dixwell, Augustine Heard & Co., nor any other person, presented himself in any such way as entitled him to be heard in the case, either in the court below or on appeal. They have not merely failed in form, but also in substance, to make themselves parties to the proceedings. It will be seen by reference to any reputable work on admiralty practice, that the first step in the defense in a proceeding in rem in instance causes in courts exercising admiralty jurisdiction, is, the interposition of a claim to the property libelled. The claim should be made by a party authorized to set up a defense—the owner, either in person, or by his agent, or by the agent of a foreign government, whose subjects are interested in the property in question. Dunl. Adm. Prac. 153; 2 Conk. Adm. 543; Ben. Adm. § 461. "In such suits," observes Mr. Justice Story, "the claimant is an actor, and is entitled to come before the court in that character only, in virtue of his proprietary interest in the thing in controversy; this alone gives him a persona standi in judicio. It is necessary that he should establish his right to that character, as a preliminary to his admission as a party ad litem, capable of sustaining the litigation. He is, therefore, in the regular and proper course of practice, required, in the first instance, to put in his claim upon oath, averring in positive terms his proprietary interest. If he refuses to do so, it is sufficient reason for a rejection of his claim. If the claim be made through the intervention of an agent, the agent is in like manner required to make oath to his belief of the verity of the claim; and if necessary, he may also be required to produce and prove his authority before he can be admitted to put in the claim. If this is not done, it furnishes matter of exception, and may be insisted upon by the adverse party, for the dismissal of the claim." U. S. v. 422 Casks of Wine, 1 Pet. [26 U. S.] 549.

The claim should state the facts showing the right of the party to intervene, that is to say, the ownership of the property, in a direct and issuable form. In the language of Mr. Benedict: "No set form of words is necessary to form a claim. In this, as in other pleadings, the court looks to the substance, rather than the form. It must state, that the party is the true and bona fide owner of the interest which he represents, and that no other person is the owner thereof. It must be verified by the oath of the party or his agent or consignee; when it is verified by the oath of an agent or consignee, he must also swear that he is authorized to do so by the owner, or if the property be, at the time of the arrest, in the possession of the master of a ship, that he is a lawful bailee thereof for the owner." Ben. Adm. § 461. The document coming nearest to a claim, is a protest signed by George Brady. It does not purport to be a claim, and is not one, either in form or substance. It alleges nothing directly, or in an issuable form, as to the ownership of the vessel; but simply recites that, "whereas the said vessel was, on or about the twenty-fourth day of June, 1871, sold and transferred by the owner thereof unto the Hong Kong, Canton and Macao Steamship Company (Limited) being a British joint stock company, duly incorporated," etc., and then on behalf of said corporation, protests against the action and the exercise of jurisdiction by the consul, not on account of the insufficiency of the libel, but by reason of the said recitals.

The document, such as it is, is not verified. It is not a claim, in any sense, upon which the said corporation was entitled to defend, or be heard, had it attempted to do so. The owner of the ship in his own name in person, or by his agent, should have filed a claim in such a form, that issue could be taken on it, then if the facts had been admitted, or proved upon denial, the claimant would have been entitled to defend, and would have become a party to the action, and entitled to act as such in all subsequent proceedings. The mere putting in of a claim is not a defense to the action, but it gives the claimant the status of a party. This is its office. After putting the claim in, and thus becoming entitled to be heard for his interest, the claimant must put before the court the grounds of his defense, in suitable allegations, so that the court, and the opposite party, may be informed of the grounds of the defense. Ben. Adm. § 465 et seq.

The consular court is a court of limited jurisdiction, and all the jurisdictional facts must be alleged in the libel, petition or complaint, otherwise it will be insufficient. If the libel or petition fails to show the facts which authorize the court to take jurisdiction under the statute, or if, for any other reason, it fails to appear upon the facts stated in the libel, or complaint, that the party filing is not entitled to any relief, the claimant after filing his claim, and becoming a party to the proceeding, may file exceptions in the nature of a special demurrer, pointing out the particulars in

which the libel or petition fails to show jurisdiction or any ground for relief. Or if there is no defect in the libel or petition, and the matters showing a want of jurisdiction, or other defense do not appear on the face of the libel, they must be set up by direct affirmative allegations in an issuable form, by way of plea, or answer. The claims, exceptions, and other matters of defense, however, may be united in the answer, at the option of the party intervening for the protection of his own interest; but this is not the best practice. Ben. Adm. c. 26; Dunl. Adm. Prac. cc. 6, 8; 2 Conk. Adm. 577 et seq. I have been thus particular in referring, briefly, to the practice, and to the works, where the proper practice in cases of this kind may be readily found, for the reason that the proceedings in this class of cases do not appear to be well understood by litigants at Canton, and the proceedings in this case, have, consequently been very irregular. This is probably owing to the scarcity of books, and the absence of members of the legal profession at Canton. By consulting some one, or more of the works referred to, the mistakes, that have occurred in this case may be avoided in the future. As the jurisdiction conferred upon consuls is highly important, the importance of procuring some reputable works on admiralty practice cannot be overestimated.

On the view taken, the court has not acquired jurisdiction of the case, and, of course, any inquiry into the merits is precluded. I feel it my duty, however, to suggest, that the libel or petition itself appears to be defective, in not stating the facts necessary to give the consular court jurisdiction under the acts of congress, and the treaty between the United States and the empire of China. It is nowhere alleged in the petition, or libel, that the steamer Spark, is an American vessel, nor are any facts alleged, by which it can be seen, that the consular court has jurisdiction.

The jurisdictional facts as before mentioned, must all be distinctly averred.

It appears from what has been said, and from the authorities cited, that no claimant of the ship appears in the record in any form that entitles him to be heard; that there is no party defendant, other than the ship—the rem—and no appeal taken in any form by any party appearing to be entitled to appeal, or in any name other than that of the ship, also, that no appeal can be taken in the name of the ship alone. There is, therefore, no valid appeal, and the appeal must be dismissed. So, also, the record fails to show any allowance of an appeal, or any citation to the adverse party, and it is not suggested, that there is any diminution of the record in these particulars. There being neither an allowance of the appeal, nor a citation disclosed by the record, the fact of the existence of the one cannot be inferred from the other. There are numerous other subordinate points made which I do not find it necessary to discuss. Let the appeal be dismissed with costs.

Case No. 13,207.

The SPARKLE.

[7 Ben. 528.] [1]

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

ADMIRALTY—SALE—SETTING ASIDE—INADEQUACY OF PRICE—COLLISION—JURISDICTION—PRACTICE.

1. A libel was filed in August, 1874, by P. against the steamer S., to recover for supplies. On the return of the process, R. appeared as claimant. but did not answer, and a decree was rendered by default, under which the vessel was sold to T. for $1,000, on the 24th of September, and the proceeds were paid to the libellant P., on September 26th. On September 30th, a petition was filed by M., setting up, that he held a mortgage on the S. made by R. to secure certain claims in Virginia and North Carolina; that the vessel had been removed thence, and brought to this state, in order to escape her being taken under the mortgage, and that the proceedings in this suit, and the sale of the vessel, were collusive, and carried on for the same purpose; and that M. had had no knowledge of such proceedings. And the petition prayed that the sale might be set aside, and the decree opened, in order that M. might be allowed to defend, on such terms as might be just. On this petition process issued against the vessel and against P. and R. and T. T. excepted to the jurisdiction of the court to grant the relief prayed for, and answers were also put in on behalf of P., R. and T., denying the charge of collusiveness in the sale and the merits of M.'s claim. On the hearing, evidence was given by M. tending to show the truth of his allegations. The vessel was shown to have been worth from $8,000 to $10,000, at the time of the sale. None of the respondents offered any evidence: *Held*, that a court of admiralty is a court of equity; and that purchasers of property sold in pursuance of its decrees, submit themselves to its jurisdiction in respect to the property purchased, and take it subject to the power of the court to vacate the sale, where such action is necessary to promote the ends of justice.

[Cited in The Union, 20 Fed. 542.]

2. This power may be called into exercise by petition.

3. A sale will be set aside, where there has been fraud or misconduct in the purchaser, fraudulent negligence or misconduct in any other person connected with the sale, surprise or misapprehension created by the conduct of the purchaser, or by some other person interested in the sale, or by the officer who conducted it.

[Cited in Blackburn v. Selma R. Co., 3 Fed. 699.]

4. On the facts in this case, there was gross inadequacy of price in the sale, and surprise on the petitioner, and also circumstances tending to show that the persons in possession of the vessel combined with the libellant to secure the sale, and tending to raise suspicion as to the action of the purchaser in the premises.

5. The sale therefore must be set aside, on the reimbursement to T. of his purchase money and his outlay in this proceeding; the libellant P. must repay into the registry of the court the money drawn by him under his decree, and the decree must be set aside, and M. allowed to intervene and defend.

[Cited in Blackburn v. Selma R. Co., 3 Fed. 700.]

In admiralty.

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

Benedict, Taft & Benedict, for Martin.
Owen & Gray, for Pratt.
N. F. Waring, for Rogers.
H. C. Place, for Tuttle.

BENEDICT, District Judge. This case comes before the court upon a petition filed by one William F. Martin, under circumstances so novel and peculiar that a detailed statement of the proceedings in the cause is necessary to the understanding of the questions of law and of fact now to be determined.

On the 27th of August, 1874, a libel was filed by one Charles H. Pratt, to enforce a lien against the steamship Sparkle for ship chandlery and ship stores, amounting to $790, supplied to that vessel, on or about the 21st of September, 1872, at Norfolk, Virginia. On the same day, process in rem was issued against the said vessel, and the vessel was thereupon seized by the marshal. No notice of seizure was published prior to the return day of the process. On the return of the process in court, Eliza Jane Rogers appeared and claimed the vessel as owner, but no application for time to answer was then applied for, nor was any answer filed. A short order of publication, returnable on the 16th of September, 1874, was then applied for by the libellant and obtained.

On the return of the short order and upon the second call of the process, no other claimant appearing, on motion of the proctors for the libellants, the default of all persons was entered, and the steamship condemned to pay the demands of the libellants, and on like motion a venditioni exponas was then issued, directing the sale of the vessel upon the usual six days' notice.

Such notice of sale was thereupon duly published, and on the 24th of September, the marshal, in obedience to the writ, sold the steamship at auction for the sum of $1,000 to one Jason H. Tuttle.

The proceeds of the sale were paid into court on the 25th of September, and, on the 26th of September, were paid over to the libellant in pursuance of the decree, the amount of his claim and costs, as ascertained, being the sum of $1,035.60.

On the 30th of September, William F. Martin presented to the court his petition setting forth, that on or about the 24th day of October, 1873, Eliza Jane Rogers, Albert Rogers her husband, and A. H. Rogers had conveyed the steamship Sparkle to him by a certain instrument in writing, to secure certain claims therein mentioned then in suit in the courts of Virginia; that the steamship was a vessel enrolled in the port of Norfolk, whose occupation was plying between that port and the waters of North Carolina, in the business of transporting fresh fish; that on the 12th day of July, 1874, judgment had been recovered upon the claims secured by the conveyance to him, for the sum of $12,095; that about the time of the rendition of such judgment, the said Albert Rogers had removed or caused to be removed the said steamship from the waters of Virginia and North Carolina, and brought to the port of New York, where she had been libelled and sold, in the action brought by Charles H. Pratt, as above described. The petitioner further averred that the purchaser of said vessel at said sale was not a bona fide purchaser of the vessel; that the sale and proceedings in the action of Pratt were, to the knowledge of the purchaser, instituted and carried on by collusion with said Rogers and his wife, for the purpose of depriving the petitioner of the right to take possession of the said vessel under his conveyance; that the claim of the libellant Pratt was a fictitious one, and did not constitute any lien on said vessel, and that no lien upon the vessel existed therefor. It was further averred, that the proceedings in the suit of Pratt did not come to the knowledge of the petitioner, until the 28th of September, 1874; wherefore it was prayed, that a process might issue, directing the marshal to seize the said steamship, and give due notice of the proceedings of the petitioner, and that a monition also issue against Jason H. Tuttle, and that he and all other persons interested in the said vessel be cited to appear before the said court at a time and place named, and to answer the allegations of the petition; and that the court would order the sale of the vessel to be set aside, and that the bill of sale given therefor by the marshal be surrendered and canceled; and that the decree entered in favor of Pratt be set aside and vacated, and that the libellant Pratt return into the registry the amount received by him in pursuance of said decree; and that the vessel be remanded to the custody of the marshal, and the petitioner be allowed to come in and defend the said action of Pratt; and for such other relief as the court may grant.

Upon this petition, process in rem and in personam was issued according to the prayer thereof. Upon the return day of this process, Tuttle, the purchaser, appeared by his proctor, and filed exceptions to the jurisdiction of the court to entertain the petition or to grant the relief prayed for therein; also an answer setting up that he was the bona fide purchaser of the vessel; that the proceedings by which she was sold were not instituted or carried on by any collusion between him and any of the other parties; and that he has acted in good faith, without any knowledge or information of the existence of the acts or matters alleged in the petition, and is entitled to have the vessel released and delivered to him as the bona fide purchaser thereof. On the same day Charles H. Pratt appeared in accordance with the citation, and filed his answer to the petition, in which, among other things, he denied any knowledge of the claims of the petitioner as set forth in his petition, and denied that his

action was brought for the purpose of preventing the petitioner from taking the vessel under his conveyance, and denied that the proceedings were instituted and carried on by collusion with said Rogers and his wife, or with any other person for the purpose of avoiding the conveyance to the petitioner, or for any other purpose than for the just and lawful one of enforcing his claim against the said vessel; and he averred that his claim in his original libel set forth was not fictitious, but constituted a valid lien upon said vessel.

Eliza Jane Rogers also filed her answer, setting up that she was the sole and only owner of the steamship Sparkle, at the dates and times in the petition mentioned, and continued such until the sale to Tuttle, by the marshal, under the decree obtained by Charles H. Pratt; that she had no acquaintance with Tuttle, nor did she ever see him to her knowledge, nor was the sale to him made or carried on by any collusion with him for any purpose whatever.

The cause thereafter came on to be heard upon the petition, exceptions, and answers, and the proofs offered by the petitioner in support of his petition; the other parties being duly represented, but not introducing any evidence.

Of the questions discussed by the respective advocates, the first to be disposed of is that raised by the exception filed by Tuttle. In disposing of this question, the allegations of the petitioner must be taken as true; and the question to be determined, therefore, is, whether a court of admiralty has the power, upon a petition, to set aside a sale made in a proceeding in rem, where the proceedings had been regularly conducted, the vessel sold, and the proceeds distributed, but where it appeared that the proceedings were collusive and fraudulent—taken for the purpose of cutting off the interest of a third party in the vessel, and to which fraud the purchaser and the libellant, as well as the owner of the vessel, were parties.

Upon such a question there is no room for doubt. The power of a court of admiralty is as full as that of any other court over its decrees. As in a court of equity, so in the admiralty, purchasers at sales made in pursuance of its decrees thereby submit themselves to its jurisdiction in respect to the property purchased, and take the property so sold subject to the power of the court to vacate the sale, where such action is necessary to promote the ends of justice. This power may be called into exercise as well by petition as by any other form of proceeding, and no difficulty is discovered in granting the necessary relief in such cases arising out of the form of proceedings in the admiralty. The process in rem of the admiralty, when it can be executed, brings the thing itself before the court, to abide the adjudication of the court, and enables the court to be informed, in the most authentic manner, whether any, and if so what, new parties have become interested in the vessel. Thus, in the present case, this steamship, by means of the process in rem, is now in custody of the marshal, subject to the orders of the court; and as, after such seizure and due advertisement, no new parties have appeared to make any objection to her resale, save only Tuttle, the purchaser at the sale already had, and the claimant Eliza Jane Rogers, the court can know that those interested in the questions involved are before the court. The court having, therefore, the power to entertain the prayer of this petition, and being enabled to do so without adjudicating upon any rights, except the rights of those who became parties to the action before the sale, and Tuttle, who submitted himself to the jurisdiction of the court by becoming the purchaser at that sale, and who has duly appeared in this proceeding, it becomes the clear duty of the court, upon such facts as are by this exception admitted, to determine the question thus presented, and grant the relief prayed for, if the evidence shall sustain the allegations of the petitioner.

In support of this view, reference may be had to Betts Adm. 100; Clerke, Praxis Adm.; Campbell v. Gardner, 3 Stockt. Ch. [11 N. J. Eq.] 426.

I have no hesitation, therefore, in overruling the exceptions filed in this cause, and thus am brought to consider the evidence which has been adduced to support the petition.

And first, I remark that I cannot agree to the position taken by the claimant Tuttle, that his purchase must stand, unless some fraud, collusion, or misconduct on his part is proved.

A court of admiralty is a court of equity, and the considerations which are deemed controlling in similar cases, when they arise in courts of equity, are equally controlling in a court of admiralty. The general rule of equity is declared to be, that a sale will be set aside where there has been fraud or misconduct in the purchaser—fraudulent negligence or misconduct in any other person connected with the sale—surprise or misapprehension created by the conduct of the purchaser, or by some other person interested in the sale, or by the officer who conducts it. Lefevre v. Laraway, 22 Barb. 177.

In Brown v. Frost, 10 Paige, 244, where no fraud, collusion, or misconduct on the part of the purchaser was shown, a sale was set aside, because a party interested, who had intended to bid, was prevented from being present by mistake or accident.

In Billington v. Forbes, 10 Paige, 487, where illness prevented a mortgagor from attending the sale, it was set aside, because a co-defendant sought to take an unconscionable advantage of his absence. Mere inadequacy of price has not been deemed sufficient to justify setting aside a sale, unless the price is so grossly inadequate that, from such inadequacy, the court can infer fraud. Where fraud can be thus inferred, the sale will be

set aside. Eberhart v. Gilchrist. 3 Stockt. Ch. [11 N. J. Eq.] 167. In Griffith v. Hadley, 10 Bosw. 587, a sale to an innocent and bona fide purchaser was set aside, where, from the circumstances, the court could infer, that, through surprise on the part of a person interested, the property was sold at a great sacrifice, although the purchaser had in no way contributed to the surprise. In Bixby v. Meade, 18 Wend. 611, a sale was set aside where property, worth a thousand dollars, was bid off by a relative for $26, and the failure of the party to attend arose from the forgetfulness of an agent to be present as directed. In King v. Morris, 2 Abb. Prac. 298, it is held that such an inadequacy as would amount to fraud will warrant a resale; and great inadequacy, with circumstances of excusable neglect, will have the same effect.

Fraud is not the only ground on which to base an application upon motion to set aside a sale. Campbell v. Gardner, 3 Stockt. Ch. [11 N. J. Eq.] 423. In Lansing v. McPherson, 3 Johns. Ch. 424, it is said that the control which a plaintiff has over the proceedings, down to the sale inclusive, should induce the courts closely to scrutinize his connection with it.

The rule in England appears to be to set aside the sale, where the price bid is so inadequate that it would be against conscience to permit the purchaser to derive such advantage from the neglect of the parties interested.

It is not necessary, therefore, to determine, from the evidence in this cause, that fraud or collusion on the part of this purchaser has been shown. It is sufficient if there has been such a surprise, and a sale at such an inadequate price as that it would be against conscience to allow the purchaser to retain the property against the rights of innocent parties. Looking, then, to the evidence, while it cannot be said that all the allegations of the petition have been proved, a clear case of surprise is shown. The petitioner was in Virginia; he had no reason to suppose that the vessel was to be removed beyond his reach, nor any reason to suppose that she was liable to seizure and sale, for his conveyance contained an express covenant that the vessel was free from liens. Nothing occurred to give him notice of the proceedings taken by Pratt, until he found the vessel in this port in the hands of Tuttle, as purchaser at the marshal's sale.

A gross inadequacy of price is also shown. The evidence is that the vessel was worth from $8,000 to $10,000, and she was sold for $1,000. To permit such a sale to stand would be to permit Tuttle to take an unconscionable advantage of the ignorance of the petitioner in respect to the pendency of any proceedings against this vessel.

These two facts alone are sufficient to warrant setting aside the sale upon such terms as shall make the purchaser whole for his purchase money, costs and expenses. But there are circumstances in this case which go to show that the persons in possession of this vessel combined with the libellant to secure her sale under the decree of this court. It is shown that the vessel came to New York, away from her ordinary route and occupation, where she would shortly be liable to be taken possession of by the petitioner, under his conveyance; and the fact is left without explanation, when explanation was easy if there be any good reason for the removal. It is quite manifest that the person who filed the libel, and those who had possession of the vessel, were in communication before the libel was filed; that the libellant derived his knowledge of the presence of the vessel from those in possession of her, and that some unexplained reason existed which made it desirable, as well to the libellant as to those in possession, to make the proceedings as inexpensive as possible.

The claim of the libellant was, upon the face of his libel, at least doubtful. It bore no proportion to the value of the vessel, and yet those in possession, and who were fully cognizant of the proceedings, allowed a decree to be entered by default, which apparently entailed upon them a serious loss, and offer no explanation of their failure to defend the action. These parties were, moreover, present at the sale, which, ruinous as it apparently was, they made no effort to prevent. Notwithstanding the fact that, in appearance, the sale, if allowed to stand, would entail a large loss upon the owner, no objection to it is now made by the owner; on the contrary, the effort of the petitioner to avoid the sale is opposed by the owner. The fact towards which these circumstances strongly point is sufficient to remove all doubt as to the propriety of an interference, by the court, to prevent the injustice which would result if this sale were allowed to stand.

In addition it must be said, that, while it is true that Tuttle, the buyer, testifies, in the most explicit manner, that he is a bona fide purchaser, having no sort of connection with any of the other parties to this proceeding, still there are facts in the case calculated to raise suspicion in respect to his action in the premises. Certainly he can have no cause of complaint, provided he be made whole for his outlay by reason of his purchase and these proceedings. The fact that an undue profit would accrue to the purchaser at a judicial sale is no reason for refusing to set aside such sale, when justice demands it.

Of course, the other parties to this proceeding can have no cause to complain if the sale be set aside, inasmuch as benefit, rather than loss, will accrue to them by granting the prayer of the petition.

In accordance with these views, the sale in question will be set aside, upon the reimbursement of the purchaser for his outlay by reason thereof and of this proceeding.

The decree rendered in favor of the libel-

lant Pratt will also be set aside, and the petitioner permitted to intervene and contest the demand, and the libellant will be directed to repay into the registry the sum withdrawn therefrom by him, in pursuance of such decree, less the taxed costs, which he is allowed to retain. His costs of this proceeding must abide the event of his action.

The form of the order to be entered, in pursuance of this decision, will be left to be determined, after hearing the parties, upon the settlement thereof.

Case No. 13,208.

SPARKMAN et al. v. HIGGINS et al.

[1 Blatchf. 205; 5 N. Y. Leg. Obs. 122; 6 Pa. Law J. 344; Fent. Pat. 122; Merw. Pat. Inv. 701; 1 Fish. Pat. Rep. 110.] [1]

Circuit Court, S. D. New York. Oct. Term, 1846.

PATENTS—INJUNCTION—MOTION TO DISSOLVE—SALE OF PATENTED ARTICLE—INVENTOR—OFFICERS OF PATENT OFFICE.

1. On a motion, on affidavits, to dissolve an injunction in a patent suit, the defendant's proofs must overcome the equity of the bill and the evidence in its support, or the motion will be denied.

2. Although the papers on an application for a patent are returned from the patent office for informality, yet, if the application is followed up with reasonable diligence, and the patent is granted, the right of the patentee will not be defeated, although he sold the patented article after his application and before the granting of his patent.

3. To constitute an inventor, it is not necessary he should have the manual skill to make drawings. If he furnishes the ideas to produce the result, he is entitled to avail himself of the mechanical skill of others to carry out his contrivance in practice.

[Cited in Smith v. Stewart, 55 Fed. 483.]

4. An applicant for a patent cannot be prejudiced by the failure of the officers of the patent office to give information of his application to a person who makes inquiry there in regard to it.

[Cited in Re Cushman, Case No. 3,514.]

In equity. This was a motion before Judge BETTS, sitting in the circuit court, to dissolve an injunction. The plaintiffs [Sparkman and Kelsey] were the patentees, under the act of August 29, 1842 (5 Stat. 543), of a patent, issued July 24th, 1846, for a design for floor oil-cloth, called "The Gothic pavement pattern." The bill alleged an infringement by the defendants Higgins & Co., by selling, and by the defendants, C. & E. Harvey, by making oil-cloths of the patented pattern. An injunction was granted on the bill, and this motion to dissolve it was made on affidavits.

The defendants showed, that in January, 1846, one Smith, of Baltimore, saw a sample of the pattern at the plaintiffs' store in New-York, and was informed that it was on sale, but not ready for delivery; that he ordered a quantity, which was sent to him on the 16th of March, and was immediately sold at Baltimore; that Higgins & Co. procured from Baltimore enough to show the pattern, and the Harveys, on seeing it, immediately prepared blocks for printing it, which were ready about the 23d of May, when they proceeded to print. They also showed that Rice & Sampson of Hallowell, Maine, saw the pattern at Baltimore, in May, went to the patent office at Washington, and were there informed that it was not patented, procured the pattern, took it to their works in Maine, made the blocks for printing it, and proceeded to print from them, prior to the date of the patent. The defendants also set up, that the design was the invention of one Berry, a workman in the plaintiffs' employ, and made oath that when they got the pattern they did not know it was patented or that the invention was claimed by the plaintiffs.

The case on the part of the plaintiffs was this: Kelsey was a practical manufacturer and designer of patterns. Sparkman was familiar with the styles of the trade. They would discuss together the subject of patterns and inform Berry of their wishes, and criticise and suggest, while the patterns were being designed. Berry had been instructed by Kelsey in the art of getting up patterns. In the summer of 1845, Kelsey proposed to Berry to get up a pattern of the kind afterwards patented. Berry did so, but the plaintiffs, on seeing it, disapproved of it, and suggested alterations and improvements. These were adopted by Berry in a new pattern which was substituted for the first one, and was the one patented. In January, 1846, a sample was printed and sent to the plaintiffs' store to be exhibited for the sale of goods by orders. Higgins & Co. saw it there and were told by Kelsey that it was some of their patent goods. Soon afterwards Smith saw it, and was told by Kelsey it was some of their registered patterns, a term to denote goods of designs patented or intended to be. Smith ordered a quantity, to be delivered as soon as possible. On the 20th of February the plaintiffs' application for a patent for the design was received at the patent office. But the papers, being informal, were amended and sworn to anew, and the application was renewed on the 23d of March. On the 22d of June the papers were again returned as informal, and were then corrected and filed again on the 14th of July. The patent was then issued.

Seth P. Staples, for defendants.
Daniel Lord, for plaintiffs.

BETTS, District Judge. The plaintiffs have an injunction, granted on their bill of complaint. The defendants move to discharge it, on affidavits; and unless their proofs overcome the equity of the bill, and the evidence supporting it, the motion must

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission. Merw. Pat. Inv. 701, contains only a partial report.]

be denied. They may make out a different case at the final hearing; but this motion must depend on what is now presented to the court.

The study of the courts has recently been, and especially since the patent acts of 1836 and 1839 [5 Stat. 117,353], to carry out the protection of the law to inventors, so as to secure to them the full benefit of their inventions. An inventor is bound to notify the public of his claim, by a caveat or application filed at the patent office, designating his discovery, and what he means to secure to himself. This is a matter often of nicety, and men of great experience encounter difficulties in preparing their papers. Correspondence ensues between the officers at Washington and the patentee, which consumes time. But if the claim thus put forward, although originally informal, be followed up with reasonable diligence, and if, eventually, the patent is granted, it prevents any right being acquired by strangers interfering in the mean time. Here, the first application, the claim to the invention, was made on the 13th day of February. It was again made on the 23d of March, and the papers were retained by the patent office until the 22d of June. They were then sent to New-York, and returned, with other and correct papers, on the 14th of July, and the patent in suit was granted on the 24th of July. It is not for the court now to examine critically the correctness or even sufficiency of the application; as it was made to all appearance in good faith, and was an attempt to make known and secure the claim.

It is next contended that Berry was the inventor and not the plaintiffs; which position, if established, would be a good ground to dissolve the injunction. The defendants lay before the court the declarations of Berry, in connection with his working without any draft, design or model before him, which, the defendants insist, proves him to be the inventor. But, on the other hand, Mr. Kelsey details very minutely the suggestions he made, his superintendence, his suggesting alterations in a design got up, his disapproving that, and the adoption of his views in the design now patented. And Mr. Berry gives his own account of the matter, and explains the declarations attributed to him, as referring to his working without a copy before him, and to the design being an original and not a copy. He does not intimate that he did not receive suggestions, alterations and directions from Mr. Kelsey, which were carried out in this design. To constitute an inventor, it is not necessary he should have the manual skill and dexterity to make the drafts. If the ideas are furnished by him, for producing the result aimed at, he is entitled to avail himself of the mechanical skill of others, to carry out practically his contrivance. Here the devising of the pattern, in this sense, appears to have been by the plaintiffs.

Again. It is contended that the plaintiffs have abandoned their claim, or so dealt with it as to give it to the public. This, if made out, would also entitle the defendants to succeed. They first rely on the sale to Smith, who gave an order for goods on seeing the pattern, in January, which the plaintiffs agreed to execute. But an inventor may do this. He may stipulate for a sale of his invention, before it is completed, without vitiating his claim; and these goods were not delivered until after the application of the 13th of February was filed in the patent office.

It is urged, also, that Rice & Sampson purchased goods of the pattern in question, at Baltimore, in April, and applied at Washington to know if it was patented, and were informed that it was not. This was true. But they do not say that they inquired if a patent had been applied for, and whether an application was pending. There was then an application there, with a specimen of the drawing of the design. If the commissioner or the officers had even overlooked it, that would not have defeated the plaintiffs' right. They had, in good faith, made their claim, and were at the time following it up, and eventually matured it. The sale did not defeat the right to the design.

It also appears that when the goods were shown in January, they were shown as the patent goods, or the registered patterns of the plaintiffs. Now, although registered patents or patterns is not a term of law, yet it may well have indicated a pattern as claimed to be of their design, and one for which they were preparing to take out a patent.

The defendants have not made out a case to dissolve the injunction, and the motion must be denied, with costs.

[For hearing on a motion for an attachment for an alleged violation of the injunction, see Case No. 13,209.]

Case No. 13,209.

SPARKMAN et al. v. HIGGINS et al.

[2 Blatchf. 29;[1] 1 Fish. Pat. Rep. 135.]

Circuit Court, S. D. New York. Oct. 20, 1846.

INJUNCTION—VIOLATION OF—STRATAGEM BY PLAINTIFF—COSTS.

1. Where a plaintiff, who had obtained an injunction from this court restraining a defendant from the infringement of a patent, set on foot a stratagem to lead the defendant to violate the injunction, and immediately made a motion for an attachment, knowing the defendant to be innocent of any wrongful act, and it clearly appeared that there had been no violation of the injunction: *Held*, that the plaintiff must pay the costs of the motion.

2. Even if there had been an actual violation of the injunction, induced by the stratagem of the plaintiff, an application for an attachment would not, it seems, be justified, either in conscience or in law.

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

[This was a bill in equity by Sparkman and Kelsey against Elias S. Higgins and others.]

Motion for an attachment for an alleged violation of an injunction restraining the defendants from infringing the plaintiffs' patent for a design for floor oil-cloth. See Sparkman v. Higgins [Case No. 13,208].

Daniel Lord, for plaintiffs.

Seth P. Staples, for defendants.

BETTS, District Judge. A witness on the part of the plaintiffs deposes that he purchased, a few days since, some of the oil-cloth of the pattern in question at a store in Pearl-street; that on the same day he applied for oil-cloth at the defendants' store in Broad-street, and bought some of the same kind there; and that the clerk who sold the latter told him that the oil-cloth in Pearl-street belonged to the defendants.

On the part of the defendants it is established, by the fullest proof, that they had no interest whatever in the Pearl-street store, or in the oil-cloth sold there, and the evidence is strong to show that the plaintiffs were well aware of that fact. It is further proved by the defendants that a person applied to their porter, at their store to see oil-cloth; that it was shown him; and that he selected out of the general stock the particular piece in question, and desired to have it sent to an address, which he gave, at a place designated, and then left the store. Immediately afterwards, one of the defendants went into the salesroom, and, on being informed by the porter of what had happened, forbade his delivering the cloth and told him it could not be sold. The defendants further prove, that when the injunction was served they gave strict orders to their clerks to stop selling that description of cloth. The person who thus called at their store did not pay for the cloth, and it was not sent to the address. The name he gave was an assumed one, and it appears that he acted for the plaintiffs. The motion for an attachment is made on his affidavit.

The counsel for the plaintiffs very properly admitted that the application could not prevail, and that the evidence fully acquitted the defendants of all blame. But it was urged that probable cause for the motion had been shown, and that costs ought not to be awarded against the plaintiffs.

The proceeding on the part of the plaintiffs was palpably a stratagem to lead the defendants to violate the injunction. This motion is not induced by any acts known to have been done by the defendants, or by any declaration or intimation of theirs that they would disregard the inhibition they were under. Their conduct was in every respect submissive to the mandate of the court. Even if the plaintiffs' agent had, under such circumstances, succeeded in making a valid purchase of the oil-cloth from the defendants' porter, by paying the price or obtaining a delivery of it, such transaction would not, either in conscience or in law, justify an application for an attachment. But there was no sale in fact; and, as the plaintiffs set on foot a scheme to entrap the defendants, and immediately pursued them with a motion for an attachment, knowing them to be innocent of any wrongful act, it is right that the plaintiffs should be charged with the costs of an application so made.

The motion for an attachment is denied, with costs to be taxed.

SPARKMAN v. PORTER. See Case No. 7,143.

Case No. 13,210.

SPARKS v. KITTREDGE.

[9 Law Rep. 318.]

District Court, D. Massachusetts. Oct., 1846.

GENERAL AVERAGE—DANGER TO CARGO—REPAIRS.

1. The owner of the cargo cannot be held to contribute, in general average, towards the expenses of repairs of the vessel, when the cargo is in safety, and receives no benefit therefrom.

[Cited in Dupont v. Vance, 19 How. (60 U. S.) 171; The L'Amerique, 35 Fed. 839, 843.]

2. Semble;—When no other vessel can be procured to take the cargo, and it would perish, or be of no value if left, if the expenses of repairs exceed the benefit to the ship-owner therefrom, such excess should be paid by the cargo, if incurred for its benefit. But whether such payment should be made by general average, quære.

In admiralty. This was a libel in behalf of the owner of a vessel against the owner of her cargo, for a general average contribution. The vessel was bound to Boston, and was accidentally stranded near Edgartown; the cargo was taken out and put in safety, and subsequently the vessel was got off, repaired, and the cargo taken on board and delivered in Boston. The libellant claimed the right to charge in general average the expenses incurred in getting the vessel off, after the cargo was landed. The respondent denied his right so to do, and this was the only question submitted to the court.

For the libellant it was contended, (1) that by usage and custom in Boston, the expenses were to be contributed for; and he introduced evidence to prove such usage; (2) that independently of any usage, the same were proper subjects for contribution.

D. A. Simmons, for libellant.

F. C. Loring, for respondent.

SPRAGUE, District Judge, held that the proof of usage was not sufficient; that though, generally speaking, it might be the practice in the port of Boston, so to adjust similar cases, yet it appeared that the usage was not uniform, and therefore it was of no weight in

determining the question. The general principle of law was, that when sacrifices were made, or expenses incurred for the general benefit, all the parties interested should contribute. In the present case, when these expenses were incurred, the cargo was in safety; it could not be said that the cargo was saved, or relieved from peril by the expenses of getting the vessel off. The only ground on which the claim could be made would be that they were incurred for the furtherance of the voyage, and in order to its completion. If this was so, then the expenses of repairs should also be charged in general average, for they stand on the same ground. But this could not be maintained. The cargo cannot be held to contribute unless it receives a benefit. Often the right of the master to detain a cargo while he makes repairs is a burthen upon the shipper, and is of no benefit to him except in extraordinary cases; as where no other vessels can be procured to take it and the cargo would perish or be of no value if left. In such a case, if the expenses of repairs exceeded the benefit to the ship-owner therefrom, it is manifest that such excess should be paid by the cargo if incurred for its benefit, but whether such payment should be made by general average or payment of the whole excess, there seemed to be some diversity of opinion.

The following authorities, among others, were adverted to. 1 Mag. Ins. 67; 2 Phil. Ins. 86; 4 Mass. 550-555; 2 Pick. 9-11; Stev. & B. Ins. 75; 2 Metc. (Mass.) 143, 144; Abb. Shipp. (S. & P.'s notes) 575; 3 Maule & S. 482; Stev. & B. Ins. 139, and note (a) 141.

In the present case, the general rule, according to the authorities, was in accordance with the general principle, and the owner of the cargo could not be held liable to contribute towards the expenses of getting off the vessel.

SPARKS (PAGAN v.). See Case No. 10,659.

Case No. 13,211.

SPARKS et al. v. PICO.

[1 McAll. 497.][1]

Circuit Court, N. D. California. Jan., 1859.

MORTGAGE—SECURITY FOR NOTE—NOTE BARRED BY STATUTE OF LIMITATIONS.

1. The fact that the note is barred by the statute of limitations, and no action at law can be maintained upon it, does not estop the holder of a mortgage from prosecuting his lien upon the mortgaged premises in a court of equity.

2. The statute of limitations bars the remedy on the note, but does not extinguish the debt.

[Cited in Hickox v. Elliott, 22 Fed. 17; The Holladay Case, 27 Fed. 838.]

The bill is filed in this case [by Sparks and Kelsey] to foreclose a mortgage. A demurrer is made to it, and the ground assigned is, that it appears by the bill that the mortgage sought to be foreclosed was given to secure the payment of a promissory note made and executed by defendant more than four years before the filing of the bill, and because it does not appear from said bill, that defendant within said four years promised in writing to pay the said debt or any part thereof.

J. B. Hart, for complainant.

Gregory Yale and A. C. Campbell, for defendant.

McALLISTER, Circuit Judge. The question arising out of these pleadings, is whether the fact that the promissory note cannot be sued on (by reason of being barred by the statute of limitations), estops complainant from enforcing in a court of equity his lien on the mortgaged property. In the case of Fairbanks v. Dawson, 9 Cal. 89, the supreme court of this state have said, speaking of the English statute of limitations and that of this state, that there may be a little difference in their language, but "their substance and meaning are the same." In the English statute the language is, "no action shall be maintained," &c. That of the California statute is, "no action shall be commenced," &c. Both statutes alike bar the remedy, neither renders void or extinguishes the debt, or cause of action. Two early cases in England, that of Draper v. Glassop, 1 Ld. Raym. 153, and an Anon. case in 1 Salk. 278, decided that the statute of limitations destroyed the debt, as well as the remedy; but Parsons, in a note to his treatise on Contracts, says of those two cases, "These decisions have now no authority;" and he refers to several more recent authorities, beginning with Lord Mansfield. He further says in his treatise on Mercantile Law (250): "It is important to remember that the statute of limitations does not avoid or cancel the debt; but only provides that no action shall be maintained upon it, after a given time." "But it does not follow, that no right can be sustained by the debt, although the debt cannot be sued. Thus, if one who holds a common note of hand on which there is a mortgage or pledge of real or personal property, without valid excuse neglects to sue the note for more than six years, he can never bring an action upon it; but his pledge or mortgage is as valid and effectual as it was before, and as far as it goes, his debt is secure; and for the purpose of realizing this security, by foreclosing a mortgage for instance, he may use whatever process is necessary on the note itself."

With a single exception, I can find no case, unless decided under a statute, which sustains the proposition that the deprivation of a right to sue on a promissory note to recover its contents, annuls the right of the holder of that note, if he also holds a mortgage in which the title to real estate was conveyed to him as security, to enforce his lien on that

[1] [Reported by Cutler McAllister, Esq.]

property in a court of equity. The solitary case to which allusion has been made as the only one which is direct upon the point which has come to the notice of this court and sustains an adverse doctrine, is that of Duty v. Graham, 12 Tex. 427.

The policy of the state of Texas, which seems to control the judiciary of that state, is apparent by reference to the case of Union Bank of Louisiana v. Stafford, 12 How. [53 U. S.] 340. In this last case the supreme court say, "However much it may be the policy of Texas (as it is alleged in the case of Love v. Doak [5 Tex. 343], and Snoddy v. Cage [Id. 106], lately decided in the supreme court of that state) to give a liberal construction to their statute of limitations, in favor of debtors, for the purpose of encouraging immigration, it is abundantly apparent that these sections (of the limitation law) can have no application to a bill in equity to enforce the sale of mortgaged property, whether the slaves in question be considered either as personalty or realty."

The principle enunciated in that case [Union Bank of Louisiana v. Stafford] 12 How. [53 U. S.] 328, is, that the Texas statute of limitations of actions upon contracts, or for the detention of personal property, have no application to a bill in equity, to foreclose a mortgage. Equity does not allow the mortgagor to set up his possession as adverse to the mortgagee.

"In cases (say the court) of concurrent jurisdiction, courts of equity are said to act in obedience to the statute of limitations, and in other cases to act upon the analogy of the limitations of law. A bill to foreclose a mortgage and enforce the sale of mortgaged property, has no analogy to an action of trover, detinue, or trespass. The claim of the mortgage is a 'jus ad rem, not a jus in re.' He does not claim as owner of the property. The possession of the mortgagor is not adverse but under the mortgagee."

Hughes v. Edwards, 9 Wheat. [22 U. S.] 489, was a case on the equity side of the court, in which a decree of foreclosure of mortgage was rendered. That the legal cause of action in that case had been barred by the statute of limitations, is inferable from the observations of Washington, J., who delivered the opinion of the court. He says, "But the use he (the appellant's counsel) endeavors to make of the objection, was to turn the complainants out of a court of equity, and leave them to their legal remedy by ejectment to recover the possession of the granted premises, in which, it was supposed, they might be successfully encountered by the statute of limitations." Id. 494. And it is proper to observe, that in the case at bar, the complainants, if left to their remedy at law, would be utterly remediless; for, by a statute of this state, no action of ejectment can be brought for the recovery of premises conveyed by mortgage. But the supreme court of the United States in above case did not turn the complainants out of court, and in relation to the question of time say, "Whether the defendant could avail himself (in the former case in the action at law) of the act of limitations, whilst the equitable remedy of the plaintiff is subsisting, is a question which need not be decided in the present case, as the parties are now before a court of equity. The effect which length of time may have upon the plaintiff's rights in that court, will be considered under another head." Id. 494.

It is manifest, then, from the two decisions of the supreme court to which reference has been made, that the statute of limitations of this state does not apply to this case, and that considerations in regard to the extent to which the rights of complainants are affected by the efflux of time are to be considered by those rules which control a court of chancery, apart from any estoppel supposed to arise out of the fact that a common-law remedy by action on the note has been barred by the statute of limitations. And here this case might be left; but the principle asserted by the demurrer in this case—that a mortgagee is remediless on his mortgage, because his remedy on the note it was given to secure had been barred by the statute of limitations—is of so great practical importance, that a more minute consideration of the authorities is not inappropriate. In the case of Elkins v. Edwards, 8 Ga. 325, it is expressly decided, that where a mortgage is given to secure a note, and the remedy on the latter is barred by the statute of limitations, and the debt is unpaid, the creditor may avail of his lien, and foreclose his mortgage. And the court gives as the reason for his ability to do so, that he (the creditor) stipulated by contract for two remedies against his debtor to enforce the collection of his demands. These two remedies are totally distinct: the one by an action at law on the note, one of the written evidences of his debt; the other, by a bill in equity to procure a sale of the mortgaged property. In Eastman v. Foster, 8 Metc. [Mass.] 19, it is decided, that a mortgage to indemnify the mortgagee for his liability as surety upon a note of the mortgagor, creates a trust and equitable lien for the holder of the note, subject to which the mortgagee holds the land, though the note be barred by the statute of limitations, &c. The same principle is affirmed in Crain v. Paine, 4 Cush. 483. The court say, "It was argued by defendant's counsel, that the note has been barred by the statute of limitations; but this clearly cannot defeat the plaintiff's title to the mortgage property, so as to bar the present action."

In Joy v. Adams, 26 Me. 330, it is said, "A mortgage security has not been deemed to be within any branch of the statute of limitations. He (the mortgagor) who would avoid such security, must show payment." He has not been allowed to defeat the right of the mortgagee, by showing that the personal security, to which the mortgage security is

collateral, has become barred by the statute of limitations. A similar doctrine is affirmed in the case of Thayer v. Mann, 19 Pick. 535.

The foregoing are the views of the text-writer, Parsons, in his treatises on Contracts and Mercantile Law, the several English decisions referred to in his note, five American state decisions, and two cases from the supreme court of the United States. Opposed to this mass of authority, is the solitary case of Duty v. Graham, 12 Tex. 427. After settling, satisfactorily to itself, that a mortgage is mere security for a debt; that the mortgagor remains the owner of the land, entitled to the possession of it, and the mortgagee cannot maintain trespass to try title to it,—the inference is drawn by the court, contrary to all the foregoing authorities, that where the note, secured by a mortgage, is barred by the statute of limitations, the effect of the statute is not only to prevent a recovery on the note, but destroys the original debt, and all additional evidences in the possession of the creditor; and this all the result of implication. Let us look to the reason of this, so far as this case is concerned. When the creditor advanced his money, he entered into two contracts. By one, he took the personal pledge of the borrower. Not content with this, he required and the borrower agreed, the one to receive and the other to deliver, a solemn, written instrument, under seal, in which the borrower acknowledges the execution and delivery of his written promissory note, and at that time that he is justly indebted to the complainant in the sum of two thousand dollars. The condition annexed to this document is, that if defendant shall pay, or shall cause to be paid, the sum of two thousand dollars, with all interest due, according to the tenor of a promissory note, specially referred to, the mortgage should be void; otherwise to remain in full force and effect. No portion of the two thousand dollars has been paid, and the mortgage is still in force by its very terms.

In Thayer v. Mann, 19 Pick. 535, 537, the court say, "A reference to the condition contained in the mortgage shows, that it is to be and remain in full force, until the debt shall be paid. The debt remains, although the statute may discharge the remedy on the note." 2 Hill. Mortg. 25. The debt is the money due. If the only evidence of its existence is a promissory note, and that is barred by the statute of limitations, the plaintiff is remediless. But if he has secured a lien on property as security, and additional evidence of the debt, he has the right to make it available by a resort to equity. If, pursuing that course, the absence of the note unaccounted for, or other circumstances, raise the presumption of payment of the debt, he must necessarily fail. In this case the nonpayment of any part of the debt is an admitted fact. Whenever the complainant shall attempt to invoke a remedy of which he is deprived by the statute of limitations, he will be encountered by that act; and the question will then arise, in the language of the court in the case of Hughes v. Edwards, 9 Wheat. [22 U. S.] 494, "Whether the defendant could avail himself of the act of limitations, whilst the equitable remedy of the plaintiff is subsisting?" This question need not be decided in this case, as the parties are now before a court of equity.

But there is a fatal defect in the form of the demurrer in this case, which avoids it, independently of all other objections. The ground assigned for the demurrer is, that it appears from the bill that the promissory note to secure which the mortgage was given, was made and executed by the defendant, more than four years before the filing of the bill. The statute of limitations does not run from the date of the note, but from the time the cause of action accrued. But, as an argument was had on all the questions involved, and the court would have permitted an amendment of the demurrer, a decision upon the whole case has been made. An order, overruling the demurrer, must be entered.

Case No. 13,212.

SPARKS v. The SONORA.

[Hoff. Op. 452.]

District Court, N. D. California. June 27, 1859.

SHIPPING—CARRIAGE OF PASSENGERS—REASONABLE ACCOMMODATIONS—NOTICE TO PASSENGER—DAMAGES.

[1. The shipowner is bound to furnish all reasonable and proper accommodations usually afforded to passengers on similar voyages in similar vessels, and such as are necessary to a reasonable degree of comfort, and to physical health and safety.]

[See Bailey v. The Sonora, Case No. 746.]

[2. A stateroom constantly filled with heated and somewhat offensive air, issuing directly from the boiler, to such an extent as to raise its temperature from 25° to 40°, with air and light somewhat obstructed by guards on which the port holes opened, and with the berth and bedding constantly wet, through defect in the arrangement of a pump, whose pipe ran through the stateroom, does not afford reasonably comfortable accommodations to a first-cabin passenger.]

[3. The ship's agent, when the comfortable staterooms are disposed of, must inform the passenger of the nature of the accommodations to be afforded him, and allow him to determine whether he will take the risk of such accommodations.]

[4. Where it cannot be determined that the unhealthiness or discomfort of a stateroom on a passage from Panama to San Francisco was the cause of the Panama fever with which the passenger was attacked, the expenses of his illness, and delays caused thereby, cannot be considered as part of the damages arising from the breach of the contract of carriage.]

[5. A sum equal to the passage money allowed as damages for the discomfort and annoyance experienced by a passenger from the failure of the ship to furnish a reasonably comfortable stateroom.]

[This was a libel for breach of contract by Harvey Sparks against the steamship Sonora.]

H. C. Clarke, for libelant.

Hall McAllister, for claimant.

HOFFMAN, District Judge. The libel in this case is filed to recover damages for a breach of a contract with libelant for his transportation as a passenger in the above vessel. It is admitted that Mr. Sparks took passage as a first-class passenger in New York to be transported to California, and that, in pursuance of that contract, he came on board the Sonora at Panama, and was conveyed to this port. The alleged breach of contract consists in the insufficient and uncomfortable character of the accommodations afforded to him. The grounds of complaint chiefly insisted on by the libelant are, first, that his stateroom was wholly unfit to be occupied by reason of its high temperature, arising from its vicinity to the boiler, and the existence of a ventilator which constantly filled it with heated air; second, by reason of offensive smells proceeding from the ventilator, and also various articles stowed upon the guard or small deck near the wheel, on which the port hole of the stateroom opened, and from the water-closets of the vessel. It is also alleged that a pipe which passed through the stateroom was leaky or defective, and that the bed and bedding of the libelant were constantly wet. It is further alleged that the crowded state of the steamer deprived the libelant of the comfort and reasonable accommodations to which he is entitled. All these causes, it is averred, not only caused the libelant to suffer temporary inconvenience and discomfort, but they affected his health, producing protracted and severe illness, thereby occasioning him great damage.

In support of these allegations much testimony was taken. It is unnecessary, however, to review it at length, for the principal facts, with the exception of some unimportant details, are clearly discernible, and the chief embarrassment in deciding the cause arises from the difficulty of determining with precision what is the character of the accommodations, and what the degree of comfort which the owner of a passenger vessel, employed as was the Sonora, agrees impliedly to afford to the cabin passengers. That some inconveniences and discomfort incidental to a voyage in tropical latitudes, and on a steamer conveying passengers in large numbers, must necessarily be submitted to, is obvious. But, in the absence of express stipulations, it is not easy to define the character of the accommodations which the passenger has a right to expect, or the degree of discomfort to which he must submit. It may be laid down, however, that the ship-owner is bound to furnish all reasonable and proper accommodations usually afforded to passengers on similar voyages in similar vessels. That passengers are frequently carried on steamers in the trade in such numbers as to be inconsistent with their comfort, or perhaps their health, would, if the fact were established, afford no justification for a continuance of the abuse, for the passenger's contract must be construed to embrace a stipulation for such accommodations as are necessary to a reasonable degree of comfort, and to physical health and safety. The question in this case is, had the libelant such accommodations?

It appears that on either side of the main cabin of the vessel is a double row of staterooms. The outer, or those on the side of the vessel, have port holes by which light and air are admitted, but the inner rooms have none. These staterooms are reached by narrow passages, which lead from the cabin to the sides of the ship. On either side of these passages are the doors of the staterooms, two on each side, made of lattice work or blinds. and at the extremity of each passage way is a port hole. Beneath the port hole, and rising about four feet from the deck, is a square trunk or ventilator, which communicates with the deck below. The stateroom of the libelant being on the outside, or next the side of the vessel, its door was immediately adjacent to the ventilator. Any hot or offensive air which might rise through the ventilator was readily admitted, especially when the wind blew into the port hole, through the latticed door of the state room. The part of the lower deck with which the ventilator communicated was used as a baggage room. The floor was, with the exception of narrow passages on either side, occupied by the roof or top of the boiler, which, rising in a rounded form, was at its highest point perhaps four feet above the level of the floor. The boiler was covered with a jacket of felt and a casing of boards. It is obvious that the temperature of the baggage room must have been much raised by the presence of the boiler. Capt. Baby himself admits that the temperature of the baggage room was about 40 degrees higher than that of the air. This heated air, therefore, arising through the ventilator, must have increased the temperature of the staterooms on either side of the passages, especially of the outer rooms immediately adjacent to it. It accordingly appears from the testimony that the air of the stateroom of the libelant, as well as of those rooms in a similar situation on the opposite side of the ship, was higher in temperature by from 25° to 40° than that of the air in other staterooms of the vessel. The captain himself states that the air in the room of Judge Bakeby, who occupied a room corresponding to that of the libelant, on the other side of the ship, was on one occasion, when the heated air was rising in large quantities through the ventilator, and was blown inwards by the wind through the port hole, much hotter than that of one of the other rooms.

It is also claimed that this air was offensive, but there does not seem to have been any cause seen by which the air became foul, though, perhaps, a smell such as arises from machinery might have been more or less perceptible. It also appears that the port hole of libelant's stateroom opened upon the guard or small deck, near the wheel, on which were stowed various articles, chiefly wet provisions and other articles required to be kept cool. It is alleged that these provisions obstructed the air and light, and rendered the atmosphere foul. It is evident that the stateroom could not have been as comfortable or desirable as other staterooms, the port holes of which were on the sides of the vessel, and unobstructed by guards, etc. But from the evidence of the officers, as to the kind of articles stowed on the guards, and the precautions taken to keep it clean by frequent washings, it would seem that no very offensive odors could have arisen from that cause. The witnesses for the libelants, however, state very positively that an offensive smell from this cause was perceptible, and it is possible that in a tropical latitude the atmosphere of the stateroom may have been slightly affected by the close proximity of the guards. It does not appear to me, from the evidence, that any effluvia from the privy could have mingled with the other bad odors to which the witnesses have testified. It was at a considerable distance, great precautions were taken to keep it clean; and even if, occasionally, some inconvenience arose from that cause, it ought, I think, to be regarded as one of those inconveniences incidental to traveling in steamers. If the water-closets are properly situated and constructed, and if every measure to insure cleanliness is adopted, the fact that inconvenience occasionally results from their presence cannot be alleged as a breach of the contract with a passenger.

It is also shown by the testimony that the berth and bedding of the libelant were perfectly wet. Its extent and degree are variously stated, but I think it clear that it was sufficient to render his berth excessively uncomfortable, if not dangerous to health. Several witnesses testify in the most positive manner that the pipe was defective, and that they saw leaking through orifices in it. On the other hand, it is testified that if the pipe had been leaky, the working of the pump would have been affected, which was not the case. A plumber who examined the pipe and pump after the arrival of the vessel testifies that he could discover no leak in the pipe, and that none could have existed. The theory of the claimants is that the flange or plate which is counter sunk in the deck must have become loose from the working of the deck, and that water thus found its way along the pipe to the berth and stateroom of the libelant. The weather during the passage seems to have been fine. Supposing, then, that the claimants are right in attributing the escape of water to the cause assigned, it would seem to be one of those contingencies against which they ought to have provided. If it is impossible to prevent such leaks from occurring, then the pipe ought not to be led through the berths of passengers. It is at all events clear that a passenger who has contracted and paid for accommodations, compatible with a reasonable degree of comfort, and such as may be used without danger to health, ought not to be compelled to occupy a bed which is, to a considerable extent, saturated with, or even made damp by, water.

With regard to the other objections to the stateroom, which have been noticed, it is not so easy to decide. It is evident that, so far as the ventilation and port holes were concerned, the room on the opposite side of the passage, as well as the two corresponding rooms on the other side of the vessel, must have been liable to precisely the same objections. The inside rooms must also have been more or less affected by the ventilation, and, being without port-holes, perhaps might be considered, by many persons, less desirable. The purser testifies that he considers Mr. Sparks' room preferable to any of the inside rooms in the cabin; but this must be a caprice of taste, for the other inside rooms were not exposed to the heated and perhaps offensive air from the ventilator, which it is admitted raised the temperature of the rooms adjacent to it very considerably. It also appears that the room occupied by libelant and the one opposite to it, as well as those corresponding to them on the other side of the ship, are commonly used whenever the ship is full, and, so far as appears, without special complaint. On the other hand, it would seem that a room constantly filled with heated and somewhat offensive air, issuing directly from the boiler, and to such an extent as to raise its temperature from 25° to 40°, with air and light somewhat obstructed by the guards, on which the port holes opened, and with the berth and bedding constantly wet, through some defect in the arrangement of the pump, does not afford that reasonably comfortable accommodation which a first-cabin passenger, who pays the price demanded for his passage, has a right to expect. It seems to me that the agents of the company, who know the construction of the ship, and when the comfortable staterooms are disposed of, are bound to inform the passenger of the nature of the accommodations which are to be afforded him, nor can they shield themselves from liability by averring that no better stateroom was at their disposition. The libelant had a right to determine for himself whether he would sacrifice his comfort and risk his health by occupying a stateroom, the temperature of which was raised so considerably by its vicinity to, and the presence of, hot air from the boilers of the vessel.

If these views are correct, it follows that the contract to furnish the libelant with reasonably comfortable accommodations has

not been complied with, and he is entitled to damages for its breach; but the amount of damages which he should be allowed it is very difficult to estimate. He alleges that by reason of the insufficient accommodations afforded, his health was impaired, and for a considerable time after his arrival he was unable to attend to business. That he was ill when he arrived here is proved, but it is impossible to affirm that his illness was the direct and immediate consequence of the grievances he complains of. Dr. Harvey Hunt, a physician who was on board, does not hesitate, it is true, to ascribe his disease to the unhealthy character of his stateroom, but the nature of the case does not seem to admit of so confident a theory of casualty. The illness by which the libelant was attacked was the common Panama or coast fever. This fever, as is well known, is more or less an endemic in the country, and all travelers across the isthmus, and on this coast, are more or less liable to its attacks. Dr. Hunt, himself, admits that the only influence which the unfavorable conditions of Mr. Sparks' stateroom could have exercised were by diminishing his vital force, or power of resistance to disease, to render him more liable to its attacks, or to assist in developing any seeds of it which might have existed in his system. A cold, excessive fatigue, late hours, or dissipation, would have had the same effect. It is, therefore, not in the power of medical skill to assign to each of the many causes which may aid in engendering or developing so common a disease its precise influences, or to affirm that the unhealthiness or discomfort of a stateroom was either its immediate or efficient cause, or a cause without which the disease would not have appeared. The most that can be said is that the conditions were unfavorable to health, and those considerations may have exercised a material influence in producing the subsequent illness of the patient. But it does not seem to me that such an hypothesis, which necessarily leaves the degree to which the unhealthiness of the stateroom contributed to produce indefinite and conjectural, can justify the court in including, as part of the damages arising from the breach of contract, the physician's bill and other expenses of the libelant's illness; more especially as it appears that the stateroom was occupied by the libelant during a part only of the voyage, after which he obtained another, and as it is shown that he exposed himself to attacks of the fever by remaining on deck until a late hour, an imprudence which may also have been not without its influence in producing or aggravating the fever. No testimony was given to show any pecuniary damage to the libelant by reason of loss of time during his illness. The only damages which could be decreed would be the expenses of his illness, and such compensation or solatium for pain and suffering as might be just. But, for the reasons assigned, I think the expenses and suffering caused by his illness after his arrival cannot be taken into account in fixing the damages for the breach of the contract.

It does not appear that the crowded state of the vessel caused any particular inconvenience to the libelant, except so far as it prevented him from obtaining another stateroom, nor that the officers willfully refused or neglected to promote his comfort as far as lay in their power. He does not appear to have been at much pains to inform the captain or superior officers of the wet condition of his berth and bedding, and they seem to have been under the impression that the orders given by the captain, on learning the existence of the leak through the steward, had remedied the evil. Had the captain been informed that the leak continued, it is, I think, tolerably clear that the libelant would have been assigned a sofa in the saloon, or elsewhere, to sleep on; an arrangement which, though not a full compliance with the contract, would have obviated the great discomfort and danger to the health of the libelant, to which, as he alleges, the occupation of the stateroom exposed him. But it is, I think, clear that the accommodations afforded to the libelant were not such as he had a right to expect under his contract, and that the company had no right to exact from a passenger the highest rate of fare, and then to assign him a room over or very near the boiler, which, though commonly used by passengers, was hot and unfit for occupation, and which, if assigned to passengers at all, they ought not to be compelled to occupy unless they have been informed of its situation and character, and have assented to the arrangement. The fact that this and the other staterooms in a similar situation were fitted up when the ship was first built, and have been commonly used as such, affords no justification for assigning them without previous notice to passengers; for the same argument would justify the construction of staterooms on top of the boiler, adjoining the water-closets, or any part of the ship which the desire of the owners to find a place in which to stow a passenger might lead them to devote to the purpose. The more just and reasonable view is that, although all the staterooms of a vessel cannot be equally comfortable and agreeable, and yet that there are parts of the ship which are unfit to be used for such a purpose, and that a stateroom liable to be constantly filled with air from a baggage room, the atmosphere of which is usually in temperature higher by 40° than the air, is not a place where passengers—it may be women and children—who have paid the highest price, are to be put, without notice or intimation of the nature of the accommodations they are to receive. Rejecting, then, as before stated, the claim for damages for loss of health as not sufficiently shown to have been produced by the breach of contract complained of, it has

appeared to me that a sum equal to the passage money paid by the libelant is a reasonble amount of damages for the discomfort and annoyance which the libelant has experienced by the failure of the company to fulfil their contract. A decree of $300 and costs must therefore be entered.

Case No. 13,213.

SPARKS v. WEST.

[1 Wash. C. C. 238.][1]

Circuit Court, D. Pennsylvania. April, 1805.

SHIPPING—DAMAGES FOR SEIZURE—VIOLATION OF REGULATIONS—ACTION AGAINST SHIPPER.

1. Action, by the owner of a vessel, against the defendant, for having put on board of her, without the knowledge of the owner, and against the regulations of Havana, a quantity of silver, which occasioned the seizure and detention of the vessel. *Held,* that the defendant is liable to answer for the damages sustained by the plaintiff, if they were occasioned by such illegal act.

2. Quere, whether, in any case, the protest of the captain is admissible in evidence?

This was an action brought by the plaintiff, owner of the ship Hope, against the defendant, for putting on board of the ship, at Havana, a quantity of dollars, without the knowledge, and against the orders of the captain given to his officers; whereby she was detained, for a long time, by the Spanish officers, in order to be searched.

Mr. Levy offered in evidence, the protest of the captain of the Hope; and to prove that this was always admitted as evidence in the courts of this state, he cited [Hyan v. Edwards], 1 Dall. [1 U. S.] 1; [Nixon v. Long], Id. 6; [Story v. Strettell], Id. 10.

Mr. Condie mentioned another case, similar to these; also, one in the court of common pleas, where an action was brought for the deviation of the captain. 7 Term R. 158. (The protest refused as evidence.) He cited also other cases, to show some of the exceptions made to the general rules of evidence.

It was opposed by Messrs. Ingersoll and W. Tilghman, as being contrary to the general rules of evidence, and as not being admitted in England.

PETERS, District Judge, was of opinion, that, as a general rule, it ought not to be admitted; that there might be cases, where there might be an exception, but this was not one.

WASHINGTON, Circuit Justice, observed, that he by no means approved of admitting such evidence. That, if any long and uniform decisions of the state courts had been produced, showing the principle to be otherwise settled, he should have felt himself perplexed. But, all the cases cited, have related to actions on policies of insurance; where it was not easy to perceive clearly any interest in the captain. But, this is an action of tort, for an injury sustained by the plaintiff, for which the captain is liable; unless he can make out such an excuse for himself, and fix the wrong on the defendant, so as to enable the plaintiff to recover against him. No train of decisions has been produced or mentioned, in such a case. He was of opinion, this protest is inadmissible evidence.

WASHINGTON, Circuit Justice (charging jury). The declaration is a special action on the case, and states the seizure, search, and detention of the vessel; as the consequence of the defendant's putting on board this money without the permission of the captain. It certainly was an unlawful act, and the defendant is liable to pay all the damages, which the plaintiff can prove to your satisfaction to have resulted to him from this act. But, it does not follow, that, because the act was unlawful, the defendant is liable for all the damages sustained by the plaintiff; unless the act was the occasion of the damage. As, suppose the 400 dollars put on board by defendant, had not been found; or it appear, from other evidence, that not this, but some other thing was the cause. Upon this point, the parties are at issue. The plaintiff, to prove the injury sustained to have arisen from this act, relies upon the following circumstances: that, the search commenced the day after it was put on board. The answer to this, is; that the vessel was to have sailed the next day. That the money was found concealed; and, therefore, was calculated to excite suspicions, that a search would discover more hidden treasure in other parts of the ship: that, when 136 dollars were found in the steward's chest, the officers declared, that they would restore it, if no more was found: that, after finding the money put on board by defendant, they took the vessel to be searched. But still, this goes only to show, that this money was possibly the cause of the search and detention, but not of the seizure.

In opposition to these circumstances, the defendant relies upon the following: the superior value of the outward, to the homeward cargo; the number of passengers to return in the vessel; the ground on which the vessel was moored, which a witness has said, was best calculated for smuggling; were all calculated to excite suspicions, in the Spanish officers, that there were contraband goods on board. They, in fact, found money and other things in the steward's chest, which they seized and detained. But, above all, the certificate of the Spanish officers, who made the seizure and search, and which they left on board as a kind of proces verbal, is relied upon to show, not only that this money was not the cause of the seizure, but that it was not the cause of the search or detention. They state, that having received information of many thousand dollars being on board the

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

vessel, they had been induced to make the search; that they found 536 dollars (viz. the 400 dollars put on board by the defendant, and the 136 dollars found in the steward's chest), and some ——, and that, in consequence of this information, and the finding of these articles, they had caused the vessel to be unloaded, and searched.

This is a summary of the evidence, and of the arguments of counsel. I have stated the legal principle, by which you are to be governed. You will say, what damages, if any, the plaintiff is entitled to.

Verdict for 1,092 dollars and 98 cents. (The claim was for upwards of 4,000 dollars.)

Case No. 13,214.

SPARROW v. MUTUAL BEN. LIFE INS. CO.

Circuit Court, D. Massachusetts. April, 1873.

INSURANCE—LIFE—INTERROGATORIES—TRUTH OF ANSWERS—MISREPRESENTATIONS—ACTS OF AGENT—ESTOPPEL.

Before SHEPLEY, Circuit Judge. This was an action upon a life insurance policy. The validity of the policy was made dependent upon the truth of the answers to the inquiries contained in the application. The insured was inquired of in the same interrogatory as to prior insurance, other insurance, and also if he had insurance upon his life in other companies, in what companies, and to what amount. The answer was, "Yes; 5000, under policy 17,990." It appeared in evidence that the insurers, a New Jersey corporation, had a general agent in Boston for Massachusetts, who had supervision over the other agencies within the state, and appointed subagents, whose duty it was to submit to applicants for insurance certain questions, and to see that they were answered. This subagent solicited the insured, at the place of business of the latter, to make application for insurance, and took down from the dictation of the insured all of the answers, except the number of the policy, which was inserted by the clerk of the subagent at the latter's direction; the information having been obtained from the records in the office, and all having been done after the signature of the insured was made to the application. The answer was untrue as to the amount of other insurance, and incomplete as to the offices in which it was placed. It was held to be a question of fact for the jury, as to each particular act in the negotiation, whether the agent, who might be acting now for the company, and now for the insured, was in fact acting for the one or the other; and the responsibility of each particular act or declaration would rest with that party for whom the agent acted in the matter, and under whose direction and control, as to that particular matter, he might be.

In the same case, where the answer, in the making of which the agent of the company intervened, was untrue and incomplete, the defendant requested the court to instruct the jury that if the insured accepted the policy with the knowledge that the answers to the several questions were as they appeared at the trial, he was bound by them, whatever knowledge the agent of the company might have had from him, or from any other person, relating to the subject-matter inquired about. But the court declined to so instruct, without qualification, but did instruct that, if the insured accepted the policy with the knowledge that the answers were in the words as they appeared at the trial, those words could not be altered or changed, or their meaning altered or changed, by the introduction of parol evidence, and that, although the agent of the company was aware from other sources that the answers were untrue, yet, if they were knowingly made by the insured, and adopted by him, and their truth made the test of the validity of the policy, he was bound by them.

[NOTE. The statement of the case above and the points decided is taken from 2 May, Ins. (3d. Ed.) § 560. The case is nowhere reported; opinion not now accessible.]

SPARTAN, The (DRINKWATER v.). See Case No. 4,085.

SPARTAN, The (POLAND v.). See Case No. 11,246.

SPAUGH (VOGLER v.). See Case No. 16,-988.

Case No. 13,215.

The SPAULDING.

[Brown's Adm. 310.][1]

District Court, E. D. Michigan. June, 1871.

MARITIME LIENS—MARSHALING OF PROCEEDS—SALVAGE—GENERAL AVERAGE.

1. In a distribution of proceeds, salvage services, rendered in getting a vessel off a reef, are entitled to priority of payment as against a claim for general average arising from the jettison of a portion of her cargo.

2. The fact that one of the salvors had the promise of a third party to pay him if he could not collect from the vessel, does not oust him of his priority.

Motion for distribution of proceeds.

The schooner was sold, pendente lite, on the original libel of Ballentine and McAlpine, and the proceeds brought into court, and now remain in the registry. Five intervening libels were filed against the vessel. The one first filed was by the Security Insurance Company of New York, and the Buffalo Insurance Co. of Buffalo, for general average on account of the jettison of a quantity of corn. The other four intervening libels were filed subsequently and simultaneously, as follows: By Wolverton for salvage services in getting the schooner off from a reef where she lay sunken and in a damaged condition, and bringing her to

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

Detroit. By Campbell and Owen, for repairs to keep her afloat. By Desotell and Hutton, for use of wharf for same purpose. By Keith and Company, in part, for storage of a portion of the schooner's furniture and rigging. The proceeds were not sufficient to pay all the claims, and the contest was as to priority as between the intervening libellants first named, and the other four.

It appeared that in order to get the schooner off the reef, it was necessary to pump the water out of her hold, and that the loss of the corn upon which the claim for general average was based, was caused by the same being pumped out with the water. It was contended: (1) That as the jettison of the corn was a necessary consequence of the measures adopted for saving the vessel, the claim of libellants on account thereof is really a salvage claim, and hence of equal rank with the other four; and (2) That the libel for the same having been first filed, it should be first paid. (3) At all events being of equal rank, it should be paid pro rata with the others.

H. B. Brown, for insurance companies.

The vessel being ashore upon the reef, any expense incurred in getting her off must be contributed for in general average, and is essentially a salvage claim. We claim for the jettison of the corn which lighted the vessel and enabled Wolverton with his steam pump, to get her off. These are both salvage claims and are of equal rank. But we are entitled to priority of payment because our libel was first filed. The Globe [Case No. 5,483]; The Triumph [Id. 14,182]; The Adele [Id. 78]. Claims for salvage take precedence of all others except seamen's wages. Lewis v. The Elizabeth & Jane [Id. 8,321]; The Paragon [Id. 10,708]: The St. Jago de Cuba, 9 Wheat. [22 U. S.] 409.

As against Campbell & Owen's libel, we are also entitled to priority from the fact that Dorr promised to pay for the repairs himself in case they could not be realized out of the vessel. They were made partly, at least, upon his credit, and we are entitled to the benefit of that in distribution. 16 Law Rep. 13.

W. A. Moore, for intervening libellants.

LONGYEAR, District Judge. It was conceded on the argument, and such is undoubtedly the law, that the lien for salvage takes precedence of the lien for general average. The libel of the insurance companies in this case is in terms for general average, and I can see nothing in the circumstances of the case to warrant the court in holding it to be anything else, even if the libel had been otherwise. Without the salvage services the whole was a loss. With the salvage services the loss is reduced to a part only. In the former case there would have been nothing left upon which a lien for general average could attach. In the latter case it has something upon which it may attach, solely because of the salvage services; and it would be not only contrary to the general rule of law above stated, but unjust and inequitable to place such lien as to the part thus saved, upon the same footing, as to precedence, as the lien for the salvage services.

It was also claimed as to one of the libels, that of Campbell and Owen, that the libellants had the promise of one Dorr, that he would pay them for the repairs done by them if they could not realize the same out of the vessel, and that their claim being thus otherwise secured, the court will not enforce their lien upon the vessel to the detriment of other lien holders. Dorr's promise was conditional, and it is not operative until Campbell and Owen have first exhausted their remedy against the vessel, which by their libel they are now seeking to do. The rule contended for therefore, although a correct one, does not apply to this case.

I hold, therefore, that the respective claims of the several libellants, Wolverton, Campbell and Owen, and Desotell and Hutton, in whole, and the claim of Keith and Co., in part (as to which adjudication has been heretofore made), together with the costs of each, must be first paid before the claims of the Security and Buffalo Insurance Companies, and that those claims must be paid pro rata, share and share alike, in case there is not sufficient to pay the whole. In view of the disposition which has been made of the first proposition on behalf of the insurance companies, consideration of their other two propositions has become unnecessary. Ordered accordingly.

SPAULDING (BURCH v.). See Case No. 2,-140.

SPAULDING v. DUFF. See Case No. 13,-219.

Case No. 13,216.

SPAULDING v. EVANS.

[2 McLean, 139.][1]

Circuit Court, D. Illinois. June Term, 1840.

PARTIES — NOTES — ALTERNATIVE PROMISE — PLEADING.

1. Where a note is given to A. B., C. D., E. F., or G. H., either of the promisees may bring the action in his own name.

2. The promise to pay is to either of the promisees, in the alternative.

[Cited in Seedhouse v. Broward (Fla.) 16 South. 429.]

3. In such a case it is not necessary to set out the note in terms in the declaration, but it is sufficient to state it according to its legal effect.

[Cited in Reynolds v. Hurst, 18 W. Va. 656.]

[This was an action on a note by Dunham Spaulding against John Evans.]

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

Cowles & Krum, for plaintiff.
Mr. Logan, for defendant.

OPINION OF THE COURT. This suit is brought upon the following note: "Chicago, 24th June, 1836. Twelve months after date I promise to pay Jameson Samuels, H. N. Davis, Elias T. Langham, or Dunham Spaulding, five hundred and seventy-five dollars, being for seven lots in Bellfontaine, value received. [Signed] John Evans." The action is brought in the name of Dunham Spaulding, and the note is described in the declaration as given to him, no reference being made to the other promisees. On the trial the note was objected to on the ground that it is not set out according to its tenor or its legal effect in the declaration. The defendant promises to pay either of the promisees. The disjunctive applies so as to give this effect to the instrument. It would seem, therefore, to follow that either of the promisees may bring the action in his own name, and in this case it would not be necessary to set out the note in full, but only so much of it as to show its legal effect. Mr. Chitty says (1 Chit. Pl. 10): "Where the contract was made with several persons, whether it were under seal or in writing, but not under seal or by parol, if their legal interest were joint, they must all, if living, join in an action in form ex contractu for the breach of it, though the covenant or contract with them was in terms joint and several." In 1 Saund. 153, note 1, it is said: "Though a man covenant with two or more jointly, yet if the interest and cause of action of the covenantees be several, and not joint, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint." Dyer, 337; 2 Madd. 82; 3 Madd. 262, 263; Bull. N. P. 157; 2 Camp. 190. In a note, Chitty, as above cited, adds: "Where a bond is joint in form only, but several in substance, an action may be maintained in the name of the several obligees. But it seems if he can maintain such action on the bond, he must set forth the bond truly, and then by proper averments show cause of action to himself alone, clearly embraced within the condition of the bond." In 2 Johns. Cas. 374, it is laid down that when one of the several obligees, covenantees, etc., having a joint legal interest in the contract, dies, the action must be brought in the name of the survivors, and the executor or administrator of the deceased must not be joined, nor can he sue separately, though the deceased alone might be entitled to the beneficial interest in the contract, and the executor must resort to a court of equity to obtain from the survivor the testator's share of the sum recovered; but, if the interest of the covenantees were several, the executor of one of them may sue, though the other be living. Saund. 153, note 1; Burrows, 1097; 1 Chit. Pl. 19. Where two or more persons sign a joint and several obligation, the obligee must sue one or all of them. 1 Saund. 291a, 3 Term R. 382. Partners are liable jointly, and not severally. 18 Johns. 459; 1 Wend. 524.

A declaration is good if it state such parts of the contract of which a breach is complained,—or, in other words, to show so much of the terms beneficial to the plaintiff in a contract,—as constitutes the point for the failure of which he sues; and it is not necessary or proper to set out in the declaration other parts, not qualifying or varying in any respect the material parts above mentioned. 4 Taunt. 285; 13 East, 18. The legal effect of the contract is all that need be stated. 1 Chit. Pl. 385. On a joint and several note either of the promisors may be sued, and in the declaration it is not necessary to notice the other party. 1 Chit. Pl. 116; Chit. Bills, 346; 4 Camp. 34; 5 Coke, 6; 1 Barn. & Ald. 224.

The declaration upon a note stated that the defendant and another made their note, by which they jointly or severally promised to pay; and upon error, after judgment by default, Lord Mansfield said: "If 'or' is to be considered in this case as a disjunctive, the plaintiff is to elect, and by the action he has made his election, to consider the note as several; but in this case it is synonymous to 'and'; 'both and each promise to pay.' Judgment affirmed." In an action against one of several makers of a joint and several promissory note, the describing it as the separate note of the defendant, without noticing the other parties, is no variance. 1 Saund. 291; 2 Chit. Pl. 581. A note signed by the defendant alone, but purporting in the body of it to have been made by the defendant and another person, was declared upon as the several note of the defendant, and it was agreed that it might be declared on according to its legal operation. Burrows, 322; 2 Camp. 308. The promise to pay, in the note under consideration, is to either of the promisees, and, this being the legal operation of the instrument, it is only necessary to allege the promise as made to the promisee who brings the action.

It is insisted, if the action can be maintained in the name of the plaintiff, it is necessary to set out the note in full, to enable the defendant to show payment to either of the promisees; that, it not being an instrument under seal, oyer cannot be craved, and that it is therefore necessary for the plaintiff to set out the note for the benefit of the defendant. It is true oyer cannot be technically prayed of this note, but it is not perceived why the rule to declare on an instrument, according to its legal effect, may not apply in this case, as well as in every other where the action is brought on a contract not under seal. Where an action is brought against one of two or more makers of a promissory note, no notice need be taken of the other parties, and here the inconvenience complained of would exist the same as in the case under

examination. If the defendant has paid the note to either of the promisees, it is good, and he may prove this as readily as he could prove payment by a copromisor, if sued on a joint and several note. The declaration sets out the note according to its legal effect, and it cannot be rejected as evidence on the ground of variance. The note was admitted, and judgment for the plaintiff.

Case No. 13,217.

SPAULDING v. McGOVERN et al.

[10 N. B. R. (1874) 188.] [1]

Circuit Court, D. New Jersey.

COURTS — FEDERAL JURISDICTION — PLEADING— JOINDER—MULTIFARIOUSNESS— BANKRUPTCY.

1. The plaintiff filed a bill in equity for the recovery of certain property against the bankrupt, his wife, and a third party. The bankrupt and his wife demurred to the bill on the grounds, First. That the matters stated in the bill are not within the jurisdiction of this court. Second. That the bill is multifarious: As to parties. As to the objects of the bill. *Held*, that the matter in dispute exceeding five hundred dollars, and the suit being between the citizens of two different states, the bill has all the conditions necessary to give this court jurisdiction.

[Cited in Cady v. Whaling, Case No. 2,285.]

2. The objection as to a misjoinder of parties does not lie in the mouths of these defendants, as only those who are improperly joined can take advantage of this objection.

3. The bill is not multifarious in its objects.

[This was a bill in equity by Alfred S. Spaulding, assignee, against John McGovern and wife and Miller Ford. Heard on demurrer.]

NIXON, District Judge. The bill of complaint is filed in this case to collect certain monies and property alleged to have been fraudulently paid and transferred by the bankrupt to his wife after his insolvency, and also to set aside a conveyance of real estate made on the 14th day of July, A. D. 1866, through the medium of the defendant, Miller Ford, to hinder, delay, and defraud the creditors of said bankrupt. The complainant states that he is a citizen of the state of New York, and that the defendants are citizens and residents of the state of New Jersey; and that the bill is filed by him as the assignee in bankruptcy of the defendant John McGovern, to recover the assets of the estate. Two of the defendants, McGovern and wife, have demurred to the bill of complaint, and for causes of demurrer have assigned—First. That the matters stated in the bill are not within the jurisdiction of the court. Second. That the bill is multifarious: As to the parties. As to the objects of the bill.

1. As to the jurisdiction of the court.

It appears that the matter in dispute exceeds the sum of five hundred dollars, and that this is a suit in equity between citizens of the state where it is brought and the citizens of another state. It has all the conditions necessary to give this court cognizance under the 11th section of the judiciary act [1 Stat. 78]. Although the complainant claims title under proceedings in bankruptcy, the cause of action is not created by the bankrupt act. It is in the nature of a creditor bill to reach assets, placed by the debtor in the hands of third parties in order to hinder, delay, and defraud the creditor. An equitable jurisdiction exists in the court over the case, wholly independent of the bankrupt law [of 1867; 14 Stat. 517], and as we can find nothing in the provisions of that act which limits or controls the right of the court to exercise authority in such cases, the demurrer to the jurisdiction is not well taken.

2. As to multifariousness.

(1) Has there been a misjoinder of parties? The demurrer is filed by two of the defendants, John McGovern and Elizabeth his wife, and the allegation is that it appears by the bill of complaint that Miller Ford, the other defendant, is not a proper party. Without determining whether it does so appear or not, it is only necessary to observe that this objection does not lie in the mouths of these defendants. If any one can demur to a misjoinder of party defendants, concerning which there seems to be a reasonable doubt, it is only those who are improperly joined, and it will be time enough for the court to consider the question when it is raised by Miller Ford himself.

(2) Is the bill multifarous as to its objects? The assignee in bankruptcy stands in the place of the creditors of the bankrupt, and has the same rights, and may pursue the same remedies in their behalf as they had or would have been entitled to if there had been no adjudication in bankruptcy. He may, therefore, embrace in this suit all such matters and causes of action as might have been included by the creditors in a creditors' bill against these defendants.

The fraud charged against the defendants is this—that they have obtained the possession of certain personal property and acquired the title to real estate belonging to the debtor and bankrupt, John McGovern, and hold the same against the claims of creditors. The property is averred to be in the custody and under the control of the defendant, Elizabeth A. McGovern, and the only apparent reason why Miller Ford is made a party is because his name was used in effecting the alleged fraudulent transfer of the real estate, and the complainant desires a discovery from him in reference to the facts of the transaction. If it should be found after answer or proof that he is a useless defendant, his name may be stricken out upon motion. Wright v. Barlow, 8 Eng. Law & Eq. 125.

It is hardly necessary to observe that a bill in equity is demurrable when it relates to

1 [Reprinted by permission.]

matters of a different nature, and having no connection with each other, but that is not the case here, the defendants all have a common interest centering in the point in issue in the cause.

The only matter in litigation is fraud, charged in the management and disposition of the property of John McGovern, and the co-defendants are brought in because they were parties and aided in the illegal transfer. It thus falls within the principle of the case of Brinkerhoff v. Brown, 6 Johns. Ch. 139, in which Chancellor Kent carefully reviewed the authorities, and held that "a bill might be filed against several persons, relative to matters of the same nature forming a connected series of acts, all intended to defraud and injure the plaintiffs, and in which all the defendants were more or less concerned though not jointly in each act." This rule was afterwards recognized and approved by the court of errors of the state of New York, in the case of Fellows v. Fellows, 4 Cow. 683, and in the supreme court in Hammond v. Hudson River Iron & Machine Co., 20 Barb. 378, and may be regarded as settled. The demurrer is overruled.

[At the final hearing of this case a decree in favor of the complainant, setting aside the deed as fraudulent, was entered. Case No. 13,-218.]

Case No. 13,218.

SPAULDING v. McGOVERN et al.

[1 N. J. Law J. 259.]

Circuit Court, D. New Jersey. Aug. 21, 1878.

BANKRUPTCY—FRAUDULENT CONVEYANCE FOR BENEFIT OF WIFE—VOLUNTARY SETTLEMENT.

A voluntary settlement by one who is indebted is fraudulent and void if the debts and contingent liabilities existing at the time of the conveyance are paid by contracting other obligations, which afterwards result in insolvency.

Bill to set aside a conveyance by a bankrupt to his wife, alleged to be in fraud of creditors. [Demurrers to the bill were formerly overruled. Case No. 13,217.]

NIXON, District Judge. The proofs sustain the allegations of the bill so far as the real estate is concerned. It is conceded that the transfer was purely voluntary. There is no pretense that the conveyance was founded upon any valuable consideration, nor is there any doubt but that he was largely in debt at the time the transfer took place. He was a wholesale and retail dealer in provisions, purchasing goods mainly upon a monthly credit, and paying his liabilities from time to time with the daily receipts of his business. The petition in bankruptcy was filed against him in January, 1870, and his indebtedness then amounted to upwards of $30,000, and his assets would not pay more than 40 per cent. If he had suffered any serious losses to bring about this state of things, since the conveyance of the real estate to his wife in July, 1866, the law casts upon him the duty of showing the fact. His silence authorizes the legal presumption that he was insolvent when the transfer was made. It appears that there was one contingent liability of a grave character hanging over him at the date of the conveyance, for a tort alleged to have been committed by him against his wife's sister. The evidence shows quite conclusively that the transfer was made to place the property beyond the reach of this claim. Cotemporaneous with the conveyance a suit was brought upon it, which resulted in a verdict against him for $3,500, a part of which remains unsatisfied. But if this judgment had been paid in full, it would not help the defendants. The principle is well settled in law and common sense that a voluntary settlement by a man who is indebted is fraudulent and void, if the debts and contingent liabilities existing at the time of the conveyance are paid by contracting other obligations, which afterwards result in insolvency. Antrim v. Kelly [Case No. 494].

It was the opinion of Lord Chancellor Hardwicke, as expressed in Townshend v. Windham, 2 Ves. Sr. 11, that "a man actually indebted, and conveying voluntarily, always means to defraud creditors." The sentiment was indorsed by Chancellor Kent in Reade v. Livingston, 3 Johns. Ch. 496, and is so much a principle of natural justice, that it may be said to exist in our jurisprudence, independent of the statute of frauds. The deed, being fraudulent and void as to creditors, must be set aside. The consequence is that all subsequent creditors are let in to share in the fund pro rata, on the principle of equal apportionment on marshalling of assets. Kehr v. Smith, 20 Wall. [87 U. S.] 36.

Let a decree be entered in favor of the complainant, as to real estate, and let the assignee, who represents all the general creditors of the bankrupt, hold the property, subject to the mortgage existing at the time of the transfer, for their equal benefit.

Case No. 13,219.

SPAULDING v. PAGE et al.

SAME v. DUFF et al.

[4 Fish. Pat. Cas. 641; 1 Sawy. 702; 4 Am. Law T. Rep. U. S. Cts. 166.] [1]

Circuit Court, D. California. Aug. 19, 1871.

PATENTS—INFRINGEMENT—MEASURE OF DAMAGES—PROFITS—LEGAL PROCEEDINGS.

1. The measure of damages, and the consequences of a recovery, should have some relation to the mode of remuneration adopted by the patentee, and to the nature of the injury inflicted by the infringement.

2. Where the patentee has adopted a patent fee, or royalty, as one mode of remuneration,

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

and in the fee has fixed his own measure of the value of the use of the machine for the entire term, or till that particular machine is worn out; and in case of an infringement the court gives him his price, the defendant, having paid the full price, is entitled henceforth to the use of the machine.

[Cited in Emerson v. Simm, Case No. 4,443; Goodyear Dental Vulcanite Co. v. Van Antwerp, Id. 5,600; Allis v. Stowell, 16 Fed. 787; Stutz v. Armstrong, 25 Fed. 148; Bragg v. City of Stockton, 27 Fed. 509; Kelley v. Ypsilanti Dress-Stay Manuf'g Co., 44 Fed. 21.]

[Cited in Porter v. Standard Measuring Mach. Co., 142 Mass. 195, 7 N. E. 925.]

3. A recovery of the profits for the use of the machine does not vest the title in the defendant; for the recovery, based upon this rule of damages, can only be for the use of the machine prior to the recovery, and, ordinarily, does not cover the value of the use for the entire period over which the patent right extends, or the period during which the particular machine is capable of being used.

[Cited in Perrigo v. Spaulding, Case No. 10,-994.]

4. Where the patentee of an improvement in saw-teeth sells saws with inserted teeth or inserts teeth in saw-plates owned by others, or furnishes teeth to be used in the places of those worn out, the parties purchasing, by paying his price, acquire a right to those specific teeth until they are worn out.

5. Where a patentee does not use the patented machine himself, nor establish a patent fee, but manufactures the patented article, and sells at fixed prices, seeking his compensation in the manufacture and sale at such fixed prices, and another party infringes the patent by making and selling the patented article; and where the patentee sues the party so infringing, and claims to recover, and does recover, the full amount of profits, which he himself would have obtained on said articles, had he manufactured and sold them at his ordinary prices, by such claim and recovery he adopts the sale made by the party infringing; and the right to use the specific articles so sold, and for which the recovery has been had, vests in the purchaser.

[Cited in Steam Stone-Cutter Co. v. Sheldons, 21 Fed. 878.]

6. The patentee is entitled to but one royalty for a patented machine, and he ought to have but one profit for the manufacture and use of a machine.

[Cited in Blake v. Greenwood Cemetery, 16 Fed. 679.]

7. It is one of the misfortunes incident to all violations of the rights of individuals, that the injured party is rarely compensated for all the expenses and vexations involved in an enforcement of his rights through legal proceedings. Patentees are not exceptions to this general rule.

These were bills in equity, filed to restrain the defendants [Nathaniel Page and others and J. R. Duff and others] from infringing letters patent [No. 33,270] for an "Improvement in saws" granted to complainant [Sept. 10, 1861, reissued April 21, 1863, No. 1,456].

M. A. Wheaton and Alfred Rix, for complainant.

Hall McAllister, for defendants.

SAWYER, Circuit Judge. The complainant is the patentee of a certain improvement in saws, which consist in inserting upon circular lines in sockets, fitted for the purpose, detachable teeth, in such a manner as to obviate the cracking of the saw-plate. He has not sold patent rights, nor established any royalty to be paid for the use of the patent.

The complainant, himself, manufactures and sells saws with teeth inserted upon the principle patented, and he inserts teeth in saw-plates for parties desiring to use his patent, and also manufactures and furnishes teeth to supply the places of those worn out, broken, or otherwise become useless. His manufactory is of sufficient capacity to enable him, thus far, to supply the demand on the Pacific coast. He has a fixed price for saws of given dimensions; a fixed price for inserting teeth in other saw-plates; and a fixed price for teeth furnished to supply the places of those worn out, or otherwise destroyed.

He derives his profits on his patent, wholly from the manufacture and sale of saws, with his patent teeth; the making and inserting of teeth in saw-plates owned by others, and the making and furnishing of extra teeth for use in the places of those worn out in the manner before indicated; and not from a sale to others of the right to manufacture, or from any royalty for the manufacture or use of his patented teeth.

While complainant was thus engaged in supplying the market with his patent teeth, William Tucker and S. O. Putnam sold a number of saws, and furnished a number of saw-teeth, in the state of California, manufactured by the American Saw Company, which were claimed to be an infringement on said patent, and complainant brought an action at law in the circuit court of the United States for the district of California against said parties for infringing said patent; and, in said action recovered judgment for all damages sustained by sales of said saws and furnishing said patented saw-teeth, made by said American Saw Company, prior to October 26, 1869.

Said Tucker and Putnam continuing to sell said American Saw Company's saws, and furnish their saw-teeth, said complainant afterward, on November 30, 1869, commenced another action on the equity side of said court, to recover damages and profits for the sale of said saws and teeth made subsequent to said judgment at law, and to restrain further infringements of said patent.

In this action complainant recovered for all saws sold, and teeth furnished, by said parties subsequent to those sales for which there had been a recovery in said former action, and prior to the injunction in the latter, and also obtained a decree for a perpetual injunction against said Tucker and Putnam, restraining them from further infringing complainant's patent by making, selling, or using saws embodying said invention.

The defendants in the two actions of Spaulding v. Duff and Spaulding v. Page, now under consideration, are owners of saw-mills. They respectively purchased of said Tucker and

Putnam several saws of the American Saw Company's manufacture, and sundry teeth, and used them in their saw-mills.

The said actions were brought by said complainant, November 30, 1869, against said several defendants for infringing said patent by the use in their saw-mills, respectively, of the said saws and teeth of the American Saw Company's manufacture, so purchased of said Tucker and Putnam, the said complainant asking an account of profits resulting from the use of said saws and an injunction restraining their further use.

The said saws and teeth so used by the defendants, Duff et al., and defendants, Page et al., are the saws and teeth purchased of said Tucker and Putnam, and they are a portion of the identical saws and teeth embraced in the said action at law of Spaulding v. Tucker [Case No. 13,220], and said action in equity of Spaulding v. Tucker [Id. 13,221], in which a recovery for damages and profits for the manufacture and sale of said saws and teeth has already been had.

These defendants have used no saws or teeth, which embody the said patented invention, except those identical saws and teeth, sold by said Tucker and Putnam to them; and the damages and profits, resulting from the manufacture and sale of these identical saws and teeth, have already been recovered by said complainant in said two actions against said Tucker and Putnam.

The complainant having recovered from Tucker and Putnam the full amount of the profits on the manufacture and sale of the saws and teeth in question, is he now, also, entitled to recover from the vendees of Tucker and Putnam the profits arising from the use of the same specific saws and teeth?

As singular as it may seem, I do not find this precise question decided in any of the numerous American patent cases. The defendants maintain that the recovery of the full amount of the profits, of making and selling the saws and teeth from Tucker and Putnam, operates to transfer to them and their vendees the right to those specific patented implements, and to their use in the same manner as a recovery of the value of an article in trespass, or trover, vests the title in the wrong-doer.

But the complainant insists that this principle has no application to patent rights, where the patentee has a continuing exclusive right during the life of his patent, which he can not be compelled by a wrong-doer to dispose of in invitum in this mode.

Some observations of Mr. Justice Story, in Earle v. Sawyer [Case No. 4,247], are referred to as sustaining this view. The suggestions there made had reference to the measure of damages for an infringement by making and using a machine, and whether the rule of damages should, in such a case, be the price of the machine. In the case put, the mode which the patentee adopted to obtain his remuneration is not considered.

One patentee may choose to use his invention himself, and find his profits in the sale of its products; another may establish a royalty for the use of his patent; another sell his right out for designated portions of territory; and another exclusively manufacture and sell his machines, and seek his remuneration in the profits of such manufacture and sale.

The measure of damages, and the consequences of a recovery, should have some relation to the mode of remuneration adopted by the patentee, and to the nature of the injury inflicted by the infringement. Even the consequences of a recovery with respect to the subsequent rights of the parties, may be modified by the measure of damages adopted.

This was so held by Mr. Justice Nelson, in his charge to the jury in Sickles v. Borden [Case No. 12,832]. If the principle stated in that case be correct, I think it decisive of this case. The learned justice stated to the jury, that, "if the patentee has an established price in the market for his patent right, or what is called a patent fee, that sum with the interest constitutes the measures of damages." He also stated that the adoption of the patent fee as the measure of damages for infringement by the use of a machine, operates to vest in the defendant the right to use the machine during the term of the patent. Sickles v. Borden [supra].

This must be upon the principle that the patentee has adopted a patent fee, or royalty, as one mode of remuneration, and in the fee has fixed his own measure of the value of the use of the machine for the entire term, or till that particular machine is worn out; and in case of an infringement the court gives him his price, and the defendant having paid the full price is entitled henceforth to the use of the machine.

If no patent fee has been adopted, then, generally, the patentee is entitled to recover the profits made in the use of the machine. A recovery of the profits for the use of the machine does not vest the title in the defendant, for the recovery, based upon this rule of damages, can only be for the use of the machine prior to the recovery, and ordinarily does not cover the value of the use for the entire period over which the patent right extends, or the period during which the particular machine is capable of being used.

While the recovery of the established patent fee covers the entire value, as fixed by the patentee himself, of the use for the entire term, and affords a complete compensation, the recovery of the profits for the use is but for a limited portion of the time, and but a partial compensation. Different consequences, therefore, as to the subsequent rights of the parties, flow from the recovery in the two cases.

In the cases now under consideration, the patentee had fixed no patent fee, or royalty, nor was he using the invention itself, and deriving his profits from its use and the sale of

its products. He manufactured and sold saws with his patent teeth inserted, or inserted teeth in saw-plates owned by other parties, or furnished his patent teeth to be inserted in the places of those already worn out, and he had his prices regularly fixed for his saws of various dimensions, for inserting teeth, and for teeth furnished. His compensation and profit consisted of the difference between the cost to him and those prices.

Of course when he sells a saw with inserted teeth, or inserts teeth in saw-plates owned by others, or furnishes teeth to be used in the places of those worn out, the parties purchasing, by paying his price, acquire a right to those specific teeth till they are worn out. Bloomer v. Millinger, 1 Wall. [68 U. S.] 350.

The profits made, therefore, are a full compensation fixed by the patentee himself for the use of those specific teeth till they are worn out and incapable of further use. He makes and sells to all who come upon these terms. When, therefore, a party has infringed by making and selling his patent saw teeth, and he has claimed and recovered, from the party making and selling, the profits which he would have received had he made and sold the teeth himself, he has received the full compensation for the use of those teeth, so long as they are capable of use, in the same manner and to the same extent, as he would have done had he made and sold them himself; and I do not perceive why the same consequences should not follow, as in the instance of a recovery of the patent fee, in the case of an infringement, when a patent fee has been established. If so, then a claim and recovery from Tucker and Putnam of the profits, which Spaulding would have received, had he made and sold the teeth and saws himself, must vest the right to use those specific implements sold in the vendees of Tucker and Putnam—the several defendants in these cases.

It is said, however, that the patentee does not receive full compensation when he is compelled to enforce his right by suit, instead of obtaining his profit by a voluntary sale, as the expenses of litigation are never fully recovered. If there is any thing in this position, it also applies with equal force to the case of a litigation to recover the patent fee where one has been established.

The two cases stand upon the same principle. It is also said that a party ought not to be compelled to make a sale against his will, in seeking to enforce his rights, upon the same terms, that he makes voluntary sales. It is one of the misfortunes incident to all violations of the rights of individuals, that the injured party is rarely compensated for all the expenses and vexations involved in an enforcement of his rights through legal proceedings. Patentees are not exceptions to this general rule.

But the complainant was not compelled to make a sale by the very act of seeking redress. If he was not satisfied to adopt the sales made by Tucker and Putnam, by seeking to recover the ordinary profits on the manufacture and sale of his invention, he could have omitted to seek such a judgment against them, confining himself to an injunction against them from future infringement, and then recover of their vendees the profits resulting from the use of the patented articles sold, so far as they had been used, and restrain their future use.

Either course was open to him. He had his choice of remedies, and choose to take judgment against Tucker and Putnam for the full profits on the manufacture and sale of the patented article, and by so doing he adopted the same, and recovered, so far as the court was able to ascertain from the evidence, the amount to which he was entitled, the full amount that he would have obtained had he made and sold them himself at his established prices; and by the claim and recovery, and by thus adopting the sale, the right to use the specific articles for which the recovery was had, vested in the vendees of Tucker and Putnam, the defendants in these actions.

The defendants are not shown to have used any saws or saw teeth, other than those for which the recovery has been had against Tucker and Putnam. Any other rule would enable the patentee to have a double recovery for the same thing: first, the full amount of the profits, as established by himself on the manufacture and sale—the mode of remuneration adopted by himself—and then the profits for the use of the same machine. The patentee is "entitled to but one royalty for a patented machine," and he ought to have but one profit for the manufacture and use of a machine. Bloomer v. Millinger, 1 Wall. [68 U. S.] 350.

One English authority, Penn v. Bibby, L. R. 3 Eq. 309, seems to support the position taken by the complainant's counsel; but it does not appear to accord fully with the view expressed by Mr. Justice Nelson in Sickles v. Borden [supra]. Perhaps a patentee would not be compelled, in a suit for infringement by the use of a patented machine, to accept the established patent fee as the measure of damages, instead of the profits derived from its use. It does not appear, in the case of Sickles v. Borden, whether the plaintiff insisted upon, or consented to, that rule or not. But if he does insist upon, or acquiesce in the rule laid down in that case, as the measure of damages, I do not see why the consequence stated by Mr. Justice Nelson should not follow.

In the case of Spaulding v. Tucker [supra], the complainant insisted that he was entitled to recover for the infringement, in making and selling his invention, the full amount which he would himself have made on the articles sold, had he manufactured and sold them himself upon his own established terms. He gave evidence showing the price at which he sold, and the profits realized upon sales at those prices, and the court adopted those profits as the measure of damages, and gave him

the benefit of the rule, so far as the damages could be ascertained from the testimony.

After a careful consideration of the principles thus far recognized by the authorities, I have reached the following conclusion: Where a patentee does not use the patented machine himself, nor establish a patent fee, but manufactures the patented article, and sells at fixed prices, seeking his compensation in the profits of the manufacture and sale at such fixed prices, and another party infringes the patent by making and selling the patented article; and where the patentee sues the party so infringing, and claims to recover, and does recover, the full amount of profits which he himself would have obtained on said articles had he manufactured and sold them at his ordinary prices, by such claim and recovery he adopts the sale made by the party infringing, and the right to use the specific articles so sold, and for which the recovery has been had, vests in the purchaser. The bill must be dismissed.

But, under the circumstances, I think defendants are not entitled to costs.

Let the bill be dismissed without costs to either party.

[For other cases involving this patent, see note to Spaulding v. Tucker, Case No. 13,221.]

SPAULDING (PERRIGO v.) See Case No. 10,994.

Case No. 13,220.

SPAULDING v. TUCKER.

[1 Deady, 649.] [1]

Circuit Court, D. California. Oct. 26, 1869. [2]

PATENTS—PATENTABLE INVENTION—PRESUMPTIONS—MECHANICAL EXPERTS—DAMAGES.

1. A mode of inserting detachable teeth in circular saw plates upon circular lines, so as to distribute the strain caused by the point of the tooth pressing upon the wood, over the whole surface of the socket or recess in which such tooth is inserted and thereby prevent the plate from cracking, is a patentable invention.

2. A patent is not allowed for the mere exercise of mechanical skill; the patentee must add something to what was previously known or used.

3. If, after a patentee has conceived the idea of his invention, and while he is in process of developing and testing it, a third person should make suggestions to him similar to the conception already in his mind and upon which he was then experimenting, such suggestion would not affect the originality of the discovery or the validity of the patent.

4. Credibility of witnesses a matter of fact for the jury.

5. Letters patent are prima facie proof of the priority of the patentee's invention, and that it is both novel and useful.

6. After a patent has become valuable and the subject of controversy, the testimony of a witness who states, that at a particular time and place long past, he suggested to the patentee the fundamental idea of his invention, should be acted upon by a jury with care.

7. The opinions of mechanical experts are not facts which bind the jury upon a question of identity of improvement or construction, but the jury must judge for themselves and find the facts accordingly.

8. Damages for infringement to be proved, not guessed at.

This action was commenced in August, 1868, to recover damages for the infringement of a patent granted to the plaintiff for the discovery or invention of an improved mode of inserting detachable teeth in circular saw plates. In the course of the trial, many of the important questions made by the defendant [William Tucker] were disposed of by the court on objections to the evidence offered by him, to prove that the invention of the plaintiff was not novel or patentable. At the close of the testimony, which occupied some days, counsel agreed to submit the case to the jury, without argument, upon the charge of the court, as to the questions before them. [Letters patent No. 33,270 were granted to complainant September 10, 1861; reissued April 21, 1863, No. 1,456.]

J. B. Felton and M. A. Wheaton, for plaintiff.

Hall McAllister and I. J. Bergin, for defendant.

DEADY, District Judge. Gentlemen of the jury: I regret that counsel have concluded not to argue this case to you, as the court would thereby have more time and opportunity to consider what instructions it ought to give you concerning the questions of law and fact which arise in it.

You have been chosen to try the issue between the parties. You are to decide all questions of fact submitted to you, according to the evidence given you in court. The law of the case will be given you by the court, and you are bound by your obligations as jurors, to be governed by it, to take the law as the court gives it to you, and apply it to the facts of the case as you ascertain them to be, and find your verdict accordingly.

But, before proceeding further, I give you the following special instructions at the request of the plaintiff and defendant respectively. At the request of the plaintiff, I instruct you that:

"This is an action brought for an alleged infringement of certain letters patent, granted by the United States to the plaintiff, Nathan W. Spaulding, for an alleged new and useful improvement on saws and saw teeth. Said alleged improvement consists: (1) In forming a recess or socket in the periphery or edge of the saw plates, for the insertion of detached or movable teeth on circular lines, where the pressure or strain is applied; and (2) making in combination with such sockets or recesses formed in saws or saw plates, teeth having their base or bottom plates

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

[2] [Reversed in 13 Wall. (80 U. S.) 453.]

formed on circular lines, to fit with exactness and precision in said sockets or recesses.

"The object of the alleged invention, 'is the construction of saws in which detachable or removable teeth may be used without danger of cracking or shifting of the saw plates, on account of such teeth being inserted therein.'

"If the jury believe from the evidence, that the plaintiff Spaulding, did make the change alleged by him in the form of the sockets or recess made in the edges of saw plates for the insertion of removable teeth, and further believe that such change produced a new and beneficial effect in rendering the saw plates less liable to split or crack, and also believe that said Spaulding was the original and first discoverer or inventor of such change in the form of said sockets or recesses, then his patent is valid, and vests in him the exclusive right and liberty of making, using, and selling to others to use, such invention.

"If, in the course of his conversation at the shop, Sonberger suggested the rounding of the corners, and yet the plaintiff had conceived the idea before, and was experimenting upon it, in the progress of developing and testing it, and proceeded to do so, and obtained a patent for it, the suggestion of Sonberger under those circumstances, would not invalidate his discovery or his patent. The plaintiff in his pleadings has only claimed five thousand dollars damages, and the verdict must not be for more than that amount."

Of the special instructions requested by the defendant I give you the following two:

"A patent is not allowed for the mere exercise of mechanical skill; the patentee must, to entitle himself to his patent, have first invented the subject matter of his patent; must have added something to what was previously known or used.

"The credibility of the witnesses of the plaintiff and defendant are altogether matter of fact for the jury, and in determining the amount of credit due them respectively, the interests, relations, motives and opportunities of observation of each witness, will be taken into consideration. But if the jury believe, that any party or witness has willfully sworn falsely with respect to any material fact, they are at liberty to disregard the whole of the testimony of such party or witness."

As you perceive, the plaintiff claims to be the inventor of a new and useful mode of inserting detachable teeth in circular saw plates, for which he has obtained a patent, and that the defendant now and since July, 1868, is infringing upon such patent by selling circular saws with detachable teeth inserted therein upon the principle and according to the mode discovered by him.

The defendant denies generally that the plaintiff invented the alleged mode of inserting teeth and the validity of his patent therefor; and also pleads specially that the discovery was made by one Newton prior to the date of the patent to the plaintiff. The court having excluded the evidence offered in support of this defence as immaterial, upon the ground that the instrument or invention described in the patent to said Newton was a species of rotatory mortising machine, and bore no similarity to the invention claimed by the plaintiff and now here in controversy, you have nothing to do with it.

The defendant also defends his conduct on the ground that in 1865 a patent was issued to one Emerson for an improvement in the mode of inserting adjustable teeth in circular saws, and that in 1866, Emerson transferred his right under such patent to the American Saw Company, and that a patent issued thereon to such company, in whose employment and by whose authority defendant is engaged in selling saws aforesaid.

The first controverted question in the case is the priority of invention. The plaintiff's patent is prima facie proof that he first invented the mode of inserting detachable teeth as described therein on circular lines, to prevent the cracking of the saw plate, and that such invention is both novel and useful. In other words, in the absence of satisfactory proof to the contrary, the patent is sufficient proof of the facts necessary to enable the plaintiff to support this action, except the alleged infringement hereof by the defendant. Therefore, although the priority of invention is a question for the jury to decide, yet you are bound by the rule of law, which makes the patent prima facie proof of these facts, and must find accordingly.

The only evidence in the case which tends to controvert the evidence of the patent is the testimony of Sonberger. That testimony was received without objection by the plaintiff, and is to be considered by you. You remember Sonberger's testimony as to the conversation which he states took place between himself and the plaintiff in the shop at Sacramento about rounding the base of the socket to prevent the cracking of the saw plate. Upon this point you also have the testimony of Ratcliff, Hansford, and the plaintiff. If you are satisfied from this evidence that Sonberger showed or told the plaintiff how to insert teeth upon circular lines, so as to prevent the saw plates from cracking by force of the strain upon the rear right angle of the rectangular socket—that he fully communicated the idea to him at the time—and that Spaulding had not already conceived the idea and was not then experimenting upon it, then I do not think Spaulding can be considered the discoverer of the method, although he afterwards put the idea into practice and obtained a patent for the invention.

Where a witness testifies that on some particular occasion long past, he communicated to the patentee the fundamental idea involved in his invention, and so far as ap-

pears nothing was ever said or heard about such communication by any one until the patent became suddenly valuable, and a controversy arose between the patentee and others concerning it, his testimony ought to be cautiously received by the jury and acted upon with hesitation.

The evidence being in conflict upon this point, you must decide it according to the preponderance thereof; but you must remember that the burden of proof is upon the defendant to overcome the prima facie case made by the patent—to satisfy your minds that the plaintiff was not the discoverer of this mode of inserting teeth in saw plates, as he claims to be, before he can claim a verdict at your hands. But if the evidence satisfies your minds that the plaintiff did not make this discovery, then you have come to the end of your investigation, and your verdict should be for the defendant.

On the other hand, if you should find in accordance with the patent that the plaintiff was the discoverer or inventor of his mode of inserting teeth, then you will consider further whether the plaintiff's and defendant's saws are identical in this particular, or whether the mode of inserting the teeth in the latter includes the invention or improvement of the former.

As you perceive, the Emerson tooth is so constructed and inserted as to lie upon its back and allow the shank to run out under the cutting point of the tooth and receive the sawdust therefrom and thus prevent the wearing of the sawplate by the friction of the flying dust. Thereby, it is claimed, the tooth is worn, but the plate, which is the more valuable of the two, is saved. This is the claim of the Emerson patent. But the plaintiff does not claim anything in his patent in this respect.

The plaintiff's invention consists in inserting teeth upon circular lines, so as to distribute the strain caused by the tooth impinging upon the wood, over the whole surface of the socket, rather than let it bear upon a particular point or angle, as it did, when they were inserted in rectangular recesses.

Now, the saving of the saw plate, by constructing the tooth so as to catch the sawdust, may be a valuable improvement in the manufacture and insertion of adjustable teeth, but the patent to Emerson and the American Saw Co., therefor does not give any one a right to sell saws with these Emerson teeth inserted therein upon circular lines so as to prevent the cracking of the plate.

If, then, it appears that the defendant's saws have their teeth inserted upon circular lines, so as to prevent the plates from cracking, as they would if inserted upon straight lines, the patent of his employer does not protect him in so doing, and he is liable in damages to the plaintiff for the infringement of his patent.

Certain persons, professing to be skilled as mechanics and machinists, have testified before you as experts, upon the question of the identity of the two modes of inserting teeth in this particular. Their opinions are entitled to consideration and weight at your hands, in proportion to the intelligence and fairness with which they gave their testimony. But their opinions are not facts, and you are not bound by them, but must find the fact for yourselves. Particularly is this so, when in a case like the present, the subject of the controversy is simple in principle and plain in form, and you have the machines or articles before you for inspection. The Spaulding and Emerson saw and models of the different teeth have been produced in evidence, and you have inspected them.

Under the circumstances, you can judge for yourselves whether the principle of the Spaulding patent—inserting the teeth on circular lines—has been used in the manufacture of the saws sold by the defendant.

If you find for the defendant upon this point, your verdict must be for him also. If there is no substantial identity in the mode of inserting the teeth in the two saws, then there is no infringement of the plaintiff's patent. But, if you find that the teeth in the defendant's saws, however different in other particulars from the plaintiff's, are inserted on circular lines, so as to prevent the cracking of the plates, your verdict must be for him.

If you find for the plaintiff, he is at least entitled to nominal damages—one cent. Beyond this you must find whatever damage the evidence shows the plaintiff has sustained by the wrongful conduct of the defendant. You are not to guess at the damages, but they must be established by the evidence. On the other hand, it is not necessary that there should be direct proof of every dollar of injury or loss. You are to consider the matter as reasonable and practical men, having reference to the nature and circumstances of the case.

Among other things, you may consider what the plaintiff's business was worth before the defendant commenced the sale of saws in this market—what number of teeth he was accustomed to sell yearly; whether he has sold a less number, or an equal number at a less price since the competition of the defendant commenced; and whether the reduction in profits, if any, was produced by such competition, or by the general stagnation in business in the country, the lowering of the price of labor, increased facilities for manufacture, etc., or all combined.

The jury found a verdict for $1,000, for which sum increased by another $1,000, the court, under section 14 of the act of July 4, 1836 (5 Stat. 123), gave judgment at the same term.

[NOTE. The judgment of this court was reversed by the supreme court, where it was car-

ried on writ of error; and the cause remanded, with orders for a new trial. 13 Wall. (80 U. S.) 453. Pending the appeal, a motion was made to retax complainant's bill of costs. The motion was granted. Case No. 13,221.

[For other cases involving this patent, see note to Spaulding v. Tucker, Case No. 13,221.]

Case No. 13,221.

SPAULDING v. TUCKER et al.

[2 Sawy. 50; 4 Am. Law T. Rep. U. S. Cts. 208; 4 Fish. Pat. Cas. 633; 6 Am. Law Rev. 161.] [1]

Circuit Court, D California. Aug. 19, 1871.

COSTS — PRINTING EVIDENCE — VOLUNTARY WITNESSES—STIPULATION.

1. The expenses of printing testimony for the convenience of the court, cannot be taxed as costs against the losing party.

[Cited in Lee v. Simpson, 42 Fed. 435; Ferguson v. Dent, 46 Fed. 95, 99.]

2. The losing party cannot be taxed with the travelling fees of witnesses, residing either within, or beyond, the reach of a subpœna, who voluntarily attend the trial, at the request of the prevailing party.

[Cited contra in Dennis v. Eddy, Case No. 3,-793; Cited in U. S. v. Sanborn, 28 Fed. 304; Haines v. McLaughlin, 29 Fed. 70; Young v. Merchants' Ins. Co., Id. 275; The Vernon, 36 Fed. 116; The Syracuse, Id. 831; Eastman v. Sherry, 37 Fed. 845; Burrow v. Kansas City, Ft. S. & M. R. Co., 54 Fed. 282; Pinson v. Atchison, T. & S. F. R. Co., Id. 465; Lillienthal v. Southern Cal. Ry. Co., 61 Fed. 623.]

[Distinguished in Alexander v. Harrison, 2 Ind. App. 52, 28 N. E. 119.]

3. A court of chancery may include in its decree, expenses incurred in obtaining necessary testimony, other than such items as are mentioned in the act of congress of 1853 [10 Stat. 161], regulating fees and costs.

4. Where the parties to a chancery suit, pending in the United States circuit court, for the district of California, for their mutual convenience, entered into an agreement to take the testimony of witnesses for both parties residing in Vermont and New Hampshire, before a commissioner in the city of New York, without the formality of a commission, and numerous witnesses on both sides voluntarily attended, and were examined, the court allowed the prevailing party a reasonable compensation for the travelling expenses of his witnesses so attending, and adopted the amount fixed by the act of 1853, as the measure of the compensation.

[This was an action by Nathan W. Spaulding against William Tucker and others for the infringement of letters patent No. 33,-270, granted to complainant September 10, 1861, reissued April 21, 1863, No. 1,456, for an improved mode of inserting detachable teeth in circular saw plates. There was a judgment for the complainant. Case No. 13,220. It is now heard upon motion to retax the complainant's bill of costs.]

M. A. Wheaton and A. Rix, for complainant.

Hall McAllister, for defendant.

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 6 Am. Law Rev. 161, contains only a partial report.]

SAWYER, Circuit Judge. The defendant objects to three classes of items included in complainant's bill of costs. Firstly, an item of three hundred and sixty dollars for printing evidence. Secondly, sundry items of travelling fees of witnesses, who reside out of the district of California, and more than one hundred miles from the place of hearing, and who, voluntarily, attended and testified at the hearing. Thirdly, the traveling fees of a large number of witnesses, who, at complainant's request, voluntarily went from their respective places of abode in different states to the city of New York, and were examined before a commissioner in the presence of the parties and their counsel.

1. The act of congress relating to costs makes no allowance for printing testimony. It is, no doubt, very convenient to have it printed. But, however convenient, it is not properly chargeable against the losing party as an item of costs.

There are, doubtless, many cases wherein the printing of the testimony would contribute so largely to a ready and full comprehension of the case by the judge, as to justify the parties in incurring that extra expense. But the law does not require it, and if printed it must be done voluntarily by the party desiring it, and at his own expense. Troy Iron & Nail Factory v. Corning [Case No. 14,197]. This item must be rejected.

2. Several witnesses came from the Eastern states to testify in court upon the hearing, and there are items of charge for a single witness, including travel, both ways, for over five thousand miles travel.

I do not find the question, as to the right of the prevailing party to tax against his opponent, the travelling fees of witnesses, who thus voluntarily attend, when residing far beyond the reach of a subpœna, settled by any decision of the supreme court.

There are some decisions upon the point on the circuit, reported. In Whipple v. Cumberland Cotton Co. [Case No. 17,515], the court allowed the travelling fees of a witness, who resided in Lowell, Massachusetts, and who attended at the trial in Portland, Maine, which is presumed to be over one hundred miles distant. In Prouty v. Draper [Id. 11,447], it does not appear whether the witness resided out of the district, or not. The inference, perhaps, is that he did not. At all events, this question was not raised or discussed. In Hathaway v. Roach [Id. 6,213], Mr. Justice Woodbury followed the practice of his predecessor, as determined in Whipple v. Cumberland Cotton Co. [supra].

These are the only cases in the national courts brought to my notice, in which fees for travel have been allowed witnesses, who came from a point beyond the reach of a subpœna, if such was the case in these instances. On the other hand, in Dreskill v. Parrish [Case No. 4,076], the court held that

fees of a witness who attended voluntarily could not be charged against the losing party. The court say: "The compensation to a witness summoned is allowed. If he attends voluntarily, or without summons, his fees cannot be charged against the losing party. The attendance of a witness is voluntary, if he be not summoned."

Those witnesses living more than one hundred miles from the place of holding court, whose fees were allowed in that case, were evidently within the district, and, therefore. amenable to the process of subpœna. Witnesses in civil cases, who live out of the district, and more than one hundred miles from the place of holding court, cannot be compelled to attend. Dreskill v. Parrish [Case No. 4,076], and 1 Stat. 335. They cannot be lawfully summoned, and, since they cannot be required to attend, their attendance is necessarily voluntary, even if a subpœna is in fact served. This authority, therefore, seems to be in point. These cases arose under the act of 1799, which provided, that "witnesses summoned in any court of the United States," shall receive five cents per mile travelling fees, "from their respective places of abode." 1 Stat. 626, § 6.

A similar decision was also made by the same court, in another action, between the same parties. Dreskill v. Parrish [supra]. Costs in cases at law are now controlled by the act of 1853, which provides, that "For each day's attendance in court, or before any officer, pursuant to law, one dollar and fifty cents, and five cents per mile for travelling from his place of residence to said place of trial or hearing, and five cents per mile for returning." 10 Stat. 167. [And section 1 provides that "The following, and no other, compensation shall be taxed and allowed." Id. 161. Thus, under this provision, no costs can be taxed and allowed for any attendance otherwise than pursuant to law.][2]

The same question arose under this act, in Woodruff v. Barney [Case No. 17,986], and after elaborate examination, Leavitt, J., held, that, "pursuant to law," means upon service of process, and not voluntarily, upon the request of the party, without process; and, in this view, I fully concur. The learned judge, however, endeavors to distinguish the case from Whipple v. Cumberland Cotton Co. [supra], on the ground that, in that case, the party was in fact served, although it does not appear whether within or without the reach of the subpœna. If it is intended to intimate that a service beyond the jurisdiction affords a good ground of distinction, with due deference to so learned a judge, I am unable to recognize it; for, in my judgment, to be summoned, within the meaning of the statute, is to be served with a process, which the law recognizes, and which the party is bound to obey. The law knows no other summons. At all events, I think, under the existing statute, to attend, "pursuant to law," is to attend under the obligatory requirements of the law. The party may request, but the law knows no request. It commands, or is silent; and a party who attends "pursuant to law," attends pursuant, or in obedience to, the commands of the law.

But it is probable that, since the contrary does not appear, it was only intended to intimate that, in the case cited, it must be presumed that the service was within, although the party resided beyond, the reach of the subpœna. Upon this hypothesis, there is no inconsistency between the later and earlier decisions. However this may be, I think, the decisions in Dreskill v. Parrish and Woodruff v. Barney [supra], on this point, entirely sound.

The principle involved in Parker v. Bigler [Case No. 10,726], is precisely the same as that here maintained. In that case, the marshal of the district of Pennsylvania, served a subpœna upon a party living in the state of Ohio. The marshal travelled by the usual route of travel, one hundred and sixty miles, to make the service. Objection to allowing the marshal's travelling fees was made, on the ground that he was not authorized by law to serve a subpœna that distance from the place of trial, without the boundaries of the district. The objection was sought to be obviated, by showing that the party lived within one hundred miles by an air-line. Mr. Justice Grier refused to allow costs for more than one hundred miles, on the ground that he could not assume an air-line for jurisdiction, and a zigzag for mileage. Thus, he recognized the validity of the objection, that the marshal is not entitled to fees for serving process upon a party, who is under no obligation to obey, or without the jurisdiction to which the process extends. If the marshal is not entitled to travelling fees for doing a voluntary act, in serving a void process, I do not perceive why the witness should be entitled to his travelling fees for voluntarily obeying it, when served.

Both, upon principle, and the weight of authority, I am satisfied that the travelling fees of those witnesses who came from other states, at the request of the complainant, to attend the hearing, and even those who came voluntarily, and not in obedience to a subpœna, from a distance within the state, ought not to be taxed as costs against the defendant. There are no special equitable grounds alleged in support of these items. Let those items of costs of this class, excepted to by defendant, be rejected.

3. There are some other items of travelling fees in this case, to which objection is made, that stand, in some particulars, upon a different footing. A large number of the witnesses examined on both sides reside in various towns in Vermont, New Hampshire, and other places in that portion of the United

[2] [From 4 Fish. Pat. Cas. 633.]

States. This was known to both parties, and, with this knowledge, and for the mutual convenience of the parties, they, by their solicitors, entered into a written stipulation and agreement in writing, to take the testimony of such witnesses before a commissioner in the city of New York, waiving all irregularity, etc.

In pursuance of this agreement, both parties collected their witnesses from the surrounding states, and took their testimony in New York. Although the attendance of these witnesses was necessarily voluntary, yet, it is claimed that they came to that place in pursuance of the understanding with the opposite party, and for his convenience, in part, and that their reasonable travelling fees ought to be allowed; that this is within the spirit of the agreement, under which their testimony was taken. The stipulation does not, it must be admitted, in express terms, provide that the travelling fees should be allowed as costs against the losing party; and, in an action at law, they would doubtless have to be rejected. But this is a suit in equity, and the question is, whether a court of equity can exercise any discretion in the matter; and, if so, whether the allowance of the travelling fees of these witnesses, would, under the circumstances, be a sound exercise of that discretion?

This distinction suggested, between a court of law and a court of equity, seems to be expressly recognized in the case of Parker v. Bigler, before cited. In that case, it was insisted that certain necessary expenses incurred for models, although not mentioned as items of costs in the act of 1853, upon the subject, were, nevertheless, properly chargeable to the losing party, as a part of the "expensa litis."

Upon this point, Mr. Justice Grier observes: "This may be true in a court of chancery, where the decree may include any expenses which have been necessarily incurred in the suit, for the information of the court, and in order to a just decision of the cause. These may be imposed on either party, or both, as the conscience of the chancellor may dictate; yet, in the courts of law, no such discretion is given to the court." Parker v. Bigler [supra].

In Woodruff v. Barney, also, the court carefully confines its discussion to "the subject of costs in cases at law." And all the other cases cited in this opinion are evidently cases at law.

The foregoing observations of Mr. Justice Grier seem, not only to recognize a judicial discretion in a court of equity to determine whether costs shall be allowed or not, but also to allow costs other than those prescribed in the statute upon the subject, according as justice and equity may require under the circumstances of each particular case.

In this case, had not the parties consented to take the testimony of those witnesses within easy reach of New York, in the manner in which it was done, it would have been necessary to send a commission to, or for counsel to attend in person at, each place, where the numerous witnesses resided, at great expense and inconvenience to both parties.

It was, doubtless, deemed more convenient, less expensive, or otherwise more advantageous to enter into the agreement that was made, than to pursue the course pointed out by the law, or this course would not have been adopted.

The agreement, necessarily, involved the payment by the parties requiring the testimony, for the services and travelling expenses of the various witnesses from their respective places of abode to New York; and in making the agreement the parties must be deemed to have contemplated and assented to the necessary consequences flowing from it. The complainant is clearly entitled to recover all proper costs of suits. This testimony so taken was important and necessary to his case. Had it been taken in the usual mode pointed out by law, he would have been entitled to recover the expenses as a part of his costs. The other mode was substituted by the consent, and in part, at least, for the convenience of the defendants themselves; and the mode so adopted forbade a coercive attendance of witnesses, and, necessarily, looked to a voluntary attendance. I think, therefore, under the circumstances, that the complainant is entitled to be allowed a reasonable sum as costs for his necessary expenses in procuring the attendance of such witnesses, and there being no special circumstances shown, to call for a different measure, I know of no better mode of arriving at what is reasonable, than to adopt the amount fixed by the act of congress as the compensation allowed witnesses, who attend upon compulsory process.

The act embodies the result of the judgment of the members of both houses of congress, as to what the allowance to witnesses should be, and I adopt the statutory allowance which the complainant himself has adopted as the measure of the allowance to be taxed against the defendants in this instance.

The several items of complainant's bill of costs, taxed for travelling fees of the several witnesses whose testimony was taken in the city of New York, and which are objected to by defendant's counsel, are allowed, and the objections thereto overruled.

Let the costs be retaxed in accordance with the views expressed in this opinion.

[For another case involving this patent, see Spaulding v. Page, Case No. 13,219.]

[The judgment of this court, as rendered in Case No. 13,220, was reversed by the supreme court, where it was carried by writ of error. 13 Wall. (80 U. S.) 453.]

SPEAR, In re. See Case No. 4,043.

Case No. 13,222.

SPEAR v. ABBOTT et al.[1]

Circuit Court, District of Columbia. Sept. 21, 1859.

PATENTS—PRACTICE—RULES FOR TAKING TESTIMONY—COMMISSIONER.

[1. The rule which requires a party to examine all his witnesses in chief before closing his opening examination only applies in a common-law tribunal in jury causes. It is not applicable in an interference case before the commissioner of patents.]

[2. The power to make regulations for the taking of testimony in contested cases in the patent office is expressly conferred on the commissioner (Act March 3, 1839, § 12; 5 Stat. 355), and is not subject to any control or revision on appeal.]

[3. Priority of invention of a combination of features to produce gas-burning stoves awarded to Abbott and Lawrence.]

[Appeal by James Spear from decision of the commissioner of patents on an interference declared, awarding to J. G. Abbott and A. Lawrence a patent as prior inventors of a certain combination of features to produce gas-burning stoves.]

DUNLOP, Chief Judge. The specifications and claims of the parties litigant in this case, with the drawings filed in the office, show the inventions claimed by appellant and appellees to be substantially the same, and the question to be decided is, who was the prior inventor? If the testimony of Bell and Lawrence was legally taken, and properly before the commissioner, and before me on appeal, there can be no doubt the appellees have established their priority, as inventors. It has accordingly been earnestly maintained by the counsel for Spear that the depositions of these witnesses must be excluded. He invokes the protection of the rule of practice in the courts of England and this country in the trial of common-law causes before a jury, which requires a party to examine all his witnesses in chief before he closes his opening examination, and forbids afterwards the introduction of any other than rebutting proof. This rule in jury trials produces order and method and expedition in the transaction of business, and promotes fairness and prevents fraud in the conduct of common-law causes. It makes a party show his hand to his adversary, prevents his splitting up his proof and retaining part for reply, and defeats the fraudulent purpose, if such exists, to make evidence to overcome and fit the defense. But the rule has no application in equity, or admiralty, or in any other than a common-law tribunal, in jury causes.

The proceedings in the patent office in contested cases have no resemblance to trials at law. The testimony is not taken before the commissioner of patents at the place of trial, but, as in equity, before a commissioner, at the place of residence of the witnesses, without any compulsory power in the patent office to coerce their attendance, and who may be scattered over the country, at remote and distant points from each other. The commissioner in the first instance, and the judge on appeal, decides both law and fact without the intervention of a jury. Besides, by section 12 of the act of congress of March 3, 1839, the power to make regulations for the taking of testimony in contested cases, in the patent office is expressly conferred on the commissioner, not subject to any control or revision by the appellate judge. In virtue of this power the following regulations have been adopted: Rule 41: "Upon the declaration of an interference, a day will be fixed for closing the testimony, and a further day fixed for the hearing of the cause. Previous to this latter day, the arguments of counsel must be filed, if at all." Rule 86: "That before the deposition of witnesses be taken, by either party, reasonable notice shall be given to the opposite party of the time and place, when and where, such deposition or depositions will be taken, so that the opposite party may cross-examine," etc., "and such notice shall, with proof of service of the same, be attached to the deposition or depositions, whether the party cross-examine or not, and such notice shall be given in sufficient time for the appearance of the opposite party, and for the transmission of the evidence to the patent office before the day of hearing."

These rules of the commissioner, made under the authority of the act of congress to which I have referred, give to either of the litigating parties the right to take depositions, without restraint, up to the day of hearing fixed by the office, or to a day near enough to give time for the transmission of the evidence to the patent office. While these rules are in existence, the parties are bound by them, and the judge on appeal must give effect to them, and, as the disputed depositions of Bell and Lawrence have been taken in conformation with the rules, they are properly and legally in the case. I add that the decision and practice of the office are in harmony with these rules, and the appellees had a right to rely upon them. If the rules are abused, and work wrong, which I do not mean to say, the commissioner has power to alter them, but such alteration could only operate prospectively.

These witnesses last referred to are not impeached, and they prove priority of invention for the appellees. It is argued that they contradict and falsify Sailor and Smith, the former witnesses of appellees, which appellees cannot lawfully do, as it is against law for a party to discredit his own witness; but this is not so. There is no contradiction, no necessary conflict. Sailor and Smith may have truly stated the time when the invention first came to their knowledge, and the other witnesses may have testified, also truly, to earlier dates, within their knowl-

[1] [Not previously reported.]

edge. As the appellees made their application to the office for a patent within two years after perfecting their invention and reducing it to practice, I think the commissioner properly awarded them a patent; and I do this 21st September, 1859, affirm the judgment of the commissioner, of date the 8th day of August, 1859. I herewith return all the papers and models to the office, with this my opinion and judgment, this 21st September, 1859.

SPEAR (ANDREWS v.). See Cases Nos. 379 and 380.

Case No. 13,223.

SPEAR v. BELSON.

[McA. Pat. Cas. 699.]

Circuit Court, District of Columbia. Aug., 1859.

PATENTS—ORIGINAL INVENTION—INTERFERENCES—LACHES.

[1. The issuance of a patent establishes prima facie the patentee's title as an original inventor, and he must be considered as such even in a subsequent interference proceeding in which prior invention by another is shown, unless there is proof either positive or presumptive that he had knowledge thereof.]

[2. It would seem that the statutory bar against one who has sold his invention more than two years before his application (Act 1839, § 7; 5 Stat. 354) ought by analogy to apply in the case of one who conceals his invention for more than two years.]

[Cited in Berg v. Thistle, Case No. 1,337; Lovering v. Dutcher, Id. 8,553.]

[3. A delay of over five years in applying for a patent, without any reasonable excuse except financial inability during one of the years, will bar the right, where a patent has in the meantime issued to another independent inventor, with the present applicant's knowledge.]

[This was an appeal by James Spear from a decision of the commissioner of patents in interference proceedings between the appellant and Belson, assignor to Stuart and Peterson.]

H. Howson, for appellant.
W. E. Whitman, for appellee.

DUNLOP, Chief Judge. The question of jurisdiction has been brought to my notice by the appellee. For the reasons assigned by the commissioner of patents and Judge Merrick in the case of Babcock v. Degener [Case No. 698], I think this appeal has been properly taken, and that I have authority to decide the case on its merits. It has been most elaborately discussed by counsel, and many questions of law and fact presented, which I need not examine, because, in my judgment, the solution of one of the points raised in the reasons of appeal will control the decision. The vital question in the case is, has Belson lost his right to a patent by failing to present his claim to the patent office in a reasonable time? I assume, in Belson's behalf, that the perforated chamber on the under side of the cross-piece in the cooking stove is a new and useful improvement, and fairly patentable. I assume that Belson first discovered it, and perfected and applied it practically in his own kitchen in Philadelphia in the fall of the year 1853. In the year 1858, in April and June, Spear patented the same improvement, in combination with other devices, without any knowledge of Belson's invention.[1] This must be conceded, because there is no proof, positive or presumptive, that Spear had such knowledge; and the action of the patent office in 1858 prima facie establishes his title as an original discoverer. They are both, then, original discoverers of the same thing, Belson being the first of the two in point of time; and though Spear first applied to the office, and secured the patents, he cannot oust Belson or defeat his application unless he shows culpable neglect and laches in Belson. Belson slept upon his invention from the fall of 1853 till the spring of 1859, a period of more than five years. He first presented himself to the patent office on the 25th of May, 1859—"Vigilantibus et non dormientibus leges subserviunt." This maxim is emphatically applicable to the patent code, whose policy favors diligence and condemns sloth. Mr. Belson had no right to use his invention privately for his own gain for five years, and then expect and claim a monopoly from the public for fourteen years more, as one of the inducements and considerations with the public in granting the monopoly is the right of the community to have immediate knowledge of, and restricted use of, the perfected invention, and the free and unrestricted use of it at the end of fourteen years. These objects can only be attained by requiring the inventor at once to present his perfected invention to the patent office, and to patent it. In Pennock v. Dialogue, 2 Pet. [27 U. S.] 1, the supreme court say: "If an inventor should be permitted to hold back from the knowledge of the public the secrets of his invention, &c., it would materially retard the progress of science and the useful arts, and give a premium to those who should be least prompt to communicate their discoveries." And in Shaw v. Cooper, 7 Pet. [32 U. S.] 323, the same court say: "Whatever may be the intention of the inventor, if he suffers his invention to go into public use, through any means whatever, without an immediate assertion of his right, he is not entitled to a patent, nor will a patent obtained under such circumstances protect his right." Belson suffered Spear, both of them residing in the same city, to patent and put in public use the improvement from April, 1858, to May, 1859, without any assertion of his right. The same doctrine is as-

[1] [Letters patent No. 19,956 were granted to J. Spear April 13, 1858.]

serted by the commissioner of patents in the cases of Ellithorp v. Robertson [Case No. 4,-409] and Savary v. Lauth [Id. 12,389], affirmed upon appeal. The seventh section of the act of 1839 denies to an inventor who has sold his invention before he has applied for a patent a right to a valid patent if such sale has been made more than two years before such application; and I see no reason why an inventor who has concealed his invention more than two years, and thereby injured the public, should stand on a better footing than the inventor above referred to who sells. The statutory bar to the inventor who sells would seem by analogy properly applicable to the inventor who secretes. Mr. Belson has withheld his application not only for more than two years, but for more than five years. His delay, in my judgment, for this long time amounts to gross and culpable negligence, and forfeits his right to a patent, unless satisfactorily accounted for.

Let us now look for a moment at the excuses assigned by him for this delay. If the statutory bar is properly applicable by analogy, as above suggested, then it cuts off all excuses, good or bad; but if I am wrong in this, let us turn to his excuses. Belson, on his re-examination by Stuart and Peterson, in answer to fourth interrogatory, says: "The reason I did not make application in 1855 was the inability, not having sufficient money to invest." But this inability did not exist in 1854 and the fall of 1853, when the invention was perfected and in use in Philadelphia; at least he does not say so; and thus by his own showing he was then (in 1853–1854) without any excuse. Again, Belson says: "In 1856 I should have made application at that time but for R. D. Granger being about the establishment of Stuart and Peterson; he and myself at that time were not on good terms. Knowing that he had a great influence with the firm of Stuart and Peterson, I was under the impression that he might make it appear to them, had I succeeded in getting a patent in my own name, without their knowledge of the same, he might have made it appear that I was not looking to my employers' interests." This is a most flimsy excuse, and certainly no foundation for any judicial action. It is all suspicion and conjecture on the part of Belson, without any proof, and assails Granger and Stuart and Peterson, by imputing to them unworthy motives and the unlawful design to obstruct Belson in the exercise of his undoubted rights. No such imputations can be listened to in the absence of proof to maintain them. I think that the honorable commissioner erred in awarding a patent to Belson, and that his decision of the 21st July, 1859, be, and the same is hereby, reversed.

SPEAR (DEXTER v.). See Case No. 3,867.

SPEAR (FOWLE v.). See Case No. 4,996.

Case No. 13,224.

SPEAR et al. v. NEWELL.

[2 Paine, 267.][1]

Circuit Court.[2]

ACCOUNT—PARTNERS—GROUNDS OF ACTION—PLEADING.

1. At common law, joint partners may sustain an action of account against each other when the proceeds of the partnership business have been received by one of the partners, and he refuses to account for the same. But this action has almost totally fallen into disuse; a bill in equity being a more convenient and suitable proceeding for the settlement of partnership accounts.

2. This action could be sustained against a bailiff, a receiver, a guardian in socage, as well as against a partner who had received moneys belonging to the partnership, and refused to account. But as it lay only on the ground that money, or its equivalent, had come to the hands of the defendant to be accounted for, it could not be maintained against a dormant partner who receives nothing, and has therefore no account to render.

3. Where, therefore, A., B. & C. entered into partnership in paper-making, under an agreement reciting the purchase and transfer of a lease for a term of years to them as tenants in common, the one-half of all the interest in said lease, together with one-half the benefit of twenty-five hundred dollars rents, already advanced on the same, to be owned and held for the use and benefit of A., and the other half to be the property of B. & C.; and the agreement further provided that B. & C. should furnish all the stock and materials of every description on their own private account and responsibility—pay all the expenses, and take charge of and conduct the business, the business to be done for the mutual profit and loss of the parties according to their respective interest; it was *held*, that an action of account brought by B. & C. to have a settlement of the partnership concerns, and to compel A. to contribute his proportion, could not be sustained.

[Cited in Carlin v. Donegan, 15 Kan. 498.]

4. And where B., one of, the partners, (A. being present and consenting thereto,) sold the stock and materials of the partnership to a new company consisting of A. and some third persons, and charged the same on the books of A., B. & C. to the new company, and credited the old company with the same amount, it was *held*, that as an absolute sale had been made to the new company, and that company charged with the amount, the transaction was closed, and no longer open to be accounted for by A. Nor, even if A. were accountable for that specific property, would it authorize the going into the partnership accounts generally.

5. It is a settled rule of the action of account, that nothing can be pleaded before the auditors, contrary to what has been previously pleaded and found by the verdict.

[Cited in Quayle v. Guild, 91 Ill. 390.]

At law.

THOMPSON, Circuit Justice. The agreement under which the parties entered into partnership, is dated 14th Oct., 1828; and after reciting the purchase and transfer of a certain lease for the term of ten years, executed

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[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [District and date not given. 2 Paine includes cases decided from 1827 to 1840.]

by Henry Barclay to one Ezra C. Woodhull, and transferred by several assignments to the parties to this suit, as tenants in common, and that the one-half of all the interest in said lease, together with one-half of the benefit of twenty-five hundred dollars, rents already advanced on the same, is now owned, and is for the use and benefit of the said Newell, and the other moiety of all the interest in the said lease and rents advanced, is the property of the said Spear, Carlton & Co., the said agreement then provides that Spear, Carlton & Co., are to provide all the stock and materials of every description on their own private account and responsibility, and pay all the expenses for carrying on the business of paper-making, and keep the mill in constant operation night and day; they also to take charge of the mill, and sell all the paper, and keep a proper account of the same, which shall be subject to the inspection of Newell, and every three months render an account of the concern, if required by the said Newell. And in consideration therefor, Newell agrees to allow them to retain in their hands certain commissions stipulated in the agreement: the business to be done for the mutual profit and loss of the parties, according to their interest in the establishment: the partnership to be dissolved by any one of the partners, on giving notice thereof. The business having been carried on for some time under this agreement, unsuccessfully, the present is an action of account brought by Spear, Carlton & Co., to have a settlement of the partnership concerns, and to compel Newell to contribute his proportion of the loss sustained; and the first question is, whether an action of account can be sustained for this purpose? There can be no doubt that at common law joint partners may sustain this action against each other when the proceeds of the partnership business have been received by one of the partners, who refuses to account for the same.[3] But it is equally true, that the action has almost totally fallen into disuse, especially where there exists a court of chancery. A bill in equity seems to be considered a more convenient and suitable proceeding for the settlement of partnership accounts.[4] But

[3] McMurray v. Rawson, 3 Hill, 59. At common law, the action of account lies against guardians in socage, bailiffs and receivers; and in favor of trade, by one merchant against another. By statute, it lies against a joint tenant or tenant in common of real estate for receiving more than his just share or proportion. 1 Rev. St. 750, § 9. This statute also gives an action of assumpsit for money had and received. The older statutes from which this revision was taken, required that the defendant should be charged as bailiff. 1 Rev. Laws 1813, p. 90. When the defendant is charged as bailiff, the declaration specifies the particular goods of which he had the care and management; and when the action is brought by one joint tenant or tenant in common against another, the declaration states the relationship between the parties, and alleges that the defendant received more than his just share and proportion. Hackwell v. Eustman, Cro. Jac. 410; Baxter v. Hozier, 5 Bing. N. C. 288; Jordan v. Wilkins [Case No. 7,526]; Godfrey v. Saunders, 3 Wils. 73; Tawdin v. Lavie, 1 Lil. Ent. 13; 1 Went. Pl. 81–89; 3 Chit. Pl. 1297; and see Wheeler v. Horne, Willes, 208. When the defendant is charged as receptor denariorum, although the writ is general, the count must be special, stating by whose hands the money was received. Co. Litt. 126a; Fitzh. Nat. Brev. 118, F; Burdet v. Thrule, 2 Lev. 126; Herne, Pl. 11, 13; 1 Mod. Ent. 48, 49; 1 Lil. Abr. 20, 22; Vin. Abr. "Account," W & K; Com. Dig. "Accompt," A, 4, and E, 2; James v. Browne, 1 Dall. [1 U. S.] 339; Jordan v. Wilkins [supra]; Bull. N. P. 217; Walker v. Holyday, Comyn, 272; Andrews v. Thornton, 1 Lil. Ent. 12. But there is said to be an exception to this rule, when the action is between partners. See, per Powell, J., in Bishop v. Eagle, 11 Mod. 186.

[4] To sustain a bill for an account there must be mutual demands, not merely payments by way of set-off; but there must be a series of transactions on one side and of payments on the other. Porter v. Spencer, 2 Johns. Ch. 169; Smith v. Marks, 2 Rand. [Va.] 449. A creditor having obtained a judgment against an executor as such, and sued out a fi. fa. de bonis testatoris, which proved ineffectual, may either resort to his action at law to establish a devastavit, or file a bill in equity against the executor and legatees for an account of assets and proportional contribution to pay the debt. Sampson v. Payne, 5 Munf. 176. Advances made by a father to a daughter who had conveyed her estate to him, and which the court set aside as improperly obtained, will be decreed to be accounted for. Slocumb v. Marshall [Case No. 12,953], Cir. Ct. Pa. Oct., 1809. Vide Whart. Dig. Supp. tit. "Equity." Every bailment is not a trust, involving an account in equity. Baker v. Biddle [Case No. 764]. Stale demands are not favored in equity when the party acquiesces for a length of time and sleeps on his rights. Baker v. Biddle [supra]. Where one is enjoying a right adversely to another, but the latter tacitly assents and acquiesces, the party shall have no account beyond the filing of his bill. Roosevelt v. Post, 1 Edw. Ch. 579. Aliter, where there has been any fraud, or wilful acts of the party in possession, by which the plaintiff has been prevented from calling for an account, or from taking measures to establish his right. Id. So, if the person in possession be a trustee, guardian, bailiff or agent, he will be held to account from the period the plaintiff's title accrued, unless protected by the statute of limitation. Id. Long and Majestre carried on trade as partners with the funds of Long, in the name of Majestre, who, without any dissolution of the partnership or without rendering any account to Long, afterward, without Long's consent, entered into partnership with Tardy, and carried into the new concern all the funds of the former partnership. On the death of Majestre, (who died intestate,) Long filed a bill against M.'s administrators and Tardy, his surviving partner, for discovery and account. Held, that Long was entitled to an account from Tardy of the transactions and profits of the partnership between him and Majestre, and of the personal estate of the intestate in his hands. Long v. Majestre, 1 Johns. Ch. 305. A master carpenter having been employed to build a house for G., and the terms of the contract being expressed in two agreements between the parties, which were left in the hands of G., the employer brings an action against G. on the agreements, and his counsel finding it necessary, and it being in fact necessary to have copies of the agreements in order to frame his declaration, requires G. to furnish copies thereof; G. refuses to furnish them, whereupon S. dismisses his action at law upon the agreements, and files a bill in equity praying an account and a decree for the balance due for the work done. Held, that the case is properly relievable in eq-

this action of account lies only on the ground that money, or what is equivalent, has come to the hands of the defendant to be accounted for. Vin. Abr. "Account," F, 1. And it is of importance in the administration of justice, that the form of actions which originate in good sense and public convenience, should be kept in view and not be confounded. [Ozeas v. Johnson] 4 Dall. [4 U. S.] 434. This action could be sustained against a bailiff, a receiver, a guardian in socage, as well as against a partner who has received moneys belonging to the partnership, and refuses to account. 1 Inst. 172; Com. Dig. tit. "Account," E, 2; Willes, 208. But the action will not lie in favor of the guardian against his ward, nor in favor of a bailiff against his employer. Vin. Abr. "Account," C, 2; B, 8; D; Com. Dig. "Account," E, 2. This shows that the action lies only against a party who may be called upon to account; and if a partner has received nothing, there can be nothing for which he has to account. Under this view of the action, it is not perceived how the action can be maintained against a dormant partner; he receives nothing, and of course can have no account to render. According to the terms of this partnership Newell had no active concern in carrying on the business, or in selling or disposing of the paper; that was to be done solely by the other partners, and Newell could not have been in the receipt of any of the partnership effects; he stood in the character of a dormant partner; and his copartners, who carried on the business, received their compensation for so doing in commissions. Such are not only the terms of the partnership, but the auditors find expressly that no part of the property, or the avails thereof mentioned in the account, ever came to the hands or possession of Newell; but that the object and effect of the action, if sustained, must be to recover of the defendant a contribution of one-half of the loss sustained by the plaintiffs in prosecuting the business contemplated by the contract. And the auditors further report, that defendant objected to having the accounts taken and settled under this form of action; but the objection was overruled, and the auditors proceeded to hear the proofs, and found and reported that the amount of one-half the loss was $2,046 32, which, with interest, $523 50,

uity. Sturtevant v. Goode, 5 Leigh, 83. No time short of twenty years has ever restrained courts of equity from enforcing an account in favor of a legatee against an executor or his representatives. Salter v. Blount, 2 Dev. & B. 218. An assignee of an executor, or of the administrator of an executor, cannot be called to an account by the legatees, where there is no fraud or collusion, even though the assets could be traced and identified. Rayner v. Pearsall, 3 Johns. Ch. 578. Where an executor returns an inventory of debts due the estate, without stating them to be desperate or doubtful, he will be held responsible for them, unless he can show that there were set-offs against them or that the debtors were insolvent, so that the debts could not be collected. Graham v. Davidson, 2 Dev. & B. 155. In the view of a court of equity all debts are of equal dignity; because all debts are equally due in conscience. But it is not so at law; and a court of equity in decreeing payment by an executor or administrator of his testator or intestate must respect the order of preference established at law, for otherwise it might compel him, who is liable only by reason of the assets in his hands, to pay the debts of the deceased out of his proper goods. Benbury v. Benbury, 2 Dev. & B. Eq. 235. In general, wherever a plaintiff's bill renders an account necessary, the account should be ordered for both parties, and both become actors, so that if a balance be found due to the defendant, it ought to be decreed to him. Payne v. Graves, 5 Leigh, 561. And see when a bill for an account will not lie and when barred by laches. Bassett's Adm'r v. Cunningham's Adm'r, 7 Leigh, 402. Chancery will not minutely examine every item in the settlement of voluminous accounts, to find errors, where none are specified by the parties. Caldwell's Ex'r v. Kinkead, 1 B. Mon. 228; s. p., 2 B. Mon. 2. Where an agent has duly and fairly accounted with his immediate and authorized principal, he is not bound to account over again to a person beneficially interested, or standing in the relation of cestui que trust to the principal. Tripler v. Olcott, 3 Johns. Ch. 473. As where F. made a bill of sale of a ship, then on her voyage, and of freight to be earned, to L., which was absolute on the face of it; and L. sent to O., the master of the ship, a copy of a bill of sale, with a power of attorney, and instructions to him as to the disposition of the property, and O. considering L. as the owner from that time, acted as his agent, and afterward accounted to him for the proceeds of the freight, &c.; it was held that O. was not accountable to F. as having a resulting trust, though some of the letters from L. to O. incidentally mentioned that the bill of sale was intended to secure O. for certain advances and responsibilities, there being no fraud or collusion between L. and O. Id. Where the supercargo and agent of a merchant here delivers goods to a merchant abroad, for sale, and the agent settles with the merchant abroad, according to the account stated by him, with full knowledge of all the facts, without any fraud or imposition, the principal here is bound by the act of his agent, and is concluded from any further claims against the merchant abroad, especially after having kept the account for several years without making any objection to it. Murray v. Toland, 3 Johns. Ch. 569. The assignees of a bankrupt partner, under a separate commission, as tenants in common with the solvent partner, and having got possession of the partnership funds, the solvent partner cannot call them out of their hands or compel them or the partnership debtors, who settled with them, to account. Murray v. Murray, 5 Johns. Ch. 60. An assignee of an assignee of a copartner, in a joint purchase and sale of lands, may sustain a bill in equity against the other copartner and the agents of the concern, to compel a discovery of the quantity purchased and sold, and for an account and distribution of the proceeds. Pendleton v. Wambursie, 4 Cranch [8 U. S.] 73. A partial devisee has no right to call an executor to a general account of the estate, though he may as to the fund in which he is interested. Clifton v. Haig's Ex'r, 4 Desaus. Eq. 345. An account may be decreed between partners, with payment to any partner of his surplus disbursements and profits. Collins v. Dickinson, 1 Hayw. [N. C.] 240. A party applying to a court of equity for an account subjects himself, though plaintiff, to a decree for a balance found due from him to the defendant. Hill v. Southerland's Ex'rs, 1 Wash. [Va.] 128; s. p., Fitzgerald v. Jones, 1 Munf. 150. An account will not be ordered between co-defendants, unless it be necessary to a final settlement, and one, at least, of the parties interested, request it. Craig v. Craig, Bailey, Eq. 102.

amounted in the whole to $2,569 83; which they reported to be due from the defendant to the plaintiffs. The declaration avers the existence of the partnership from the 14th of October, 1828, to the 16th of June, 1829, and that the parties were jointly concerned in conducting and carrying on the business; and that during that time Spear, Carlton & Co. advanced, for the benefit of the company, $10,000, for which they have been in no way indemnified and paid; and that during that time the said Newell received $5,000 over and above his share of the said property and concern, and that he has always refused to account with them or pay them the sum justly due them upon the said partnership concern.

The defendant pleads: 1st. That he was not a partner, &c.; and 2d. Denying that plaintiffs had made any advances for the partnership concern, or that he had received any money or other thing from the said pretended partnership, or refused to account with or pay over to the plaintiffs any sum of money or other thing upon said partnership concern.

Upon the trial of their issues before a jury, the plaintiffs gave in evidence the written articles of agreement, and also proved that during the continuance of the partnership they had advanced for stock and materials $40,000; that they had sold all the paper made at the mill, and received the proceeds according to the account annexed. And it was also proved that upon the dissolution of the partnership, Spear, one of the plaintiffs, (the defendant Newell being present and consenting thereto,) sold the stock and materials of the said partnership then on hand, to the amount of about $1,400, to a new company, consisting of the defendant and some third persons, and charged the same on the books of Spear, Carlton & Co., to the said new company, and credited the old company with the same amount. Upon this evidence a verdict was found for the plaintiffs; and auditors were thereupon appointed to take the accounts; and upon the coming in of their report, exceptions were taken, and the case now comes before the court upon these exceptions.

The principal difficulty in this case grows out of this verdict. For, independent of that, the facts and circumstances of the case, and the report of the auditors, show very clearly that the defendant has not received any of the money or property of the partnership for which he can be called upon to account in this form of action. There are two judgments in the action: the first judgment is, that the defendant do account, usually called a judgment quod computet, which is in the nature of an award of the court, and interlocutory only, and not definitive. It is, however, considered essential that this judgment should be entered (3 Wils. 88), and would seem to imply that the defendant was liable to be called upon to account; but the judgment quod computet being interlocutory only, must be under the control of the court, and subject to be set aside if improperly entered; it is rather matter of form, for the purpose of referring the cause to auditors. The declaration avers, that the defendant had received $5,000 over and above his share of the partnership property; and the only evidence to sustain, in any manner, the verdict and interlocutory judgment, was, that the stock and materials of this company, to the amount of about $1,400, was sold to a new company consisting of the defendant and some third persons, and for which it was probably supposed, upon the trial, that the defendant ought to be accountable. But this view of the case cannot be sustained, for it was an absolute sale made to the new company, and that company charged with the amount, and credit given for the same on the books of Spear, Carlton & Co. It was, therefore, a transaction closed, and no longer open to be accounted for by the defendant; but, admitting that the defendant was accountable for that specific property, it could not authorize the going into the accounts of the partnership generally, as the auditors have done. Not only is no notice whatever taken by the auditors of the property thus had by the defendant as one of the new company, but the auditors find expressly that no property of the partnership ever came to the hands or possession of the defendant.

It is admitted to be a settled rule of this action, that nothing can be pleaded before the auditors contrary to what has been previously pleaded and found by the verdict. 3 Wils. 88. But to confine the inquiry before the auditors, to the particular property which, it appeared upon the trial before the jury, had come to the possession of the defendant, would not be contrary to what is found by the verdict: and, indeed, the verdict, as entered, must be deemed to have been taken, subject to the opinion of the court; and would doubtless have been set aside, if application for that purpose had been made before the appointment of auditors.

We are, accordingly, of opinion, that the action of account cannot be sustained in this case, and that the report of the auditors must be set aside.

NOTE. Authorities cited on the argument: Co. Inst. 172, cited in Selw. N. P., now said to be the foundation of the action of account. Com. Dig. tit. "Action," E; Willes, 208; Vin. Abr. tit. "Action of Account"; 1 Vt. 97; s. c. 1 Aikin, 145. To show what partners can maintain such action: Selw. N. P. 5; Cro. Eliz. 830; Cro. Car. 116; 3 Wils. 113; Gow. Partn. 83; 3 Bin. 319; 2 Cow. 425; 1 Bin. 193; [James v. Browne] 1 Dall. [1 U. S.] 339; Gow. 83; 2 Chip. 95, 91; Co. Litt. 172a; [Ozeas v. Johnson] 4 Dall. [4 U. S.] 435; 6 Vt. 27. The foundation of this rule, where the action of account will lie, is laid down in Coke. Defendant not concluded by the judgment to account. This is mere matter of form, and the cause goes to auditors, and their report is considered in the nature of a special verdict. 1 Chit. Pl. 243.

SPEAR (PASSAIC ZINC CO. v.). See Case No. 10,789.

Case No. 13,225.

SPEAR v. STUART.

[See Case No. 13,223.]

Case No. 13,226.

SPEED v. SMITH.

[10 Int. Rev. Rec. 157; 3 Am. Law Rev. 779; [1] 16 Pittsb. Leg. J. 219; 2 Am. Law T. Rep. U. S. Cts. 149.]

Circuit Court, S. D. Mississippi. 1869.

WAR—COMMERCIAL RELATIONS—PROCLAMATION OF PRESIDENT—INTERNATIONAL LAW—PROBATE COURTS—JURISDICTION.

1. The proclamation of the president of April 19, 1861 [12 Stat. 1259], did not interdict commercial intercourse between the citizens of the states in rebellion and those of the other states.

2. Contracts made prior to July 13, 1861, were not invalidated by the operation of the principles of international law.

3. Construction of the statute of Mississippi touching jurisdiction of probate courts, guardian ad litem, &c.

HILL, District Judge. This bill in equity was filed by the complainant against the defendants for the foreclosure of a mortgage executed by the defendant, B. D. Smith, on the 1st day of May, 1861, to secure the purchase money by the defendant to complainant for the Lauderdale Springs property, situated in Lauderdale county, in said Southern district.

The pleadings and proof show the following facts: Thomas Adams was the owner in fee of said property and died intestate. Upon his death, the property descended to his three minor children, subject to the right of dower of his widow, who, with her said minor children, returned to Louisville, Ky., to the house of complainant, the brother of the widow, and uncle of the minors. C. H. Minge, a friend of the family, was requested to take out letters of guardianship from the probate court of Lauderdale county, for the minor children, and to procure a decree from said court, and sell said property, as it was going into dilapidation and waste, being valuable only as a watering place and summer resort for health and pleasure. The letters were granted, decree obtained, and sale made as requested, the purpose being to transfer the proceeds to Louisville, to be placed under the control of the mother of the minors, as their guardian. The widow relinquished her right of dower before the sale. The complainant at the sale became the purchaser, at the price $8,000: the sale was confirmed by the court, and deed made by the guardian to complainant. In August, 1860, through said Minge, acting as his agent, complainant contracted to sell said property to said Smith for the sum of $10,000, payable in three annual instalments, with 8 per cent. interest. It was further agreed in that contract that when complainant executed a deed for the lands and improvements, Smith would execute his notes for the payment of the purchase money and a mortgage on the property to secure the same. Two deeds were made, which were not accepted, for the alleged reason that the acknowledgments were not sufficiently attested; one of which was that the state of Mississippi had ceased to be one of the states in the Union, and the acknowledgment should be made and attested as provided for deeds made in a foreign country. A deed was made in April, 1861, which was accepted, and the notes and mortgage executed by Smith according to said contract. Smith went into possession immediately upon the making of the contract, and remained in possession until October, 1864, when he sold and delivered possession to Hulburt, Sturges, and others. No part of said purchase money was paid in any manner until about the time, or after the sale, by Smith. Smith offered to pay the notes in Confederate treasury notes to Leachman, the attorney employed by Minge to prepare the deeds and to transact the business. The notes and mortgage were to have been sent to complainant at Louisville, Ky., but before it could be done, after their execution, intercourse between Mississippi and Louisville became somewhat hazardous; and they remained in the possession of Leachman, without any instructions from complainant, either to him or Minge, in relation to them. Complainant having engaged actively on the side of the United States in the war then being commenced between the Confederate States and the United States, no further communication was had between complainant and Minge or Leachman until after the close of the war.

When the proposition to pay in Confederate money was made, Leachman declined accepting it, believing that it would be worthless, at least to complainant. Smith threatened that if it was not accepted he would report the debt to the Confederate authorities, and have it confiscated, so that complainant would get nothing. Minge, who was the client of Leachman, directed him to accept it, saying that he had full confidence in the success of the Confederate cause, and would vest it in Confederate bonds, or in the purchase of cotton, and in that way save it for the minor children. Upon this instruction Leachman accepted the Confederate notes at par, and wrote a receipt across the face of the notes, acknowledging payment, and that it was in full satisfaction of the mortgage, and delivered the notes to Smith, but no satisfaction of the mortgage was entered on the record where the mortgage was recorded. The treasury notes received from Smith were paid over to Minge or his agents; what disposition was made of

[1] [3 Am. Law Rev. 779, contains only a partial report.]

them by Minge is not shown. Minge died soon after the payment was made.

Soon after Hulburt and others purchased from Smith they sold the property to the trustees of the orphans' home, a benevolent association, and were to receive in payment the sum of $50,000 in Confederate treasury notes, but only paid $10,000 in that currency. The trustees immediately went into possession, having received the bond of the vendors, conditioned that a good and sufficient title should be made upon the payment of the balance of the purchase-money. After the close of the war Rev. Mr. Teasdale, the financial and business agent of the orphans' association, was in the city of Louisville making appeals to the citizens for aid in support of the institution. The complainant called on him, and stated that he had not received payment for the property, and that the trustees had best not make any further payments of the notes given by Smith to him. After this interview Hulburt and others, and the trustees agreed that the remaining purchase-money should be discharged by the payment of $7,000 in United States treasury notes, a part of which was paid. After complainant had employed counsel to bring this suit, the counsel informed Teasdale, who was still the agent of the trustees, that he was instructed to bring suit to subject the property to the payment of the purchase-money due complainant, and that the trustees had better not make any further payments to Hulburt and others until the matter was settled. Teasdale stated that the trustees were safe; that they had a good bond for title, and would pay the remainder, which they have since done. Smith has been adjudicated a bankrupt. The bill does not seek a decree against any of the defendants, so as to render them personally liable, but that the amount due shall be paid as the court may direct, and in default that the property be sold, and the proceeds applied to the payment of the amount due. Four points of defence are relied on by defendants.

(1) That the title obtained by complainant at the guardian's sale is defective, for the reason that no guardian ad litem was appointed for the minors, and the report was not made to the first term of the court after the sale, but to a subsequent term.

(2) That the notes and mortgage deed, as well as the deed from complainant, were executed after the commencement of the war between the United States and the Confederate States, and that at the time the complainant, was a citizen and resident of the state of Kentucky, one of the states in the Union, and that said Smith was a citizen and resident of the state of Mississippi, one of the states then engaged in war against the United States, and that according to the law of nations all commercial intercourse was then prohibited between the citizens of the state of Kentucky and Mississippi, and therefore the contract was illegal and void.

(3) That the payment made to Leachman, the attorney for Minge, the alleged agent of complainant, whether or not by complainant's knowledge or consent, was nevertheless a good payment; that is, that it was a complete execution of the contract, and will not now be disturbed.

(4) That the defendants who hold under Smith are bona fide purchasers without notice, and cannot be affected by any equities existing between complainant and Smith. These different points of defence will be considered in the order in which they are stated.

1. The statute does not require in such case the appointment of a guardian ad litem. It requires that the three next of kin to the minors shall be summoned, provided they reside in the state. None such reside in the state; but the court, out of abundant caution, caused publication to be made citing the next of kin. The probate court had full and ample jurisdiction over the estate of the wards, with power to direct a sale of the property if deemed most in interest of the minors, and consequently all the presumptions in favor of the validity of the proceedings must be made in this court that are given to those of other courts of general jurisdiction. It is unlike the special jurisdiction given by statute to the probate court to subject lands descended to the heir-at-law to the payment of the debts of the decedent from whom they descended; in such case all that the statute requires must affirmatively appear from the record. The proceedings of the probate court must be held valid until by proper proceedings they have been set aside. Besides, the parties have not been evicted, and have a warranty of title.

2. The general rule is, that when a war commences between two separate and independent nations, commercial intercourse between the people of the nations so at war is interdicted, and for two reasons: (1) Those of one nation might furnish means to the other to carry on the war; (2) information beneficial to the one and injurious to the other might thereby be imparted. But the government so at war may relax these rules, and when such intercourse is permitted, contracts, otherwise illegal, will be valid.

The late war, being a rebellion by the people of a portion of the states against the government and authority of the United States. only had the effect of interdicting commercial intercourse between the inhabitants of the sections at war, when so declared by the president of the United States, in his proclamation of the 16th of August, 1861, made in pursuance to the act of congress approved the 13th of July, 1861. The proclamation of April 19, 1861, establishing the blockade of the ports of the United States in the states mentioned therein did not interdict commercial intercourse between the citizens of the states in rebellion and those of the other states. That proclamation was for a twofold purpose: (1) to prevent importations without the payment of impost duties; and (2) to pre-

vent the insurgent states from procuring the means to carry on the war. This was putting up the outside fence for the reasons stated, but the partition or cross fence between the states in rebellion and the other states was not put up until the proclamation of August. The deed from the complainant to said Smith was executed in April, 1861, and the notes and mortgage, 1st of May, 1861. At this time, and for some time afterwards, the mails of the United States were transmitted from the St. Lawrence to the Rio Grande. The telegraph communicated the information from New Orleans to Boston. No interference had then been made by the United States with the commerce and trade between the citizens of the different states then engaged in rebellion with those who remained loyal to the Union. The rebellion having been unsuccessful, the citizens of the states who engaged in it are estopped from setting up any act of the assumed new government as a defence to any agreement or contract entered into with a citizen of one of the loyal states otherwise binding and valid. Had the rebellion been a success, then a different rule would have prevailed. From the above principles it will be seen that this point of defence cannot be maintained.

3. There is no evidence that the payment made in Confederate treasury notes was authorized by complainant, or indeed that either Minge or Leachman had received any instruction or had any power to collect the notes in any kind of funds. The testimony is that the notes were to have been sent to complainant in Kentucky. It cannot be supposed that complainant at this time would have consented to such payment. The complainant was then a citizen of Kentucky, engaged on the Federal side of the war, and it is fair to presume was as confident of the failure of the Confederate cause as Mr. Minge was in its success; besides, Smith, before the payment by him, contracted to sell the property, after having had the use of it for over three years, for twice the amount he paid, and those to whom he sold almost immediately sold to the trustees of a charitable institution for about twice the amount they gave, all in the same kind of funds. It is not supposed that this point of defence is seriously made.

4. Hulburt and others, when they purchased from Smith, knew that the legal title to the property had been conveyed to complainant as a security for the payment of the notes given for the purchase money, and also knew the mode of supposed payment, and the means by which the notes were procured by Smith. The presumption from the evidence is that they contracted for the property before the supposed payment was made, and furnished the means so used. They also received from Smith his deed, with warranty of title. The trustees only held bond for title, and made no payment except the $10,000 in Confederate money, until after having been notified through their financial agent and business manager. Teasdale, complainant, repudiated the transaction between Minge and Smith. To make this defence good, the purchase money must have been paid, and the legal title received without notice of the rights of complainant or his claim thereto. This mortgage deed was duly recorded in the office of the probate clerk of Lauderdale county, and was unsatisfied so far as the record showed, and was constructive notice to the world as to complainant's title. If they rely upon the fact that the notes had been surrendered to Smith, they must be charged with knowledge of circumstances attending it, and which, though it may not have been so intended, must be held in law as a fraud upon the rights of complainant.

Complainant is entitled to the payment of the notes so executed by Smith, or to a decree for the sale of the property, and the proceeds, so far as they may be necessary, applied to such payment.

SPEEDEN (UNITED STATES v.). See Case No. 16,366.

SPEEDWELL, The. See Case No. 30.

SPEEDWELL, The. See Case No. 10,252.

SPEER (CROUCH v.). See Case No. 3,438.

SPEER (HALL v.). See Case No. 5,947.

Case No. 13,227.

SPEIGLE et al. v. MEREDITH et al.

[4 Biss. 120.][1]

Circuit Court, D. Indiana. Jan., 1868.

PLEADING IN EQUITY — JURISDICTIONAL FACTS — TRUSTS—QUIETING TITLE.

1. A naked power or trust must be strictly construed.

2. A conveyance of land in consideration of coupon bonds is a sale of the land. Such a sale by a trustee empowered to sell the land may be valid, though it is not a sale for money.

3. Where a bill charged that the complainants are the legal owners of lands of which the defendants have forcibly taken possession under a false and fictitious claim of title, but giving no intimation of the nature of the fictitious title, the bill is bad for want of equity on its face. The remedy in such a case is an action at law.

4. A bill in equity in this court must distinctly state the citizenship of every necessary party to it, and show that the complainants and defendants are citizens of different states. And if it fails to do this, it will be bad on demurrer; and any decree on it in favor of the complainants would be liable to reversal in the supreme

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court. No appearance, demurrer, or answer to such a bill will waive this omission in it.

[Cited in Tug River Coal & Salt Co. v. Brigel, 14 C. C. A. 577, 67 Fed. 628.]

In equity.

R. M. Corwin, for complainants.

March & Gordon, for defendants.

McDONALD, District Judge. This is a bill to quiet title. It states that George C. Speigle and John N. Stoockle, the complainants, are citizens of Ohio; that Solomon Meredith and Ira Jarrett, two of the defendants, are citizens of the state of Indiana; and that the residence of four other defendants, to wit: William A. Johnson, Martha V. Johnson, Thomas Ray, and Elizabeth Siver, is unknown. The bill also makes the Cincinnati and Chicago Railroad Company—an Indiana corporation—a defendant.

The bill charges that said railroad company, in May, 1854, had occasion to borrow $150,000, to effect which the company issued that amount of coupon bonds payable to bearer in five years with ten per cent. interest; and that to secure their payment, the company executed a deed of trust to the defendant Meredith, and one William Butler, now deceased, on certain Indiana lands, in the nature of a mortgage.

The bill further charges that the deed of trust embodied a provision to the effect that whenever the railroad company should wish to make sale of any part of said lands, and should secure and surrender to the trustees to be canceled an amount of said coupon bonds equal to the appraised value of the land so wished to be sold, then the trustees should execute a conveyance for the same to such persons as the company should designate; and that in case of the death of either of the trustees, the survivor should make such conveyance.

The bill also charges that on the 27th of July, 1866, and after the death of the trustee, Butler, the complainants were the holders and owners of $10,500, of said coupon bonds; that on demand by them of payment, the company failed to pay these bonds for want of funds; that thereupon, the company offered to sell 160 acres of said lands for said bonds, which offer the complainants accepted, and agreed to take the land at its appraised value as provided in the deed of trust; and that accordingly the coupon bonds so held by them were delivered to the trustee, Meredith, to be canceled, and he thereupon conveyed said 160 acres of land to them.

After making these allegations, the bill proceeds to say that the defendants, Ira Jarrett, William A. Johnson, Martha V. Johnson, Thomas Ray, and Elizabeth Siver, contriving to injure the complainants, &c., claim to hold said 160 acres of land by some pretended title from said railroad company, which is false and fictitious, and, if made at all, was made without sufficient warrant of law or other authority, and in contravention of the rights of the complainants; and that said last named defendants have forcibly taken possession of said land, and wrongfully, unlawfully, and to the great detriment of the complainants, prevent them from enjoying it, and have refused to them the possession of it though often demanded and requested to give up the possession of the land, &c.

The bill prays for the quieting of the title, the cancellation of the defendants' pretended title papers, and the surrender of the possession to them.

The defendants, Jarrett, Ray, William Johnson, and Elizabeth Siver have demurred to the bill, on the ground that "said complainants have not, by their said bill, made such a case as gives the court jurisdiction of the same, or entitles them in a court of equity to any discovery," or to any relief in equity whatever.

Whether this demurrer ought to be sustained, is the question to be decided.

1. In support of the demurrer, it is objected that, on the face of the bill, the conveyance of the 160 acre tract of land is void. This objection is founded in the provision in the trust deed, already noticed, that the trustee could convey the land when the railroad company wished to "sell" it; that the power to convey was a naked power dependent on that precedent condition; that such a power must be literally followed and strictly construed; that the condition must be interpreted to mean a sale for cash in hand; and that the transaction stated in the bill was not a sale for cash, but a mere barter or exchange.

There can be no doubt that a naked power or trust must be literally followed and strictly construed. Hill, Trustees, 478; Williams v. Peyton's Lessee, 4 Wheat. [17 U. S.] 77. But I think that, on the face of the bill, the condition, on which the trustee might, according to the deed of trust, make the conveyance, was strictly and literally followed. A sale of lands does not necessarily suppose a sale for cash. The term barter is not applied to contracts concerning land, but to such only as relate to goods and chattels. Barter is "a contract by which the parties exchange goods." Bouv. Law Dict. This transaction, therefore, was not a barter.

Now was the transaction an exchange? This term, as applied to lands, "is a mutual grant of equal interests"—"as a fee simple for a fee simple, a lease of twenty years for a lease of twenty years, and the like." 2 Bl. Comm. 323. An exchange is a transfer of lands for lands. This, therefore, was not an exchange; for it was a transfer of lands for coupon bonds.

There can be no doubt that a conveyance of lands in consideration of personal property or choses in action, is strictly and literally a sale. If A convey his farm to B in consideration of a stock of goods, that is unquestionably a sale of the farm; and it is equally so, if the consideration be public stocks, or corporation bonds. There is nothing in this objection.

2. In support of the demurrer, it is con-

tended that, on the face of the bill, the complainants have a complete remedy at law; and that, therefore, there is no equity jurisdiction. The bill shows that the legal title to the land in question is in the complainants. It charges that the defendants who demur have forcibly taken possession of the land, and wrongfully and unlawfully hold it against the rights of the complainants, under a false and fictitious claim of title from the railroad company. It does not in any way describe this title, nor even show that it is in writing. According to the allegations, it is really no title at all—certainly none that would be a defense in an action of ejectment. If the facts stated in the bill are true, these defendants are mere trespassers. And the question is, will a bill in equity lie against such trespassers merely because they forcibly took possession of the land and hold it, as the bill states, under claim of some "false and fictitious" title?

Nothing can be better settled than the rule, that equity will not take jurisdiction in a case where the complainants have a plain and complete remedy at law. And this rule is expressly declared in the sixteenth section of the judiciary act [1 Stat. 82]. It is equally well settled that a court of equity will not entertain a bill where the title which the complainant seeks to enforce is a merely legal one, and presents no special ground for equitable relief. Hipp v. Babin, 19 How. [60 U. S.] 271.

But the solicitor for the complainants insists that this bill, besides setting up a legal title in them, does present special ground for equitable relief; and that this special ground is the false and pretended title claimed by the defendants. It can hardly be contended that every claim of a pretended title to land will entitle the legal owner of it to apply to equity for relief. Almost every intruder upon land pretends to some title; but it amounts to nothing, if it be false and fictitious, and if it be no defense to an action of ejectment by the legal owner. And in no such case will equity aid the holder of the legal title; for he has a plain and adequate remedy at law.

It is certainly unusual for the legal owner to sue a trespasser, who has turned him out of possession, in a court of equity, merely because the wrong-doer pretends that he has a title to the land. I doubt whether such a case can be found in the books. Perhaps a bill in equity might in such case be sustained, if it shows that the pretended title would be an obstruction to the recovery in an action of ejectment. But, from anything stated in the bill, it cannot be concluded that the defendants' "false and pretended" title would be any obstruction whatever to the assertion of the complainants' rights in an action at law.

The complainants insist, however, that equity has jurisdiction to remove a cloud from a legal title; and that for this reason the bill in question is good. It is indeed true that courts of equity often entertain jurisdiction of bills to remove clouds from legal titles. But, in such cases, the bill must show that there really is such a cloud, and that the aid of a court of equity is necessary to remove it. No such thing is shown by this bill. I repeat that, so far as its allegations are concerned, these defendants appear to be mere trespassers. And certainly the mere assertion of a trespasser in possession of lands that he has a title thereto, does not raise such a cloud on the legal title as to justify the interference of a court of equity.

But it is contended that in cases where a plaintiff has occasion to state the title of the defendant, the rules of pleading do not require it to be set out with particularity, because the plaintiff is not presumed to be informed of the particulars of the defendant's title. No doubt this is the rule in pleadings at common law; and the reason of it equally applies in equity pleading. But in the case of a bill to remove a cloud from a legal title, I think that the bill must show enough to indicate plainly what that cloud is; and if it consist of a deed of conveyance, it ought, at least, to show who are the parties to it, whether it is prior or subsequent to the complainant's deed, and such other facts as will fairly indicate that it is a serious obstruction to the complainant's rights. I think the bill shows no cloud whatever on the complainant's title.

3. There is still another fatal defect in this bill, not noticed in the arguments of counsel. The bill, as we have seen, makes Meredith and the railroad company parties. But it is clear they are not necessary parties; for if every allegation in the bill were true, no decree could go against them. The real parties to the case are Ira Jarrett, William A. Johnson, Martha V. Johnson, Thomas Ray, and Elizabeth Siver. The bill avers that Ira Jarrett is a citizen of Indiana. But, as to the four last-named defendants, there is no averment of citizenship whatever. On the contrary, it avers that their residence is unknown.

This is a case in which the jurisdiction of this court depends on the citizenship of the parties. In such a case, the citizenship of each party must be stated positively. And the statement must be in terms conformable with those of the constitution and the judiciary act conferring the jurisdiction. Bingham v. Cabot, 3 Dall. [3 U. S.] 382; Abercrombie v. Dupuis, 1 Cranch [5 U. S.] 343; Wood v. Wagnon, 2 Cranch [6 U. S.] 9; Capron v. Van Noorden, 2 Cranch [6 U. S.] 126; Winchester v. Jackson, 3 Cranch [7 U. S.] 514; Hope Insurance Co. v. Boardman, 5 Cranch [9 U. S.] 57; Sullivan v. Fulton Steamboat Co., 6 Wheat. [19 U. S.] 450; Breithaupt v. Bank of Georgia, 1 Pet. [26 U. S.] 238; Gassies v. Ballon, 16 Pet. [41 U. S.] 761.

It is true that the act of congress of Feb. 28, 1839 (5 Stat. 321), somewhat alters the rule laid down in the cases above cited, so

far as concerns cases where some of the defendants do not reside in the state where the suit is brought. But that alteration does not affect the present question. The rule undoubtedly still is that in every case in this court where its jurisdiction depends on the citizenship of the parties, the citizenship of every necessary party must be distinctly stated in the bill or declaration; and it must appear thereby that every necessary party is capable, so far as citizenship is concerned, of suing or being sued in this court.

Nor is this rule affected by the fact that Ira Jarrett, William A. Johnson, Thomas Ray, and Elizabeth Siver have appeared and demurred to this bill. In courts of general jurisdiction, an appearance and demurrer commonly give jurisdiction over the person so appearing and demurring. But it is not so in the national courts, all of which are courts of limited jurisdiction. Even after a plea in bar has been filed, the defendant may withdraw it, and plead to the jurisdiction. Eberly v. Moore, 24 How. [65 U. S.] 147. And no consent of parties, in such a case as this, can give us jurisdiction. Ballance v. Forsyth, 21 How. [62 U. S.] 389.

If without objection to the jurisdiction, this cause should proceed to final hearing and decree for the complainants, the decree would be erroneous, and might be reversed. McCormick v. Sullivant, 10 Wheat. [23 U. S.] 192.

Nothing, therefore, but a statement in the pleadings of the citizenship of four of these defendants, can give us jurisdiction over them. And as the charge against all the defendants against whom under this bill any decree could possibly be rendered, is that of a joint and wrongful trespass and possession under a joint false and fictitious claim of title under the railroad company, jurisdiction of the case as against Jarrett alone, who is alleged to be a citizen of Indiana, could not, in my opinion, be taken for the want of the proper and necessary parties.

Unless, therefore, the complainants take leave to amend their bill, it will be dismissed without prejudice.

The complainants amended the bill.

NOTE. The general rule is that the power must be strictly executed. Perry, Trusts, § 254. A party out of possession has no right to resort to equity to remove cloud on title. Herrington v. Williams, 31 Tex. 448; Polk v. Pendleton, 31 Md. 118; Barron v. Robbins, 22 Mich. 35; Lake Bigler Road Co. v. Bedford, 3 Nev. 399; Branch v. Mitchell, 24 Ark. 431. Contra that he has: Almony v. Hicks, 3 Head, 39. One in possession may maintain a bill against one out of possession to remove cloud of deed valid on its face, where extrinsic facts must be shown to establish its invalidity. Crooke v. Andrews, 40 N. Y. (1 Hand) 547; Newell v. Wheeler, 48 N. Y. 486; Reed v. Tyler, 56 Ill. 288; Gage v. Rohbrach, 57 Ill. 262; Gage v. Billings, 56 Ill. 268. But there is no cloud where defect is apparent on face, or must appear upon attempt to prove title under it. Overing v. Foote, 43 N. Y. (4 Hand) 290; and Meloy v. Dougherty, 16 Wis. 269.

Case No. 13,228.

Ex parte SPENCE.

[3 App. Com'r Pat. 220.]

Circuit Court, District of Columbia. Oct. Term, 1859.

PATENTS—APPEAL FROM COMMISSIONER—DIRECTORY REQUIREMENTS OF STATUTE.

[1. The court, on appeal from a decision of the commissioner of patents, can only review his conclusions, and not the processes by which such conclusions may have been attained.]

[2. The commissioner is not required to submit to an exhibition of experiments at the discretion of the applicant.]

[3. The statutory requirement that the commissioner shall give the applicant such reasons and suggestions as will enable him to judge of the expediency of abandoning or modifying his application is directory merely, and his action in the premises is not subject to review on appeal.]

[4. Spence's application for a patent for an improvement in culinary boiling apparatus *held* properly rejected for want of novelty.]

[Appeal by George S. G. Spence from a decision of the commissioner of patents refusing him a patent for an improvement in culinary boiling apparatus.]

MERRICK, Circuit Judge. It is extremely difficult to ascertain from examining the reasons of appeal filed in the cause what are the precise points of error upon the merits of the claim which are relied on by the appellant. If the real object of the appellant in his two first reasons be to complain that the investigation made by the office was only superficial, and that the reasons for the conclusions arrived at by the office were two obscurely or imperfectly communicated to him by writing, it is here to be observed that the judge upon appeal is only charged to scrutinize the conclusions which the office may have reached in any case, and not the processes by which such conclusion may have been attained; that the law does not require the commissioner to submit to an exhibition of experiments at the discretion of the applicant, but confides in that officer's exercise of such means of informing his judgment as his own mind may direct. And, moreover, while it is certainly the duty of the commissioner, enjoined by the statute, to give a party such reasons and make such suggestions as will enable him to judge of the expediency of abandoning or modifying his application, yet these requirements of the statute are only directory to the commissioner, and not proper matter for the appellate tribunals. But in this case the several office letters of August 9th, 13th, and 26th, appear to have fully answered these directions of the statute; and, were the matter complained of inquirable on appeal, the appellant could not prevail in the face of those letters.

Nor do I perceive any error in the judgment of the office upon the third and fourth reasons assigned. The third reason is calmly an impeachment of the well-settled rule that a pat-

ent shall not be granted for the application of an old contrivance to a new purpose, or in technical language, for "a double use."

The reference to the patent of October 28, 1837, to John Morris, which is assailed in the fourth reason of appeal; appears to me to take away from applicant all color of claim to a patent which he might otherwise have, urged upon the ground that the references embraced in the matter of the third reason did not show a boiler with double sides. But, independent of that reference, the case appears destitute of real merit. I cannot perceive any function of a patentable nature performed by or claimed in the specification for this part of the combination. The prolongation of the flange to the bottom prevents the escape of steam in no more effective way than would a flange of the ordinary length, carefully made and adjusted to the size of the boiler. I entirely concur in the view expressed on that branch of the case in the office letter of August 13th.

Finding no error in the decision of the office upon any of the reasons assigned, I must affirm the decision of the commissioner.

Now, therefore, I hereby certify to the Honorable Wm. D. Bishop, commissioner of patents, that, having assigned the 7th of October for hearing the foregoing appeal, and the appellant having been heard by counsel, I have read and considered the several reasons of appeal, the response of the commissioner to those reasons and the arguments in the case; and, having fully considered the premises, I hereby adjudge and determine that the decision of the office be affirmed, and the application of George S. G. Spence for a patent for an improvement in culinary boiling apparatus as claimed be finally rejected.

SPENCE (KIDD v.). See Case No. 7,755.

Case No. 13,229.

In re SPENCER.

[18 N. B. R. 199.] [1]

Circuit Court, S. D. New York. May 23. 1878.

BANKRUPTCY—COMPOSITION—REPORT OF REGISTER—CREDITORS—NOTICE.

1. On application for a final order of confirmation of a proposed composition, the report of the register must, for the purposes of such application, be taken to be a true and full report of all the proceedings before him. If parties are dissatisfied with it, either because of alleged omission or mistake, they should move promptly to have it referred back for correction. The other party is entitled to have notice of such proposed correction before the motion for confirmation comes on for argument.

2. If, through accident or design, the notice of the first meeting fails to reach creditors whose presence at the meeting might alter the result of the vote, and the court is satisfied that their failure to attend was owing to the failure of the notice alone, and that their votes would have changed the result, it is proper and right that on their application the meeting, if closed, should be reopened, and the vote of each person received and counted; but such relief should be applied for promptly, and one who lies by until the second meeting has been called and convened cannot then ask to have the first meeting reassembled, unless the delay is excused for sufficient cause.

3. When the register has decided as to the right to prove and vote upon a particular claim as between two parties who claim such right, the proper course for the party aggrieved is to apply for an adjournment of the meeting till his right as a creditor can be tested and passed upon by the court before the final vote is taken. He may ask to have the question certified to the court upon the testimony before the register; or, if he desires to produce further evidence, he should ask leave to produce it, and, if necessary, ask for time. If, however, he submits to the decision, and without further objection allows the vote to be taken, he cannot ordinarily be allowed to reopen the question at the second meeting, upon consideration of the question whether the requisite majority present at the first meeting have assented to the composition.

[Cited in Re Keller, Case No. 7,654.]

4. If any party is aggrieved by the rulings of the register on his application for time or opportunity to prove his right to vote, or to disprove another claimant's right, it is competent for the court, in order to secure a full and fair vote, to reopen the meeting and adjourn it, and provide for the proper determination of all questions of the right to vote in some suitable way before a final vote is taken; and, upon the coming in of the report of the register, his rulings on these questions, as disclosed by the record, are subject to the review of the court for the determination of the question whether the requisite majority of those present have assented to the composition.

5. The composition was only two per cent. The largest creditor, without whose vote, if she had been present, it could not have been passed, was strongly opposed to it. Owing to misdirection of the notice by accident or design, she was not present to vote. There was also a doubt as to the right of one of the consenting creditors to vote. *Held*, that the composition was not for the best interests of the creditors; that there was a formal, but not a real, compliance with the requirements of the law as to the consenting majority of creditors.

In bankruptcy.

W. E. Smith, for bankrupt.

J. G. Gay and G. H. Starr, for consenting creditors.

H. B. Ferguson, for S. K. Spencer.

CHOATE, District Judge. This is a motion for a final order of confirmation of a proposed composition offered by the bankrupt. Upon this motion affidavits are offered on behalf of opposing creditors for the purpose of showing errors in the reports of the register of the proceedings at the first and second meetings in composition, in that the register omitted to make any record of objections taken and other proceedings at the meetings, and in that he misstated what did take place. So far as the objections to the order of confirmation rest on this ground they must be overruled.

The report of the register must be taken

[1] [Reprinted by permission.]

to be a true and full report of all the proceedings before him for the purposes of this motion, and if parties are dissatisfied with his report, either because of alleged omission or mistake, they should move promptly to have it referred back for correction. The other party is entitled to have notice of such proposed correction before the motion for confirmation comes on for argument.

In this case, however, it appears by the report of the register that proof was made at the first meeting, by one Clarkson, on two judgments recovered by one Seagrave, in the year 1872, against the bankrupt jointly with Samuel K. Spencer and Margaret A. Spencer, which judgments were upon notes made by the bankrupt to the order of and indorsed by Samuel K. Spencer, the judgments amounting together to four thousand and thirty-four dollars and thirty-seven cents. The deposition alleged that the judgments had been duly assigned to Clarkson, and that he was the lawful owner and holder thereof. No written assignment was produced or proved. At the same meeting, and on the same day, one Samuel K. Spencer filed a deposition for proof of claim for four thousand nine hundred and seven dollars and forty-seven cents, including said two judgments as belonging to him, which proof was objected to by the attorney for Clarkson. The bankrupt produced his sworn statement of debts and assets, in which Clarkson appears as the owner of these judgments, and wherein it is stated that they were recovered on notes made by the bankrupt for the accommodation of Samuel K. Spencer, which were discounted by Seagrave for Samuel K. Spencer, who received the amount thereof, and that they had been assigned to Clarkson. The bankrupt then submitted his proposition for a composition, and the meeting was adjourned for the purpose of having objections filed to the proof made by Samuel K. Spencer. Upon the adjourned day Samuel K. Spencer appeared with counsel. The bankrupt filed objections to his proof, and after hearing counsel the register held that he should be admitted as a creditor to the amount of one thousand dollars, excluding his claim as the owner of these two judgments. The meeting then without objection, so far as appears, proceeded to consider and vote upon the composition. Clarkson voted yea on five thousand and thirty-four dollars and thirty-seven cents, by inadvertence apparently, his claim being overstated by one thousand dollars. Samuel K. Spencer voted nay on one thousand dollars. The vote was seven creditors in the affirmative, whose debts amounted to thirteen thousand six hundred and thirty-three dollars and fifty-two cents. In the negative two creditors, whose debts were one thousand six hundred and seven dollars and twenty-six cents. The first meeting was closed December 17, 1877. The second meeting was called for the 28th of March, 1878. At this meeting Samuel K. Spencer appeared with counsel, also Clarkson and other creditors.

The attorney for Samuel K. Spencer produced a new proof of his claim, sworn to March 28, 1878, in which, besides his claim for one thousand dollars on a promissory note on which he had been allowed to vote, he included the two judgments above referred to, averring in his deposition that the notes on which they were recovered were made by the bankrupt for value and delivered to him; that he indorsed the same and delivered them to Seagrave to secure the sum of one thousand dollars loaned by Seagrave to him; that he afterwards paid the loan and received the notes back; that the notes were protested and he instructed his attorney to sue on the notes and make himself a defendant as indorser, because he did not want to sue his brother in his own name; that Seagrave held the judgment in trust for him and he had never consented to an assignment. The proof was objected to by the bankrupt on the ground that by the transcript of the judgment Samuel K. Spencer appeared to be a judgment debtor, that his claim had been already passed upon at the first meeting, and on other grounds. The attorney for Samuel K. Spencer objected to the claim of Clarkson. Another creditor, Mrs. Thomas, also objected to Clarkson's claim, and filed written objections to it. The register held that these matters were not subjects of inquiry at this meeting, and the meeting adjourned. On the adjourned day the counsel for Samuel K. Spencer offered to prove, by witnesses then in court, that the two judgments proved by Clarkson really belonged to Samuel K. Spencer.

The counsel for Clarkson objected that the question could not be entertained at that stage of the proceedings, and that the question had been passed on at the first meeting and that no objection had been then made to Clarkson's claim. The register held that he had no authority at this meeting to take the proof which was offered.

The counsel for creditors opposing the composition proposed to examine the bankrupt. This was objected to on the ground that the application was too late, and the register so held. The meeting was then declared closed.

In opposition to the confirmation of the composition one Augusta Thomas now makes affidavit that she did not, in fact, receive the notice or any notice of the first meeting until it was too late for her to attend; that she has resided at 76 Norfolk street, in this city, for three years last past, and never resided at 79 Norfolk street, the address given as her place of residence in the schedule of creditors, and to which, as appears by the record, her notice was sent. She also swears that her true address was well known to the bankrupt. Her debt, which was proved immediately after the first meeting, amounts with interest to about eight thousand dollars. She is oppos-

ed to the composition, and if she had been present at the first meeting in all probability it would not have been approved, as her vote would have been sufficient to defeat it.

This case presents some interesting questions as to the proper practice in composition proceedings. The terms of the law which make the validity of the composition to depend upon its receiving the approval of a certain proportion in number and value of the creditors present at the meeting, render it very important and indeed essential that proper measures should be taken to notify creditors of the meeting, and that before a vote is taken the question of the right of persons claiming to vote should be properly determined. As to the notice, ordinarily, the proof by affidavit of the giving of the regular notice through the mail to all the creditors named in the schedule will be held sufficient and conclusive of the regularity of the notice; but if, through accident or design, this notice fails to reach creditors whose presence at the meeting might alter the result of the vote, and the court is satisfied that their failure to attend the meeting was owing to the failure of the notice alone, and that their votes would have changed the result, it certainly would be proper and right that on their application the meeting, if closed, should be reopened, and the vote of each person received and counted. If, however, this relief is sought, it should be applied for promptly, and one who lies by till the second meeting has been called and convened can hardly ask them to have the first meeting reassembled, unless the delay is excused for sufficient cause. In this case the creditor, Mrs. Thomas, was telegraphed for while the first meeting was in session, but arrived too late to cast her vote. She made proof of her claim, however, on the same day, December 17, 1877. I think her delay to move for relief, on the ground of the failure to get the notice, till March 28th, was such laches as should now bar her claim to object to the vote taken at the first meeting as irregular. The fact, however, that she, the largest creditor, strenuously objects to the composition is a circumstance that should have its due weight with the court on the question whether the composition proposed is for the best interests of the creditors.

As to the determination of all questions respecting the right to vote, and the amount on which any party claiming to be a creditor shall be allowed to vote, from the necessity of the case the statute must be construed to give the court power to determine such questions, and as the meeting is held not in court but before the register, the duty devolves on him to determine the question in the first instance from such proofs of claim and other evidence as the parties may offer. Whether this decision, when made by the register or by the court, is controlling for any other purpose than that of determining how the creditor shall rank for the purposes of this vote is not in question in this case.

The question of the right of Clarkson or of Samuel K. Spencer to vote as the owner of the two judgments was virtually passed upon by the register at the first meeting in favor of Clarkson. This proof was undoubtedly defective, in that the assignment from Seagrave, the judgment creditor, to him was not produced. It may have been by parol, but that would be extraordinary, and there is no evidence of it. Samuel K. Spencer seems to have submitted his case to the register at the meeting, and the proof offered by Clarkson was decided to be regular, and that offered by Spencer insufficient, and it was held that Clarkson, and not Spencer, was entitled to vote on these claims. I think, under these circumstances, the proper course is for the party making claim thus disallowed to apply to the register for an adjournment of the meeting till his right as a creditor can be tested and passed upon by the court before the final vote is taken. He may ask to have the question certified to the court upon the testimony before the register, or if he desires to produce further evidence, he should ask leave to produce it, and if necessary ask for time. If, however, he submits to the decision, and without further objection allows the vote to be taken, I think he cannot ordinarily be allowed to reopen the question at the second meeting, upon consideration of the question whether the requisite majority of creditors present at the first meeting has assented to the composition. I say ordinarily, because cases may arise where, by reason of newly discovered evidence or on other equitable grounds, the party should not be concluded even by his acquiescence in the taking of the vote. If any party is aggrieved by the rulings of the register on his application for time or opportunity to prove his right to vote, or to disprove another claimant's right, it is competent for the court, in order to secure a full and fair vote, to reopen the meeting and adjourn it, and provide for the proper determination of all questions of the right to vote in some suitable way before a final vote is taken, and upon the coming in of the report of the register, his rulings on these questions, as disclosed by the record, are subject to the review of the court, for the determination of the question whether the requisite majority of those present has assented to the composition. In this case Spencer apparently acquiesced in the decision of the register, and took no measures to have the question reheard until the second meeting was convened on the 28th of March. He then proposed to try before the register the same question with witnesses. Such practice would be very inconvenient in keeping the creditors together till such trial could be had, and in the absence of special circumstances excusing the delay and justifying the reopening of the question, the register properly declined to receive the evidence. Spencer in his deposition does not show any particular merits. His statement is so extraordinary as to his ownership of the judgments in which he was a judgment debtor that it would require a considerable

weight of evidence to prove such a claim. The remarks above made in relation to the examination of the claim of Spencer apply also to the re-examination of the proof of debt made by Clarkson. Any other creditor present at the first meeting could have applied to have Clarkson's claim re-examined, and Mrs. Thomas, though not present at the meeting, could have applied, on the case now made by her affidavit, to have the meeting reopened and her objections to Clarkson's claim considered, but the register very properly held that the application to the second meeting was too late so far as the question of the right to vote at the first meeting was concerned. In all such questions it should not be overlooked that the bankrupt law [of 1867; 14 Stat. 517] affords and was intended to give speedy and summary methods for the settlement of insolvent estates, and that therefore great diligence should be required of all parties, where the want of such diligence will embarrass or delay other parties in interest. I do not, however, question the right or duty of the court at any time to entertain applications intended to correct mistakes, expose fraud or improper practice, or to bring to the notice of the court in these composition proceedings any matters that may properly be considered in determining whether the composition is fair and proper. Thus I am brought to the conclusion that the proceedings of the meeting have been regular, and that neither of the parties claiming to be aggrieved is in a position to ask, as a matter of right, that the proceedings be set aside, or the composition rejected, on the ground of irregularity.

The question still remains, however, whether it is for the best interests of creditors that it should be confirmed and recorded. The composition is only two per cent. No creditor has any very large interest certainly in its confirmation, although there is an apparent entire want of assets. The largest creditor, without whose vote, if she had been present, it could not have passed, is strongly opposed to it. Her address was by accident or design erroneously given in the schedule of creditors by which the notices of the first meeting were issued, and she was not present to vote. I am not entirely satisfied about Clarkson's right to vote.

On all the circumstances, I am not able to bring myself to the belief that for so small a consideration as two per cent. on their debts it is for the best interests of the creditors to release the debtor from ninety-eight per cent. There has been a formal, but not a real, compliance with the requirements of the law as to the consenting majority of the creditors.

Order refused, without prejudice to the right of the bankrupt to propose the same or other composition.

Case No. 13,230.

In re SPENCER.

[See Case No. 13,234.]

Case No. 13,231.

SPENCER v. The ALIDA.

[13 Leg. Int. 369.]

District Court, S. D. New York. 1856.

MARITIME LIENS—SUPPLIES—FILING CLAIM.

[This was a libel for supplies by Louis C. Spencer against the steamboat Alida.]

[Before BETTS, District Judge.]

BY THE COURT. The leading facts to support the action correspond with those in the case of Elmore v. The Alida [Case No. 4,419]. The suit was commenced October 17, on a bill for milk supplied at daily trips during the month of September, amounting to $38.39; and for potatoes, supplied also daily from September 22 to October 10, amounting to $24.33. The lien particulars were filed October 17, the debt being contracted for each article of supply on the day of its delivery to the boat. The right of action, therefore, is only preserved by filing a lien specification within ten days thereafter. Two particulars of the debt contracted anterior to the 6th of October can be recovered against the vessel. The lien, therefore, ceased its action by the departure of the boat from this port, if the creditor did not avail himself of the statutory privilege to resuscitate it by filing a lien specification within ten days after that event.

A reference must be had to a commissioner, to ascertain the amount recoverable on these principles.

Case No. 13,232.

SPENCER v. The CHARLES AVERY.

[1 Bond, 117.][1]

District Court, S. D. Ohio. April Term, 1857.

SALVAGE—NATURE OF SERVICE—DANGER TO LIFE—BY REQUEST—RECEIVING PAY FOR SERVICE—MEASURE OF COMPENSATION.

1. Where a steamboat, on the Ohio river, laden with flour, was sunk by floating ice within a few feet of the shore, and her cargo was saved, at the request of the master of the boat, by fifty of sixty persons on the bank of the river, such service entitles the parties to a decree for salvage.

2. It is a well-settled principle of the maritime law, that risk or danger of life is not a necessary element of a salvage service. Where such risk or danger is incurred in saving property from destruction, it will place the salvors in a high position of merit, and entitle them to a more liberal compensation for the service than would otherwise be accorded to them.

3. The controlling inquiry in salvage cases is, was the property in peril of being lost, and was it saved by the efforts of those claiming to be salvors.

4. The measure of compensation, in salvage cases, depends wholly on the circumstances attending the service. Where there has been great personal exposure and risk, and property has been rescued from inevitable destruction

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

by the intrepidity of the salvors, a liberal allowance will be made. One-half the value of the property saved has been allowed in such cases. There may be cases where the service is attended with so little difficulty and peril that it would entitle the parties to little more than a quantum meruit for work and labor.

5. It is not material whether the salvage service was rendered spontaneously or by request, or whether with or without a previous contract between the owner or his agent and the salvors.

6. Persons who aid in a salvage service, and receive pay therefor from the owners of the property saved, abandon their right as salvors.

[This was a libel for salvage by Elisha T. Spencer against the steamboat Charles Avery and cargo.]

Chapline & Caldwell, for libellants.

King & Anderson, for respondents.

OPINION OF THE COURT. This action was brought to recover compensation for an alleged salvage service rendered by the libellant and others in the rescue of the cargo of the steamboat Charles Avery. The material facts are, that for several weeks prior to the 6th of February last, the said steamboat, ladened principally with flour in barrels and wheat in sacks, had been ice-bound at Hockingport, a short distance above the mouth of Hocking river, within a few feet of the shore of the Ohio river. About nine o'clock in the morning of the 6th of February, the ice in the river began to move, and, in its descent, struck the starboard side of the steamboat with such force as to make an opening some forty feet in length, and two feet in width, through which the water entered rapidly and caused the boat almost instantly to sink and settle on the bottom of the river. There was at that place about two and a half feet of water, and the river was rapidly rising. A part of the flour was stowed in the hold of the boat, a part on the lower deck, aft the boilers, and some three hundred and fifty barrels on the guards. The wheat, with the other portion of the cargo, consisting of twenty-one barrels of dried ginseng, and a quantity of rags and feathers, was also on the lower deck. At the time of the disaster, the master of the boat and three of the crew were present; and a Mr. Williams, acting apparently by the authority of the master, proposed to the persons then on the bank of the river, to assist in taking out and saving the cargo. These persons, numbering between fifty and sixty, of whom Spencer, the libellant, was one, immediately engaged in the work, and were assiduously and laboriously engaged from about half after nine o'clock in the morning till between four and five o'clock in the afternoon, when they ceased working, having taken out and placed on the shore eight hundred and ninety barrels of the flour, four hundred and seventy-seven bushels of wheat, and the ginseng, rags, feathers, etc., which made up the residue of the cargo. Eighty-six barrels of the flour were left in the hold of the boat, and were removed by other parties some days after the sinking of the boat.

It appears from the evidence that in the evening after the property had been rescued from the boat, Mr. Williams gave notice to those who had aided in the work, that he would pay them for their services; and thirty-three of the number applied for and received payment at a rate varying from $1.25 to $2 each. The other part of the company declined to receive pay, and they are, as the court is informed, claimants for salvage, although no one but the libellant Spencer, has commenced any proceeding to enforce this claim. The cargo was owned by several different persons, whose names are set out in the answer. They insist, by their counsel, that the service rendered by the libellant, and those acting with him, was not a salvage service for which they are entitled to compensation upon any principle of the maritime law. And this is the principal inquiry presented for the determination of the court.

It is very clear there was no apparent danger of the loss of life in the removal of the cargo. There was, indeed, a possibility that while the persons at work were engaged in removing the flour from the hold of the boat, it might have been torn to pieces by the pressure of the ice upon it; in which case they would have been in great danger. But as this result did not take place, there is no ground for assuming that there was any personal danger to the parties beyond the injury to health, which might result to those who worked in the water in the removal of the flour from the hold of the boat. It is, however, clear beyond all question, that a part, at least, of the cargo was in immediate and imminent danger of being irrecoverably lost. There is very little doubt, that if not removed, the flour upon the guards, and most probably all that was deposited on the deck, would have been carried away by the water. The river was rapidly rising when the boat sunk, and when labor was suspended in the evening, there was nearly four feet of water on the deck. It is equally certain that the injury to the cargo, from the action of the water, would have been somewhat in proportion to the length of time it was submerged. It would result that the damage was materially lessened by the promptness with which the property was removed from the boat.

Do these facts present a case which entitles the parties to a decree for salvage? It is a well-settled principle of the maritime law, that risk or danger of life is not a necessary element of a salvage service. It is true that where such risk or danger is incurred in saving property from destruction, it will place the salvors in a higher position of merit, and entitle them to a more liberal compensation for the service than would otherwise be accorded to them. But the controlling inquiry is, in salvage cases, was the property

in peril of being lost, and was it saved by the efforts of those claiming to be salvors? Salvage is defined to be, "the compensation allowed to other persons, by whose assistance a ship or its loading may be saved from impending peril, or recovered after actual loss." Abb. Shipp. (Ed. 1846) 659. In the case of Talbot v. Seaman [1 Cranch (5 U. S.) 1], 1 Cond. R. 229, the supreme court of the United States distinctly recognize this principle. The danger to the property must be real and imminent, and not merely speculative. In 1 Conk. Adm. 279, the doctrine is stated thus: "If the case be one demanding assistance, and it is effectually rendered in saving the vessel or cargo, or any part of either, from impending destruction or loss, a claim for salvage will be maintained." This doctrine was recognized by this court in the case of McGinnis v. The Pontiac [Case No. 8,801]. And it is also settled, that it is not material whether the salvage service was rendered spontaneously or by request, or whether with or without a previous contract between the owner or his agent and the salvors.

These principles, applied to the facts proved in this case, leave no reason for a doubt that the service rendered was a salvage service, for which compensation may be awarded by a court of admiralty. It is true the service rendered does not import the highest grade of merit. It lacks some of the elements necessary to give it this character. As before remarked, there was no apparent peril of life in the service; but it was promptly rendered, and laborious and exhausting while it continued, and effective in its results.

The measure of compensation in salvage cases depends wholly on the circumstances attending the service. Where there has been great personal exposure and risk, and it is certain that property has been rescued from inevitable destruction by the boldness and intrepidity of the salvors, a liberal allowance will be made. One-half of the property saved has been allowed in such cases. In others, a small per centum on the value has been deemed sufficient; and sometimes a sum in numero has been decreed. In Rowe v. The Brig [Case No. 12,093] that learned judge states the law on this subject as follows: "Cases may occur of such extraordinary peril and difficulty, of such exalted virtue and enterprise, that a moiety, even of a very valuable property, might be too small a proportion; and, on the other hand, there may be cases where the service is attended with so little difficulty and peril, that it would entitle the parties to little more than a quantum meruit for work and labor."

The value of the property rescued is also to be considered in estimating the amount of compensation for a salvage service. The evidence in the case before the court is not explicit as to this value. In his answer, the master of the steamboat states the entire cargo to have been worth about three thousand dollars. It would seem, however, from the evidence of the deputy marshal who made the seizure under the process of this court, and of witnesses who have testified as to the market value of the property, that the part rescued by the persons employed was not of less value than $6,500. Of this, the proportion saved from entire loss may be safely estimated at about $2,500. And it may be assumed from the evidence, that the increased damage to that part of the cargo not in immediate danger of being wholly lost, which would have resulted from its longer continuance in the water, would not be less than $1,000. On this basis, the actual benefit to the owners of the property, from the labors of those who aided in its rescue, amounted to $3,500. This result is obtained without reference to the chances of the loss of the entire freight of the boat, if it had not been promptly removed.

There is some difficulty in fixing the sum to be allowed as salvage in this case. It is clear the facts do not warrant a very high rate of compensation to the salvors, but it is equally clear that they are entitled to something beyond a mere quantum meruit allowance for their labor. As before noticed, thirty-three of those who aided in this service have abandoned their right as salvors by receiving pay from the owners. It is obvious that the proportion to which they would have been entitled, if they had not thus given up their right to salvage, can not be awarded to those having a right thus to claim. In settling a basis of a decree, the entire value of the salvage service is first to be ascertained, and from this is to be deducted the sum to which the persons paid would have been entitled, if they had not relinquished their claim as salvors. The balance will be the amount to be decreed as salvage. Upon the whole, it seems to the court that the equity of this case will be fully met by a decree for a gross sum of six hundred dollars to those who have not waived their rights as salvors by receiving payment for their services. A decree, finding this sum as the amount of salvage, and providing for its apportionment among the owners of the cargo, according to the interest of each, will therefore be entered. The distribution will be made in equal proportions to the libellant, and such other persons as within sixty days, by proper proceedings in this court, shall establish their right to a distributive share of said sum.

SPENCER (HOOD v.). See Case No. 6,665.

Case No. 13,233.

SPENCER et ux. v. SPENCER.

[1 Gall. 622.] [1]

Circuit Court, D. Rhode Island. Nov., 1813.

LOST INSTRUMENTS—WILL AFTER PROBATE—PROBATE—EFFECT OF IN RHODE ISLAND.

1. A will, after contestation and probate, was mislaid, and after nine years, a copy was allowed to be read to the jury in a real action for part of the land devised in the will.

2. Quære, if the probate of a will in Rhode Island be not conclusive, as well as to real. as personal estate. See Smith v. Fenner [Case No. 13,046].

[Cited in Harrison v. Rowan, Case No. 6,141; Tompkins v. Tompkins, Id. 14,091.]

[Cited in Bryant v. Allen, 6 N. H. 117.]

This was a real action brought by the plaintiffs [Reynolds Spencer and wife], in right of the wife, to recover her purparty by descent in her father's estate. The defendant [Ephraim Spencer], who is her brother, claimed the estate in question under a will of the father. It appeared in evidence, that the will was made in 1801, soon after which the testator died, and it was originally contested on the probate, before the town council (who have jurisdiction in this behalf in Rhode Island), and was finally approved on the appeal by the governor and council (the final appellate jurisdiction), in June, 1802; and that the defendant had ever since been in possession of the estate under the will; and no controversy arose under it until about 1811. The plaintiff, Reynolds Spencer, was a surety to the probate bond given by the defendant, according to law, on the final probate of the will. In the controversy before the probate courts, no doubt ever was made, as to the capacity of the testator or the actual execution of the will. The whole controversy turned on a legacy of $20, which it was supposed had been altered. The original will was not missed by the defendant until the close of 1810, when a suit was commenced by a co-heir; and though diligent search had been made, it could not be found. It was in the defendant's desk, the key of which was hung up in the room, and accessible to every body who came into the house. There was some slight imputation upon a sister, who had lived in the house several years, and had access to the desk, and had since left the house after some uneasiness: but the evidence on this head was extremely loose. The defendant offered to make an affidavit of the facts, as to the loss, and to submit himself to answer any interrogatories by the plaintiffs; which however the latter declined. The person, who originally wrote the will, and the subscribing witnesses, were in court, ready to prove the execution. The question to the court was, whether, under all the circumstances of this case, the production of the original will ought to be dispensed with, and an office copy admitted to be read to the jury.

Searle & Whipple, for plaintiffs.

Bridgham & Robbins, for defendant.

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

STORY, Circuit Justice. It is understood to have been the practice in Rhode Island, to consider the probate of a will conclusive only as to personal estate; probably from a misapplication of the rule, as to probates in the ecclesiastical courts in England. The decision in England rests on the ground, that the ecclesiastical courts have no jurisdiction, except as to personal estate. The law is otherwise in Rhode Island. Its probate courts have complete jurisdiction as to wills, in respect both to real and to personal estates. A will purporting only to affect real estate must still be submitted to their jurisdiction for probate. I have always understood, that a decree of a court of competent jurisdiction upon the very point in controversy is conclusive upon other courts, at least unless fraud be shown. It is on this ground, that an ecclesiastical probate is conclusive as to personal estate in England. And by parity of reasoning, in Massachusetts, where the general laws in respect to wills are almost the same as in this state, the regular probate of a will is held conclusive, as well as to real as personal estate. However, I do not mean to press the point; it will be time enough to decide it, when the case absolutely requires it. If the practice be founded in error, it ought to be corrected.

Under all the circumstances, I think the office copy of the will ought to be allowed as evidence. The will was originally contested before a competent tribunal, and approved; and the heirs acquiesced without a murmur for eight years at least. No doubt ever was whispered of the capacity of the testator or the regular execution of it. The plaintiff, Mr. Spencer, has borne testimony to its verity by becoming himself a party to the probate proceedings in its favor. There can be no conceivable motive for the defendant to suppress it, in a case where his whole title hangs upon it. It appears to have been carelessly kept, and as it seems to have been mislaid, and the party is willing to be interrogated, as to all the facts, I am of opinion that the copy should be read to the jury. We all know that papers, which are recorded, are scarcely ever kept with the same care, as those which are altogether private.

The plaintiffs then asked leave to discontinue, which was allowed.

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

SPENCER (UNITED STATES v.). See Cases Nos. 16,367 and 16,368.

SPENCER, The J. F. See Cases Nos. 7,315 and 7,316.

SPENCER OPTICAL MANUF'G CO. (WREN v.). See Case No. 18,062.

Case No. 13,234.

In re SPENSER.

[5 Sawy. 195; 18 Alb. Law J. 83, 153; 6 Reporter, 294; 1 N. J. Law J. 248; 2 Tex. Law J. 42, 116; 13 Am. Law Rev. 167; 3 Cin. Law Bul. 1003; 10 Chi. Leg. News, 355; 7 N. Y. Wkly. Dig. 29; 24 Int. Rev. Rec. 331; 7 Cent. Law J. 84.] [1]

Circuit Court, D. Oregon. July 8, 1878.

ALIENS—NATURALIZATION—MORAL CHARACTER—PARDON.

1. An alien, to be entitled to admission to citizenship, must first prove that he has behaved as a man of good moral character during all the period of his residence in the United States.

2. What constitutes good moral character may vary in some respects in different times and places, but a person who commits perjury does not behave as a man of good moral character and is not, therefore, entitled to admission to citizenship.

3. A pardon is prospective and not retrospective in its operation; and while it absolves the offender from the guilt of his offense and relieves him from the legal disabilities consequent thereon, it does not obliterate or wipe out the fact of the commission of the crime, so that it cannot be made to appear on an application to be admitted to citizenship.

Application to be admitted to citizenship.

The plaintiff in propria persona.

DEADY, District Judge. William Spenser, an alien, applies to "be admitted to become a citizen of the United States" under section 2165, Rev. St. From the evidence it satisfactorily appears that he duly declared his intentions and has continuously resided in the United States—the state of Oregon—at least since 1870. He is therefore entitled to be admitted to citizenship if it appears that during such residence "he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed towards the good order and happiness of the same." Rev. St. § 2165, subd. 3.

The proof shows that the applicant has resided in Oregon, near The Dalles, for more than eight years; that in 1876, and after he had declared his intentions, he was duly convicted in the circuit court of the state, for Wasco county, of the crime of perjury, committed by swearing falsely as a witness in a case in said court, in which he was a party, and sentenced to five years' imprisonment in the penitentiary; that after being in prison fifteen months and eight days he was unqualifiedly pardoned by the governor, upon, as the pardon recites, the petition of sundry citizens of Wasco county and because it appeared that there were doubts as to his guilt, and unless he was released from prison there was danger that he would lose his homestead.

Upon this state of facts two questions arise: 1. Has the applicant "behaved as a man of good moral character" within the meaning of the statute; and, 2. What is the effect of the pardon in this respect? In the first place, during what time is the behavior of the applicant open to consideration? The statute supra declares that "it shall be made to appear to the satisfaction of the court admitting such alien that he has resided within the United States five years at least * * * and that during that time he has behaved as a man of good moral character," etc. Is an alien who has behaved as a man of good moral character during the five years immediately preceding his application, but who had not so behaved during his residence in the United States prior thereto entitled to admission? I think not. The behavior of the applicant during all the time of his residence within the United States is material. The good of the country does not require, and it does not appear to be the policy of the law to promote, the naturalization of aliens who have at any time during their residence in the United States behaved otherwise than as persons of good moral character. The citizenship of the country is sufficiently alloyed and debased by the presence of immoral natives without the addition of those born in foreign countries.

The applicant must not simply have sustained a good reputation, but his conduct must have been such as comports with a good character. In other words, he must have behaved—conducted himself—as a man of good moral character ordinarily would, should or does. Character consists of the qualities which constitute the individual; reputation the sum of opinions entertained concerning him. The former is interior, the latter external. The one is the substance, the other the shadow. N. Y. Pen. Code, 120; 8 Barb. 603.

What is "a good moral character" within the meaning of the statute may not be easy of determination in all cases. The standard may vary from one generation to another, and probably the average man of the country is as high as it can be set. In one age and country duelling, drinking and gaming are considered immoral, and in another they are regarded as very venial sins at most. The only authorities I have been able to find upon this subject are the cases of Ex parte Douglas and Ex parte Sandberg, cited in 2 Bright. Fed. Dig. 25, from 5 West. Jur. 171. These cases hold that an alien who lives in a state of polygamy, or believes that polygamy may be rightfully practiced in defiance of the laws to the contrary, is not entitled to citizenship.

Upon general principles it would seem that whatever is forbidden by the law of the land ought to be considered, for the time being, immoral, within the purview of this statute. And it may be said with good reason that a person who violates the law thereby manifests, in a greater or less degree, that he

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 6 Reporter, 294, and 7 N. Y. Wkly. Dig. 29, contain only partial reports.]

is not "well disposed to the good order and happiness" of the country. Good behavior—that behavior for which a person reasonably suspected of an intention to misbehave, may be required to give surety, is defined to be conduct authorized by law, and bad behavior such as the law punishes. Bouv. Dict. verb. "Behavior"; 2 Bl. Comm. 251, 256. But perjury is not only malum prohibitum, but malum in se. At both the civil and common law it was classed among the crimina falsi, and wherever, as in this case, it affected the administration of justice, by introducing falsehood and fraud therein, it was, at common law, deemed infamous, and the person committing it held incompetent as a witness and unworthy of credit. U. S. v. Block [Case No. 14,609].

There can be no question, then, but that a person who commits perjury has so far behaved as a man of bad moral character. But it may be said that an alien who has otherwise behaved as a man of good moral character during a residence in the country of at least five years, ought not to be denied admission to citizenship on account of the commission in that time of a single illegal or immoral act. This suggestion is based upon the idea that it is sufficient if the behavior of the applicant was generally good—that the good preponderated over the evil. In some sense this may be correct. For instance, the law of the state prohibits gaming and the unlicensed sale of spirituous liquors. These acts thereby become immoral. But their criminality consists in their being prohibited and not because they are deemed to be intrinsically wrong—mala in se. Now, if an applicant for naturalization, whose behavior, during a period of five or more years, was otherwise good, was shown to have committed during that time either of those or similar crimes, I am not prepared to say that his application ought to be denied on account of his behavior. And yet it is clear that anything like habitual gaming or vending of liquors under such circumstances would constitute bad behavior—immoral behavior—and be a bar under the statute to admission to citizenship. But in the case of murder, robbery, theft, bribery, or perjury, it seems to me that a single instance of the commission of either of them is enough to prevent the admission. The burden of proof is upon the applicant to prove "to the satisfaction of the court" that during the period of his probation he has conducted himself as a moral man. But when the proof shows that he has committed an infamous crime, it is not possible, in my judgment, to find that his behavior has been such as to entitle him under the statute to receive the privilege and power of American citizenship.

What effect, if any, does the pardon have upon the application? By the constitution of this state (article 5, § 14) the governor has power to grant pardons, after conviction for all offenses, except treason, "subject to such regulations as may be prescribed by law." The Criminal Code makes no restrictions upon the power of the governor, except that he must first require the judge or district attorney who tried the case to give him a statement of the facts. Or. Civ. Code, c. 32. This pardon does not show that this statement was asked for or obtained, nor does it appear therefrom what gave rise to the alleged doubts as to the defendant's guilt. But this suggestion cannot affect the truth or operation of the judgment which estabished his guilt. So far then as this application is concerned, the matter stands thus: The applicant was duly convicted of perjury, and the governor, in the exercise of that mercy which belongs to him in his official character, has pardoned him for reasons of his own, that are immaterial to this inquiry.

The pardon is now produced by the applicant to show not only that his crime has been forgiven him, but that it never was, and therefore it cannot now, be relied upon to prove that he has not behaved as a man of good moral character during his residence in the United States. In Ex parte Garland, 4 Wall. [71 U. S.] 380, Mr. Justice Field speaking for a majority of the court says: "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eyes of the law the offender is as innocent as if he had never committed the offense." This is probably as strong and unqualified a statement of the scope and efficacy of a pardon as can be found in the books. And yet I do not suppose the opinion is to be understood as going the length of holding that while the party is to be deemed innocent of the crime by reason of the pardon from and after the taking effect thereof, that it is also to be deemed that he never did commit the crime or was convicted of it. The effect of the pardon is prospective and not retrospective. It removes the guilt and restores the party to a state of innocence. But it does not change the past and cannot annihilate the established fact that he was guilty of the offense. And such, I think, is the doctrine of the authorities cited in support of this opinion, namely, 4 Bl. Comm. 402; 6 Bac. tit. "Pardon," H. Blackstone's language is: "The effect of such a pardon by the king is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offense for which he obtained his pardon; and not so much to restore him to his former, as to give him a new credit and capacity." And the author goes on to state that a pardon does not purify the blood during the period it was corrupted by conviction, and gives the following illustration: "Yet if a person attainted receives the king's pardon and afterwards hath a son, that son may be heir to his father, because the father being made a new man might transmit new inheritable blood; though had he been born before the pardon he could never have inher-

ited at all." Bacon says a pardon makes the party, "as it were, a new man." It removes the punishment and "legal disabilities consequent on the crime." It restores his competency to be a witness, "but yet his credit must be left to the jury." From these authorities it is plain that a pardon does not operate retrospectively. The offender is purged of his guilt, and thenceforth he is an innocent man; but the past is not obliterated nor the fact that he had committed the crime wiped out.

Apply these principles to this case. By the commission of the crime the applicant was guilty of misbehavior, within the meaning of the statute, during his residence in the United States. The pardon has absolved him from the guilt of the act, and relieved him from the legal disabilities consequent thereupon. But it has not done away with the fact of his conviction. It does not operate retrospectively. The answer to the question: Has he behaved as a man of good moral character? must still be in the negative; for the fact remains, notwithstanding the pardon, that the applicant was guilty of the crime of perjury—did behave otherwise than as a man of good moral character.

The fact that the applicant cannot obtain title to his homestead, unless he is admitted to citizenship, cannot affect the consideration of the question. Doubtless, in this respect, the matter operates as a hardship upon him. But this only illustrates the truth of the proverb—"The way of transgressors is hard," and in the long run it is better for the world that it should be so.

The proof is not satisfactory that the applicant has behaved as a man of good moral character during his residence in the United States, but the contrary, and therefore the application is denied. But the applicant having no counsel, and the matter having been submitted without argument, and being now res judicata, if he shall be hereafter advised that there is probable error in this ruling, he may apply within a reasonable time to set aside the judgment denying his application, and for a rehearing thereof.

SPENSER (HASTINGS v.). See Case No. 6,-201.

SPENSER (STEWART v.). See Case No. 13,-437.

Case No. 13,235.

SPERRING et al. v. TAYLOR et al.

[2 McLean, 362.][1]

Circuit Court, D. Indiana. May Term, 1841.

PLEADING AT LAW—DECLARATION—BREACH OF CONDITION.

1. In a declaration on a marshal's bond, it is not necessary to aver that the penalty has not been paid.

[Cited in Wetmore v. Rice, Case No. 17,-468.]

2. The usual averment of the breach of the condition is sufficient.

[This was an action on a bond by Sperring and Laforgur against Taylor and others.]

Mr. Morrison, for plaintiffs.

Smith & Bright, for defendants.

McLEAN, Circuit Justice. The pleadings in this action are similar to those in the preceding case, and this suit is founded on the marshal's bond as in that one. It is unnecessary to review the points already considered and decided, but there is one new point raised in this case which will be examined.

It is objected to the declaration that it contains no averment that the penalty of the bond has not been paid. Was this averment necessary? This bond is taken in a large penalty to secure those who shall be injured through the default or negligence of the marshal. No one is entitled to recover on this bond more than an indemnity for the injury sustained. And every individual who suffers from the failure of duty by the marshal, has an equal right to sue on this bond. No one is entitled to recover the penalty, unless he shall show that he has suffered damages to that amount. It is true that the sureties on the bond cannot be compelled to pay more than the penalty. But they cannot discharge themselves by paying the amount of the penalty to any one, who shall recover on the bond a sum less than the penalty. So soon as the sureties shall pay to those who shall be entitled to it, a sum equal to the penalty in their bond, they may set up the fact as matter of defence, or it may, perhaps, be examined on motion that they be discharged. But it is not necessary, in bringing suit on a bond like this, to aver in the declaration the nonpayment of the penalty. An averment of the breach of the condition is sufficient. This principle was recognized in the case of State v. M'Clane, 2 Blackf. (Ind.) 192.

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

SPERRY (BLAKE v.). See Case No. 1,503.

Case No. 13,236.

SPERRY v. DELAWARE INS. CO.

[2 Wash. C. C. 243.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

MARINE INSURANCE—NEUTRALITY—CAPTORS—CONCLUSIVENESS OF CONDEMNATION—MASTER'S INSTRUCTIONS.

1. Action on a policy of insurance, dated the 27th of June, 1807, on goods on board the Little William, from Philadelphia to Tonningen, or Hamburg, if not blockaded; warranted American property, proof to be made here. The captain was instructed, "If you can ascertain and obtain permission to go to Hamburg,

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

from the cruising vessel at the entrance of the Eyder, you will proceed; but on no account attempt it, unless you are well assured that the blockade of the Elbe is raised." The vessel was captured by a British cruiser, six hundred miles from Tonningen, and was condemned. The captain did not deliver his letter of instructions to the captors, until some days after he had delivered the ship's papers. The vessel and cargo were condemned by Sir William Scott, as enemy's property. The stipulation in the policy, as to the place where proof is to be made in support of the warranty, is not set aside by the sentence of a foreign court against the neutrality, but the same may be vindicated here, notwithstanding such sentence.

[Cited in The Delta, Case No. 3,777.]

2. The instructions of the owner, under which the master of a vessel, sailing to a port known to be blockaded, is directed to govern himself by information to be obtained at the mouth of the blockaded port, justify suspicions of an intention to violate the blockade; but these should cease, when it is manifest that the conduct of the captain was legal and fair.

3. If the instructions to the master violated any of the rules established in the court of admiralty of England, although such rules were against the laws of nations, the instructions should have been communicated to the underwriters.

4. The instructions of the plaintiff to the master, did not violate any of these rules, the vessel being destined to Tonningen, unless she should obtain permission at the entrance of a place not blockaded, to proceed to Hamburg.

5. The conduct of the captain, in not delivering the letter of instructions when captured, was imprudent; but was not such as should affect the assured.

The policy in question, was effected on the 27th of June, 1807, on goods, the property of the plaintiff [F. W. Sperry], an American citizen, on board the Little William, belonging to Jacob Sperry, also an American citizen, at and from Philadelphia to Tonningen, or Hamburg, if not blockaded; warranted American property, proof whereof to be made here. She sailed on the voyage insured, on the 3d of July 1807. On the 30th of June, the owner of the vessel, who was also the agent of the plaintiff, wrote a letter of instructions to his captain, in which he directs him "to proceed to Tonningen, and on arrival, to forward, by express, his letters to Mr. Vogell of Hamburg, to whom (he says) you are consigned, and under whose care you will place yourself. If you can ascertain and obtain permission to go to Hamburg from the cruising vessels at the entrance of the Eyder, you will proceed; but on no account attempt it, unless you are well assured that the blockade of the Elbe is raised." On the 31st of July, the Little William was captured in the British Channel, six leagues to the southward of Stare Point, and carried into Plymouth. The captain delivered to the captors all his papers, except the letter of instructions, and so stated in answer to one of the standing interrogatories; but it was afterwards given up, and was made use of in the cause. It appeared in evidence, that the place of capture was about six hundred miles from Tonningen: that Heligoland, a small island in the North Sea, inhabited by fishermen and pilots, belonging to Denmark, where there is a light-house, kept at the expense of the Hamburgers, is nineteen miles from the mouth of the Elbe, and twenty from the mouth of the Eyder: that it is the dividing point, where all vessels destined to either of those rivers, or to the Weser, stop to take a pilot; and one of the witnesses said, that it is considered as being at the mouth of the Eyder: that Hamburg is about fifty-six miles from Cruxhaven, and this about twenty-five above the mouth of the Elbe: that the mouths of the Elbe and Eyder are about twenty miles apart; and that during the blockade, goods were permitted to be carried along shore from Hamburg to Tonningen; and sometimes they were carried over land from Hamburg to Tonningen, about eighty miles: that cruising vessels, not forming the blockading squadron, were frequently met with to the westward and southward of Heligoland, and sometimes to the eastward. The captain, upon his examination before the high court of admiralty, stated his destination, as mentioned in his letter of instructions, and that he intended to obtain information, whether the blockade was raised at Heligoland, and there to determine as to the course he should take; but on no account to go to the Elbe, unless he should there understand that the blockade was raised. It also appeared by the depositions of Vogell and a Mr. Sperry, at Hamburg, that they received letters from Jacob Sperry, apprizing them of this shipment; that the vessel was to go to Tonningen, unless the blockade of the Elbe was raised, and directing them to prepare a return cargo. That in consequence of these letters, they sent forward a cargo from Hamburg to Tonningen, and were afterwards obliged to ship it in another vessel, having heard of the capture of the Little William. There were many shippers of the cargo sent out in this vessel, and by all the bills of lading and invoices, it appeared that the destination was to Tonningen. The ship herself, and part of Jacob Sperry's cargo, were not insured. On the 23d of November, the ship and cargo were condemned, generally, as enemy's property. On the 12th of November, a regular abandonment was made and refused. The defendants' counsel offered to read the deposition of a clerk of one of the proctors in the court of admiralty, concerned in the cause there, in order to show what were the grounds assigned by Sir W. Scott, in delivering his opinion for the sentence of condemnation. This was at first opposed, but at length consented to by the plaintiff's counsel. The ground assigned was, that an American vessel, sailing to a port known to be blockaded, ought to inquire at some English or neutral port, whether the blockade is still subsisting, and not to do so from the blockading squadron at the mouth of the river so invested. That in this case, the instructions confined the captain to inquiries to be made of the cruising vessel, (in the singular,) at the mouth of the Eyder, which must mean the northernmost of the vessels, forming the

blockade. Of course this amounted to a breach of the blockade. In the copy of the letter of instructions, appearing on the record of the proceedings, this word is written "vessel." In the copy-book of Jacob Sperry, it is written "vessels," in the plural, and his clerk stated that he copied the letter truly.

It was objected, by the defendants, to the recovery: First, that the sentence of the court of admiralty, condemning this property for a breach of blockade, was conclusive; and that the clause added to the warranty of neutrality, that proof was to be made here, only applied to the property being neutral, but not to collateral points, such as the not conducting as a neutral. Secondly, that the sailing with a knowledge of the blockade, under instructions to ask permission and obtain information of the blockading squadron, was, according to the law of nations, a breach of blockade; that it appeared by the evidence in the cause, that the information was to be obtained from the blockading squadron. Thirdly, that the letter of instructions was material to the risk, and ought to have been communicated. Heligoland, the dividing point, is at the mouth of the Eyder, and so near to the Elbe, that it would of course be the place, about or near to which the blockading squadron would be. There, then, the inquiry was to be made. It was necessarily to be made of the vessels forming the blockade, because none others could grant permission to enter the Elbe. These two facts, then, bring the case precisely within the principles laid down by Sir W. Scott, in the cases of The Betsey [1 C. Rob. Adm. 332] and that of The Posten [note to 1 C. Rob. Adm. 332], decided in 1799, and that of The Spes and The Irene [5 C. Rob. Adm. 76], decided in 1804. These cases were, or ought to have been, known to the insured; and, therefore, his letter of instructions exposing the property to this peril, ought to have been communicated. On the subject of concealment, was cited 7 Term R. 162. Fourthly, the conduct of the captain, in omitting to surrender his letter of instructions to the captors, increased the danger of confiscation, for which the insured is liable. 2 C. Rob. Adm. 28; 3 C. Rob. Adm. 143, 153. To prove that parol evidence was admissible to explain the ground of condemnation, was cited 2 Doug. 554; [Vasse v. Ball] 2 Dall. 272; 7 Term R. 527; Dederer v. Delaware Ins. Co. [Case No. 3,733], in this court.

For the plaintiff, it was argued, that the destination of this vessel, under all the circumstances of the case, did not amount to a breach of blockade. Vattel, bk. 3, c. 7, § 117. Intention to break a blockade, without an attempt, is not sufficient. Fitzsimmons v. Newport Ins. Co. [4 Cranch (8 U. S.) 185], in the supreme court of the United States. Sailing to a blockaded port, knowing it to be so, is not a breach. 3 Caines, 235; 5 C. Rob. Adm. 76. The instructions, it was contended, were not material; because, in this case, the inquiry was not to be made of the blockading squadron at the mouth of the Elbe, but was to be made at the mouth of the Eyder. As to the conduct of the captain, this was not a ground of condemnation.

THE COURT stopped the counsel, as to the conclusiveness of the foreign sentence, observing, that they adhered to what was said in the case of Calbreath v. Gracy [Case No. 2,295]. The stipulation, as to the form in which the proof is to be made, is co-extensive with the warranty of neutrality.

Mr. Levy, Jared Ingersoll, and Charles J. Ingersoll, for plaintiff.

Rawle, Coudy & Tilghman, for defendants.

WASHINGTON, Circuit Justice (charging jury). For the satisfaction of the parties, and particularly of the one against whom the court will decide, it may be proper to observe, that in few instances have we seen a case where either party was more excusable for coming into a court of justice, than the present. The court has felt extreme doubt upon one of the points, and our opinion, which is now settled, has wavered considerably, during the very able discussion which we have heard. Whether the decisions of Sir W. Scott, as given in the cases cited from Robinson, are, to the extent to which they are contended to go, agreeable to the law of nations, may well be doubted; there is, in our opinion, less room to doubt as to the application of those principles to the case now under consideration. As a rule of evidence, there can be no reasonable objection to the doctrine laid down in this case. It certainly is a very suspicious circumstance, that a neutral vessel, even though it be an American, should sail upon a destination to a port known to be blockaded, with instructions, or with a known intention to be governed, as to her ulterior progress to that port by the information she might obtain at the mouth of the river, from the vessels forming the investment. It might well be said, that your coming here to ask a foolish question, or to solicit a permission so unlikely to be granted, is strong evidence that you meant to go in, if time and opportunity had offered. But to consider that as an actual breach of blockade, which is only evidence of an intention to commit a breach, seems to extend a mere measure of precaution and of preventive legal policy, (as the judge expresses himself in one of the cases cited,) beyond the necessity which created the rule. In this case, the light of heaven was not more clear, than the honest neutral destination of this vessel, and of course this court must say, that the foreign court was not warranted in pronouncing that her conduct amounted, really or technically, to a breach of the blockade of Hamburg. Indeed, we have the authority of Sir W. Scott himself for this opinion. In the case of The Betsey [supra], decided in May, 1799, her destination was to Amsterdam, a port known to be blockaded before she left America; and the instructions were to go to

Hamburg, if she should not be so fortunate as to get into Amsterdam, owing to the English ships still keeping up the blockade, which, it is said, "you will know by speaking those which lie off." This was as strong a case as could well have occurred for the application of the rule, and yet, in consideration of the fairness of the transaction, appearing from other evidence, she was acquitted. In the present case, it is obvious that the judge was entirely influenced by the circumstance, that the inquiry was to be made, and the permission obtained, from the cruising vessel at the entrance of the Eyder, which he construed to mean one of the blockading squadron. But, if this had been the meaning, we cannot conceive how this decision is to be reconciled with that just quoted. Whether the expression in the original letter was "vessel," or "vessels," may properly be left to the jury to decide, upon the evidence; but, even if it were the former, we think it is obvious that the latter was intended, from the manifest absurdity of pointing to a particular vessel, of which it was impossible the American owner could have had any knowledge. Upon this point, therefore, we are of opinion, that the warranty of neutrality was not falsified.

The important, and by far the most difficult question, still remains to be considered. Did the letter of instructions expose the property to a risk not contemplated by the policy? If it did, and if it was material in your opinion, then the policy is void. In this point of view, it is immaterial whether the decisions of Sir W. Scott, in 1799 and 1804, were consistent with the law of nations, or not. If not so, still the danger of capture and loss was as certain, as if the rule laid down had been in all respects correct. What was this risk?—That a vessel, destined to a blockaded port, known before her sailing to be blockaded, with instructions to go elsewhere, only in the case of her being turned away by the blockading squadron when on their station, is considered as guilty of a breach of blockade, and subject to confiscation. This rule was known to the insured and to the underwriters, or ought to have been known to them; but whether the vessel was placed in a situation, where the rule would apply, was known only to the insured. It is in vain for the insured to say, that he mistook the meaning of those decisions, or that he did not suppose the instructions were at all material to be known by the underwriters. If the case were even doubtful, it was his duty to give to the other contracting party, equally with himself, an opportunity of judging. If he has acted wrong, though without intention, and is of course innocent in a moral point of view, so are the underwriters; and the rule is clear, that if one of two innocent persons must suffer a loss, he who has occasioned the loss must bear it. The question then is, did this letter expose the property to the risk, of which both parties are presumed to be apprized? Let it be supposed that the author of this letter, at the time he wrote it, had Sir W. Scott's decisions before him. In the case of The Betsey, he would discover, that an American vessel, destined to a blockaded port, known before she sailed to be in that situation, and with directions to make inquiries of the blockading squadron lying off, was acquitted. This of course would excite no alarm. In the case of The Posten [supra], he would discover, not only that she was a European vessel, and in this respect less favoured than an American vessel, but that her destination was to a blockaded port, and that she was to receive information from the blockading squadron on that destination. He would of course think it not prudent, to give such directions to the captain of his vessel. Looking upon the case of The Spes and The Irene [supra] he would observe that these too were European vessels; that the owners knew of the blockade of the Elbe, yet instructed their captains to continue their course to Hamburg, till they should be warned, and turned away.

With these cases before him, what were the orders given in this case, by the owner of this vessel?—To proceed to Tonningen, a port not blockaded; but in case the captain could ascertain and obtain permission to go to Hamburg, he was in that case to go there. From whom, then, was he to obtain information and permission? The answer is obvious—permission from some of the blockading squadron, in case he should meet with any at the entrance into the Eyder—information from any other cruiser in the same place, provided none of the blockading squadron should be there. Where was the information and permission to be obtained?—At the mouth of the Eyder. But, to constitute this offence, according to the decisions I have alluded to, it was not sufficient, that the inquiries should be made of the blockading squadron, but it must have been at the mouth of the river; for it is clear, that if they had been met with at a distance from their station, there was no objection to the inquiry being then made. But in this case, it was to be made of them, or of any other cruisers, not at the mouth of the Elbe, the invested river, but at the mouth of the Eyder, which was not invested, and where it was lawful for this vessel to go. The difficulty which weighed with the court, for a considerable time, was produced by the evidence of one of the witnesses, who stated that Heligoland was considered as at the mouth of the Eyder; which seemed to produce some doubt, at least, whether, if the inquiry was to be made of one of the blockading squadron, at a place considered to be the mouth of the Elbe, as well as of the Eyder, the case was not within the principle laid down in 1804. But, when the geographical situation of these places is considered—that Heligoland is in the direct and legitimate course to Tonningen, and that from that spot the courses to the two rivers diverge; that, in point of fact, this little island is twenty miles distant from the real junction of the Eyder and the Elbe, with

the sea; and that the expression is not, that the information is to be obtained at the mouth of the Elbe, or even at Heligoland, but expressly at the entrance of the Eyder—it is plain, that the intention was, that she should look out for some vessel to the eastward of Heligoland, and in a course which she was permitted to pursue, and different from that which would have led her to the mouth of the Elbe. If the blockading squadron had discovered her pursuing that course, it would have been obvious, that she was not intending, or in a situation to bring herself within the letter or the meaning of the rules laid down by Sir W. Scott. Had her course been towards the mouth of the Elbe, the case would have been different. Upon this point, therefore, we are of opinion that the letter of instructions did not violate any decisions in England, prior to this insurance. As to the conduct of the captain, although certainly imprudent, yet it was not such as ought to affect the insured. This was not, in the slightest degree, relied upon by the court, as contributing to the condemnation of the property. It is incidentally glanced at by the judge, more in the spirit of admonition, than of severe censure.

Verdict for plaintiff.

Case No. 13,237.

SPERRY et al. v. ERIE RY. CO.

[6 Blatchf. 425.][1]

Circuit Court, S. D. New York. May 31, 1869.

CHAMPERTY — HOW PLEADED — MOTION TO TAKE FROM FILES.

An objection that a bill in equity was filed under an agreement made between the plaintiffs and certain other parties, which is void for champerty, ought to be raised formally, by answer, and not by a motion to take the bill from the files.

[This was a bill in equity by Elihu Sperry and Anna Sperry against the Erie Railway Company.] Motion by the defendants to take the bill of complaint in this suit from the files of the court, and to set aside the service of the subpœna therein, on the ground that the bill and the subpœna were an abuse of the process of the court, and a fraud thereon, and that the suit partook of the nature of maintenance.

William W. McFarland, for plaintiffs.
Clarence A. Seward, for defendants.

BLATCHFORD, District Judge. The ground of this motion is, that the bill was filed under an agreement made between the plaintiffs and certain other parties, which is void for champerty. I do not think this is the proper mode of taking the objection. It ought to be raised formally, by answer, so that plenary proofs may be taken in regard to such an issue, and the right of review in regard to it be secured to both parties. If the motion were to be granted, the plaintiffs would be without remedy. The motion is denied.

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

SPERRY (KENOSHA & R. R. CO. v.). See Case No. 7,712.

SPERRY v. LOGAN. See Case No. 13,238.

Case No. 13,238.

SPERRY v. RIBBANS et al.

SAME v. LOGAN et al.

[3 Ban. & A. 260;[1] 1 N. J. Law J. 115.]

Circuit Court, D. New Jersey. March, 1878.

PATENTS—PRELIMINARY INJUNCTION—LACHES.

1. Where a patentee had knowledge of the infringement for nearly two years before applying for a preliminary injunction, and had warned the defendants that they were infringers, a motion for such injunction was denied.

[Cited in Kittle v. Hall, 29 Fed. 511; Pope Manuf'g Co. v. Johnson, 40 Fed. 585.]

2. Patentees must not expect from the court a greater degree of diligence than they themselves exhibit.

[These were bills in equity by John Sperry against Robert C. Ribbans and others and Theodore N. Logan and others, to enjoin the infringement of letters patent No. 40,507, granted to complainant November 3, 1863.]

F. C. Nye, for complainant.
John Whitehead, for defendants.

NIXON, District Judge. These are motions for preliminary injunctions in the two cases above stated. They are by the same complainant against different defendants; but as they involve the same questions and have been argued together, they will be considered and decided together.

The application is to enjoin and restrain the defendants, "provisionally and during the pendency of the suits, from making, using or vending to others to be used, any boxes such as they have heretofore made or sold, or substantially the same as, or containing or embodying or making use of what is claimed substantially," in certain letters patent No. 40,507, "for improvement in manufacturing boxes," dated November 3d, 1863, and issued to the complainant. There has been no adjudication in favor of the validity of the patent; and the counsel of the complainant relies mainly upon the long acquiescence of the public in his possession and use of the same, as a sufficient ground to authorize the court to grant the provisional injunction asked for.

The defendants, in their answers and affidavits, contend that the second claim of the said patent, which is alleged to be infringed, is not only void for want of novelty,

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

but is bad in law, because there is nothing in the specification, drawings or models, which indicates any method of manufacturing a box from a single piece of wood. These, and a number of other questions, were ably discussed on the argument; but one fact appeared, which seems to the court so decisive of the pending motions, that it is unnecessary, at the present stage of the case, to enter into an examination of the validity of the patent—an inquiry always to be avoided, if practicable, until the final hearing.

That fact was this: the complainant, who is also the patentee, learned, as early as the spring of 1876, that the defendants, George A. Mannie & Co., were manufacturing, and claimed the right to manufacture, the boxes now complained of as an infringement of the second claim of his patent. He states that he saw them and warned them that they were infringers. They would not desist, but insisted upon their right to continue the manufacture and sale. They did continue, and became, with the knowledge of the complainant, the largest producers of wooden boxes of any manufacturers in the market. The complainant quietly acquiesced for nearly two years, and did not serve the defendants with notice of their motions, until about three weeks ago, to wit: on the 6th and 7th of March, 1878.

Patentees must not expect from the court a greater degree of diligence than they themselves exhibit. Under the rules, these cases will be ready for final hearing at the next term of the court. Since the complainant has voluntarily acquiesced in the alleged infringement for twenty-two months, it is not unreasonable that the court, by refusing to interfere, should compel an involuntary acquiescence for six months longer; and especially so, as there has been no suggestion that the defendants are unable to respond in damages for the legal consequences of their acts.

The motion, in each case, is denied.

SPERRY (UNITED STATES v.). See Case No. 16,369.

Case No. 13,238a.

The SPES.

[Nowhere reported; opinion not now accessible.]

Case No. 13,239.

In re SPEYER et al.

[6 N. B. R. (1873) 255;[1] 42 How. Pr. 397.]

District Court, S. D. New York.

BANKRUPTCY — POWER OF REGISTER OVER FUNDS OF BANKRUPT—CONTEMPT.

A register may order bankrupts to hand over to his custodian funds in their hands. Disobedience to such an order adjudged a contempt, for which an attachment was issued from the court.

[Cited in Re Allen, Case No. 208; Re McKenna, 9 Fed. 29; U. S. v. Anonymous, 21 Fed. 770.]

The above named bankrupts [F. & A. Speyer] filed their petition to be declared bankrupts on the fourth day of January, eighteen hundred and seventy-one. In their schedules they set forth that the sum of one thousand three hundred and ten dollars and five cents in money was in their hands. The register in charge appointed Mr. LeRoy T. Gove custodian of the estate during the interim and until the assignee should be elected. The custodian thereupon demanded the said money of the bankrupts, and was informed by them that one of the bankrupts—having the money in his pocket—had been robbed of the same on the morning after filing the said petition. Whereupon the said custodian summoned the bankrupts before the register, and proceeded to examine them concerning the same. Upon this testimony so taken, the register made an order that said bankrupts hand over to the said custodian the said sum of one thousand three hundred and ten dollars and five cents within twenty-four hours after the service of said order on them. This order was duly served on the bankrupts; they failing to comply therewith, the said custodian moved the court before the district judge on notice to the bankrupts for an order that an attachment issue against them as for a contempt, for a disobedience to the order of the register. Whereupon the court referred the matter back to the register to take such testimony as the said bankrupts might offer by way of purging the alleging contempt. Testimony was then taken on the part of the plaintiffs, whereupon the register certified the case.

By ISAIAH T. WILLIAMS, Register:

I, the undersigned register in bankruptcy, to whom the matter of the alleged contempt in this case was referred by the order of this honorable court, bearing date the fourth day of February, eighteen hundred and seventy-one, and hereto annexed, do hereby certify and report to this honorable court, that I have been attended by the said bankrupt, Abraham Speyer, and his counsel, Dubois Smith, Esq., and that I have taken all the testimony offered by him under said order, to wit: The testimony of the said Abraham Speyer, and Frederick Speyer, together with further testimony, of the said LeRoy T. Gove, Esq., all of which is hereto annexed, and herewith returned to this honorable court. And I further certify that upon a careful examination of said testimony, I am unable to accept the statements of the said bankrupts, as affording the true reason why the said sum of one thousand three hundred and ten dollars and five cents was not paid over to the said custodian on his demand, nor was there anything in the manner of either of the said bankrupts,

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[1] [Reprinted from 6 N. B. R. 255, by permission.]

while under examination calculated to inspire confidence in their statements. I cannot entertain the slightest doubt that the loss of said money is a mere pretence on the part of the said Abraham Speyer. I therefore certify to this honorable court, that in my opinion the order of the court should be forthwith entered, committing the said Abraham Speyer to the county jail of the county of New York until he shall have paid over to the said custodian the said sum of one thousand three hundred and ten dollars and five cents, with interest thereon from the sixth day of January, eighteen hundred and seventy-one, besides the costs of this proceeding, to be adjusted before the register in charge of the said case.

BLATCHFORD, District Judge. Enter an order herein in accordance with the conclusions of the register.

Case No. 13,240.

SPEYER v. The MARY BELLE ROBERTS. EGGERS v. SAME. CHAUNCEY v. SAME.

[2 Sawy. 1.] [1]

District Court, D. California. Feb. 10, 1871.

SHIPPING—DAMAGE TO GOODS—CARRIER'S FAULT—PERILS OF SEA.

Where goods arrived in a damaged condition, and it appeared that the damage was in great part caused by the carrier's fault, but that damage, to some extent, would probably have been caused by perils of the sea encountered by the vessel, but to what extent the carrier was unable to show; *held*, that he was liable for the whole.

[Cited in brief in Fleishman v. The John P. Best, Case No. 4,861. Cited in The Shand, 16 Fed. 572; The Tommy, Id. 608.]

[These were libels for injury to goods, by Morris Speyer, George H. Eggers, and H. N. Chauncey against the Mary Belle Roberts.]

Milton Andros, for libellants.

McAllisters & Bergin, for claimant.

HOFFMAN, District Judge. The libels in the above cases, which by consent were tried together, were filed to recover damages for injuries to goods shipped on the above vessel to be transported from Hamburg to this port. The injury to the goods being proved, the carrier offered evidence tending to show that it was occasioned by perils of the sea. The libellant then produced testimony tending to prove as averred in the answer, that the damage was caused: (1) By careless and negligent stowage of the cargo. (2) By the reason of the insufficient and defective condition of the scuppers when the vessel commenced her voyage. (3) By sweat and moisture arising from insufficient ventilation, and the neglect of the master, while at Falmouth, (a port of refuge he had sought to escape a gale during which the vessel had made a great deal of water) to remove the hatches or take any measures to dry the cargo, and, also, by his neglect during the voyage from Falmouth to take off his hatches in order to dry and ventilate the cargo.

The evidence shows beyond controversy, that shortly after leaving Hamburg, the vessel was exposed to sea perils of an unusual character. The severity of the gale, the ugly cross-sea, the straining and leaking of the ship, the long and ineffectual pumping by the crew, and their exhausted condition in consequence, their application to the master to seek a port of refuge, and his final determination to do so, after consultation with the mate, are established by the concurrent testimony of all on board.

It is also, I think, evident that the vessel was well provided, and in a seaworthy condition, when she left Hamburg, with the exception that there was a hole in one of her scuppers. It was strenuously urged at the hearing that, as the scupper, at the place where this hole was found, passed through solid timber, but little water could have reached the cargo, and that, therefore, no considerable part of the damage can be attributed to this defect. And such would seem to be the fact, if the statements of the witnesses, as to the precise position of the hole in the scupper, be accepted.

On the other hand, the master, in his protest, seems to ascribe the greater part of the damage to this very cause. His statement is: "On this day had an examination, found the port scupper had been broken off at some time in the severe weather encountered, and that the sea had free access to the vessel through this scupper."

This statement contains two errors: First, the hole in the scupper was discovered, not after the arrival of the vessel at Falmouth, but some time previously, and during the gale; second, there is no reason to believe that it was made during the gale, or at any time after the departure of the vessel. Its origin was ascribed by the master and officers, either to an injury inflicted while clearing the scupper of ice, or else made by a boat hook in the hands of some lighterman along side the vessel at Hamburg.

In the view I take of the case, it is not necessary to attempt to determine (if that were possible) how much of the injury to the cargo is to be attributed to this cause. That some of it was due to it, cannot, I think, be denied; but probably no very considerable amount when compared with the total damage.

Some attempt was made to show that the leak under the grub-beam was caused by defective caulking. I think, however, under the proofs, that the straining and working of the ship in the very severe storm she encountered, may be accepted as the cause of this leak.

But the most important allegations of the libel with regard to the stowage of the cargo

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

and the insufficiency of the dunnage, appear to be clearly established by the proofs.

A large number of witnesses, including the port warden and other experts, concur in the statement that the dunnage to the cargo, especially at the bilges, was wholly insufficient. The master himself seems to admit that the cargo was not stowed as he directed, nor, we may infer, as he considered properly. He states that when the stevedores were stowing the cargo he was down with them as often as he could be—perhaps, one third of the time. That he gave orders to break out cargo when he did not think it was stowed properly—"This happened at least a dozen times, probably many more, my orders were obeyed whilst I was there. I am satisfied from the breaking out of the cargo here that the cargo was stowed back as it originally was. I mean that after I had left the hold they put things back as they were before." I do not deem it necessary to recapitulate the names of the numerous witnesses who confirm the conclusion which would naturally be drawn from these admissions of the master. Some of them do not hesitate to express the opinion that the greater part of the damage was caused by insufficiency of dunnage.

That the effect of a want of dunnage would be to expose the cargo to injury from water running down the sides and also to increase the damage from water which might collect in the hold, was abundantly proved and is obvious without proof. The very object for which dunnage is used is to protect the cargo from injury by being wetted. That the cargo would have sustained, even if properly dunnaged, some injury from the unavoidable effect of sea perils encountered by the vessel, and her consequent leaking, must be admitted. But what would have been the extent of that injury, and how much of the damage is to be attributed to each cause, it is impossible now to ascertain.

The question thus arises: Is the carrier liable to make good the whole damage sustained, when the proofs show that part of it was occasioned by a cause for which he was not responsible, and part was caused by his own negligence, but he is unable to show how much was due to either cause separately? To exonerate a carrier, prima facie, from the liability assumed by him under his bill of lading, it will be sufficient to show that the immediate cause of the injury was a peril of the seas, or other cause for which he is not responsible.

But after this proof has been given, it is competent for the shipper to show that the loss might have been avoided by reasonable skill and diligence, in other words, that the loss would not have occurred except for the carrier's negligence. Clark v. Barnwell, 12 How. [53 U. S.] 280. In such cases it has been held that the inquiry is, did the want of skill of the master and crew contribute in any degree to the loss? And that the carrier must show, not that the loss might have happened if the act complained of had not been done, but that it must have happened.

Thus when the immediate cause of the loss was the sudden and unexpected rising of a river to an unprecedented height, and it appeared that if the goods had been forwarded without unreasonable delay they would not have been exposed to the danger, it was held that this negligence of the carrier rendered him liable for a loss of which the immediate cause was a vis major. In Williams v. Grant, 1 Conn. 487, the court says: "And in cases of this description carriers may be liable for a loss arising from inevitable necessity existing at the time of the loss, if they have been guilty of a previous negligence or misconduct by which the loss may have been occasioned * * * It is a condition precedent to the exoneration of carriers that they should have been in no default, or, in other words, that the goods of the shipper should not have been exposed to the peril, or accident, which occasioned the loss by their own misconduct, negligence, or ignorance. For though the immediate or proximate cause of the loss may have been what is termed act of God, or inevitable accident, yet, if the carrier unnecessarily exposes the property to such accident, by any culpable act or omission of his own, he is not excused. Per Gould, J. It is evident, therefore, that in this case the carrier is liable for all injuries which, though immediately caused by a peril of the sea, would not have occurred had not his own negligence contributed to produce the injurious result. The bad stowage of the cargo was, as to this damage not the causa causans but the causa sine qua non and for the effect of this cause he is liable.

The real difficulty in the case arises from the fact which, however, is not conclusively established, that the cargo would have sustained some damage even if it had been properly stowed; but how much cannot be known. We are thus forced to choose between two alternatives, either to hold the carrier responsible for damages, a part of which he is not accountable for, or else to deny to the shipper any compensation for losses, which, in great part, were caused by the carrier's fault.

The former alternative must, in my opinion, be adopted. By his contract, the carrier promised to deliver the goods in like good order and condition as when received, unless prevented from so doing by one of the excepted perils. The cargo being found to be damaged, the burden of proof was on him to show that the loss was occasioned by one of the causes which, by law and the terms of his contract, afford an excuse for its non-performance. It is not enough that he show that a part of the damage was so caused, while the remainder was caused by his own negligence. To excuse himself for that portion of the loss for which he is not liable, he must show how much that portion is; and, unable to exonerate himself in toto, he should establish the degree and extent of the exoneration to which he is entitled.

If he fails to do this, it seems to me that he must be held responsible for the whole damage.

If these views are correct, it is unnecessary to consider how far the master was in fault by neglecting to open his hatches, and attempt to dry and ventilate the cargo while the ship lay at Falmouth, or during his subsequent voyage.

The master, during the voyage, is undoubtedly bound to take all possible care of the cargo, and "he is responsible," says Mr. Chancellor Kent, "for every injury which might have been prevented by human foresight, and prudence, and competent naval skill." 3 Kent, Comm. p. 213; 1 Pars. Shipp. & Adm. 262; [Clark v. Barnwell] 12 How. [53 U. S.] 280; The Gentleman [Case No. 5,324].

Something must, however, be left to the master's discretion and sound judgment; and, in the present case, the evidence hardly justifies the conclusion that the practice of taking off hatches in fair weather on a voyage from Europe or the Eastern ports is so universal, safe and proper a means of ventilating the cargo, as to make the ship responsible, when it is not done, for all the damage by sweat sustained by the cargo, especially when it is apparent that that damage could have been only partially prevented, and, perhaps, to a very inconsiderable degree by any such precautions. With respect to the duty of taking off the hatches at Falmouth, the case is stronger, but the conclusion arrived at, in regard to the liability for the negligent stowage, renders the decision of the point unnecessary. The damages proved by Morris Speyer are $14,682.56; by Eggers & Co., 1,862.19; by Chauncey & Co., 321.99. It is possible, however, that some of these amounts may be slightly erroneous. If so, I am ready to correct them if the error be pointed out.

Case No. 13,241.

SPICER et al. v. WARD et al.

[3 N. B. R. 512 (Quarto, 127).] [1]

District Court, D. Rhode Island. 1870.

BANKRUPTCY—GENERAL ASSIGNMENT—ESTOPPEL.

1. A general assignment by an insolvent firm of all the firm property for the benefit equally of all its creditors, untainted by actual fraud, is nevertheless an act of bankruptcy, as being, in contemplation of law, made with intent to defeat or delay the operation of the bankruptcy act [of 1867 (14 Stat. 517)].

[Cited in Re Marter, Case No. 9,143; Globe Ins. Co. v. Cleveland Ins. Co., Id. 5,486.]

[Disapproved in Haas v. O'Brien, 66 N. Y. 602.]

2. Treating with the assignee and bankrupts by creditors, with an offer to assent to the assignment if the assignee should be changed, does not estop creditors from proceeding in bankruptcy, though it is possible for creditors so to act as to be estopped in such a case.

[Cited in Re Williams, Case No. 17,706.]

[This was a proceeding in bankruptcy by Spicer & Peckham against Ward & Trow.]

KNOWLES, District Judge. This is one of the many cases in which the points presented for consideration are neither so novel, nor so disputable now, in 1870, as to require, or even to warrant a very elaborate statement on the part of the court, of the grounds of its decision. The petitioners charge against the respondents three certain acts of bankruptcy. These, or some one of them, they are bound to prove under penalty of a dismissal of their petition with costs—and, of course, a liability to an action for malicious and unfounded prosecution. The respondents file a denial, in common form, and they challenge proofs of the criminatory allegations. The essential allegation of fact in each of the three charges is, that on the 3d day of January, 1870, the respondents made and executed to one George W. Payton an assignment of all their property, as a firm, for the benefit equally of all the firm's creditors—which act, it is alleged, in the first specification, was done with the intent to hinder, delay, and defraud creditors; in the second specification, with intent to defeat and delay the operation of the bankrupt act—being insolvent; and in the third, with the same intent as last mentioned, being in contemplation of bankruptcy or insolvency.

The making of the assignment being admitted, and the insolvency of the firm at the time being fully proven, or conceded, it was denied on the part of the respondents that an act of bankruptcy within the purview of the bankrupt act was shown, and this upon two grounds.

The first of these was, that an assignment for the benefit equally of all creditors, untainted by actual fraud, was not, under the statute, an act of bankruptcy; citing in support of this position an opinion of Justice Swayne of the supreme court, overruling a decision of the judge of the Southern district of Massachusetts,—In re Kingsley [Case No. 7,819], and Langley v. Perry [Id. 8,067], and an opinion of Justice Nelson of the same court, reported in Sedgwick v. Place [Id. 12,622]. In this position of the respondents I am unable to concur. Granting, for the sake of argument, that these opinions of these distinguished jurists sustain fully the point to which they are cited (a concession, in my judgment, against the fact), I am constrained to say that I cannot assent to that construction of the bankrupt law for which the respondents here contend. Of the opinion of Justice Swayne, we have but a reporter's synopsis of points ruled—not a sentence of the author's reasonings—while, on the other hand, in Perry v. Langley [Id. 11,006], we have the full opinion of Judge Leavitt, In Langley v. Perry [su-

[1] [Reprinted by permission.]

pra], the opinion overruled by Justice Swayne, in which, according to my judgment, the true construction of the bankrupt law, as regards the point in question, is given, with reasons therefor which seem to me unanswerable. Under the view of the law as here expounded, the making of the assignment of the 3d of January by the respondents was an act of bankruptcy, because made, in contemplation of law, with intent to defeat or delay the operation of the bankrupt act. Says the judge: "The intention of the law clearly was, that when a failing debtor was conscious of his inability to prosecute his business and pay his debts, he should at once subject his property to such a disposition as the bankrupt law has provided for. The property then becomes a sacred trust for the benefit of his creditors, who have a right to insist that it shall be administered, not according to the wish or preference of the insolvent, or in accordance with the insolvent law of the state, but according to the provisions of the national bankrupt law." This, in my judgment, is the sounder construction of the bankrupt law, as to the point in question, and by reference to the Case of Randall & Sunderland [Case No. 11,551], it will be seen that Judge Deady, of the district of Oregon, entertains a similar view, and in its support has given to the profession an argument which few of his brethren of the North, the South, or the East will attempt to refute, to strengthen, or amend. In re Goldschmidt [Id. 5,520]. The view is adopted by Judge Blatchford, of Southern district of New York.

But secondly, say the respondents, supposing the assignment to be an act of bankruptcy, these petitioners are estopped by certain acts of omission or commission from complaining thereof in this court by petition. They have, say the respondents, delayed filing their petition for sixteen days from the date of the assignment; have within that period often conferred with the respondents and their assignee, concerning the condition of the estate, and have sought to sell their claim against the respondents to the assignee for about half its amount; and last, but not least, have offered to assent to the assignment, and refrain from proceedings under the bankrupt law, if the respondents and the assignee would surrender the property assigned, and commit its disposal and management to some person more satisfactory to the petitioners and other creditors than was the assignee named, who, it was conceded, was personally unacquainted with the business of the assignors, and who insisted on employing, as his agents, for the purposes of the trust, the assignors themselves. As to this ground of defense, it seems needful merely to say, that the facts in proof are, in my view, insufficient for the exigency. That a creditor may be estopped by his acts or declarations, from proceeding in bankruptcy against a debtor, no matter how culpable the debtor may be, is readily conceded; and that a court should always aim, by recognizing the doctrine of estoppel, to subserve the interests of good morals and fair dealing, is also conceded. Still, in my view, before it can adjudge a creditor estopped from invoking against a debtor the powers of a court of bankruptcy, he should be held to prove other facts, and more pertinent and significant than those proven in this case—and this, though it were not shown by the creditor, as it is shown in this case, that proceedings in bankruptcy were resolved on by the petitioners as soon as it was ascertained that the debtors would not assent to a substitution of any assignee in the place of one chosen by them, and that within seventeen days next succeeding the date of the act of bankruptcy their petition against their guilty debtors was filed.

It is gratifying to the court to be warranted in adding, that no corrupt intent to defraud a creditor, or to contravene any statute of the state, is imputed to the respondents or their learned counsel by the petitioners, or is imputable to them upon the evidence. But on the other hand, it is anything but gratifying to learn, what is shown by the testimony in this cause, that there is much reason to doubt whether, even at this late day, the community at large fully realize as a veritable fixed fact, that under this bankrupt law, so far as concerns the relations of debtor and creditor, the mode of conducting business, and the possession and disposal of property by parties of blighted credit or in embarrassed or straightened circumstances, "old things have passed away, and all things have become new." For many years past, it has been known everywhere, in Gath and Askalon, as well as in Providence and Newport, that in Rhode Island, assignments were upheld by our courts in conformity with state laws, which in any other state in the Union would at sight have been set aside as fraudulent, by any judge or chancellor. The bankrupt law, it should now be remembered, practically nullifies these state laws, and stigmatizes as fraudulent, in fact or in law, many a practice which the business men and legislators of Rhode Island have been wont to uphold and commend, as pre-eminently conducive to the prosperity of all of the state's multiform industrial pursuits and enterprises.

In the controversies, wherever raging, in relation to the expediency of the enacting of the bankrupt law, or the expediency or inexpediency of its repeal, the bench cannot, without impropriety, participate. Its duty is done, when, as cases arise, it expounds, applies, and administers the law, and as the law's organ, makes known to the community those rules of conduct to which the citizen will be required to prove conformity on his part when it shall have chanced that, for or against him, the searching, potent, and ine-

vasible processes of the bankrupt law shall have been invoked.

The respondents are adjudged bankrupts. Decree entered, declaring the firm of Ward & Trow bankrupts.

Case No. 13,242.

In re SPILLMAN.

[13 N. B. R. 214;[1] 8 Chi. Leg. News, 140; 23 Pittsb. Leg. J. 87.]

District Court, D. Massachusetts. 1876.

BANKRUPTCY—COMPOSITION—REGISTER'S FEES.

1. In composition cases the register is entitled to five dollars for incidental expenses; three dollars for the meeting; five dollars when acting under a special order; ten cents for filing each paper; twenty cents for each folio of the examination; twenty-five cents for each affidavit; one dollar for ordering an adjournment of a meeting, and ten cents for each folio of the report.

2. When the resolution has been definitely passed upon, the business of the meeting is over and no adjournment is needed.

3. The confirmation need not be presented at the meeting of creditors.

4. If the confirmation is presented to the register, the time spent in examining it may be considered as spent under a special order.

5. No memoranda are necessary in composition cases.

[In the matter of Benjamin F. Spillman, a bankrupt.]

LOWELL, District Judge. In examining the question of the fees of the register in the case of composition, I have found that the fee bill, though not specially intended to reach such cases, may be applied to them. Without tracing all the items of charge in this case, I will point out such as seem to be allowable:

First. The general docket fee for office and incidental expenses, five dollars.

Second. For general meeting of creditors, three dollars.

Third. For service under order of court not exceeding per day,[2] five dollars.

Fourth. Filing papers, not before filed with clerk, each[3] ten cents.

Fifth. Examination of bankrupt taken down in writing, for each folio, twenty cents.

Sixth. For affidavits when necessary, each twenty-five cents.

Seventh. Adjournments. A large part of the fees proposed to be charged in the bill sent in by the register are derived from adjournments and adjourned meetings. I understand the ground for making such adjournments was that the confirmation was incomplete. The statute does not contemplate that the confirmation should be made at a meeting, nor that it should be presented to the register. The debtor may procure it within any reasonable time after the meeting. Knowing that they often were presented and filed, I required the register's opinion upon them if filed with him. My orders are perhaps annulled by the action of the supreme court. Whether so or not, I shall at once repeal them. I do not understand the supreme court to require the register to pass upon the confirmation, and he is at liberty to refuse to do so. If he does examine it he may be considered to do so under a special order, and the time taken may be added to that spent in examining the resolution itself. Whenever the resolution has been definitely passed upon by the creditors assembled in person or by proxy, the business of the meeting is over. I believe it has been ruled in England that such a meeting cannot be lawfully adjourned, excepting by such a vote as would be requisite to pass the resolution. How that may be by our law I have not had occasion to decide. When an adjourned meeting is necessary (if ever) a fee for ordering it, one dollar; and for holding it, three dollars.

Eighth. Memoranda. The short memoranda are not necessary in composition cases, because the report which the register is required to make of the proceedings includes them. The memoranda are needed in ordinary cases to keep the creditors, who may choose to apply to the court, informed of the state of the proceedings from time to time during the months or years that the case may be pending. In composition cases the register ought to keep a docket and minutes, and can send them up if called for. He may, however, tax the folios of his report itself, for each folio, ten cents.

[1] [Reprinted from 13 N. B. R. 214, by permission.]

[2] I suppose in most cases the responsible duty which is put upon the register to examine and report will take time beyond and besides the holding of the meeting.

[3] A paper signed by any number of persons is but one paper. This was long since decided in taxing fees of the clerk.

SPLENDID, The. See Case No. 5,485.

Case No. 13,243.

The SPLENDID v. The GLOBE.

[The case reported under above title in 35 Hunt, Mer. Mag. 447, is the same as Case No. 5,485.]

Case No. 13,244.

SPOFFORD v. RITTEN.

[4 McLean, 253.][1]

Circuit Court, D. Michigan. June Term, 1847.

PLEADING AT LAW—AMENDMENT—SERVICE OF COPY.

1. A very slight amendment of the declaration, which in no respect can affect the merits of the case, does not require a copy of the declaration to be served under the rule.

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

2. The plea filed by the defendant, required the amendment.

3. There is no irregularity in the judgment, which can authorize the court to set it aside.

In equity.

Mr. Emmons, for plaintiff.

Mr. Goodwin, for defendant.

McLEAN, Circuit Justice. This is a motion to set aside a judgment, on the ground that the suit had been commenced by declaration, which was served on defendant, who pleaded that he was an alien, though alleged in the declaration to be a citizen of Michigan. Leave was given to amend the declaration, alleging that the defendant was an alien. On this amendment being made, a judgment by default was entered. And now a motion was made to set aside the judgment by default, for irregularity. 1 Chit. Pl. 253, 1 Doug. (Mich.) 434.

It is contended that a new cause of action can not be introduced by the plaintiff, in his declaration, under leave to amend it, which shall affect the rights of the defendant by avoiding the statute of limitations. But the above amendment was not of that character. It was a mere description of the person, which in no respect affected the rights of either party. He, being an alien, was as liable to the process of the court, and the claim of the plaintiff, as if he were a citizen. So that there could be no objection to the amendment, arising out of the lapse of time, or on any other ground. The amendment could not have taken the party by surprise, as it became necessary from the interposition of his plea.

There is no objection that no rule for plea was entered after the declaration was amended. But the objection is, that the counsel for the defendant, being in court, cognizant of the plea of the defendant, the leave to amend, and rule for plea, had not a copy of the amended declaration served upon him. The rule in terms requires this to be done in general language; but the court must see that a rule designed to protect the rights of the defendant, shall not be made to operate unjustly against the plaintiff. There could be no necessity for a copy of the declaration to be served on the counsel in this case. The amendment was slight, and not at all affecting any defense which the defendant could set up on the merits.

The motion is overruled.

Case No. 13,244a.

SPOONER v. DANIELS.

[Betts' Scr. Bk. 505.]

Circuit Court, S. D. New York. Oct. 21, 1854.

LIBEL—JOURNAL PUBLICATIONS — PARTIES LIABLE —CRITICISM—MALICE—EVIDENCE.

[1. Liability for a libelous article published in a journal extends to the owner and editor, whether they had personal knowledge of the publication or not; but not to a mere hired contributor, unless he either wrote the article, or induced its insertion.]

[2. A critical article, in which the words "swindler,". "humbug," and "fraud," are applied to the author of a work of art, is libelous in itself, and gives rise to a presumption of malice sufficient to support an action, without proof of damage.]

[3. When actual malice is proved in the publication of an article disparaging a work of art, the person responsible for it cannot shield himself from liability on the ground that he was acting in the capacity of a critic.]

[4. Evidence which would amount to justification may be introduced, though justification is not pleaded, but in that case it can only go to reduce damages, and not to defeat the action.]

[5. If the jury find from the tone and tenor of an article of criticism that the writer is actuated by general malice, a disposition to scandalize the plaintiff's works, though not arising from personal ill will, growing out of any personal acquaintance with plaintiff, they may award exemplary damages.]

[This was an action at law for libel, brought by Shearjashub Spooner against John W. Daniels. The article complained of purported to be a criticism upon a work of art produced by plaintiff, namely, a restoration or reproduction of Boydell's illustrations of Shakespeare.]

BETTS, District Judge (charging jury). I suppose, gentlemen, you will feel that it was time that this controversy should be brought to a close, so that you may bestow upon it that action which now devolves upon you as sworn jurors in the case. The scheme of this action, gentlemen, is that the plaintiff, being the owner of this publication, had been traduced and defamed, by a publication made by the defendant in a newspaper in the state of Virginia; that he has been personally injured by that attack, as it was defamatory to his character, and that he had also been prejudiced in the work which he had published, and was attempting to circulate and dispose of. This imposes upon the plaintiff, in order to sustain his action, to show, firstly, that he was proprietor of this publication, and that he was the owner of this edition of Boydell; secondly, that the defendant is the person who has published the defamatory articles; and, thirdly, that his article is, of itself, or by extraneous circumstances, of such a slanderous character as to make it the subject of a lawsuit. It is not necessary to establish a degree of property in the points that would enable him to claim them, nor any other act of ownership than the possession and claim of the right to them. If the evidence shows you that he has conducted himself in respect to them as the owner, dealt with them as the owner, then he is to be regarded, for all the purposes of this trial, as the owner, there being no evidence controverting a natural inference from those facts. The next important step is to satisfy you, upon the evidence, that he has selected, and made the subject of this action, the individual whom he supposes has done the

wrong. He must prove to your satisfaction that the defendant is either the author of this publication, or in such position, in respect to it, that he becomes responsible for it. First, he must prove authorship by direct positive testimony to that fact, or he may establish it by the proof of such circumstances and facts as necessarily lead to the inference that he was the author; and, when he has given evidence enough to raise a fair presumption that he is the writer of it, then it devolves upon the defendant to exonerate himself from the effect of the inference in proof. The law makes the owner, proprietor, or editor of a paper or periodical answerable for all slanderous and injurious articles inserted in it, because it is in his power to prevent such insertion, and because, when the article appears, and inflicts the injury, the law presumes it is with his consent. It is a presumption of law, and not a presumption of fact. The proprietor may be as ignorant as any other man in the community of the article, until it appears in print; he may trust his foreman or general agent to select articles, and determine upon their insertion; he may not be personally cognizant at all of the particular publication,—still the law will presume, for general purposes, for the order, convenience, and good of society, him to be the individual who has consented to authorize the publication. You are then to look at the facts, gentlemen, in order to ascertain whether or not the testimony proves Mr. Daniels, the defendant, to be the writer of the articles. In that particular, you have one branch of evidence, one portion of the testimony, that seems to be direct and positive; but it consists in the declarations or admissions, directly or impliedly, upon the part of Mr. Daniels. I refer to the testimony of Mr. Peebles. Now, in regard to declarations or admissions, when offered against a person in evidence which may affect his property or person, or establish aught against him in favor of another, the law always admonishes the jury to exercise great caution. It is very difficult for a witness, after a lapse of any period of time, or, indeed, immediately afterwards, always to restate precisely in words what he heard another person say. Now, in this instance, as in others, the whole effect of the declaration rests in a statement of the precise language used. If Mr. Daniels, at the interview with Mr. Peebles, said: "That is my article," or referred to it as his article, assuming it to be his own, that would be an admission of the fact; and, in view of such testimony, the jury would be called upon, without some other explanation, to hold him responsible. But if Mr. Daniels said: "The article published in the newspaper," or "That article, is justifiable, and it is all right and proper," it would not be an acknowledgment that he was the author or writer of it. It does not assume him to be the composer of it, but it assumes him to be the defender of it, and one who is willing to stand answerable for the justice of the remarks. Now, in a matter of this kind, as in all others, you will proceed very cautiously. In this case, where a defendant may have removed all possible doubt upon the subject, it is for you to say whether there is ground for doubt—whether it is safe to trust the memory of the witness in the use of a particular pronoun or particle, so as to fix the result of the whole case upon that circumstance. We may suppose Mr. Peebles to be perfectly ingenuous in the matter, devoid of excitement or enmity towards Mr. Daniels, and entertaining no disposition to falsify or misrepresent what he really said, but to be an honest reporter of the precise language employed, yet, your own experience will have taught you how extremely difficult it is for a man to carry in his mind the precise expressions employed by another, even should the conversation be temperate; but if any animosity or excitement existed, if Mr. Peebles was seeking the adjustment of some difficulty, or urging a complaint, in such a case there would be more reason to distrust the justice of his memory.

If the plaintiff fails to prove that the defendant is the composer of the article, then the defendant is not censurable, unless he proves that he was in such a position in regard to this paper that he is legally responsible for the article published in it. It must be that he was the proprietor, that he had a pecuniary interest in it, or that he was placed in such superintendence and charge of it that enabled him to control the articles that were inserted. If he were the editor, then he is responsible, whether he wrote it or not; but if the evidence is shown to your satisfaction, and is not explained, that Mr. Daniels was only a contributor to the paper, paid for his services as employé of the paper, or writer, then he is not legally responsible for any insertion in that paper not emanating from himself. In regard to the facts of the case, let it be remarked that it is said upon the part of the plaintiffs that the defendant could easily prove whether he composed these articles or not, and he could also easily prove who did write them, because he had the power of examining his coeditors and proprietors of the paper. But this position, gentlemen, may be regarded in two views. The same witnesses who proved the fact upon the part of Mr. Daniels, and who were examined by him, were opened to examination, and were examined by the plaintiff. If they knew the fact, if it was incumbent upon the plaintiff to prove affirmatively, as the foundation of his action, who was the writer of the publication, it was his duty to examine those witnesses, and, instead of putting one single, general, loose interrogatory, he should have asked the witnesses: "Did you write the article?" "Do you know who wrote it?" "Did Mr. Daniels write it?" The witnesses were equally open to the plaintiff, but his side refused to put the question, and the inference

is just as strong that they dared not put it, as it is against Daniels that he dared not put it. In that respect they stand equal. Now, so far as respects the question of ownership or editorship, the testimony of the witnesses, if reliable, seems to dispose of that, and to establish the fact that Mr. Daniels was not connected with that paper in either of those capacities, but that he was only engaged as a salaried writer. If the evidence renders the defendant responsible, then it becomes necessary to look for a moment at the manner in which the plaintiff has put forth his grievance, because he cannot come into a court of justice and claim at your hands for damages, upon the ground that there had been various injurious and prejudicial remarks made regarding him individually, and his business avocations, or respecting the value of his property; but he must lay down on paper what has been said of him, and he must define, interpret, or mark out the meaning upon paper that is put upon those charges, and he must show to your satisfaction that he has put a true meaning upon them; that is to say, he must, in his declaration, as it is called,—his complaint of the wrong done him,—spread out what it is the defendant had written or said which is a slander against him, and, it being libelous matter, he must not only state the words, but also the meaning that gives them that libelous quality, and then, when he has done that, he must satisfy you by testimony that that is the proper interpretation at which they should be received. The plaintiff, you will perceive, gentlemen, from the tenor of the argument, as well as the course of the proof, conceives that he has been defamed by this writer personally, in his individual character, in a mode to affect the value of his property, and in relation to his profession or avocation as a compiler or designer of the work in question. The declaration sets out pretty much in words the substance of this newspaper publication, and you will observe, in reading it, that the publication does not purport to designate Mr. Spooner by name in those remarks that are injurious and offensive in their character; and one observation may well be made, in this respect, in regard to the tenor and spirit of this publication. It is what I believe the profession call a "slashing" article, and the writers of them suppose that they do high credit to themselves, and evince great smartness and talent, by using coarse, rough, and violent language; and if they apply that to individuals, if they give an application to it which tends to injure the party's character and reputation, they ought to be made to smart for their smartness. Every writer in the newspapers of the day should be held to a vigorous responsibility for the free use of his coarse and injurious epithets. There should be no immunity to him because he conducts a public paper. The arm of the law should reach him with more force to restrain him in that capacity. He being placed in a situation of doing wrong, of throwing distress into families, and attacking private character, should be called to a serious responsibility for the manner in which he discharges the power he holds in his possession. It is no sort of mitigation, in my judgment,—and I think I speak the voice of the law in that respect,—that a man is editor or contributor to a public paper, that he fills that paper with aspersions upon his neighbors' conduct and business. His being so would rather aggravate, than diminish, his offense. The inquiry here, you will observe, is, has he applied any remarks or charges of a slanderous character to Mr. Spooner personally? That is a matter that you must determine by inference. The innuendoes in the declaration, as they are called, say that the terms "swindler," "humbug," "fraud," are all designed to designate and mark out Mr. Spooner, the individual who owned the articles which are the subject of the newspaper remarks. If they do, and you find that the publication contemplated that, then the plaintiff has a right to say that he was the object in view of the writer, that he was the one intended to be slandered, and then that portion of the publication would be slanderous in itself. It is then libelous, and the foundation for an action, without showing any damage or malice on the part of the defendant, further than that malice which is always to be inferred from a publication which is false.

It is claimed that the defendant here published this article for the purpose of enlightening the public taste with respect to a work of art, and that, as a sort of monitor to public opinion, it was his duty to speak fairly and unreservedly of this work. Be it so. I shall make a remark upon that topic in a moment or two. Still the law gives him no liberty, beyond a fair criticism, to attack the character of the individual owner of that article. He had no right to assail the reputation of Mr. Spooner, or any person connected with him. He has no immunity to do that. He must restrict himself strictly to the line of a critic. He may point out the faults of this work. He is allowed to show that it is not deserving of the encomiums attempted to be put upon it, that it is worthless, without being subject to an action for slander; but when he goes beyond that line, and hurls stigmas upon the character of Spooner, if he calls him cheat, or any other imputation that is disgraceful to him, then he is undoubtedly answerable in damages for that wrong. But, gentlemen, it is your province to determine upon the questions of fact. It is not my habit to descant or comment upon the evidence. I leave that to you. I only mean to point out the principles of law which govern you in the application of the facts, after you have discovered what they are. Then, again, the defendant may protect himself in the publication upon the ground that he wrote merely as a critic (supposing that he had not slandered Spooner personally), and that he was endeavoring to point out the imperfections, as he deemed them, of the

work. He certainly can do this, unless the plaintiff succeeds in proving positive malice. But if the plaintiff can show that the publication of this article was made with express malice, and with an express design to injure the publication of the work of the plaintiffs, then the circumstances of the defendant in acting in the capacity of a critic would not shield him from liability to an action. Again, if it is proved that his publication was malicious, that his purpose was hostile to Spooner, and that he not only meant to write down his work, but to disparage it in such a way as to be offensive to the feelings of Mr. Spooner, still, if he (the defendant) had been able to show that the work, in itself, was of no value, or of very trivial value, then the plaintiff, although express malice is proved, is not entitled to a verdict compensating him for the loss he has sustained, but only to such a loss as necessarily results from the publication; and for the loss that you may judge he has sustained by this publication, you will remunerate him, if there is express malice proved against the defendant in the publication of these things. It is necessary, then, to entitle the plaintiff to damages, not only for him to prove that the publication was not a fair and proper criticism, and that it was conducted by malice, but he must also prove that he has sustained injury in consequence. Now, supposing that it was not a criticism, in the fair sense of it, but a malicious publication, what is the evidence to establish damages, as claimed by the plaintiff in that respect? In the first place, it is not necessary for him to prove positively the degree and extent of the damages, but he must prove the facts from which you are led to judge that the publication must have done him an injury. Now the only evidence on that point is in respect to the extent of the sale made in the South. If, upon an examination of the evidence upon that head, that it is to be accounted for otherwise, and attributed with equal reason to other causes than the publication of the defendant, then you cannot make the defendant exclusively responsible for it. If you can suppose that the sale of this work was stopped, either because there was no public taste for it, or that it did not come up to the public expectation, or that it was too expensive, or from any other cause that frequently attends enterprises of this description, then the defendant would not be answerable for the publication of any angry article bearing upon the subject, because the plaintiff had not succeeded in finding a profitable market for his commodity; but if you find that this article controlled the public taste, or affected the disposition of the public to purchase, then you will say that he must make good to the plaintiff the loss he has occasioned him by a publication which he does not show is true, in itself. A point of law has been ruled by the court that, although the defendant, in an action for slander, who only pleads the general issue, and does not say he will prove the truth, cannot discharge himself from the action by proving that what he wrote was true, but he may diminish the damages if he satisfies the jury that the publication after all was substantially correct. Although they cannot acquit him, yet they will restrain the damages to what his real loss was in consequence of the publication. That will tend to diminish the damages. There is some controversy in the books upon that subject, and it may, perhaps, as yet, be an unsettled point in adjudicating upon a question of evidence in actions of slander and libel. Courts of high standing and character have admitted that evidence, while others have excluded it. However, I believe it proper in this case to say to you that the rule of law is, that when a man is sued for libel, although he does not plead justification, he may give evidence which would have amounted to justification, and that evidence would go to reduce the damages, but not defeat the action.

Now, gentlemen, a great deal has been said, in the course of the argument before you, upon the offensive and unfounded criticism that has been indulged in, and that leads you to the inquiry as to what are the rights of the plaintiff in regard to this property of his? what is the character that he has assumed to give to that property? and what is the attack which has been made on the part of the defendant? It is to be observed that his right to the property is not assailed or denied. But what does he claim to be his property? Certainly not, according to the evidence or tenor of his argument that he is the owner of the paper,—of the stamp upon the paper,—that that is his personal chattel, in respect of which he maintains an action for; but he claims to be the person who, by his skill and enterprise and money, has brought back into re-existence an old lost work of art, of high value and worth. He does not say, in his declaration, that he has composed a work equal to or superior to Boydell's Shakspeare, but he takes the ground that he has restored what was lost to the public by the wearing out of the old copperplates upon which Boydell's edition of these illustrations was stricken off and printed. Now, then, he assumes in his capacity but a limited right. He takes but a limited and restricted right of possession over his property. You must, then, look at the evidence, and see whether he proves that he has restored Boydell's edition to what it was originally, and whether this American edition is the English edition republished or reprinted, precisely as if he had taken the original plates, while they were still alive, to give off their proof impressions, and had struck them off here, and made the American edition the same as those in England. In regard to this matter, some witnesses have said that they do not think these prints are equal to Boydell's, and, others, again, do not think that Boydell's work was one of high art and merit. But that is a subject for your consideration, in one point of view. If you find that these are facsimiles of the original prints, then it may become a

material question in this case whether that was a work of high art and merit. There can be no doubt but that artists will differ widely in their valuation of mere works of art and taste. One class of gentlemen will value the high perfection of the mechanical art of engraving; another, that the printing was of a high order; and a third, belonging probably to the greater mass, will value them because they really translate and exhibit the thoughts of the great dramatist whose works they are intended to illustrate. You therefore see, gentlemen, the wide field that you must enter upon when you undertake to determine from the evidence whether these prove to be a work of that character. I suppose it is very familiar to you all that men of deep study, men of the most extraordinary genius, will radically differ as to what is the true representation of the spirit of Shakspeare. If you have not experienced that difficulty by the study of picture and prints, you may have attended theaters, where men of great talent have appeared upon the stage to illustrate Shakspeare. You may remember, perhaps, the exhibitions of Cooks, young Kean, and Macready, as well as our own artists, and thus undertake to apply them to some of these illustrations, Lear, Othello, or Hamlet, and be enabled to call to mind whether you have ever seen any two of these artists who would give the same representation of the spirit of the author, in the construction of the character they attempted to represent. So it may be with regard to publication. One class of judges, taking up these prints, might say: "They are the embodiment of my idea of Shakspeare," and another class of very experienced men, of high taste, might say: "We consider them worthless in that point of view, for they do not reproduce my apprehensions of the dramatist's idea of the individual or the scene, and are only valuable as works of art." Another would say: "I will buy that picture; for, if those are the faces of the men when they existed, it will be valuable to me." Each one, you will see, therefore, puts a value upon it according to his own mind. The object of these remarks is to show you, when you go into the field of determining the value, how broad and indefinite it is; for should any number of amateurs or connoisseurs be examined before you with respect to supposed illustrations, you would be just as much blinded as now in regard to the appreciation placed upon them as works of illustration; but, when you came to the question whether the works are of high art and finish, you can get more satisfaction, and you can determine two things—first, whether they are counterparts, facsimiles, and reproductions of the original Boydell; and, if they are, whether they are works of high art and value. If the plaintiff proves that they are works of high art and value, then he is not to be injured in his possession of that property, and is entitled to compensation at your hands for the loss sustained.

The defendant's counsel has laid before the court a list of instructions, which he wished me to submit to you. So far as I adopt his idea, they have been included in the statement I have made to you, and, where they have not, the responsibility will rest upon me, and he can take his exceptions. You will, then, gentlemen, take the following as the rules of law to govern you in this inquiry: Ascertain whether Mr. Spooner was the owner of the publication, ascertain whether Mr. Daniels wrote the article which is alleged to be defamatory, ascertain, if he did not write it, whether he is the proprietor of the paper; then, with this article before you, and with evidence to establish each of these facts, he is responsible for it, in the judgment of the law. But, if he was merely a hired contributor, he is not answerable, unless there is evidence to show that he induced its insertion, and thus contributed to the promulgation of his slander. Then you are to inquire as to the meaning of this article. If it imports anything derogatory or prejudicial to the personal character of Mr. Spooner, he is entitled to damages for that libel, so far as you may judge to be a proper compensation. If you find that when the owner offered this publication for public sale as a reprint and facsimile of the original Boydell, and it was so, that the publication of this article was prejudicial to the sale, and you will find that the publication was made maliciously to that end, you are to give damages to the plaintiff for the loss he has sustained in that point of view; and, also, if you find, on the other hand, that the defendant has shown that these articles are not the original Boydell's, if you find that he has shown that they are not highly valuable as works of art, if you find that they are not illustrations of Shakspeare, these facts will go in diminution of damages. They will not take away entire damages, but go in mitigation, or to lessen the damage. And if you find that the defendant was actuated by general malice in this matter, a disposition to scandalize the plaintiff's works, and if you find that not from any previous acquaintance he had with the plaintiff, or from any ill will he had borne to the plaintiff before, if you derive that judgment from the tone and tenor of his publication, then you are entitled to lay heavy damages upon him beyond the actual injury that the property sustained. But if he has written in a spirit denoting a purpose to injure the character, hurt the feelings, prejudice the property, and break up the pursuit of the defendant, then he ought to be made responsible for that malicious purpose, although that malicious purpose may result from this high-handed and boisterous manner in which he speaks against the Northern people, and against Mr. Spooner, as an individual from the North; but, gentlemen, you must take care not to endeavor to vindicate the people of the North from the senseless aspersions thrown upon them, by punishing him in damages, and bestowing those damages upon Mr. Spooner. You will award Mr. Spoon-

er damages in accordance with the injury that he has received. I now leave the case in your hands.

The jury then retired for consultation. When they returned into court, they rendered a verdict for the plaintiff. Damages, $3,250.

Case No. 13,245.

SPOONER v. McCONNELL et al.

[1 McLean, 337.] [1]

Circuit Court, D. Ohio. Dec., 1838.

TERRITORIES — STATES — CONSTITUTION — SOVEREIGNTY—RIGHT TO TAX—WATERS—RIGHT TO NAVIGATE—DAMS—INJUNCTION.

1. Some parts of the ordinance of 1787, for the government of the Northwestern Territory, were designed temporarily to regulate the government of the territory.

[Cited in Astrom v. Hammond, Case No. 596.]

[Cited in Chandler v. Douglass, 8 Blackf. 12.]

2. These were necessarily abolished on a change from a territorial to a state government.

3. Other parts were designed to be permanent, and were sanctioned by compact.

[Cited in brief in McCrea v. U. S., 93 Ill. 32–34.]

4. These were comprised in six articles, which were declared to be unalterable, except by common consent.

5. Some of these, however, being guaranteed in the federal constitution, subsequently adopted, may be considered as practically annulled.

6. And any provisions of the ordinance which are repugnant to the constitution of Ohio, may be considered as also annulled.

[Cited in Sarah v. Borders, 4 Scam. 349.]

7. The people of the state adopted the constitution, and it was sanctioned by congress, so that here was the common consent required by the compact, for the abrogation of any of its provisions.

8. But the article respecting the navigableness of certain waters and the carrying places between them, remains without modification; and also the article which prohibits slavery.

[Cited in Palmer v. Cuyahoga Co. Case No. 10,688; Jolly v. Terre Haute Drawbridge Co., Id. 7,441.]

[Cited in Benjamin v. Manistee Imp. Co., 42 Mich. 634, 4 N. W. 486; Jarrot v. Jarrot, 2 Gilman, 8; Moore v. Sanborne, 2 Mich. 523. Cited in brief in Myers v. City of St. Louis, 82 Mo. 370.]

9. These stand unrepealed, and others, unless they shall be considered as repealed by implication.

10. They are not incompatible with state sovereignty.

[Cited in Wisconsin River Imp. Co. v. Manson, 43 Wis. 263.]

11. The state has agreed not to tax the public lands, nor until five years after they shall have been sold, but this does not impair its sovereignty.

12. An incorporation of a company to improve the navigation of a river, takes such river, from the action of ordinary legislation, but this is not incompatible with state sovereignty.

[Cited in La Plaisance Bay Harbor Co. v. City of Monroe, Walk. Ch. 167.]

13. The right to tax still exists as fully as ever, but some of the objects of taxation may be withdrawn by compact; and so as it regards legislative action on certain rivers.

[Cited in brief in Harmon v. Chicago, 140 Ill. 381, 29 N. E. 732.]

14. Admitting a state into the Union, on an equal footing, with the original states, does not mean, that its powers, legislative, judicial, and executive, shall be exercised to the same extent and in the same mode as all the other states.

15. In this respect, the states are unequal, as perhaps, the powers of no two states, are exercised in the same mode and to the same extent.

16. They are equal, as being alike free in the formation of their constitution, and in the exercise of the powers of government under such restrictions and limitations as each may have voluntarily imposed on itself. And in the people of each having the power to modify or change their constitution at discretion.

17. The federal government is one of limited powers, but sovereign within the powers delegated.

18. But the sovereignty in this country resides with the constituency, and not with the functionaries of government.

19. The people of the states are the constituency of the federal as well as of the state governments, and they may alter the constitution of the federal, and of their respective state governments.

20. Compacts are as obligatory upon states as upon individuals. And the fact of their entering into compacts, which bind them, shows that they are free.

[See Bennett v. Boggs, Case No. 1,319.]

21. The provisions of the ordinance in regard to certain navigable streams and the carrying places between them, do not prohibit the legislature of the state from improving the navigation of such rivers and carrying places.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867.]

[Cited in Commissioners v. Withers, 29 Miss. 21.]

22. Neither the rivers nor the carrying places can be obstructed, but must remain free; but if the legislature with its funds, or through the instrumentality of companies, should improve the navigation of the rivers by canals or otherwise, and the carrying places, by canals, railroads, or turnpike roads, tolls may be charged for the increased facilities.

[Cited in Griffing v. Gibb, Case No. 5,819; Huse v. Glover, 15 Fed. 299; Id., 119 U. S. 549, 7 Sup. Ct. 316.]

[Cited in State v. White Oak River Corp. (N. C.) 16 S. E. 332.]

23. An obstruction such as natural falls, &c. does not destroy the character of the river above them, if it be navigable.

24. No individual has a right to prosecute, in his own name, for a public nuisance.

25. He cannot so prosecute, unless the act complained of, be a private nuisance to himself.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867; Illinois & St. L. R. & Canal Co. v. St. Louis, Id. 7,007.]

[Cited in Attorney General v. Chicago & N. W. Ry. Co., 35 Wis. 539; Spangler's Appeal, 64 Pa. St. 392.]

26. Courts of chancery will not interfere by injunction to prevent a threatened wrong, unless the danger is imminent, and the injury is irremediable in any other form.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867; Parker v. Winnipiseogee, C. & W. Co., 2 Black (67 U. S.) 553; Chicago &

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

A. Ry. Co. v. New York, L. E. & W. R. Co., 24 Fed. 519.]

27. The right set up by the complainant, as a citizen of the United States, to navigate the above waters, is an abstract right, and such an one, as chancery cannot protect from violation.

28. He does not state that he is engaged in navigating the Maumee, which he charges, the defendants threaten to obstruct, by the construction of one or more dams, but merely relies on his right to do so, which may never be exercised.

29. Chancery does not deal with abstractions or contingencies, but with practical rights and to prevent impending wrongs.

[Cited in Pierpont v. Fowle, Case No. 11,-152.]

30. The complainant alleges, generally, that he will be injured in his property, by the construction of the dams, and on this ground prays an injunction; but he does not show how he will be injured.

31. This is necessary, that the court may judge whether the wrong complained of, entitles him to an injunction.

32. Every wrong done, in this way on which an action may be sustained, will not entitle a party to an injunction.

33. The facts must present a case, which cannot be adequately redressed, in any other form.

[34. Cited in U. S. v. Bain, Case No. 14,-496, to the point that, notwithstanding the ordinance of 1787 declared the navigable waters of the Northwest Territory should be "common highways, and forever free" yet the Ohio legislature had a right to charter a canal company, which company obstructed by a dam the navigation of the Maumee river.]

[Cited in Macomber v. Nichols, 34 Mich. 218.]

[This was a bill in equity by Lysander Spooner against Alexander McConnell and others. Heard on motion for an injunction.]

Mr. Swayne, for complainant.

Wright & Harris, for defendants.

Before McLEAN, Circuit Justice, and LEAVITT, District Judge.

McLEAN, Circuit Justice. This is an application for an injunction by the complainant, who is a citizen of Massachusetts, and who represents himself to be the proprietor of a tract of eighty acres of land, situated at the head of the rapids, above the Maumee bay, and bounded by the Maumee river, north; and also of a certain island in said river, opposite the above tract, containing two and fourth-fifths acres, in Wood county, and state of Ohio. He states that during a great part of the year, the river is navigable from the head of the rapids to Fort Wayne, a distance of one hundred and twenty miles. That a steam boat and other vessels ply between these points; and that this part of the river has been navigated and used as a principal thoroughfare for the transportation of merchandize and articles of produce, from the first settlement of the country. That around the rapids, which are about sixteen miles in length, there is a portage that connects with the Maumee bay, which is navigable for steam boats and other vessels, that ply upon the lake. That this river leads into the St. Lawrence, through Lake Erie, and is within the country formerly called the Northwestern Territory; and to which the ordinance of the 13th of July, 1787, applied. That among certain articles of compact contained in said ordinance, and which are declared to be unalterable, except by common consent, it is declared "the navigable waters leading to the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States and those of any other state, that may be admitted into the confederacy, without any tax, impost, or duty therefor." That by an act of congress entitled an "Act providing for the sales of the lands of the United States in the territory north-west of the river Ohio, and above the mouth of the Kentucky river," passed the 18th May, 1796 [1 Stat. 464], this article of the compact is recognized and affirmed. And that in making the surveys and sales of the public lands, the bed of the Maumee river has never been included. The complainant also states that the legislature of Ohio, the 3d March, 1834, passed an act entitled "An act to authorize the locating and establishing so much of the line of the Wabash and Erie Canal, as lies within the state of Ohio; and to authorize the selection, location, sale, and application of the proceeds of the sales of its lands" [Vol. 32, Laws Ohio, p. 308]; under the authority of which law, and other acts of the legislature, which provided that a navigable canal shall be constructed, a canal has been located from the west boundary of Ohio, to the mouth of the Maumee river, the construction of which is in active progress. That the canal commissioners who superintend the work under a pretence of a right in the state of Ohio to control and at her discretion, obstruct the navigable rivers within the limits of the state, are about to erect one or more dams across the Maumee river, above the rapids, for the purpose of supplying the above canal with water. The complainant further represents, that he purchased the property above mentioned, situated at the head of the rapids, at a very large price, with a view to the benefits of the navigation of that part of the river which is above the rapids; and which he alleges, is secured to him by the ordinance, the law of congress cited, and the constitution of the United States. That there is an extensive water power on his property. That two extensive saw mills and one flouring mill have already been erected thereon, and it was his expectation that many others would speedily be erected, were it not for the dam or dams which the defendants threaten to build. That, although the dam or dams intended to be erected, are some miles above his property, yet the effect would be greatly to obstruct, if not entirely to prevent the navigation of the river, which would materially lessen, if it should not wholly destroy the value of his property. And, as a

citizen of the United States, he claims a right to navigate the river, &c. He prays, therefore, that an injunction may issue, &c. At the last term, an injunction having been previously allowed nisi, cause was shown by the defendants, and the case was fully argued on both sides; and, as the principles involved are deeply interesting to those states which have been formed within the limits of the Northwestern Territory, and were for the first time raised for judicial examination in the federal tribunals, the cause was continued under advisement to the present term.

There are two grounds on which the complainant rests his right, both of which must be sustained to entitle him to the prayer of his bill: (1) He must show that the compact in the ordinance is in force. (2) That under the circumstances of the case, and in the form presented, he is entitled to the interposition of the court.

These positions have been earnestly and ingeniously controverted by the counsel for the defendants; and it becomes necessary, carefully to examine them. The ordinance was passed before the adoption of the federal constitution. It was entitled "An ordinance for the government of the territory of the United States, north-west of the river Ohio." Many of its provisions were temporary in their nature, having for their object the organization and operation of a territorial government. Others assume the solemn form of a compact, between the original states and the people and states in the territory, which were to remain forever unalterable, unless by common consent. These were comprised in six articles, the first of which provided that no person should be molested for his religious sentiment, or his mode of worship. The second secured the benefits of the writ of habeas corpus; trial by jury; the right of representation in the legislature; that crimes, unless capital, should be bailable; against the infliction of cruel punishment; the sacredness of private property, and of private contracts. The third article declared that schools and the means of education should be encouraged, and that good faith should be observed towards the Indians. The fourth article declares that the states which may be formed in the territory, shall forever remain a part of the confederacy, subject to the Articles of Confederation. That the inhabitants shall be liable to pay a part of the federal debt, according to a just apportionment. That no tax should be imposed on the lands of the United States, or any interference in their sale by the federal government. That non-resident holders of land should not be taxed higher than residents; and then it is declared, "that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor." The fifth article relates to the boundaries of the states to be formed in the territory, and what number of inhabitants shall entitle them to be admitted into the Union, on an equal footing with the original states. The sixth article declares "that there shall neither be slavery nor involuntary servitude in the territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted." In the act of cession of this territory by the state of Virginia to the United States, among other conditions, it is declared, that it should be laid out and formed into states, &c. which shall be distinct republican states, and admitted members of the Federal Union, having the same rights of sovereignty, freedom and independence as the other states. Some of the provisions of the compact contained in the ordinance were subsequently guarantied by the federal constitution. And so far as this guaranty extends, it may be considered, practically, as superceding the ordinance. This remark applies to that provision of the constitution which declares, that the new states shall be admitted into the Union with the same rights of sovereignty as the original states, the rights of conscience, the inviolability of contracts, &c. That this ordinance was obligatory in all its parts at the time of its adoption, no one can doubt; and the only enquiry now is whether, by the adoption of the federal constitution, the constitution of the state, or by any other means, it has been superceded or annulled, in whole or in part. The change from a territorial government to that of a state, necessarily abolished all those parts of the ordinance which gave a temporary organization to the government; and also such parts as were designed to produce a certain moral and political effect. Of the latter description were those provisions which secured the rights of conscience, which declared that education should be encouraged, that excessive bail should not be required, &c. And it may be admitted that any provision in the constitution of the state. must annul any repugnant provision contained in the ordinance. This is within the terms of the compact. The people of the state formed the constitution, and it was sanctioned by congress; so that there was the "common consent," required by the compact to alter or annul it. But in regard to the great question in this case, as to the navigable waters, the state constitution purports to make no alteration; and if the ordinance in this part be annulled, it must be done by implication; and on this ground the motion for an injunction is resisted. It is insisted that if effect be given to this provision of the ordinance it is restrictive of the sovereign power of the state; and is repugnant not only to the constitution of the state and the constitution of the United States, but to the act of congress which declares that the state of Ohio shall be admitted into the Union, on an equal footing with the original states. If this position be correct, it must be fatal to the plaintiff's right.

At this stage of the controversy it would be a sufficient answer to this argument to say, that the legislative power of the state has not, expressly, authorized the defendants to obstruct the navigation of the Maumee. Under the laws of the state they have authority to superintend the construction of public works, and of the canal stated; and when necessary to the work, to appropriate private property to public use; but as their authority does not expressly extend to the obstructions threatened, it cannot be so construed in opposition to even a doubtful right under the compact. And this view is greatly strengthened by the positive action of the legislature. In all cases, it is believed, where they have authorized a bridge to be built, or a dam to be constructed over a navigable stream, special provision has been made to preserve the navigation free from obstruction. But the case has not been argued upon this narrow ground, nor are the court disposed to rest their opinion upon it.

It is a well established principle, that no political change in a government, annuls a compact made with another sovereign power or with individuals. The compact is protected by that sacred regard for plighted faith, which should be cherished alike by individuals and organized communities. A disregard of this great principle would reject all the lights and advantages of civilization, and throw us back on the age of vandalism. This compact was formed between political communities and the future inhabitants of a rising territory, and the states which should be formed within it. And all who became inhabitants of the territory made themselves parties to the compact. And this compact so formed could only be rescinded, by the common assent of those who were parties to it. When application was made to congress by the people of the eastern part of the territory, to authorize the call of a convention to form a constitution, modifications of certain provisions of the compact were proposed, some of which were embodied in the constitution subsequently formed, and others of them, after various alterations, were also inserted. But that provision of the compact which declared that the navigable waters falling into the St. Lawrence and the Mississippi, and the carrying places between them shall be common highways and forever free, &c., was not proposed to be modified. By an act of congress of the 18th May, 1796, which provided for the sale of the lands of the United States in the territory, it is declared "that all navigable rivers, within the territory to be disposed of by virtue of the act, shall be deemed to be and remain public highways." And all the surveys made on such rivers were bounded by them, and the beds of the rivers were never included in the surveys nor sold to individuals. From this act of congress and these surveys it clearly appears, that the navigable waters within the territory were considered by one party to the compact, as declared by that instrument, public highways. Is there any thing in the constitution of the state, which by implication must be held repugnant to this part of the compact. The state has been admitted into the Union on an equal footing with the original states. And yet the state is bound by compact not to tax the lands of the United States, nor until the expiration of five years after they shall have been sold. The power to tax is an incident to sovereignty. Does this exemption take away or lessen this power. If it does, in the sense contended, then the state of Ohio was not admitted into the Union, with the same powers of sovereignty as the original states. This consequence is not obviated by the fact, that this was a restriction imposed, with the consent of the state, for an equivalent. If it be an abridgment of the sovereign power of the state, the objection stands in its full force. The compact not to tax was the voluntary act of the people of the state, but not more so than was the compact by the same people that the navigable waters should be common highways. And this exemption from taxation is as much a restriction on the exercise of the sovereign power, as the exemption of the navigable streams from obstruction by the same power. The right to authorize works on a navigable stream, which may, to some extent, obstruct its navigation by the sovereign power of a state, is not less clear, on general principles, than the right to tax. By compact with the federal government, the national road, that lies within the state, is to be kept in repair by tolls imposed by the state for that purpose. The state cannot, under this compact, vacate this road, as it may all public roads established by its authority; and does this compact abridge the sovereignty of the state?

By the eighth article of the treaty of peace made with Great Britain, in 1783, the "navigation of the river Mississippi from its source to the ocean," it is declared, "shall forever remain free and open to the subjects of Great Britain and the citizens of the United States." A part of this river was within the established boundary of the United States, and did this compact abridge the sovereignty of the Union? If the state of Ohio grant a charter to a company to improve the navigation of a certain river, and authorize them to charge a toll, this would withdraw such river from ordinary legislation, but would it affect the sovereignty of the state? It is not unusual for independent governments to stipulate, that the navigation of certain rivers within the territories of each, shall be common to the subjects of both governments. Individuals are free to do that which may be done lawfully, but by a compact they may stipulate that they will not do certain things, and does this destroy their agency? On the contrary, does not the obligation of the compact or agreement voluntarily formed, show their power and regu-

late their rights? The same may be done under certain restrictions, by the people of a state. The terms, "sovereign power of a state," are often used, without any very definite idea of their meaning, and they are often misapplied. Prior to the formation of the federal constitution, the states were sovereign in the absolute sense of the term. They had established a certain agency, under the Articles of Confederation, but this agency had little or no power beyond that of recommending to the states, the adoption of certain measures. It could not be properly denominated a government, as it did not possess the power of carrying its acts into effect. The people of the states, by the adoption of the federal constitution, imposed certain limitations in the exercise of their powers which appertain to sovereignty. But the states are still sovereign. They are bound by the compact not to exercise certain powers which they have delegated to the federal government, and the citizens of the state are bound to respect and obey the powers thus delegated. But this compact, or federal constitution, was voluntarily formed by the people of the states, in their sovereign capacity, and may be changed, at their pleasure, in the mode provided.

The sovereignty of a state does not reside in the persons who fill the different departments of its government; but in the people from whom the government emanated, and who may change it at their discretion. Sovereignty, then, in this country, abides with the constituency and not with the agent. And this remark is true, both in reference to the federal and state governments. If the people of a state, in their sovereign capacity, enter into a compact, either from motives of sound policy or for a valuable consideration paid, that certain lands within the state shall be exempt from taxation, or that certain navigable rivers shall remain unobstructed, the sovereignty of the state is no more affected, than it is by every act of incorporation, where exclusive privileges are given to a company or an individual. Certain objects on which the sovereign power may act are, by its own consent, withdrawn from its action; but this does not divest the state of any attribute of its sovereignty. If certain lands be exempt from taxation, the general power to tax is not affected; and so as to any exclusive right or privilege which is vested by compact or act of incorporation. A state cannot divest itself of its essential attributes of sovereignty. It cannot enter into a compact not to exercise its legislative and judicial functions, or its elective rights; because this would be to change the form of government which is guaranteed by the federal constitution. But it is earnestly contended that the rights asserted by the complainant, are wholly incompatible with the sovereignty of the state, and with the provision that the state was admitted on an equal footing with the original states. Does this provision mean, that the new state shall exercise the same powers and in the same modes, as are exercised by any other state. Now this cannot be the true construction of the provision, for there cannot be found, perhaps, any two states in the Union whose legislative, judicial and executive powers are in every respect alike. If the argument be sound, that there is no equal footing short of exact equality in this respect, then the states are not equal. But if the meaning be, that the people of the new state, exercising the sovereign powers which belong to the people of any other state, shall be admitted into the Union, subject to such provisions in their fundamental law as they shall have sanctioned; within the restrictions of the federal constitution, then the states are equal. Equal in rank, equal in their powers of sovereignty; and only differ in their restrictions, which, in the exercise of those powers, they may have voluntarily imposed upon themselves. Thus a state may, in her constitution, prohibit the legislature from incorporating banks, or in fact from passing any act of incorporation; and yet this state would be admitted into the Union on an equal footing with the other states. The same powers were exercised in forming a constitution, but in the distribution of the powers of the state government they were not given to the same extent, nor were they to be exercised in the same manner. But this produces no inequality. The states are equal, inasmuch as each has, by its own voluntary will established its own government, and has the power to alter it. This is the principle on which the state governments are established, and consequently they all stand upon an equal footing. They have the same basis; have been formed according to the will of the people, and may be changed at their discretion. If then, there is nothing in the constitution of the state which is repugnant to the compact in the ordinance in relation to navigable waters, and the parties to the compact have in no form annulled it, and it is not inconsistent with that equality which the state of Ohio claims with the original states, it follows that this compact is in full force, and is a subject of judicial cognizance.

The sixth article of the compact prohibits slavery. The constitution of the state also prohibits it. Now notwithstanding this inhibition in the constitution, the people of the state in convention, might so alter the constitution as to admit slavery. But does not the compact prevent such an alteration without the consent of the original states? If this be not the effect of the compact, its import has been misconceived by the people of the state generally. They have looked upon this provision as a security against the introduction of slavery, even beyond the provisions of the constitution. And this consideration has drawn masses of population to our state, who now repose under all the guaranties which

are given on this subject by the constitution and the compact. The provision of the compact in regard to slavery rests upon the same basis, as that which regards the navigable waters within the state. They are both declared to be unalterable, except by common consent. But it is contended that congress having made a donation of lands to aid in the structure of this canal on condition that its navigation shall be free to the United States for the transportation of troops and munitions of war; and as the canal can be of no use without the water of the Maumee, it must follow that the provisions of the compact, as it regards this river, are annulled by the assent of both parties.

This argument would have great force, if it were impracticable to draw the necessary water for the canal from the river, without materially obstructing its navigation. This is not pretended. And if a sufficient supply of water may be drawn from the river, without injury to its navigation, it would be a most unreasonable implication to hold, that the compact, in regard to this river is annulled or was intended to be annulled. It is insisted that the Maumee river above the falls is not embraced by the compact. That by the common law rivers were only held to be navigable as far as the tide ebbed and flowed; and that by analogy this principle may be applied in this country to a river so far as its navigation is continuous, but no further. That in this view the obstruction of the falls of the Maumee must terminate its navigableness. If this position be correct, the navigation of the St. Lawrence, and the waters connected with it, terminate at the falls of the Niagara. And if the same rule were applied to our rivers generally, it would do violence to the common understanding of the country, and contradict the daily demonstrations which are every where witnessed. In England, where the common law rule on this subject prevails, the rivers are of no great length; and they are not in fact, navigable above the flowing of the tide. Neither this rule nor any principle drawn from it, has been applied to rivers in this country. Obstructions do often occur on navigable rivers, without changing their character; and where a river, like the Maumee, affords a continuous navigation for steam boats one hundred and twenty miles above an obstruction, two thirds of the year, it must be held navigable, within the meaning of the compact. The fact of navigableness may be proved, like any other fact in the cause, and for the purposes of the injunction, may be considered as proved by the oath of the complainant. The supreme court of this state in the case of Hogg v. Zanesville Canal & Manuf'g Co., 5 Ohio, 410, had occasion to examine the point now under consideration. That was an action of trespass, in which the plaintiffs claimed damages for the loss of a boat and cargo in crossing a dam over the Muskingum river, which the legislature had authorized the defendants to construct, but they were required to make and keep in repair a lock in the dam of certain dimensions, which would afford a safe passage for boats. This lock had fallen out of repair, in consequence of which the loss was suffered of which the plaintiffs complained. In their opinion the court say, "to the validity of certain statutes as affording a protection to the defendants, the plaintiffs object on the ground that they interfere with the ordinance, &c." This portion of the ordinance of 1787 the court say, is as much obligatory upon the state of Ohio as our own constitution. In truth it is more so; for the constitution may be altered by the people of the state, while this cannot be altered without the assent both of the people of this state and of the United States, through their representatives. It is an article of compact, and until we assume the principle that the sovereign power of the state is not bound by compact, this clause must be considered obligatory. Certain "navigable rivers" in Ohio are "common highways." Of this character is the Muskingum river. Every citizen of the United States has a perfect right to its free navigation. A right derived, not from the legislature of Ohio, but from a superior source. With this right the legislature cannot interfere. In other words they cannot by any law which they may pass, impede or obstruct the navigation of that river. That which they cannot do directly they cannot do indirectly. If they have not themselves the power to obstruct or impede the navigation, they cannot confer this favor upon an individual or a corporation.

On the part of the complainant it is insisted, that the compact is violated if the legislature authorize the construction of any work, on a navigable stream, though it may improve its navigation. That a dam across the Maumee, though constructed with a lock, would delay and therefore obstruct the navigation. On the other hand the defendants' counsel insist, that the legislature may improve the navigation of any river in the exercise of their discretion, and that it is for them to determine what shall amount to an obstruction. That this is not a judicial question but one of expediency, which must be determined by the law making power. If the compact be in force, if it secure to the public, and every citizen, a right to the unobstructed navigation of the navigable rivers within the state, the judicial power is bound to recognize this right. And there can be no more difficulty in this than many other cases of daily cognizance in courts of justice. A court or jury must also decide from facts, whether an injury complained of amounts to a nuisance either public or private. And in the present case, the court can decide whether the acts threatened to be done by the defendants, would be injurious to the public and to the complainant in particular; and whether they violate the compact. The provisions of the ordinance had reference to the navigable

rivers and the carrying places, as they then were. And in that state they were to remain free, without tax, &c. But this does not prevent the legislature from improving the navigation of rivers and the carrying places between them. Such improvements can in no sense be considered as repugnant to the ordinance, but in promotion of its great object. And it would seem to be no violation of the compact if the legislature should exact a toll, not for the navigation of the rivers in their natural state, but for the increased facilities established by the funds of the state. The carrying places between the navigable points at the date of the compact, were in their natural state. No way had been opened for a solitary traveller, much less for purposes of commerce. In this wild and unimproved state, neither the territorial not state legislature could prohibit the passage over these carrying places, nor impose a tax on travellers or merchandize for passing over them. But if the legislature with the funds of the state, or through the instrumentality of an incorporated company, should construct a canal, a turnpike road or a rail road, connecting the navigable parts of these rivers, it could be no violation of the ordinance to exact a toll for the use of these ways. This would not impair any right given by the compact, but would require a compensation for a benefit conferred. And it would be no sufficient answer to this, to say that the traveller or transporter of produce or merchandize had a right to thread his way through the unbroken forests, and therefore these must be permitted to remain in their natural state. Navigable rivers and the carrying places between them, are placed on the same footing by the compact; and the only difference between them is, the rivers have established channels, whilst the carrying places are unmarked. They are both in their natural condition, and the state, it would seem, is no more prohibited from improving the navigation of the rivers than the carrying places between them. And if a toll may be charged, for the increased facilities in the one case, for the same reason it may in the other. We therefore can entertain no doubt, that the legislature may improve, at their discretion, the navigable rivers of the state, and authorize the construction of any works on them which shall not materially obstruct their navigableness. They may build a dam over the Maumee, if it shall be so constructed with a lock or otherwise, as not materially to obstruct its navigation.

The counsel for the complainant contend that the United States still hold the proprietary right, in the streams of the state. And on this ground, independent of the compact, as well as under "the power to regulate commerce among the several states," congress had a right to declare, as in the act of 1796 they have declared, that these streams should remain free, &c. It is true the United States held the proprietary right under the act of cession, and also the right of sovereignty until the state government was established; but the mere proprietary right, if it exist, gives no right of sovereignty. The United States may own land within a state, but political jurisdiction does not follow this ownership. Where jurisdiction is necessary, as for forts and arsenals, a cession of it is obtained from the state. Even the lands of the United States, within the state, are exempted from taxation by compact. Jurisdiction over these rivers is vested in the local government, subject to the provisions of the compact. What legislative power congress may exercise over these rivers, under the power to regulate commerce among the several states, it does not seem to be necessary now to determine. Any law on this subject must be general in its provisions and consequently apply to all the states. The law of 1798 does not purport to be an exercise of power under this provision of the constitution.

We come now to enquire whether the complainant, under the circumstances of the case, and in the form presented, is entitled to an injunction. It is objected in the first place, that the complainant being a citizen of Massachusetts is not a party to the compact. That this instrument was formed between the original states and the people of the territory and of the states which should be formed within it. The force of this objection is not perceived. Under no circumstances can it be material for any one, who asks relief under the compact, to show that he is a party to it. The complainant is a citizen of the state of Massachusetts, which gives him a right to sue in this court, and if he bring himself within the rule which authorizes an injunction, he may ask it though no party to the compact. The injunction is not asked on the sovereign power of the state, but on certain individuals assuming to act in behalf of the state. This course of proceeding is fully sustained by the principle settled by the supreme court of the United States in the case of Bank of U. S. v. Osborn, 9 Wheat. [22 U. S.] 733. Must the right of the complainant be established at law, before he can claim an injunction? This is earnestly contended by the defendants. Whatever doubts may have formerly existed on this subject, there seems to be no ground for any at this day. The injunction is issued because, under the circumstances of the case, it is the only adequate remedy. In cases of an alleged violation of copy right, it is often resorted to. And in the case of the Universities of Cambridge & Oxford v. Richardson, 6 Ves. 689, Lord Elden remarked, "It is said that in cases of this sort the universal rule is, not to grant or sustain an injunction until the right is made clear at law.' With all deference to Lord Mansfield, I cannot accede to that proposition, so unqualified. There are many instances in my own memory in which the court has granted or sustained injunctions to the hearing, under such circumstances." And he also observes in the same case, "If there be a number of mills

upon a stream, each having a right to the water, at the instance of any one the court would enjoin." Where waste is threatened, the party has a right to an injunction to prevent the mischief. Gibson v. Smith, 2 Atk. 182. In the case of Lane v. Newdigate, 10 Ves. 194, an injunction was granted to restrain the use of the water, so as not to injure the plaintiff's manufactory. And in the case of Gardner v. Village of Newburg, 2 Johns. Ch. 164, the court say, "that chancery has concurrent jurisdiction with a court of law, in cases of private nuisances." The diversion of water courses, is a common case for the exercise of this jurisdiction. 2 Vern. 390; 1 Vern. 120, 127, 275; 16 Ves. 338. There are some cases in the books where the chancellor has refused an injunction, until the right was established at law. Reid v. Gifford, 6 Johns. Ch. 19; 7 Johns. Ch. 162; 6 Ves. 51; 7 Johns Ch. 314. But these cases are clearly distinguishable from others, where the injunction is held to be the proper remedy.

Does the complainant bring his case within the principle, on which this extraordinary interposition of the court is given? An injunction is granted to prevent an irreparable injury. In other words, an injury for which an action at law might not give complete redress. And the principle is well illustrated by an injunction to prevent the diversion of the flowing of water to a mill, which would destroy its value. The foundation of this jurisdiction is the necessity of a preventive remedy, where great and immediate mischief or material injury would arise to the comfort and useful enjoyment of property. The interference rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of the right which, upon just and equitable grounds, ought not to be prevented. 1 Vern. 120, 127, 275. This preventive remedy is never given against an ordinary trespass, for in such case the law will afford adequate redress. But where an action at law, from the nature of the injury, cannot give that full and ample indemnity which the party is justly entitled to, he may ask the interposition of chancery to prevent the injury. In 7 Johns. Ch. 314, the chancellor says—"An injunction is not granted to restrain a mere trespass, where the injury is not irreparable and destructive of the plaintiff's estate; but is susceptible of perfect pecuniary compensation, and for which the party may obtain adequate satisfaction in the ordinary course of law. It must be a strong and peculiar case of trespass going to the destruction of the inheritance, or where the mischief is remediless, to entitle the party to the interference of the court by injunction." This is the principle on which this remedy is given. Does the case made by the complainant come within the rule? He presents his rights, which are threatened to be invaded, in two aspects: (1) As a citizen of the United States, he claims the right of the free navigation of the Maumee river, which the proposed dam or dams would destroy. (2) That he owns a tract of land on the river, and a small island in it, the value of which would be materially injured, if not wholly destroyed, by the obstructions to the navigation of the river.

As it regards the first ground, whatever rights the complainant may set up as a citizen of the United States, under the compact to navigate the river, it would seem to afford no ground for this extraordinary interference of the court. This right is in fact not impaired or practically affected unless he, as a citizen of the United States, is about to navigate the river. No such allegation is contained in the bill. It is then an abstract right which he asserts, and which he may never practically exercise. A court of chancery never deals with abstractions, but acts upon existing and practical rights, and prevents impending wrongs. It will enjoin, as before stated, only to prevent an irreparable injury—and that cannot be considered as such an injury, which depends on a future contingency, such as the exercise of an abstract right. If the complainant shall, at any future time, think proper to attempt to navigate the river, and shall be prevented from doing so, by the dam or dams now threatened to be erected, or shall suffer injury from such dam or dams in his vessel or cargo, he may well claim damages for the injury. In this way can this right of navigation, which is common to all the citizens of the United States, be practically asserted.

The other ground requires a more particular examination. The complainant states that he purchased the property situated at the head of the rapids, as above described, at a very large price, with a view to the navigation of that part of the river extending from the head of the rapids to Fort Wayne, and especially because it is situated at the lower termination thereof, which benefits he claims are secured to him by the ordinance and law of congress before mentioned, and the constitution of the United States. "That there is an extensive and valuable water power upon the property, afforded by the rapids of the river which commence at said point. Two extensive saw mills and one flouring mill have already been erected thereon, and it was the expectation of the complainant that many others would speedily be erected, and he believes they still would be, but for the anticipated effects of said dam or dams, which are threatened to be located above. That said dam or dams are intended to be erected some miles above his property, and that the effect thereof would be to greatly obstruct, if not entirely cut off and destroy the navigation of the river, throughout the entire distance between the foot of the rapids and Fort Wayne. That the value of his propery would be thereby greatly lessened, if not wholly destroyed, and his right as a citizen of the United States to navigate said river without obstruction, hindrance or payment of toll, would be violated and rendered of little or no practical value whatever. And he insists that the dam or dams would be a

public nuisance, and that, as such, their erection should be arrested by the interposition of the court."

From the case stated by the complainant it is clear that he considers the dam or dams as a public nuisance, and that he as a citizen of the United States, being entitled to the free navigation of the river, has a right to prosecute for this nuisance, and ask the court to enjoin the defendants. No individual has a right to prosecute for a public nuisance in his own name, or at his own instance, in this form of action, unless such nuisance be irreparably injurious to himself. The United States through their law officer might well ask to have this nuisance, if it shall be one, abated; but the special and private injury to an individual is the only ground on which he can ask for relief against it. 18 Ves. 215; 6 Johns. Ch. 439; Attorney General v. Nichol, 16 Ves. 338. In the case of City of Georgetown v. Alexandria Co., 12 Pet. [37 U. S.] 98, the supreme court say, as the result of the cases examined, "a court of equity will now take jurisdiction of a public nuisance, at the instance of a private person; where he is in imminent danger of suffering a special injury, for which, under the circumstances of the case, the law would not afford an adequate remedy." And in the case of Crowder v. Tinkler, 19 Ves. 616, the chancellor says, "the complaint is therefore to be considered as of not a public nuisance simply; but what, being so in its nature, is attended with extreme probability of irreparable injury to the property of the plaintiffs, including also, danger to their existence, and on such case clearly established I do not hesitate to say an injunction would be granted."

We have already considered the more abstract right of navigating the river, secured to every citizen of the United States, as too remote and contingent, for the special interference of the court. The right may exist absolutely, in the abstract, but whether it will ever be exercised is wholly contingent. If the complainant were actually engaged in plying a steam boat or other vessel, between Fort Wayne and the rapids, he would at least present a tangible case, by showing the exercise of a right which would be destroyed by the construction of the works complained of. It is a public nuisance to obstruct a highway, on which every citizen has a right to travel; but can any citizen on the ground of this right, ask a court of chancery to enjoin any persons who may threaten to erect such obstruction? The individual has suffered no special injury, much less an injury that is irremediable, in any other form than by injunction. If, in attempting to travel the road, he should be prevented from doing so, by the obstruction, he would have a right to bring his action at law for damages. And this is the only appropriate redress, which an individual, under such circumstances, can have. The persons who constructed the nuisance would be liable to a public prosecution, and in this form the redress to the public would be ample. The complainant alleges that he paid a high price for his property on account of its situation, and that its value will be greatly injured if not wholly destroyed by the dam or dams which the defendants are about to build. But he does not state how this consequence will follow. If it result from destroying the navigableness of the river, is it not easy to state in what manner it injures his property? Has he a landing place on his ground, a place where the produce transported on the river is deposited, or what other facts or circumstances shew that the value of property depends upon the navigation of the river? It is not enough for the complainant to say, generally, that he will be injured by the construction of the works; but he must state how his property will be injured. This is the turning point in the case; the ground on which the injunction must be allowed, if it shall be issued. The complainant does not complain that the flowing of the water is diverted or will be diverted from his mill, so as to injure it; or that the volume of water will be so reduced as to prevent the construction of other mills. No special injury of any kind is alleged but, generally, that the obstructions would injure the value of his property. This may be the estimate of the complainant, but by a statement of the facts on which his estimate is formed, he must enable the court to judge of its correctness. He has stated no fact going to show how the free navigation of the river, gives value to his property. Is the river a highway to his mill, and is it used for the transportation of lumber to or from the mill? This is not stated in the bill. Does the river afford the only outlet or approach to his mill? Nothing of this kind is pretended. How then does the proposed obstructions on the river, inflict on the complainant an irremediable injury? The court do not see how such an injury is inflicted, and the complainant has failed to enlighten them on the subject.

In the case of Corning v. Lowerre, 6 Johns. Ch. 439, an injunction was granted to restrain a defendant from obstructing a street, in the city of New York, by building a house thereon; it being not only a public nuisance, but producing special injury to the plaintiffs by affecting the enjoyment of their property in the vicinity, and the value of it. In that case there was an intimate connection between the enjoyment of the property and the street which led to it; and this was shown by the facts of the case.

In the case of Attorney General v. Nichol, 16 Ves. 338, the chancellor said, that an injunction against darkening ancient windows cannot be sustained in every case affecting the value of the premises, that would support an action. The effect must be, that material injury amounting to nuisance, which should not only be redressed by damages, but upon equitable principles prevented. And in 7 Johns. Ch. 314, where an injunction was re-

fused, the chancellor says—"The plaintiff does not aver that the ledge of stone or mass of rock, on which the trespass is committed, is of any essential use, or that he does or can apply it to any valuable purpose. It cannot be compared then to a lead or coal mine, or a quarry of marble, or a fine building, or precious stones, or a grove of timber, or a mill establishment, which the court of chancery has thought proper to protect from trespass and ruin by injunction." The court would not hesitate to enjoin the defendants, and to give effect to their decree, on a proper case being made; but the complainant has failed to show that measure of injury which calls for its special interposition by an injunction. The injunction is therefore not allowed.

LEAVITT, District Judge. The object of this bill is to obtain an injunction restraining the respondents, as the agents of the state of Ohio, from proceeding in the erection of a dam across the Maumee river, authorized as necessary under a law of the state, providing for the construction of so much of the Erie and Wabash canal, as lies within the limits of the state. The complainant alleges, that this dam, if completed, will greatly injure, if not wholly destroy, the navigation of said river, and thereby become a nuisance; and also, that it will materially lessen the value of real estate, of which he is the proprietor, lying some distance below the point, where it is proposed to erect said dam. He claims that the act of the legislature of the state, providing for the construction of said canal, so far as it may be considered as authorizing any obstruction to the navigation of said river, is in conflict with the ordinance of congress of the 13th July, 1787; and that, as the owner of property which will be injured in value by the erection of said dam, he is entitled to the preventive remedy, afforded by the process of injunction. The provision of the ordinance of 1787, in violation of which, the complainant alleges that his rights are about to be invaded, is as follows: "The navigable waters leading into the St. Lawrence and Mississippi, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of said territory, (north-west of the Ohio,) as to the citizens of the United States, and those of any other states, that may be admitted into the confederacy, without any tax, impost, or duty therefor."

It is insisted by the counsel for the respondents, that the ordinance of 1787 has been superseded, or virtually abrogated in Ohio, by the adoption of her constitution, and her admission into the Union as a sovereign state, "on an equal footing with the original states;" and that the free and uncontrolled use of the navigable water course, within her limits, pertains to her, as a necessary appendage of sovereignty. Although this ordinance, on various occasions, has been the subject of much public discussion, the question now presented has never been decided by any of the federal tribunals of the country. And the case, in the supreme court of Ohio, cited in argument, and to which reference will hereafter be made, is believed to be the only one, in which it has received a judicial consideration.

Preliminary to the examination of this memorable ordinance, and as connected with the history of its origin and adoption, it may be proper to notice, that the vast extent of country, known as the Northwest Territory, was vested in the United States, by cessions from the states, within whose chartered limits, it was embraced. The state of Virginia, claiming to hold a large portion of the territory, in sovereignty, by her deed of cession of the 1st of March, 1784, granted "to the United States, in congress assembled, all her right, title, and claim, as well of soil, as of jurisdiction" (with certain reservations and exceptions stated in the deed) "as a common fund, for the use and benefit of such of the United States, as have become, or shall become, members of the Confederation, or federal alliance of the states." The congress of the United States, thus possessed of this great domain, in trust for the common benefit, on the 13th of July, 1787, adopted the ordinance entitled, "An ordinance for the government of the territory of the United States, north west of the river Ohio." This ordinance, after making provision for a temporary government within the territory, declares, among other things, "that for extending the fundamental principles of civil and religious liberty which form the basis, whereon these republics, their laws and constitutions, are erected: to fix and establish those principles, as the basis of all laws, constitutions and governments, which forever hereafter shall be formed in the territory; to provide also for the establishment of states and permanent governments therein, and for their admission to a share in the federal councils, on an equal footing with the original states, at as early a period as may be consistent with the general interest; the following articles shall be considered as articles of compact between the original states, and the people and states, in the said territory, and forever remain unalterable, unless by common consent." Then follow the articles of compact, six in number, guaranteeing, in the most solemn and impressive forms of expression, the great principles of civil and political liberty, namely—the toleration of freedom of opinion in matters of religion; the benefits of the writ of habeas corpus; of trial by jury; and of judicial proceedings according to the course of common law; the encouragement of schools, and the means of instruction; good faith and humanity towards the Indian tribes; the right of the states formed within the territory to admission into the Union, with certain provisions as to the number and boundaries of such states; and that neither slavery nor involuntary servitude shall be introduced, otherwise than in punishment for crimes.

In this category also is included the provision already quoted, securing the free and unobstructed navigation of the water courses therein referred to. This clause, it appears by reference to the journal of the old congress, was not included in the original draft of the ordinance, but was afterwards unanimously adopted, as an addition to the fourth article of the compact.

To form a just view of this instrument, and properly to appreciate the far-reaching designs and noble elevation of the framers, it is important to recur to the circumstances in which they were placed at the time of its adoption. That it is the production of profound minds, guided by principles of the purest patriotism, is sufficiently attested on the face of the ordinance. Many of the members of congress of '87, from which it emanated, had participated largely in the toils and trials, and were deeply imbued with the spirit of the revolution from which the country had just emerged. The nation, with her fiscal energies greatly paralyzed and her resources exhausted, was in possession of a domain, vast in extent, and in prospective value, almost beyond computation. In addressing itself to the responsible duty of disposing of this domain, congress may well be supposed to have been actuated by the twofold design of making it available for the relief of the country from her financial embarrassments, and of extending and perpetuating the great principles of national liberty, which had been involved in the struggle for independence. An enthusiastic devotion to those principles was a distinguishing characteristic of the American people, at that period; and there were thousands in Europe, in whose bosoms the same feelings glowed with equal intensity. In this state of things, it was alike the dictate of inclination, of duty, and of policy, that the principles of the government which were to exist in the Northwest Territory, should be not only distinctly and authoritatively announced and defined, but placed on a secure and an immovable basis. It was not difficult to foresee, that those in whom the doctrines of the revolution had taken deep root, and who were looking to this fertile region as the place of their permanent settlement and abode, would enquire with the most watchful solicitude, as to the securities which were provided for the enjoyment and preservation of their civil and political rights; and that nothing short of the amplest guarantys of the blessings of liberty would satisfy their wishes, and induce them to immigrate to the territory.

These are some of the considerations, from which, if the language of the ordinance on this point was doubtful or ambiguous, the inference would be sustainable, that it was the design of its framers, to make its leading principles and requisitions, of perpetual obligation on those who then were, or should afterwards become, the parties to it. But, if regard is had to the language of the ordinance, no room is left for inference or conjecture, as to the design of congress in its adoption. When it is declared to be the intention of the articles of compact to extend the "fundamental principles of civil and religious liberty," and "to fix and establish those principles, as the basis of all laws, constitutions and governments, which forever hereafter shall be formed in the said territory," there can be no hesitancy in saying, it was designed to lay a strong and enduring foundation, on which the structures of government in the territory, should be based.

In the arguments submitted in this case, no attempt was made to maintain the position, that the congress of '87 had transcended its powers, in the enactment of the ordinance for the government of the Northwest Territory. Nor is it supposed that a doubt can exist, as to the competency of that body to prescribe the principles on which states formed within the territory might be admitted into the Union; or to propose as matters of compact, stipulations, which should be obligatory on the states, as members of the confederacy. The only point of enquiry therefore, in reference to this branch of the case, is, whether the ordinance has been superseded and rendered inoperative, in whole or in part, within the state of Ohio. In looking into the ordinance, it is obvious, that all the provisions of the articles of compact, are not to be viewed as standing precisely on the same footing. The guaranties for the security of the great principles of liberty, which lie at the foundation, and constitute essential elements, of all true republican governments, are obviously to be regarded in a different light from those which pertain merely to the right and possession of property, and its advantageous enjoyment. This distinction seems to have been recognized by the framers of the constitution of Ohio, and to have exerted an influence upon them, in framing that instrument. They evidently acted under a belief, that the fundamental law of the state, must conform, in all its leading features and principles, to those of the ordinance of '87. But, while they were careful to impress those features upon, and incorporate those principles into the constitution of Ohio, they did not deem it necessary or proper, to treat all the provisions of the ordinance, as entitled to the same high consideration. Hence no reference is made in the constitution to that provision of the ordinance relating to the navigability of water courses;—and for the plain reason, that this was not necessary, in order to give to the constitution a republican character, and make it conform to the great principles declared in the ordinance.

Considering the distinction here indicated, as well taken, the conclusion to which it points, is, that in so far as the constitution of Ohio has embraced, and secured the perpetuity of the essential principles of free government, set forth in the ordinance, the latter instrument may be considered as superseded, within the state. In the preamble to the bill of rights, forming a part of the constitution of Ohio, it is declared, that the principles which it asserts shall be "forever unalterably

established." To this extent, therefore, it may be conceded, that the great purposes of the ordinance are effected and amply secured; and that to this extent, its operation may be considered as at an end. Whether, in the event of a change in the constitution of Ohio, by which its provisions would be made to conflict with the ordinance, it would be possible to apply a corrective to the evil, is not a question involved in this case. Nor would it be either profitable or proper to engage in its discussion. From the well known attachment of the people of Ohio, to the republican principles of her constitution, the hope may be justly indulged, that they will never consent to, or tolerate any change in the fundamental law of the state, by which it will be brought into conflict with the ordinance of '87.

Conceding that the articles of compact contained in the ordinance have been superseded or suspended, in the manner and to the extent indicated, it is not perceived, that the provision respecting the free navigation of water courses, can be viewed as coming within the operation of the principle stated. If the provision can be considered as inoperative within the state of Ohio, it must be upon one or both of the following grounds: (1) Because congress in accepting the constitution of Ohio, as submitted for the approval of that body, is thereby to be presumed to have given the assent of the parties, to the abrogation of the provision referred to, or (2) because, the right claimed under that provision, is a necessary appendage of sovereignty, and cannot exist elsewhere than in Ohio, but in derogation of her rights and standing, as a sovereign and independent state.

1. As to the first of these propositions, it may be remarked, that there is no pretence that the parties to the compact, by any action on the part of congress, or otherwise, have given any express assent to the repeal or abrogation of the guaranty respecting the navigation of rivers; and, that if it is to be viewed as inoperative, that result is to be made out, altogether by implication.

It is proposed to enquire, very briefly, whether in fact, or in law, there is any thing which warrants such an implication. In April, 1802, upon the application of the people of that part of the territory north-west of the Ohio, now embraced within the limits of the state of Ohio, congress passed a law to enable them "to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original states, and for other purposes." This act provides among other things, for holding a convention of the people of that part of the territory; and authorizes such convention to form a constitution and state government, provided, the same shall be republican, and not repugnant to the ordinance of the 13th July, 1787. This provision is adverted to, as evidencing, that the congress of 1802 most distinctly recognized the obligatory character of the ordinance, and as containing an unequivocal expression of the opinion, that no state within the territory could be organized, and admitted into the Union, with a constitution "repugnant" to that instrument. That body did not consider itself as vested with the power to absolve the state of Ohio from the obligations created by the compact. Nor can it be doubted, that if the constitution of the state had been submitted to congress with a provision, that the use and control of the navigable water courses within her limits, should rest exclusively in Ohio, that the instrument would have been rejected, as in conflict with the ordinance. It is also clear, that the people of Ohio in calling a convention and adopting a constitution, under the act of congress of April, 1802, recognized the ordinance as affording a paramount rule for their guidance. This is deducible from the fact that in the preamble to their constitution, the right of the state to admission into the Union is based upon the ordinance, the constitution of the United States, and the act of congress just referred to. The constitution of Ohio thus formed and embodying, as has been seen, the great and leading doctrines of a free government, as set forth in the ordinance, but containing nothing on the subject of the free navigation of water courses, was submitted to congress, and approved by that body as "republican," and not "repugnant" to the ordinance. And the state was thereupon admitted into the Union.

If it be conceded that congress possessed the competency of giving the assent of the parties to the compact, to the abrogation of any of its provisions, it is not perceived that the action of that body affords any just ground to infer any intention to do so in the case referred to. Nor, is there any reason to conclude that the convention of Ohio supposed the state had, by her admission into the Union, obtained a release from the obligation imposed by the provision of the ordinance under consideration. These bodies seem to have a constant reference to this instrument; and both in the most solemn and deliberate manner recognized its obligatory character. And hence, so far as it pointed out the landmarks of a free government, it was deemed necessary that the constitution of Ohio should embody its principles. It was, doubtless, one of the great purposes of the ordinance, to afford a directory to the states to be formed within the territory, in the construction of their governments; and the principles which it laid down were regarded as the tests by which the republican character of a state constitution was to be decided. But, as the provision in relation to water courses would remain and be of perpetual obligation, in virtue of the ordinance, there was no necessity that the constitution of Ohio should contain a distinct recognition of its obligatory character. From the language in which this guaranty is couched, and the nature and extent of the interests affected by it, the inference of any intention on the part of congress to assent to its abro-

gation in Ohio, is strongly rebutted. The terms of this part of the compact are, that the water courses referred to "shall be common highways, and forever free, as well to the inhabitants of the territory, as to the citizens of the United States, and those of any other state that may be admitted into the confederacy." In duration, the benefits which it intended to secure, were without any limit; in extent, they were to be common, to the inhabitants of the confederacy as it then existed or might afterwards exist. All were interested in this provision, since all might have occasion to navigate the rivers referred to. Is it rational to conclude, that congress intended to surrender a right so solemnly secured, so important in its character, and so extensive in its operation? And is such an intention to be predicated of any action, short of an express declaration to that effect? If an ordinary act of legislation cannot be repealed without the observance of the forms and solemnities requisite, in its enactments, a compact declared on its face to be "unalterable, unless by common consent," cannot be abrogated by mere implication.

2. The next enquiry is, whether the right set up, in behalf of the state of Ohio, is a necessary appendage of sovereignty, so that it cannot exist elsewhere, but in derogation of her character and standing, as a sovereign and independent state. The affirmative of this proposition has been strenuously and ably urged by the counsel for the respondents; and, its importance commends it to the attentive consideration of the court. It may be readily conceded, that if the congress of '87, professing to provide the means for the formation of state governments, and the admission of states into the Union, on a footing of equality with the other states, have prescribed and annexed conditions, so repugnant and incongruous, as to defeat the ends that were in view, thus far its acts may be regarded as nullities; since, to that extent, that body must be viewed as having transcended its powers. In consistency with the terms and intentions of the acts ceding the territory to congress, that body could not attach conditions to the admission of states, that would be degrading to them, by detracting from their standing, as sovereign states.

It may relieve this subject of some of its apparent difficulties, to settle precisely, the character and extent of the restriction upon the state, created by the ordinance, in reference to her navigable water courses. For, in accordance with the views here briefly presented, and which will be given more at large, in a subsequent part of this opinion, it is not "necessary to insist upon, or vindicate, a construction of the ordinance, which shall take from the state, all control over her navigable streams." The guaranty on this subject is viewed as restrictive of the power of the state, to commit a public wrong, in authorizing or permitting obstructions and hindrances, to the navigation of her streams, by actual impediments, or the imposition of tolls or duties. There is an obvious distinction, between the right to destroy navigation, and the right or power, to improve it. The imposition of a toll or duty, for the use of any of the streams referred to, by the ordinance, in their natural state; or, the erection of any fixture, that would destroy or injure the utility of such a stream, for the purposes of navigation, would be in violation both of the letter and spirit of that instrument. And the cases here supposed are precisely such, as it intended to prevent. But, the erection of a dam, designed for, and "tending to, the improvement of navigation, by affording increased facilities for commercial intercourse," so far from being opposed to the ordinance, would be in furtherance of the purposes had in view by its framers. Looking at this subject in this light, it is not perceived that the recognition of the obligatory character of the provision of the ordinance, under consideration, so far detracts from the rights of sovereignty, in Ohio, as to warrant the conclusion, that she is not sovereign, in any just sense of that term. To entitle a state to that character, it is not regarded as essential, that she should possess, in an equal degree, the same powers, over all subjects, that may be possessed by other states. In any other aspect of this subject, no one of the states formed within the territory north-west of the river Ohio, has been admitted into the Union, on a footing of equality with some of the original states. The institution of slavery existed in many of the original states, at the period of the adoption of the ordinance of '87; and, in several of them, it continues to exist. Yet, the ordinance expressly inhibits the introduction of slavery in any of the states to be formed within the territory; and these states have made this provision of the ordinance, a part of their constitution. In this case then, it is clear, that some of the original states possess rights, and exercise a species of jurisdiction, which is prohibited to Ohio, and other states. And yet, can it be maintained, that the latter states are not equally sovereign with the former?

It may be well on this point, to refer to the language of the ordinance, to ascertain in what light this subject was viewed, by those who framed and passed it. To suppose them ignorant of the political rights and relations of the state, or that they misconceived the powers with which they were clothed, would be doing them great injustice. Under a form of government, in which the congress represented the states, in their sovereign capacities, it may be safely inferred, that the rights of the states, were not only well understood, but scrupulously guarded. And, in making provision "for the establishment of states and permanent governments" within the territory, and "for their admission to a share in the federal councils, on an equal footing with the original states," it is to be presumed they intended what the language imports. Nor is it

to be conceived, that they would annex a condition to the admission of a state, repugnant to, and inconsistent with, the declared purpose of providing for the admission of new states, on an equal footing with the old states. And the inference is therefore irresistible, that while congress intended to make the guaranty, on the subject of water courses, perpetually obligatory, the intelligence and sagacity of that body, did not lead to a suspicion, that it detracted, in any degree, from the sovereignty of the states, that might be admitted into the confederacy, in virtue of the ordinance. Again:—By the terms of the ordinance, the states admitted into the confederacy, thereupon became parties to the compact. It has been already remarked, that the congress of 1802, in providing for the admission of Ohio, and the convention of that state, in adopting a constitution, and submitting it to congress, distinctly recognized the obligatory character of the ordinance. The state became a voluntary party to the articles of compact which it contained; one of which embraced the stipulation, that certain navigable streams within her limits, should remain forever free for public use. It was optional with the state, to assent to, or refuse this condition; but having assented to it, and acknowledged its binding character, she is concluded from taking the ground, that it imposes no obligation upon her. Suppose that in addition to the terms of the compact, it had been declared, that a portion of the profits and benefits to be derived from mines of lead, gold and silver, discovered in the territory, should be forever reserved to the United States for the common benefit? Would not such a provision be obligatory on a state, coming into the Union, as a party to such a compact; and would it be competent for her to insist, after her admission, that such reservation was inconsistent with her rights as a sovereign state, and therefore, void? Again: —By a compact between the United States, and the state of Ohio, the latter has obligated herself, not to tax lands sold by the government, for the term of five years after the sale. Upon the ground assumed by the respondent's counsel, she is not bound by this compact. For, the right of taxation is one of the highest incidents of sovereignty; and yet, the obligatory character of this compact, has never been seriously questioned. If a state, may in this way, yield her right to tax property within her limits, may she not also, in perfect accordance with her character and standing as a sovereign state, agree to forego the exercise of a jurisdiction over her water courses, which she would otherwise possess?

These considerations seem fully to warrant the conclusion, that the provision of the ordinance of 1787, in relation to the free use and navigation of water courses, has not been superseded or abrogated, in Ohio; and, that neither the state, or an individual, has a right practically to destroy or obstruct their navigation.

It is believed, the views here presented accord with those which have prevailed in Ohio, from the earliest period of her history. All the departments of her government have recognized the sacred and inviolable character of that part of the ordinance of 1787, which is now under review: nor is any instance known, in which the position assumed by the counsel for the respondents, has been seriously urged. It is true, the legislature has not considered the state, so entirely prohibited from all control over the navigable streams within her limits, as to deprive her of all power to authorize improvements, which instead of obstructing or injuring, would improve and facilitate, navigation, and thus promote, the great purposes intended by the ordinance. In some cases, with a view to such results, individuals have been authorized by law, to erect dams upon streams, that may be considered as within the contemplation of the ordinance; but always, upon the condition, that locks shall be constructed and kept in repair, so as not to detract from the utility of the stream, as a navigable water course. The act, authorizing the Erie and Wabash canal cannot be viewed as an exception to the principle: for, although the act confers, by necessary implication, the power of using and diverting the water of navigable streams, as subsidiary to the accomplishment of the main purpose intended by the law, it is not to be inferred therefrom, either that it was designed to injure, or that in fact, it will injure, the interests of navigation.

But the question, as to the force and effect to be given to the provision of the ordinance under consideration, has been settled by the decision of the supreme court of Ohio. In the case of Hogg v. Zanesville Canal & Manuf'g Co., 5 Ohio, 416, in which the point was before the court, the judge says, "that this portion of the ordinance of 1787, is as much obligatory upon the state of Ohio, as our own constitution. In truth it is more so; for the constitution may be altered by the people of the state, while this cannot be altered without the assent, both of the people of this state, and of the United States, through their representatives. It is an article of compact, and until we assume the principle, that the sovereign power of a state is not bound by compact, this clause must be considered obligatory."

Another very important enquiry arises in this case, which may be stated thus: Admitting the provision of the ordinance under review to be obligatory, does the case made in the complainant's bill involve its violation, so as to entitle him to the remedy sought for? The grievance complained of in this case is, that the erection of the proposed dam across the Maumee, will greatly injure, if not wholly destroy, the navigation of that stream, and deprive the complainant of the benefits he expected to derive therefrom, and in contemplation of which, he purchased his land at a high price; and that his land will be materially lessened in value, as also the mill seats

upon it, and that the dam will be a public nuisance.

The facts necessary to a full understanding of this part of the case, are not very satisfactorily stated in the bill. It is, however, understood to have been conceded in the argument, that in the construction of the Erie and Wabash Canal, authorized by the legislature of Ohio, the canal commissioners have deemed it necessary to erect one or more dams across the Maumee, for the purpose of supplying the canal with water. That this canal is designed as a channel of commercial intercourse, between Lake Erie and the interior of the state of Indiana; and that it is located along or near to the Maumee river. And in connection with these facts it should be stated that the land of the complainant lies at some distance below the point where it is proposed to erect the dam, or dams. It becomes a material inquiry in the case, whether the erection of a dam, under the circumstances, and for the purpose stated, is an obstruction to the navigation of this stream, within the spirit and meaning of the ordinance. Some views in support of the negative of this proposition have already been incidentally thrown out; but it is proposed to say something additionally, in confirmation of the position assumed.

Referring to the case already noticed, reported in the 5th volume of the Ohio Reports, it is found that this point also arose, and that the court decided, that a dam or other fixture, on a stream, which was substantially an improvement of navigation, could not be regarded as such an obstruction or impediment as was within the contemplation of the framers of the ordinance. In looking at the provision of that instrument on this subject, it is apparent, that it was designed to prevent, first, actual impediments and obstructions by dams or other fixtures; second, impediments and obstructions resulting from the imposition of "any tax, imposts, or duty."

It will assist materially in giving a just and enlightened interpretation to this provision, to ascertain the intentions of those by whose sanction it was made a part of the ordinance of '87. And to this end, it seems proper to refer to the actual state of things at the time that instrument was adopted. Although the geography of the territory north-west of the Ohio was imperfectly known at that period, it was well ascertained that there were rivers and lakes, within its limits and upon its confines, formed on a scale of grandeur unknown in any other portion of the globe. The prospectice importance and utility of those great natural water courses and basins as affording the means of commercial intercourse throughout that vast, and fertile region, were fully appreciated. And as an inducement to immigration, it was justly deemed of moment that the future and uninterrupted enjoyment of these great facilities and advantages, should be placed upon a secure basis. Foreseeing that the time would come when between the lakes on the north, and the Mississippi and its tributaries, there would be much intercommunication, it was deemed important to guard against these obstructions; and hence, doubtless, the reason for the provision securing the right of way along the "carrying places, or portages, between the waters of the streams emptying into the lakes, and those which flowed into the Mississippi." And it may not be inaptly suggested, that the political condition and prospects of the country had an influence upon the congress of '87, in placing those guards around the navigation and commerce of the West. Under the articles of Confederation then existing, there were well founded apprehensions, if that form of government should continue, that harmony among the states would not be preserved; and that hostile interests and hostile collisions would be engendered. And in the event that the states formed in the West should be thrown into this position, in regard to other portions of the confederacy, there was danger, that in a spirit of aggression or retaliation, they might adopt measures excluding the citizens of their adversary state or states from a participation in the benefits of navigating the Western waters. To prevent, by solemn compact, such an occurrence, was probably one of the purposes of the provision referred to. Certain it is, the clause under review was designed for good, and not for evil. So far as it was intended to restrict the action or power of states or individuals, it was to disable them from the infliction of public injury. The people of the United States were not to be deprived of the use of the water courses in the Northwest Territory, by any unjust or wanton exercise of power over them: but it was not contemplated that the hands of the states should be so tied up, as that it should not be in their power to remove a natural impediment to navigation, or avoid such an impediment, by canals or other improvements. A contrary construction would be a perversion of the great and primary design of the clause. It would embarrass, if not entirely arrest, some of the great works of internal improvement, in progress or projected, in the West. It would place it in the power of a single individual to thwart the wishes, and seriously to injure the interests, of entire communities and states. Take the case before the court as an illustration of the consequences of such a doctrine. By the joint and simultaneous action of the states of Ohio and Indiana, the Erie and Wabash Canal has been authorized and commenced. It is designed as a channel of intercourse between Lake Erie and the interior of Indiana; and when completed, will be greatly promotive of the interests, not only of those states, but of a large portion of the Union. To sanction the doctrine, that for purposes so beneficent and patriotic, it is not competent for those states to use or control the waters of their navigable streams, would be pregnant with the most injurious results. For, it should be borne in mind, that if this power does not exist in these states, it exists no-

where. The same reason for denying it to the states applies with equal force to the congress of the United States. That Body, as the representative of the people of the United States, is a party to the compact, and as much bound by its stipulations, as the states individually. If, therefore, the ordinance is to receive a construction, that shall tie up the hands of all the parties to the compact, from making any improvements in navigation in the West, a fatal blow will have been inflicted upon the prosperity of that region. Upon this principle, if a rapid or other natural obstruction occurs in a stream, otherwise navigable, it is not competent to resort to the instrumentality of a dam, for the purpose of making an artificial channel, whereby to avoid such obstruction. And by a parity of reasoning, it would not be competent for a state to authorize the construction of a rail road, or turnpike, over or along any of the "portages or carrying places" referred to in the ordinance, and thereby hinder the free and common use of the same, by the imposition of tolls, as a compensation for the benefits of such improvements. Such a construction of that instrument, would be subversive of one of its leading designs.

It is no answer to the views here thrown out to say, that these improvements, when completed, will subject those who use them, to the payment of a "tax, impost, or duty." The object of the ordinance so far as it provides an exemption from these charges was to prevent the imposition of any duty for the use of the streams and carrying places referred to, in their natural state; and it might also be justly extended in its meaning, so as to prevent onerous and oppressive tolls or exactions, for their use, in an improved state. Reasonable tolls, imposed and paid, for the use of a canal or artificial road, are not to be viewed as unjust exactions; but as a fair compensation, in consideration of the increased facilities for trade and intercourse, afforded by such improvements.

According to this view of the subject, the right of the complainant to the process of injunction, is to be settled, upon principles wholly unconnected with, and irrespective of, the ordinance of '87. For, although, upon the case made he can claim nothing in virtue of the compact contained in that instrument, yet, if he brings himself within the principles, on which courts of chancery are wont to interfere, he is entitled to the relief sought for.

The case, then, is to be viewed merely as an application for an injunction to prevent an apprehended injury to complainant, from the erection of the dam mentioned in the bill, in connection with the allegation, that such dam will be a public nuisance. In the case of City of Georgetown v. Alexandria Canal Co., 12 Pet. [37 U. S.] 91, the doctrine is laid down, "that in case of a public nuisance, where a bill is filed by a private person, asking for relief by way of prevention, the plaintiff cannot maintain a stand in a court of equity, unless he avers and proves some special damage." And it is also recognized as an undoubted principle of law, in that case, that an obstruction to a navigable stream, is a public nuisance. In the case of Putnam v. Valentine, 5 Ohio, 188, it is said by the court, that "chancery jurisdiction extends to restrain the doing of an act, from which irreparable damage to individuals, or great public injury, would ensue." The same principle is asserted and recognized, as the law in England. Eden, Inj. 157.

The question, whether a court of chancery, upon the application of an individual, will interfere to prevent what is alleged to be a public nuisance, unconnected with a special injury to the complainant, does not arise in this case. The grounds upon which the complainant seeks relief are, that the dam mentioned in the bill, will be a public nuisance, and will be attended with a private injury to himself. And, if an injunction can be awarded, it must be, upon both, or the latter, of these grounds.

The question, whether the erection of the dam mentioned in the complainant's bill, will amount to a public nuisance, has already been considered, and the conclusion announced, namely, that the diversion of a portion of the water of a navigable stream, effected by means of a dam thrown across the river, for the purpose of supplying a canal, designed for the improvement of navigation, cannot be viewed as such an obstruction, as entitles it to the character and designation of a public nuisance. In 3 Bl. Comm. 216, it is said, "that public or common nuisances (are those) which affect the public, and are an annoyance to all the king's subjects." According to this definition, a public nuisance must threaten, or be attended with effects, detrimental to the community, to an extent rendering it necessary, that the law should interfere, to prevent it, if not already established, or to abate it, if established. So far then, as the public is concerned, can it be predicated of the obstruction complained of in this case, that it will be a nuisance? But, upon the authority of principles settled, both in this country and in England, it may be said, that cases may exist in which the preventive remedy by injunction may be had, to avert the doing of an act, which will be attended with injury to an individual. In all this class of cases, however, the principle universally obtains, that the act complained of, must be attended with irreparable damage or injury to the complainant; or that there is an extreme probability of such a result. Thus, in the case of Crowder v. Tinkler, 19 Ves. 616, an injunction was granted, to restrain the defendant from the erection of a powder house near the complainant's premises; not on the ground of its being a public nuisance, but of great danger to complainant from such erection. And in the case of Earl of Ripon v.

Hobart, 8 Cond. Eng. Ch. 331, the lord chancellor said, "I can see no ground whatever, therefore, for granting an injunction of this description, which fails in the very point that forms the ground of relief—the preventing irreparable mischief." And in the same case this rule is laid down. "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, without waiting for the result of a trial—but where the thing sought to be restrained, is not unavoidable, and in itself noxious, but only something which may according to circumstances, prove so, the court will refuse to interfere, until the matter has been tried at law; generally by an action: though in particular cases, an issue may be directed for the satisfaction of the court, where an action could not be formed so as to meet the question." Has the claimant presented a case involving the certainty, or extreme probability of irreparable mischief, from the doing of the acts complained of in his bill, so as to entitle him to the relief sought for, within the principles here laid down?

The bill contains no direct allegation, that the injury which the complainant apprehends from the erection of the dam, will be irreparable in its nature. And the court is left to deduce that, as a necessary result from the facts stated in the bill. These facts are,—(1) That he purchased his land at a high price, in contemplation of the advantages of navigating the Maumee to Fort Wayne. (2) That there is a valuable water power on his land; that two saw mills and one flour mill have been erected on it, and more would have been erected, but for the erection of the proposed dams. (3) That the value of his property will be greatly lessened. On none of these grounds can the injury complained of be regarded, as of a character which calls for the arrest of the proposed dam, by the award of an injunction. As to the first, it is sufficient to observe, that upon the principle assumed, that the dam will not be a public nuisance, the deprivation of the advantage which the complainant anticipated from the navigation of the Maumee, affords no ground for issuing an injunction. It is an immunity, the value of which must necessarily depend on circumstances: and when it is sought to make it the basis of the relief here asked for, its value and importance to the complainant, must be satisfactorily proved. As the subject is here presented to the court, this immunity is of a character, so vague and intangible, that it cannot, in this form, be considered a proper matter for judicial cognizance. The same vagueness and uncertainty attaches to the allegation concerning the injury apprehended to the mill seats of the complainant. There is no pretence, that the erection of the dam will withdraw or divert the water, in such a manner as to injure or detract from the value of his water privileges: or that, it will be attended with any overflow of water, upon his land: —but the grievance is, that the apprehended obstruction of the river will so far lessen the probable profits of mills, as to take away the inducements to engage in that business; and thus, essentially injure the value of his land.

There is no case known, in which the process of injunction has been awarded, on such, or any similar grounds. There is nothing before the court, which warrants the inference, that the injury, which the complainant may sustain, is irreparable, except through the operation of an injunction, to restrain the respondents from proceeding further in the erection of the dam. And upon the authority of numerous cases on this subject, it is clear, that this remedy cannot be afforded, except upon the ground of irreparable mischief or injury to the complainant. If the injury which the complainant apprehends should result from the completion of this public improvement, he may have a remedy in another form. He may be enabled, either by an appeal to the legislature of the state, or by an action at law, to obtain a redress of the grievances complained of: but, in the form, and under the circumstances, in which the case is before this court, he is not entitled to the process of injunction.

NOTE. On overruling this motion for an injunction, the counsel for the complainant prayed an appeal; but the court suggested that an appeal would lie only on a final decree; and that this being merely the decision of a motion for an injunction, no appeal would lie from it. The court expressed a strong desire, as the principles of this case, were important to the state, that it should be taken to the supreme court without delay, and proposed and indeed recommended to the counsel for the state to file a demurrer, that a final decree might be entered and the cause be immediately taken to the supreme court by appeal. But the counsel declined filing the demurrer, and as they had not been ruled to answer by the complainant, they were not bound to answer or demur. The cause was, consequently, continued.

Case No. 13,246.

SPRAGGINS v. COUNTY COURT OF HUMPHRIES.

[Brunner, Col. Cas. 218;[1] 1 Cooke, 160.]

Circuit Court, D. Tennessee. 1812.

REMOVAL OF CAUSES—MANDAMUS.

A mandamus will lie to enforce the removal of a cause from a state to a federal court.

[Disapproved in Hough v. Western Transp. Co., Case No. 6,724; Fisk v. Union Pac. R. Co., Id. 4,827.]

Hezekiah Johnson commenced a caveat in the court of pleas and quarter sessions for the county of Humphries against Samuel Spraggins, to prevent the emanation of a

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

grant for eighty-one acres of land. Spraggins appeared and filed his petition, praying that the cause might be removed for trial to this court. The petition stated that he was at the time of filing it a citizen of the state of Louisiana, and was at the commencement of the suit a citizen of the territory now composing that state. It also alleges that the matter in dispute was of more value than five hundred dollars. The allegations in the petition were supported by proof; and every other requisite of the act of congress was offered to be complied with; but the county court overruled the motion made by Spraggins, and refused to permit the removal of the cause to this court.

Cooke, on behalf of Spraggins, produced the record, and thereupon moved this court for a mandamus directed to the county court of Humphries. And after argument on the part of the applicant,—

M'NAIRY, District Judge (absent TODD, Circuit Justice). When this subject was first agitated I felt inclined to believe that this court had not the power to issue a mandamus in such a case as the present. But I am now clearly satisfied that the power exists. By the act of congress passed on this subject this court have a right to the cause. The law has placed such causes precisely in the same situation as if this court had original jurisdiction of them; and, therefore, as the county court was bound, upon the case being properly made out, to remove the cause upon application to this court; and as I see that this application has been made and improperly refused, I can have no hesitation in granting the mandamus. It is a legal privilege which the defendant possesses to have his cause tried here; but if the state court illegally and unjustifiably refuses the transmission of the suit, and this court refuses by mandamus to aid the applicant, will he not be remediless? And no principle is clearer than that where the law has given a clear right, and no remedy exists, the respective courts will interfere by mandamus, and see that justice and law is administered. 4 Burrows, 2186; Hard. 172; 3 Burrows, 1267–1660.

In one point of view this may be considered as in the nature of an appeal to this court. And it is well settled that where the inferior jurisdiction refuses an appeal allowable by law, a mandamus will lie. 1 East, 686. But, independent of all this, the fourteenth section of the act of congress in question expressly provides that this court shall have power "to issue all writs and other process necessary for the exercise of its jurisdiction." To maintain the jurisdiction of this court in the present instance it is necessary to issue the writ of mandamus.

NOTE. Mandamus to Compel Removal of Cause.—The doctrine laid down in this case that a mandamus will lie to compel the removal of a cause from a state to a federal court is severely criticised and denied, the courts holding that no mandamus is necessary for such purpose, and therefore no jurisdiction is acquired to issue the writ. See Fisk v. Union Pac. R. Co. [Case No. 4,827]; Hough v. Western Transp. Co. [Id. 6,724].

Case No. 13,247.

Ex parte SPRAGUE.

[3 App. Com'r Pat. 211.]

Circuit Court, District of Columbia. Sept. 3, 1859.

PATENTS—NOVELTY—INVENTION—BRIDGES.

[Sprague's invention of an improvement in bridges, consisting of a series of clutches in combination with tubular sections and with braces for making truss bridges, possesses novelty and utility, and is patentable.]

Appeal by Joseph W. Sprague from the decision of the commissioner of patents, rejecting his application for a patent for an improvement in bridges.

MORSELL, Circuit Judge. The specification presented with the application states: "My bridge is made chiefly of boiler-plate, or wrought iron, and it combines strength and lightness with comparative cheapness of construction. My invention consists of a series of clutches of a peculiar construction, in combination with tubular sections and with braces for making truss bridges. What I claim as new in the construction of bridges, and desire to secure by letters patent of the United States, is the above-described series of clutches, c, with bands, c, in combination with the tubular sections, B, for the purposes, substantially, as set forth."

The commissioner, in the report of the examiners, adopted by him, says: "Sprague now claims the above-described clutches, c, provided with bands, c, in combination with the tubular sections, B, for the purposes as substantially set forth. It will be perceived that the clutches with bands are not claimed in combination with any part of the bridge except the sectional tubes; and as these tubes are shown in the application of W. B. Moore for a patent for an improved pipe-coupling, rejected July 25, 1855, we cannot discover why the conditions of Sprague's claim are not therein fully met. Indeed the very terms of Sprague's specification may be used in describing Moore's coupling, and it is evident that in the one, as well as in the other, the coupling may be made to grasp the pipes by means of heat and shrinkage. In short, the couplings, including the bands, c, are identical in form and structure in both cases, as will be seen on a careful examination of the models, and may be applied to the same purposes or used interchangeably, and cannot in the one case perform functions which they do not in the other. Sprague has not, therefore, made any invention. He has produced a mere application of an old device to a new use, and thus, it is well settled, is not the subject of

letters patent." The recommendation in this report was followed by the commissioner, and the patent finally refused, June 26, 1858.

The appellant filed two reasons of appeal from this decision. They are very general: First, that the improvement in bridges made by the said Joseph W. Sprague is new and useful and therefore patentable. Second, the decisions of the commissioner of patents rejecting said Sprague's improvement in bridges are contrary to the law and the evidence in the case.

In reply to these reasons, the acting commissioner of patents says: "The appellant has had two different applications for a patent for improvements in bridge construction before this office, both of which have been rejected on substantially the same grounds. The first application, made or completed June 18, 1857, claimed, by an amendment filed July 14, 1857, the combination of independent connecting pieces of wrought or cast iron with tubular chords, or beams, braces, &c., of an iron bridge. The second application, made April 14, 1858, claimed a series of clutches with bands in combination with the tubular sections of a bridge. These cases were each twice rejected by the examiner, and a third time by the commissioner, mainly on the ground that there appeared to be no novelty in the applicant's method of connecting the tubular sections by thimbles or collars, &c., as shown by the references adduced, although these connections were used in other relations, and that, as there was no novelty in forming the frames and trusses of bridges of tubular sections, there appeared to be no just grounds of patentable combination presented, &c."

Due notice of the time and place of hearing having been first caused to be given, the commissioner caused the said decision, reasons of appeal, report thereon, and all the original papers, with the references, to be laid before the judge. His argument in writing and the said case was submitted for consideration.

There is no doubt that if what Sprague has produced is, in the language of the commissioner, "a mere application of an old device to a new use," he is not entitled to a patent therefor. But he contends, and I think correctly, that his wrought iron tube, B, and the clutches, c, provided with shoulders for the support of the diagonal braces, and with bands, c, shrunk on said clutches, the whole being so arranged that the great strains to which that kind of bridge is subjected to shall be equalized by being distributed and transmitted from part to part in combination with the whole bridge to which those devices are intended to apply, are new, substantially, and important improvements of bridges of that construction; that is, of wrought iron truss bridges. That wrought iron truss bridges have in recent times been thought greatly superior to cast iron bridges, and preferred on all occasions by the most experienced engineers, for truss bridges. That his bridge, in combination with which his new contrivances or devices, as arranged, are intended to operate, is almost entirely formed of wrought iron. That the judicious effect of said arrangement in the distribution of all the great strains to the various points appropriated and fitted for the purpose, makes it a much stronger bridge than any others, and effected at considerably less expense than any of that kind, with the advantage of being lighter, also dispensing in every instance with the necessity of using rivets, thereby avoiding delay and expense and substituting what is more perfect. That by his new method he has overcome the difficulty of connecting together wrought iron tubes and wrought iron rods, heretofore an insuperable obstacle to their use in combination.

It would be well to notice here that, according to the view taken of it in the opinion and report of the commissioner, he thinks the combination is limited by the description of the claim to a combination with the clutches, c, provided with bands with tubular section, B, for the purposes substantially as set forth. On that subject, I think, if the whole specification is taken together in construction (which it ought to be where there is any doubt), it will appear that "the purposes set forth" as stated in the specification substantially are that they must be placed so as to operate in connection with the whole structure or bridge, in the relations to that whole structure as particularly described, and as forming united parts of it, and not to a more isolated condition. If such was the meaning, such the ascertained thing, is it like either of the references given by the commissioner?

First as to Harbach's bridge. The employment of tubes of iron in this bridge does, it is true, bear some resemblance to that of Sprague's, but the peculiar devices, it is believed, are very essentially different. The first difference I notice is in Harbach's bridge; the tubes have only a common lap joint, the end of one tube passing into the end of the other, without provision to meet and equalize the necessary strains, or for performing the other useful and necessary functions of the clutches of Sprague's bridge. Again, Harbach connects the tubes on the center of the panel, between two points of support. This is believed to be the weakest point of the beam, and therefore the most improper for such a purpose as coupling. Sprague's break in the continuity of the tubes is made at a point which is in every way guarded against lateral flexures,—a most material difference. Harbach constructs his lower chord of tubes of boiler-plate iron riveted together. The only strain which can act upon the lower chord is one of tension. A riveted tube for this purpose and in that position is a bad form of construction. Sprague's tube everywhere, by his peculiar device, is in the best possible connection for transmitting and equalizing strains.

As to the other references,—Moore's application for an improved pipe-coupling rejected July 25th, 1855. The couplings of Moore are made of brass, with a screw cut upon each end, which screws are then used to cut a corresponding screw in the soft leaden pipe as the joint is put together. How, according to the idea suggested in the report, can this be dispensed with, and a band shrunk on, as in Sprague's? How could this be done to answer the intent and purpose of the inventor? If, indeed, it could for any purpose of either party, where would the shoulders, as in Sprague's clutch for the support of the diagonal braces, be placed for any useful purpose, in the couplings of the gas pipe, and how could they be used interchangeably as supposed? And so also as to Sprague's lower chord; what possible trace can be found of the least resemblance to the coupling of a gas pipe? Is there any principle in the two alike? The designs, objects, and intent and operations of the two are entirely different; the one is to be occupied in the combination of a truss-bridge. The other as a gas pipe. I think, therefore, that there is sufficient novelty in the claim presented by the appellant, and that the opinion of the commissioner is erroneous and ought to be reversed.

MORSELL, Circuit Judge. I, James S. Morsell, an assistant judge of the circuit court of the district of Columbia, do certify to the Hon. the commissioner of patents that, after due notice given of the time and place of hearing the above-mentioned appeal, and after the decision, reasons of appeal, report thereon, and all the original papers, with the references, on the said day were laid before me by the said commissioner; and after the said Joseph W. Sprague, by his counsel, appeared, and filed his argument in writing, the said case was deliberately considered by me, and upon such consideration I am of opinion, and do so decide, that the said decision of the commissioner is erroneous and ought to be reversed, and the same is hereby reversed and annulled, and it is hereby ordered that a patent be issued by him to said Joseph W. Sprague for his invention aforesaid, as prayed.

Case No. 13,248.

SPRAGUE et al. v. ADRIANCE et al.

[3 Ban. & A. 124;[1] 14 O. G. 308.]

Circuit Court, S. D. New York. Oct., 1877.

PATENTS — ABANDONMENT — ASSIGNMENT — SCOPE OF PATENT—HARVESTERS.

1. Abandonment is a fact and not a conclusion of law.

2. Where the evidence showed that the inventor, although allowing more than four years to elapse from the date of his invention before applying for a patent, nevertheless kept the invention from the public, and it appearing also that he was in straitened circumstances: *Held*, that, under the circumstances of the case, an abandonment was not proved.

[See Babcock v. Degener, Case No. 698.]

3. The rule, that in cases of delay in applying for patents, the intervening rights of other inventors who in the meantime have devised and patented the same thing, should be protected against the delaying inventor, does not apply to the case of the complainants, who did not know of or acquiesce in the acts of the intervening inventors.

4. The case of Consolidated Fruit Jar Co. v. Wright, 94 U. S. 92, distinguished.

5. Whether, if the first inventor is estopped by conduct of his own, his assignees would be, unless shown to have been cognizant of it, quære.

6. The scope of the patent is fixed by what was known at the date of the completed invention, and not by what was known at the time when the application was filed.

7. The first and second claims of reissued letters patent, Number 3,372, granted to Frederick Nishwitz, April 13th, 1869 (original patent dated February 10th, 1858), for improvement in harvesters, *held* valid.

[This was a bill in equity by William Sprague and others against John P. Adriance and others for the infringement of reissued letters patent No. 3,372, granted to Frederick Nishwitz April 13, 1869, the original letters patent, No. 19,377, having been granted February 16, 1858.]

George Gifford and Benjamin F. Thurston, for complainants.

George Harding, for defendants.

WHEELER, District Judge. This suit is brought for relief against an alleged infringement of reissued letters patent No. 3,372, division B, granted to Frederick Nishwitz, and now owned by the orators, for an improvement in mowing-machines, and has been heard on pleadings, proofs and argument. It is found as matter of fact that the invention was made in 1853. The application for the original patent was filed January 12th, 1858.

The defences set up are that Nishwitz is not the first inventor; that he abandoned his invention to the public before applying for his patent, or so conducted himself with reference to it that he was estopped from claiming a patent for it, or any rights under the patent; that the reissue is not for the same invention set forth in the original, and that the defendants do not infringe.

Abandonment itself is a fact, and not a conclusion of positive law, statutory or common, arising from any prescribed state of facts. The lapse of time between the invention and the application was about four years and a half, and large, but there was no fixed limit within which the application must be made; it was not so great as in many cases where patents have been upheld; and the straitened and other circumstances of the inventor were such that, although it was some and quite strong evidence in itself of an abandonment,

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

it is explained away, and, taken all together, the evidence not only fails to show any abandonment in fact, but on the contrary, shows satisfactorily that he cherished and carefully kept his invention to himself, away from the public, for himself.

During that time other inventors entered the same field, and some of them occupied some of nearly, if not exactly, the same ground, and obtained patents for some of nearly, or quite, the same things now claimed under his, and it is with much plausibility urged that after what occurred he and those claiming under him should in equity be estopped from maintaining the claims now made, and the language of the court in Consolidated Fruit Jar Co. v. Wright, 94 U. S. 92, is especially relied upon in support of that position. With great justice, to the apprehension of all, it is there well and authoritatively said with reference to this subject, as had been many times by many courts before said with reference to others, that he who is silent when he should speak must be silent when he would speak, if he cannot do so without a violation of law and injustice to others. It is to be observed, however, that the case was made to turn upon the defence of purchase, sale or prior use of the invention for more than two years prior to the application, with the consent and allowance of the inventor, provided for by sections 15 of the act of 1836 [5 Stat. 123], and 7 of the act of 1839 [Id. 354], and that of an abandonment in fact; and what was said was apparently said with reference to the justice of those defences, rather than with reference to an independent defence founded upon an equitable estoppel. But if such independent defence was alluded to, the proposition was carefully made to include, as always before, that he who is required to be silent on account of not having before spoken, must have before remained silent when called upon to speak. In that case the inventor appears to have seen others making use of his invention, without claiming it himself, when he must have known that if he did not make known his claim then, and should successfully do so afterward, they would be damnified. He was directly called upon by the circumstances to speak, and, not having spoken, was situated like those witnessing transfers of their property by others without making known their ownership, who have always been estopped from setting it up afterward.

But in this case it is not shown that Nishwitz knew others were making any advancements or investments of either capital or skill on faith that the ground he had begun to occupy was open to all, or that they would not have made them, if they had known all he could have told them. He was never called upon to speak, and so was never silent when he should have spoken. Therefore this rule, just as it is in itself, does not apply to him.

There might, perhaps, be question whether, if the inventor himself would be estopped by conduct of his own, his assigns would be, unless shown to have been cognizant of it, as innocent purchasers of other property must be, in order to be estopped, but that question does not arise here, as the inventor himself is not affected.

The statutes allowed a reissue of the patent on certain grounds for the same invention set forth in the original. The grounds of the application, and the identity of the invention were so made to appear to the patent office that the reissue was granted, and it is valid against the objection made in this respect, unless the difference in the inventions is shown. The original specification and model are shown by copies. The language in which the object of the invention is set forth has been somewhat changed; more full descriptions of some parts of the invention shown by the model have been inserted in place of others, and some so shown have been described in the specification that were not there described before; but in fact nothing has been added to the specification that did not appear before somewhere. The claims have been changed, as the statute warrants, when the invention is in reality the same.

From these considerations it results that the patent is valid for something. It was said in argument, in behalf of the defendants, that the production patented must be compared with things as they were at the time of the application, and, in behalf of the orators, that the comparison must be made as of the time of the invention, in order to determine the scope of the patent. The statute authorized granting patents for new and useful inventions, without other limit. It seems to be quite obvious that the extent of an invention must be ascertained by comparing what the inventor produces with what was before that time known. If he is entitled to a patent at all, he is by the statute entitled to one for that invention so ascertained, and there is no provision for cutting it down to less on account of subsequent inventions, and it cannot be so cut down without engrafting an addition on to the statute by a judicial construction never before given to it.

At the time Nishwitz made this invention there was, so far as shown by this record, as has been pointed out by counsel or observed, no mowing-machine, except Manny's, under his patent of 1851, that had its cutting apparatus attached to the forward part of a frame extending forward toward the ground from and swinging by an axle supported by two wheels, and none at all that had this apparatus attached to any frame swinging with or upon an axle so supported separately from the draft-pole, and none that had a lever to raise or lower the cutting apparatus resting on the draft frame or pole. Manny's had a cutting apparatus hung to a frame so extending forward and swinging, but the draft-pole was hinged to the corner farthest from the grass to be cut and next to the ground, and carried forward to another pair of wheels, to which the team was attached, and the

main wheels ran directly behind the cutters. Sylla and Adams, if they had made the invention patented to them September 20th, 1853, as is probable, had a mower arranged in a manner somewhat similar. Ketchum had a one-wheeled mower, with the cutting apparatus resting on the ground at the side of the wheel. N. T. Allen had a harvester and thrasher, not a mower, with a frame mounted on two wheels and cutting apparatus suspended by rods from it at the front end. Haines had a mower, and there was an English patent for one, with frames so mounted and cutting apparatus suspended by rods from the rear end. Allen's, Haines, and the English patent each had the cutting apparatus extending laterally toward the grass or grain to be cut. Manny's mower had an arm projecting forward from the frame, and adjustable on the forward carriage, and Sylla and Adams' contrivances for straightening up or bending down the line of the frame and draft to raise or lower the cutting apparatus. The English patent had a windlass and Allen's reaper a lever for the same purpose. Haines's mower afterward had a lever resting on the main frame back of the axle, and not on the draft, also for the same purpose. It is claimed for the defendants that the evidence shows this lever was in use on the Haines machines at that time, but the proofs are very conflicting, and it does not fully appear that it was, as is required to establish the defence of priority of invention or use provided by section 15 of the act of 1836, and the decisions in reference to it.

Nishwitz arranged a mower having two wheels with an axle and a frame extending forward from and swinging with it to support the cutting apparatus, and a draft-pole hinged to and vibrating on the axle over and separately from the frame, and provided for raising, lowering and adjusting the height of the cutting apparatus by a lever of the second order pivoted on the draft-pole to draw up or let down a rope or chain passing over a pulley to the frame, adjustable by a pawl. Hinging the draft-pole and frame in that manner upon, and so as to pivot about, the main axle separately, allowing the frame and cutting apparatus to rise and fall without the pole doing so, and arranging the lever, chain and pawl, with which to raise and lower them when desired, were wholly new features in such machines, and would have been so even if Haines had then had in use such a lever as he employed afterward. His cutting apparatus was not carried by any frame vibrating separately upon the axle, and if it was carried by an equivalent his lever was not pivoted upon nor did it rest on the draft-pole nor anything supported by the team to sustain it. By his arrangement the team might to some extent support the lever in raising the cutting apparatus, but it would only be after the pole had been thrown up as far as the tackling would let it go, and then by holding it with their weight from going higher, not sustaining it with their strength, as in Nishwitz's arrangement. These improvements all appeared in Nishwitz's original specification and model. His original patent did not cover them, but his reissued one, now owned by the orators, does in its first and second claims.

The defendants have the draft pole and frame supporting the cutting apparatus, each pivoted on and vibrating separately about the axle supported by two wheels, and the lever of the second order pivoted on and supported by the draft-pole, and a part of a circle about the pivot end of the lever for the chain to pass over, equivalent for that purpose to a pulley, and the chain passing over the circle to the frame carrying the cutting apparatus, and a ratchet, equivalent to the pawl, for adjusting the place of the lever, all for the purpose of raising, lowering and adjusting the height of the cutting apparatus. Thus the defendants appear to have taken the whole of Nishwitz's invention.

It is said that the object of his invention was to adjust the height of cut, and that the defendants use other means, and not these contrivances, for that purpose. But another object of his invention was to adjust the height of the cutting apparatus in passing obstacles and moving the machine from place to place. The defendants use them for these purposes, and the evidence tends to show that they are used to some extent in their machines for adjusting the height of cut also. To what extent they are used in either respect, either to the profit of the defendants or damage of the orators, is not now to be determined. Either use, as these matters are now viewed, appears to be an infringement. The extent of the use is a proper matter to be determined on an accounting.

Let a decree be entered, establishing the validity of the first and second claims of the patent, that the defendants have infringed the same, and for an injunction and account accordingly.

SPRAGUE (ALLEN v.). See Case No. 238.

SPRAGUE (BLANCHARD v.). See Cases Nos. 1,516–1,518.

Case No. 13,249.

SPRAGUE et al. v. COCHECO MANUF'G CO.

[10 Blatchf. 173.] [1]

Circuit Court, S. D. New York. Sept. 23, 1872.

CORPORATIONS—TRANSFER OF SHARES—TRUSTEE—BREACH OF TRUST—HOLDER WITHOUT NOTICE.

B., as trustee under a will, held five shares in the stock of a Massachusetts corporation, represented by a certificate issued to him, as "B., trustee," in 1857. In 1863, a court of Massachusetts, in a suit against B., in which he ap-

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

peared, removed him from his trusteeship, and appointed another trustee in his place, and ordered the certificates of stock of the trust estate to be delivered and assigned by B. to the new trustee, and, in default thereof, the assignment of the shares to be made by a master. The master assigned the five shares to the new trustee, who exhibited the assignment to the corporation, and demanded a transfer of the shares on its books and a certificate therefor to him. The corporation had notice of the suit, and of the proceedings and decree in it, and paid dividends on the shares to the new trustee. Afterwards, and in 1866, H. obtained from S. a loan of money on a delivery and pledge of the certificate issued to B. It had annexed to it a form of assignment, with no name of an assignee, and a power of attorney to transfer the shares, dated in 1858, and signed, "B., trustee," and witnessed, but with no name of an attorney in it. S. made the loan without notice of the proceedings in Massachusetts, or of any breach of trust by B. Afterwards, S., with the assent of H., inserted his own name, as assignee and attorney, in the power, and presented it to the corporation, and asked for a transfer of the shares to himself, and a certificate therefor. It was refused. S. then sued the corporation to recover the value of the shares: *Held*, that the suit could not be maintained.

[Cited in brief in Harbison v. James, 90 Mo. 414, 2 S. W. 292.]

[This was a suit on the certificates of certain stock by Joseph A. Sprague and others against the Cocheco Manufacturing Company.]

Charles H. Smith, for plaintiffs.
Charles F. Blake, for defendant.

WOODRUFF, Circuit Judge. Edward Belknap was trustee, under the will of John Belknap, late of Boston, in Massachusetts, deceased, and, as such trustee, he held five shares of stock in the Cocheco Manufacturing Company, a corporation created by, and doing business in, Massachusetts, "to be held in trust and managed," with other property, for the purposes in the will of the deceased specified, which were, the appropriation of the income, as directed, until the death of the testator's widow, and then to divide the principal, as also directed.

On the 26th of May, 1859, a suit was commenced by one of the beneficiaries, in the supreme judicial court of Massachusetts, (which court had full power and jurisdiction in the premises,) against the said Edward Belknap, to remove him from the trust, for misfeasance therein. In that suit, the said Edward Belknap was represented by counsel, and such proceedings were had therein, that Charles Amory was appointed receiver of the trust estate, pending the suit, and Belknap was enjoined against transferring or assigning the same; and thereafter, on the 23d of February, 1863, a decree was made removing the said Belknap from the office of trustee under the said will, and appointing the said Charles Amory and J. Ingersoll Bowditch trustees in his stead, and directing the said Belknap to assign and transfer the trust estate to the new trustees, and to deliver to them all deeds, mortgages, certificates, &c., relating to the trust estate, and a reference was ordered to a master to take an account of the trust estate, &c. On the coming in of the master's report, and on the 16th of April, 1864, a final decree was made, ascertaining and fixing the amounts of arrears of income due to certain of the beneficiaries, settling the costs and counsel fees to be paid, and directing the application of the moneys in the hands of the receiver, &c., and ordering, that, in case the said Edward Belknap should neglect or fail to deliver up to the said Amory and Bowditch, the new trustees, the several certificates of corporate stock and mortgages belonging to the trust estate, and assign and transfer the same to them, then the said master in chancery be, and he thereby was, authorized to execute and deliver to the said trustees proper transfers, &c., of said shares and mortgages, so as to vest the property therein in the said trustees. Thereupon, and before the transaction of the 18th of June, 1866, through which the plaintiffs claim to be entitled, the master in chancery executed an assignment of the stock now in question to the new trustees, which was exhibited to the defendant, and a demand was made upon the defendant for the transfer of the stock on the defendant's books, and for a new certificate in the name of such new trustees. Of the pendency of that suit, and of the orders and decrees therein, the defendant had notice, and, during the continuance of the receivership, the dividends declared on the stock were paid to the receiver, and thereafter to the said new trustees.

After all this had taken place, one Raphael, professing to act for the benefit of one Hudson, on the 18th of June, 1866, applied to the plaintiffs in this suit for a loan of two thousand dollars, to be repaid, with interest, in sixty days, proffering, as collateral security, the certificate issued to Edward Belknap, trustee, dated March 9th, 1857, for the said five shares of the capital stock of the defendant, the said certificate having annexed thereto a paper, in the form of an assignment, but without containing the name of any assignee, and with power of attorney to transfer the stock, but without naming or designating, directly or indirectly, any attorney, dated December 20th, 1858, and signed, "Edward Belknap, trustee," and purporting to be attested by a witness. The plaintiffs, having no notice of the proceedings in Massachusetts, and being assured by Raphael that the stock was "genuine stock," and by a person who was the agent of the defendant in New York, in selling its goods, that the certificate was a genuine certificate, and that stock in the defendant's corporation was worth seven or eight hundred dollars a share, and believing such representations, and having no notice of any breach of trust by Belknap, made the said loan, and received from Raphael the certificate, and the paper annexed, signed by Belknap. The plaintiffs, by the assent of Raphael, then filled up the last-named paper, by inserting their own names as assignees, and as attorneys to transfer the stock therein named, and presented it

to the defendant, and demanded a transfer of the said stock, and a new certificate in their own names, when they were informed that the stock was the property of trustees under the said will of John Belknap, and that Edward Belknap had been removed from the trust, and new trustees appointed in his place, and a transfer and new certificate to the plaintiffs was refused. The plaintiffs then, claiming to be so authorized by the said annexed power of attorney, filled up the blank assignment and power printed on the back of the said certificate of stock, and again demanded that it be received and recorded, and a new certificate be issued to the plaintiffs, and the defendant again refused. Whereupon, this action is brought against the defendant, to recover the value of the stock, as damages.

There are some other details given in the case, as agreed upon by counsel, but the foregoing are all that I deem material to the decision I am called upon to make. The defendant rests on the title of the new trustees, at whose request and at whose risk the action is defended. The certificate of stock certifies, that "Edward Belknap, trustee," is proprietor of five shares in the corporate property of the Cocheco Manufacturing Company, "which shares are transferable by assignment on the back hereof, and recorded by the treasurer of said corporation, and, upon delivery of such assignment of said certificate, a new certificate or certificates shall be issued, according to the interest of the parties." and is duly attested under the corporate seal, March 9th, 1857.

A very important question is at once suggested by the case so made: Is the stock of a corporation in the state of Massachusetts so within the power of its courts, (having, so far as the case discloses, all proper parties before them,) that their decree will operate upon the title of the stock, and may transfer it to a third person, notwithstanding the certificate therefor, in the form above stated, is outstanding? I say, with proper parties before it, because Belknap, the holder of the legal title, was a party, and the plaintiffs have not shown the title of any other person acquired, or conjectured to have been acquired, prior to the decree removing him from his trust, and awarding the stock to his successors in the trust. If such stock cannot be reached by the courts, and dealt with as right and justice may demand, it would be interesting to enquire how stock can be attached and be subjected to the payment of the debts of the owner. How can it be reached and appropriated to the payment of judgments recovered, either by taking on execution, or by a proceeding in equity in favor of judgment creditors? How, especially, shall the property of an absconding debtor in stock held by him be reached and applied? After all means have been exhausted, through regular judicial proceedings, is the corporation bound to recognize the title of one who, years afterwards, produces the certificate, with the signature of the former owner, to a blank assignment, and proves that, since such judicial proceedings, he has advanced money on the faith of the certificate? Has the rule, caveat emptor, no application to sales of stock? Have the usages of banks and brokers in New York, (which are certified to me in this case,) to advance money upon, and to buy and sell on the faith of such papers, legal efficiency to make the courts powerless to protect beneficiaries, and to compel payment to creditors, because the holder may succeed in keeping the certificate of stock beyond their reach? I am not prepared to hold that stock in a corporation is not a chattel interest, or that the certificate of stock gives to the stock itself the character of negotiability which belongs to commercial paper under the law merchant.

I do not think it necessary to discuss the questions thus raised at great length, nor is it important to this case, to bring into view, for the purpose of analogy, the various instances in which possession of just such papers may be obtained by fraud or theft, or in which a person may have their possession without the knowledge or consent of the owner, or when, though possession be entrusted to him, he may have no authority in fact to dispose of the stock. Nor, in this case, is it necessary to affirm or deny the other arguments by which the defence herein is sustained. It is sufficient, for the decision of the case, that I should say, that the decree of the court in Massachusetts, and the assignment there made by the master in chancery, is a full protection to the defendant against a claim made by the plaintiffs, under a transfer to them after such decree and assignment, unless they show, that, before such decree, the person from whom they claim, and to whom they advanced their money, had acquired from the former trustee a title which was good as against his successors. This they have not shown. Without, therefore, considering whether the paper signed by the former trustee, which assigned to no one, and which authorized no one to transfer the stock, should, under any, and, if so, what circumstances, be deemed to authorize the holder to fill the blanks, I am satisfied that the plaintiffs have failed to show title to the stock, of any efficiency, as against the new trustees, or as against the defendant, having notice of the decree and proceedings under the same, to invest the new trustees with the title.

The judgment is ordered for the defendant, with costs.

SPRAGUE (HOYT v.). See Case No. 6,810.

SPRAGUE (JACKSON v.). See Case No. 7,148.

Case No. 13,250.

SPRAGUE v. KAIN.

[Bee, 184.] [1]

District Court, D. South Carolina. March 23, 1802.

SEAMEN—WAGES—FORFEITURE FOR STRIKING MASTER.

Forfeiture of half a seaman's wages decreed, in consequence of his striking the captain. The latter had inflicted other punishment for the offence, which prevented the court from decreeing forfeiture of the whole.

[Cited in The Mentor, Case No. 9,427; Smith v. Treat, Id. 13,117; The Cornelia Amsden, Id. 3,234.]

[See The Almatia, Case No. 254.]

[This was a libel for wages by Joshua Sprague against Alexander Kain.]

It appears in evidence in this cause, that the actor used insulting language to his captain, the defendant, who was thereby provoked to strike him with his open hand, or fist; it is not clear with which. Two of the witnesses swear that the captain also struck this man with a grange staff. Upon this the seaman seized a scrubbing brush, with which he struck the captain several blows over the head, and repeated them till he was stopped by two passengers and the mate. The captain's head was severely cut, and he was for some time senseless. When he recovered, he caused the man to be confined and afterwards sent to jail at the Havanna, where he remained three weeks; the vessel being then ready to sail, he was taken on board, and kept in confinement below, till his arrival here. He now sues for wages; and the question is, whether he is entitled to all or any part of them, after this violence exercised upon his captain.

This is the first case I have been called upon to decide, in which a seaman has been convicted of striking, or even attempting to strike his commanding officer; and the act of congress does not provide for such a one. I must, therefore, be guided by the marine law. It is agreed on all hands, that the master of a ship may give due and moderate correction to the mariners under his orders. In the present case the words of provocation were first given on the yard-arm, where, it seems, some liberty of speech is allowed; but it also appears that the words were repeated on deck; for, upon the captain's asking the actor whether the sail was properly furled, he answered: "It was done as well as the captain himself could have done it." This was certainly insolent language from one who is said not to be a good seaman; and a blow with the fist was, on such provocation, very moderate correction. His behaviour subjected him to a more severe punishment, and he does not seem to have shewn any marks of contrition. If, therefore, the master had turned him ashore at the Havanna, I should not have hesitated to decree a total forfeiture of his wages. But as the captain took the law into his own hands by imprisoning this man at the Havanna, and by a subsequent confinement of eight days, on board, I think the offence is, in some measure, done away. I decree, therefore, that he forfeit only one half of his wages, and that the remainder be paid by the captain. The parties must pay their own costs.

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

Case No. 13,251.

SPRAGUE et al. v. LITHERBERRY.

[4 McLean, 442.] [1]

Circuit Court, D. Ohio. July Term, 1848.

GUARDIANS—POWER TO APPOINT—DOMICIL—RECORD—AMENDMENTS—PRESUMPTION IN FAVOR OF REGULARITY.

1. The court of common pleas have the power to appoint guardians, and also guardians ad litem.

[Cited in Leonard v. Putnam, 51 N. H. 251.]

2. A guardian may waive process, and enter his appearance for his wards.

3. Temporary absence from the county does not affect the jurisdiction of the court, in the appointment of a guardian.

4. The domicil of the infant is always presumed to be that of its mother.

[Cited in brief in Rockingham v. Springfield, 59 Vt. 522, 9 Atl. 242.]

5. The place where its parents lived and died, and its property remains, is presumed to be the proper place for the court to make the appointment.

6. The signature of the judge to the record, is not necessary under the statute.

7. A court has the power to make amendments nunc pro tunc.

8. The case still being continued on the docket, and the counsel presumed to be in court, no notice of an amendment was necessary. It supplied the defect, by the delinquency of the clerk.

9. After the lapse of twenty-three years, when a great change has taken place in the value of the property, courts require clear ground to set aside the proceedings from which titles emanated.

10. Parol proof, after so great a lapse of time, not admissible to show that the minors were residents of Clermont county, and not of Hamilton.

11. We can not have before us the evidence that was before the common pleas, when the guardian was appointed.

12. Every presumption is in favor of the proceedings of a court having a general jurisdiction.

[Cited in Re Wilson, 18 Fed. 37.]

[Cited in Allan v. Hoffman (Va.) 2 S. E. 606; Dequindre v. Williams, 31 Ind. 456.]

[This was an action of ejectment by Sprague and others against John Litherberry.]

Gholson, Miner & Fishback, for plaintiffs.
Fox, Gwynne & Chase, for defendant.

OPINION OF THE COURT. This action is brought to recover possession of certain

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

lots of ground in the city of Cincinnati. Deed from Steubens Harpers to Joseph Seaman, dated the 29th October, 1806, for the premises in dispute. Deed from Seaman and Steubens to Samuel Harpers, on the same day, signed by Seaman. Deed from Joseph Seaman to H. Hafer 20th August, 1813, for five acres, a part of the land. Deed from Joseph Carpenter, dated 13th August, 1813, to H. Hafer for five acres. Deed from William Cooper to Henry Hafer, 26th May, 1813, for twelve acres and sixty-two hundredths. It was proved that Henry Hafer died in 1825, in Cincinnati, and left three children, two daughters and a son. The eldest daughter died in 1832, leaving Caroline and Henry surviving. Hafer was in possession, two or three years, and claimed the property until his death. The property was improved and was situated in the Eastern Liberties, and one of the witnesses says that Hafer was in possession five years. Caroline married A. Sprague, one of the lessors of the plaintiff, and lives in Kentucky. The defendants claim under an administrator's sale of the premises. A certificate was given in evidence under the seal of the court of common pleas, of Hamilton county, showing that Griffin Yeatman was appointed guardian of Caroline and Henry. Letters of administration were granted to Francis Kerr, on the estate of Hafer. A record was offered in evidence, showing a petition by the administrator, stating the debts due by the estate of Hafer and that there was no personal property out of which the debts could be paid, and praying an order for the sale of real estate, etc. Griffin Yeatman, the guardian, acknowledged notice. This record was objected to, because it does not appear to be a final record, and was not signed by the judge. The court admitted the record saying, that from the nature of the proceedings they took place at different times. Nothing more than an application by the administrator and an order of sale, could take place at the first term. At a subsequent term the sale would be brought before the court, etc. The statute or usage requires that the signature of the judges, or of the presiding judge, should be signed to the minutes of the proceedings of each day; but it is not necessary that this shall appear in the record of each case. And an omission of the signature, it is supposed, would not make the proceeding void. The objection is not understood to relate to the authentication of the record. The sale of the property was made on the 27th of May, 1826, to one Wicks and others, and deeds were made, as appears from the return of the administrator, to the purchasers. Deed from James Smith et al., to ——. Mortgage of Henry Hafer to Francis Kerr. The record of the court of common pleas was given in evidence in regard to the sale, etc.

A number of witnesses were examined to prove that at a certain time the children of Hafer were taken, by some friends to Clermont county, in Ohio. Objections to be made on the argument. On the part of the lessors of the plaintiff, it was argued that to render the sale good the heirs must have been made defendants. That this is the law of Ohio, has been repeatedly decided. 2 Chase's Ohio St. p. 1311, § 19. Also the Act 24 and the act of the 12th of March, 1831, are referred to, as requiring notice to the heir. That in the case of Ewing's Lessee v. Higby, 7 Ohio, 198, it was held, coming up collaterally, that the heirs must be notified. That in 12 Ohio, 253, where the question was collateral, it was held that notice to the heirs was essential to the exercise of jurisdiction. If the heirs were not made parties, the proceedings would be void. That in 1 Hill, 139, it was ruled, that infant heirs can not be concluded by a surrogate sale of lands, without the appointment of guardian. In [Elliott v. Peirsol] 1 Pet. [26 U. S.] 340, it is said there must be jurisdiction to protect officers from liability as trespassers. 12 Ohio, 195; 3 Ohio, 240; 11 Ohio, 442. Where there is no power to act, no legal consequences can follow. If there was no jurisdiction the proceedings were void. And that there was no jurisdiction may be shown aliunde. The heirs were not made parties by the appointment of Yeatman general guardian. This appointment was made nine days before the petition was filed. The court had no power to appoint Yeatman guardian. 2 Chase's Ohio St. p. 1317. Power to appoint a guardian is limited to the county in which the court sits. In 2 Leigh, 719, evidence was admitted to show that the party was entitled to letters of administration. If such jurisdiction be exceeded by the court, the act is void. 9 Mass. 543. If letters of administration be granted in a county other than where the deceased resided at his decease, the grant is void. 5 Pick. 20 same. Also 18 Pick. 496; 8 Wend. 139; 2 Williams. Ex'rs, 1084. Where an appointment of a guardian is made for a minor without the county it is void. 12 Ohio, 195 On the 20th December, 1825, the court appointed Griffin Yeatman guardian of the minor children of Henry Hafer deceased. At this time the heirs were not in the county. Nine days afterward the administrator filed his application to sell the land. As guardian he acknowledged notice, and waived process. Four years afterward, in 1829, the court, without motion, or notice, entered the following: "And now here, to wit, on 1st of September, 1829, the court being satisfied that Griffin Yeatman was appointed in November term, 1825, guardian ad litem, and accepted service after the appointment; that Yeatman swears that in November, 1825, he was so appointed at the request of Kerr, the administrator, on the application of Charles Fox, Esquire; and the court order the entry nunc pro tunc." And it is contended that the record could not be so amended. 3 Ohio

Cond. R. 696; 5 Ohio Cond. R. 284; [Elliott v. Peirsol] 1 Pet. [26 U. S.] 340; 3 Rand. 104. An order or judgment nunc pro tunc does not presuppose any such judgment had been entered. This is never done except on the death of a party, or to avoid prejudice by delay. 1 Starkie, Ev. 932; 1 Strange, 426; 1 Taunt. 385; 1 Burrows, 146, 219. The court had no power in 1829 to amend the record of 1825. The power to amend may be inquired into. 6 Dana, 226; [Elliott v. Peirsol] 1 Pet. [26 U. S.] 340; 20 Wend. 145; 23 Wend. 616; 3 Ohio, 337, 549, 560; 2 Ohio, 27; 2 Chase's Ohio St. p. 1275, § 96. Any defect in process or in the pleading may be amended; nothing else. This was not a clerical error. [Brush v. Robbins, Case No. 2,059.] It is not proposed to amend the judgment, but to amend the record by inserting the judgment, which the clerk had neglected to do. 9 Ohio, 132; 3 Ohio, 523. Power of amendment at common law. 1 Bac. Abr. 145; 1 Salk. 47; 3 Salk. 31; 2 Wils. 147; 27 E. C. L. 264; [Elliott v. Peirsol] 1 Pet. [26 U. S.] 342; [Brudlove v. Nicolet] 7 Pet. [32 U. S.] 422, 432; [Livingston v. Mooee] Id. 522. No power after the term to amend a judgment, except a mere matter of form. 2 Ohio, 248; 3 Ohio, 486, 523, 524, 577. Two contradictory records are before the court. If the judge had inspected the final record he would have corrected the errors.

If the court had the power to make the entry, it could not do so legally without notice. [Walden v. Craig] 14 Pet. [39 U. S.] 154. But if the power may be exercised, it can not operate retrospectively. 2 Chase's Ohio St. p. 1274, § 87; 27 E. C. L. 264.

It is urged that the record affords no evidence that Yeatman was appointed a general guardian. That it has not the signature of the judge, as required by the statute. 2 Chase's Ohio St. p. 1275, §§ 93, 94. The object of requiring the judge's signature was, to see that the record was correct.

If the heirs are necessary parties, they must be so made, to give jurisdiction. The sale was made under an old order. The power to sell must be in the hands of the sheriff.

The above points were discussed at large and ably by the complainants' counsel, and some authorities not named above, were cited. The synopsis is a very imperfect one, but it states the ground on which the arguments for the plaintiffs were mainly founded; and it will enable the jury better to understand the views of the court. The controverted points the case, gentlemen of the jury, are questions of law, which are, properly, referred to the court. These questions, however, refer to facts which are before the jury, and on which the questions of law arise. Hafer died in 1825. He left, as his heirs, two daughters and a son. In 1832, his eldest daughter died. Some short time after his death, the grand parents took the children to Clermont, the place of their residence. At November term, 1825, December the 20th, the court appointed Griffin Yeatman guardian of the persons and estates of Mary Hafer, aged nine years, Caroline Hafer, aged seven years, and Henry Hafer, aged five years; and the guardian gave bond in one hundred dollars in each case. On the 29th December, of the same year, Francis Kerr, administrator, filed his petition, naming the minor heirs as defendants, and stating the debts due by the estate and its assets, real and personal; from which it appears that the estate owed upwards of sixteen thousand dollars, and the petition prayed that the real estate might be sold. And on the same day the following entry was made: "As guardian of the children, mentioned in the above petition, I hereby acknowledge notice of the above petition, and waive the necessity of process being issued." Signed, "Griffin Yeatman." And also the following entry was made on the same day: "And now, here, to wit, on the 29th of December, 1825, in the term of November and year aforesaid, the petition of the administrator of Henry Hafer, deceased, for the sale of certain real estate therein described, notice acknowledged by Griffin Yeatman, guardian to the minors mentioned in the said petition, whereupon the court appointed Casper Hopple et al., appraisers, etc. An order of sale was issued, the appraisement having been made, dated 7th February, 1826. The administrator, after giving due notice, sold the real estate for about one thousand dollars less than the appraisement." The cause was continued regularly, until August term, 1829, when Griffin Yeatman made an affidavit, that at November term he was appointed guardian ad litem, for the minor heirs of Hafer, to appear in their behalf, in an application by the administrator for the sale of the real estate of Henry Hafer, deceased, which appointment he supposed had been entered, and he requested that it might then be entered, etc. And the court at the same term say, being satisfied that Griffin Yeatman was appointed guardian ad litem for the defendants, to defend this suit, at the term of November, 1825, and prior to the order of appraisement in the cause, who then accepted of his appointment, and appeared in the case, and that the defendants, by their said guardian, appeared in the cause prior to the said order of appraisement; and it being suggested that there is a doubt whether the said facts sufficiently appear of record, it is ordered to be entered, as of the term of November, 1825, that said Griffin Yeatman was appointed by the court, guardian ad litem for said defendants, and that the said guardian voluntarily appeared, etc., and the sale was ratified.

It is contended that there could have been but one appointment of guardian. The guardian first appointed, was of the persons and estates of the minors. He was appointed the 20th of December, 1825, and gave bonds on the 29th of the same month. There can be no mistake as to this appointment. It is not only matter of record, but the facts are so clearly

stated as to leave no room for doubt. This appointment was made before the petition, by the administrator, for the sale of the real estate, was filed. It appears that subsequent to this appointment of guardian the same person was appointed guardian ad litem. This was, no doubt, supposed to be necessary in the prosecution of the petition. The defense set up under the mortgage can not be sustained. If the proceedings are void, there is no connection by any of the defendants with the mortgage. And if the proceedings be valid, the mortgage has been discharged, and in no sense can it constitute an outstanding title to affect the recovery of the lessors of the plaintiff.

It is said there are discrepancies between the records. The final record is admitted to be evidence, though not signed by the judge. In the case of Osburn v. State, 7 Ohio (pt. 1) p. 212, it is said, "The signature of the presiding judge adds no validity to a record; and the record itself would be evidence, or an exemplification might be sent abroad and used without such signature." The final record differs from the short entries made in the blotter. And this difference always exists. In the minutes the petition or pleading is never stated at length. Short entries are made, from which, and the papers referred to, the record at length is made up.

Has a court the power to inquire into the jurisdiction of the court whose record is offered in evidence? This power is necessarily exercised by all courts. But in making such an inquiry, the court must be careful to discriminate between what constitutes jurisdiction and error. Where a court, from its general powers, has jurisdiction of the subject matter, a due notice served on the party, if the proceeding be in personam, or an attachment laid on the land, if the proceeding be in rem, gives jurisdiction; and after this attached, no proceeding in the subsequent stages of the case, however erroneous, will make them void. Bank of U. S. v. Voorhees [Case No. 939]; [Voorhees v. Bank of U. S.] 10 Pet. [35 U. S. 449]. In this respect there is a difference between courts of a general and a limited or special jurisdiction. In the latter, the facts must appear on the face of the proceedings which give jurisdiction, but in the former, jurisdiction is presumed, unless the contrary appear. In the one case, jurisdiction may be presumed, in the other, no such presumption lies. In Grignon's Lessee v. Astor, 2 How. [43 U. S.] 339, which involved collaterally the validity of an administrator's sale, the court say: "No other requisites to the jurisdiction of the county court are prescribed than the death of Grignon, the insufficiency of his personal estate to pay his debts, and a representation thereof to the county court where he dwelt or his real estate was situate, making these facts appear to the court." And that proceeding was under a law which required "the said courts, previous to their passing on the said representation, shall order due notice to be given to all parties concerned, or their guardians," etc.

To give jurisdiction in the case before us, must the heirs be made parties? This is a question, as has been contended by the counsel for the plaintiffs, under the Ohio statutes, and we follow the construction of the statutes by the supreme court of the state. In 16th Ohio, a proceeding to sell the lands of the deceased, was declared void, "where no notice was given to the heirs, and the land was not described." Adams v. Jeffries, 12 Ohio, 274; the court say: "The heir has a right to be a party to the proceedings which deprive him of his estate, and we are constrained to deny the jurisdiction of a court which attempts to proceed without him."

There are some general expressions—Robb v. Irwin's Lessee, 15 Ohio, 700—which would seem to conflict with the above. The court say: "With these things the court of probate, on an application to sell land, have nothing to do, any further than to ascertain whether there are debts; whether the personal assets are sufficient, and whether it is necessary to sell the land," etc. But the question in that case was, whether a guardian ad litem could waive process and appear? By the 19th section of the act which regulates these proceedings (2 Chase, Ohio St. p. 134), it is provided, "that the application shall be by petition, to which the lawful heir, or the person having the next estate of inheritance of the testator or intestate, shall be made defendant."

In Ewing v. Hollister's Adm'rs, 7 Ohio, 138, the court say: "Before the passage of this act, it was held, that a citation, served on the general guardian of an infant defendant, was a proper mode of giving such defendant notice of the pendency of the petition." It is admitted that the general guardian may waive process, and appear for the minors. This was done, in this case, by Griffin Yeatman, the guardian. Was Yeatman duly appointed guardian? Before this answer is given, it may be proper to inquire, whether we can go beyond the entry upon the record? The statute provides, "that the court of common pleas shall have power, whenever they consider it necessary, to appoint a guardian or guardians to all minors within their county," etc. In the case of Maxsom's Lessee v. Sawyer, 12 Ohio, 195, the court held, that the appointment of guardian is open to inquiry collaterally. And they say: "If the plaintiff's lessor was not so within the county, he being the minor, the court had no jurisdiction; and the fact may be shown in this collateral way." In Perry's Lessee v. Brainard, 11 Ohio, 442, the court held, "that the guardianship of a minor female expires, by operation of law, when the ward arrives at the age of twelve years." In both these cases, the minor was the plaintiff in the suit.

The only objection to the first appointment of Yeatman is that the minor heirs were not within Hamilton county at the time the appointment was made. That this would be ex-

aminable by the supreme court, on a certiorari or otherwise, may be admitted. But can it be examined into collaterally? In Ludlow's Heirs v. McBride, 3 Ohio, 257, the court say: "So far as the courts of common pleas were invested with jurisdiction over the subject matter upon which they have acted, their decisions and orders are final and conclusive; if not reversed for error, they cannot be impeached collaterally. The grounds and proofs on which they proceeded are not examinable in this case." This is an important question of law, which must rest upon general principles, and does not depend on the construction of a statute. In making the appointment of guardian, the court having general jurisdiction, is presumed to have examined the facts on which their jurisdiction depended. The court held, in Lincoln v. Tower [Case No. 8,355], "that the appearance of the defendant is a material fact, and so is the service of process. It is admitted that the allegations in a record which were not material nor traversable, are not conclusive on the parties. But the record is conclusive of all matters in relation to the judgment, which were material, and which might have been traversed." 2 Serg. & R. 123; Leech v. Armitage, 2 Dall. [2 U. S.] 125; Green v. Ovington, 16 Johns. 58. In Thompson v. Talmie, 2 Pet. [27 U. S.] 165, the court say: "The age of the heirs was, at all events, a matter of fact upon which the court was to judge; and the law no where requires the court to enter on record the evidence upon which they decided that fact. And how can we now say, but that the court had satisfactory evidence before it, that one of the heirs was of age?" If it was so stated in terms on the face of the proceeding, and even if the jurisdiction of the court depended upon that fact, it is by no means clear that it would be permitted to contradict it, on a direct proceeding to reverse any order or decree made by the court. But, to permit that fact to be drawn in question collaterally, is certainly not warranted by any principle of law.

The principle was decided in the case last cited, which must govern the question now under consideration. The matter of fact, as to the residence of the minors, when Yeatman was appointed guardian was, of necessity, before the court of common pleas, when they made the appointment; and it was not necessary to place that fact upon record. That court determined it, and can the fact be open to proof collaterally, when the record is offered in evidence? If such be the law, then every fact necessary to be established in a judicial proceeding, whether it relate to the jurisdiction of the court, or to the merits of the case, and which did not constitute a part of the record, is open for examination. And how numberless are these facts, in the action of courts? In this view, less effect would be given to the judgment of the court, than to the verdict of a jury. In the transaction of its business, a court in almost every step taken in a cause must act upon rules, adopted by statute or by judicial discretion. And all these rules impose limitations, within which, certain things must be done. And when the court, having the subject before it, decides a matter under these rules, can such matter ever be inquired into collaterally? I am aware that, in New York, it was held, where no fraud or unfairness was alleged in regard to the service of process, evidence might be heard to contradict the return of the officers; in a case on a record from a sister state, that decision, I think, must stand alone. Nine days before the petition was presented by Kerr, Yeatman was appointed. A waiver of process and an entry of his appearance were made in the presence of the court, and were entered upon its record. Should the fact under consideration be held to be open, collaterally, it is impossible to say to what uncertainties and mischiefs the principle might lead. How is the evidence on which the court acted to be preserved? Life is uncertain, and a fact susceptible of clear proof now, may be involved in great uncertainty twenty years hence. No one may be able to prove it. And shall titles, under judicial sales, rest upon so uncertain a basis?

Admit all that is contended for, in regard to the residence of the infants, when the guardian was appointed. No one will contend that the minors must, in fact, be within the county when the appointment was made. They may have been absent on a visit; their own mother was not living, and they were left in the charge of their step-mother. Her home would be their domicil, and by the law, she was entitled to occupy the mansion house one year from the death of her husband. What is to fix the domicil of infants? The home of these infants was in Hamilton county. Their property was there, and it was there only that a guardian could property be appointed. If they had not, at the time, an actual residence in Hamilton county, they had constructively. It was the place of their birth, where their father and mother lived and died, and where all their property was to be found. They had left the county, at most, only a few months before this appointment was made. There is no suggestion of fraud or unfairness in the appointment. If it were proper now, after the lapse of twenty-three years, to inquire into these facts, how are we to ascertain that the court of common pleas had not evidence before it, that the absence of the minors from the county was only temporary, and did not affect their domicil? If this question were open, we should incline to say that the residence of the infants with their grand-parents, for a few months, in Clermont county, is not evidence of a change of domicil, under the circumstances, so as to affect the jurisdiction of the court. But we think, that this matter, without an allegation of fraud or unfairness, is not open for inquiry, especially after the lapse of twenty-three years.

The amendment at the instance of Kerr,

the administrator, on the affidavit of Yeatman, Sept. 1, 1829, who stated that at the November term he was appointed guardian, ad litem, as a prerequisite by the court, to the attainment of an order to sell the land, was the exercise of a discretion which no court, in a collateral manner, can disregard or treat as a nullity. It was not, in fact, the amendment of a judgment or an order. It was supplying the omission of the clerk in failing to enter, as his duty required, the appointment. The court was satisfied from the evidence, that the appointment had been made by them, and that the clerk had failed to perform his clerical duty in entering it. The case had proceeded upon the presumption that the entry of the appointment had been made as ordered. The capacity of Yeatman as guardian ad litem, had been recognized, in several important steps taken in the case. By the entry nunc pro tunc, no one was taken by surprise, no one gained an advantage; in the opinion of the court, such an entry was necessary to legalize the proceedings. The debts of the estate were large and no doubt pressing, and it was the interest of the heirs to have them paid; under such circumstances the order was entered. It had every equitable consideration to recommend it, and there was no objection to it, as it seems, of any force. The objection comes after the lapse of near a quarter of a century, when the land, in the hands of the purchasers, their heirs or grantees, by the improvements thereon, and by the growth of the city, has become of immense value, and it is made before a different tribunal from that which authorized the entry: under such circumstances the objection can not be sustained. When the order was made, the parties were still before the court, the cause having been regularly continued to that time, and under the circumstances we are not prepared to say that a court could set aside the proceeding, which exercised a supervisory power over the action of the common pleas—but the only question before us is, whether the order was void. We think it can not be so treated. The questions of law having been considered by the court, gentlemen, but little has been left for your consideration. Your verdict will be made under the opinion of the court expressed.

Certain instructions were asked, which were refused; and the court charged the jury that the county of Hamilton, where the children were born and where their father died, leaving a widow, the step-mother of his minor heirs, and who was entitled to dower in the lands, and who remained, as appears from the evidence, some time in the county, constituted in law the domicil of the minors, their property being there; and that notwithstanding their absence as proved, the court of common pleas, of Hamilton county, had power to appoint a guardian for them. That the facts on which the court acted were not required to be placed on record, and that every presumption was in favor of the action of the court, especially after the lapse of twenty-three years. That the proceedings of the court on the petition of the administrator for the sale of the lands, and the deeds made under the sales, divested the title of the heirs, and vested it in the purchasers.

THE COURT then informed the jury, that by the ruling of the above points of law favorable to the defendants, their verdict would be, not guilty.

Verdict not guilty.

Case No. 13,252.

SPRAGUE v. The MARIA.

[See Case No. 13,253.]

SPRAGUE (MATHEWSON v.). See Case No. 9,278.

Case No. 13,253.

SPRAGUE et al. v. ONE HUNDRED AND FORTY BARRELS OF FLOUR.

[2 Story, 195;[1] 6 Law Rep. 14.]

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

SALVAGE—DERELICT—COMPENSATION—COSTS.

1. The general rule in the admiralty, in cases of derelict, is to allow one moiety of the property saved to the salvors; but this allowance may be enlarged by the circumstances of a particular case, where the services performed are of an extraordinary nature.

2. Under the circumstances of the present case, one moiety of the gross proceeds of the value of the property was decreed to the salvors, with full costs and expenses; the latter to be a charge exclusively upon the other moiety.

This was a libel for salvage of certain goods, and was certified to this court, from the district court, under the act of 3d of March, 1821 (chapter 189), on account of the district judge being related to the libellants. The libel set forth, in substance, that on the 9th of April, 1842, the master and crew of the brig Cambrian, of Boston, discovered a wreck, which they boarded, and discovered that it was the hull of the schooner Maria, of New York, and found, that the said hull, and the cargo on board thereof, were entirely derelict, and without any person on board, and nearly full of water. That the said master and crew attempted to take out the goods, wares, and merchandise, laden in the said schooner, and to convey them on board the said brig Cambrian, but the weather was so tempestuous, and the sea so rough, that they were not

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

able to take out more of the said goods, wares, and merchandise, than one hundred and forty barrels of flour, two chain cables, one small anchor, two stoves, and one hard wood table, all of which they brought to the port of Boston. That the said master and crew, and owners of the said brig Cambrian, by reason of the great risk and hazard they ran, and the service they performed in saving the said portion of the said cargo, deserve, and are justly entitled to receive meet and competent salvage for such service, together with all charges and expenses attending the same.

The Mutual Safety Insurance Company, of New York, intervening for their interest in the cargo of the Maria, appeared and claimed the goods, wares, and merchandise, above mentioned, as their property. They admitted the facts, as set forth in the libel, and prayed the court, after awarding to the libellants [Phineas Sprague and others] meet and competent salvage, to decree restitution of the said property to the claimants.

The cause came on for argument upon the libel and answer, no evidence having been taken by either party, and no matter of fact being in controversy.

Wm. Gray, for libellants.

The following cases were cited for the libellants. Rowe v. The Brig [Case No. 12,093]; Cross v. The Bellona [Id. 3,428]; Hindry v. The Priscilla [Id. 6,515]; Taylor v. Twenty-Five Thousand Dollars [Id. 13,807]; Bass v. Five Negroes [Id. 1,093]; Jerby v. One Hundred and Ninety-Four Slaves [Id. 7,288]; The Fortuna, 4 C. Rob. Adm. 193; The Frances Mary, 2 Hagg. Adm. 89; The L'Esperance, 1 Dod. 46; The Blenden Hall, 1 Dod. 414; Hand v. The Elvira [Case No. 6,015]; The Elizabeth & Jane [Id. 4,356]; The Rising Sun [Id. 11,858]; The Henry Ewbank [Id. 6,376]; The Britannia, 3 Hagg. Adm. 153; The Aquila, 1 C. Rob. Adm. 42; The Jonge Bastiaan, 5 C. Rob. Adm. 322.

F. C. Loring, for claimants.

STORY, Circuit Justice. This is a clear case of derelict, and is admitted on all sides to be so. The general rule in the admiralty, under such circumstances, is to allow a moiety of the property saved to the salvors. It is not, however, an inflexible rule, but it will yield to circumstances; as, for example, where the property is very large, and no extraordinary perils or labors have been encountered, the allowance has sometimes been less. On the other hand, where the property has been small, the salvors numerous, and the perils imminent, or the services laborious and exhausting, a larger allowance has been thought justifiable. But unless under some peculiar circumstances of this sort, the general rule is silently permitted to have its sway. The case of The Blenden Hall, 1 Dod. 414, illustrates the former position; although it strikes me, that the salvage awarded was there too low, under all the circumstances. The case of The Fortuna, 4 C. Rob. Adm. 193, The Marquis of Huntly, 3 Hagg. Adm. 248, 249, and The Charlotta, 2 Hagg. Adm. 361, are to the same effect. On the other hand, there are cases, in which more than a moiety has been decreed to the salvors, under circumstances such as have been already alluded to. See The William Hamilton, 3 Hagg. Adm. 168, and note 1; The Reliance, 2 Hagg. Adm. 90, note; The Jonge Bastiaan, 5 C. Rob. Adm. 322. But the decisions all show, that it is with great reluctance, that courts of admiralty award more than a moiety. The Frances Mary, 2 Hagg. Adm 89; The Britannia, 3 Hagg. Adm. 153, 154; The Effort, 3 Hagg. Adm. 165, 167; The Ewell Grove, 3 Hagg. Adm. 209, 221; The Queen Mab, 3 Hagg. Adm. 242. As long ago as in the case of Rowe v. The Brig [Case No. 12,093], I had occasion to express my own opinions upon the subject; and I can perceive no reasons now to recede from what was then said. The gross amount of all the property, saved in the present case, is about six hundred and ninety-six dollars. Of this, articles to the value of one hundred and nineteen dollars are unclaimed; the residue, the flour now claimed, sold for the gross amount of five hundred and seventy-seven dollars; the number of the salvors is twenty-two. The service was plainly a meritorious one; but not under circumstances of extraordinary peril or difficulty. No objection is made, nor, indeed, in my judgment, could reasonably be made, against the allowance of the moiety of the proceeds. The libellants, however, insist, that they are entitled to a higher remuneration, and ask three fifths.

In the present case, I cannot say, that I see sufficient grounds to deviate from the general rule of a moiety; and I should be loth to do so, unless under pressing circumstances, since it might otherwise produce litigation in every case of derelict. I shall, therefore, decree one moiety of the gross proceeds of the value of the property to the libellants, with their full costs and expenses; the costs and expenses to be a charge exclusively upon the other moiety. This is not an unusual course in cases of this sort; and it will in effect not essentially vary from a decree for three fifths of the net proceeds.

Case No. 13,254.

SPRAGUE v. PITT et al.

[1 Kan. 610; McCahon, 212.] [1]

Circuit Court, D. Kansas. May Term, 1868.

SALE FOR TAXES—TAX DEED—LIMITATIONS.

1. A tax deed duly executed by a county clerk, in pursuance of a valid sale of land for taxes by the county treasurer, witnessed and acknowledged, is prima facie evidence of title.

[1] [Reprinted by permission.]

2. A tax deed so executed, witnessed, and acknowledged, and recorded, is a bar to an action for the recovery of the land, after two years from the time of recording such deed.

[This was an action of ejectment by Galatia Sprague against George L. Pitt and Peter Burr.]

MILLER, Circuit Justice. As conclusions of fact. That on the 25th day of November, 1859, Galatia Sprague, the plaintiff in this suit, located a military land warrant upon the following described tract of land, situate in the county of Johnson and state of Kansas, namely, the northeast quarter of section twelve (12) in township (13) of range twenty-one; and that on the 1st day of October, 1860, said land was duly patented to the plaintiff in this suit, by letters patent duly issued by the president of the United States; and that on the 15th day of September, 1863, Jesse H. Jackson, as county clerk of the county of Johnson, in the state of Kansas, under his hand and the seal of the said county, made a tax deed, thereby conveying said land to one E. A. Abbott, as assignee of said county, in pursuance of a sale thereof made by the treasurer of said county on the 6th day of September, 1860 (at a sale began on the first Tuesday of September, 1860), to said county, for taxes for the year A. D. 1859, and interest and costs thereon, and an assignment of the certificate of purchase to said E. A. Abbott on the 20th day of July, 1863; and that on the 22nd day of May, 1865, said E. A. Abbott conveyed all his right and title to said land to defendant George L. Pitt; and that on the 15th day of September, A. D. 1863, said tax deed was recorded in the office of the register of deeds of said county of Johnson; and that said tax deed was witnessed by two persons, and was acknowledged before a justice of the peace of said county; and that said tract of land is worth more than two thousand dollars.

And as conclusions of law from the above facts, the court decides that said treasurer had power to sell said land for taxes of 1859, on said 6th day of September, 1860; and that said county clerk had power to make said tax deed; and that said tax deed is prima facie evidence of title to said land; and that this action is barred by the statute of Kansas limiting the time in which actions may be commenced for the recovery of lands sold for taxes to two years from the time of recording the tax deed; and that plaintiff is not entitled to recover the possession of said land. It is, therefore, considered that the said defendants go hence without day, and recover of and from the said plaintiff all costs in and about this suit expended, etc.

SPRAGUE (STONE v.). See Case No. 13,487

SPRAGUE (TOLAND v.). See Case No. 14,076.

Case No. 13,255.

SPRAGUE v. WEST.

[Abb. Adm. 548;[1] 8 N. Y. Leg. Obs. 241; 3 Am. Law J. (N. S.) 202.]

District Court, S. D. New York. July 26, 1849.

SHIPPING—UNLADING — DELIVERY — DEMURRAGE— HOW COMPUTED.

1. The owner of the vessel takes the risk of working weather during the time required for the unlading of the cargo.

[Cited in The Mary E. Taber, Case No. 9,209; Bertellote v. Part of Cargo of Brimstone, 3 Fed. 662.]

2. The consignee takes the risk of roads and means of transportation from the dock; and is bound to take the cargo as delivered to him at the vessel's side, and to remove it as fast as the vessel can be reasonably discharged.

[Cited in The Hyperion's Cargo, Case No. 6,987; Unnevehr v. The Hindoo, 1 Fed. 629; Bertellote v. Part of Cargo of Brimstone, 3 Fed. 662; Gronstadt v. Witthoff, 15 Fed. 271.]

3. It seems that the consignee cannot be made liable for demurrage where there is in the charter party or bill of lading no express agreement or stipulation in respect to it, or in respect to lay days.

[Cited in The Hyperion's Cargo, Case No. 6,987.]

4. The freighter is liable to the vessel for any unnecessary detention in loading or unloading, although no express contract is made on the subject; and compensation for such detention may be recovered under the name of demurrage.

[Cited in Donaldson v. McDowell, Case No. 3,985; Two Hundred and Seventy-Five Tons of Mineral Phosphate, 9 Fed. 211; Blowers v. One Wire Rope Cable, 19 Fed. 449; Hawgood v. One Thousand Three Hundred and Ten Tons of Coal, 21 Fed. 685; The William Marshall, 29 Fed. 329; Neilsen v. Jesup, 30 Fed. 139; Gates v. Ryan, 37 Fed. 155; Melloy v. Lehigh & W. Coal Co., Id. 378.]

[Cited in Brett v. Van Praag, 157 Mass. 143, 31 N. E. 763; Falkenburg v. Clark, 11 R. I. 283. Cited in brief in Hall v. Barker, 64 Me. 341.]

5. Upon what principles demurrage for the unnecessary detention of a vessel while unloading should be computed.

[Cited in Sheppard v. Philadelphia Butchers' Ice Co., Case No. 12,757.]

This was a libel in personam by James Sprague and others, owners of the schooner John R. Watson, against J. Selby West, to recover damages for the detention of a vessel.

The libel in the cause was as follows:

"To the Honorable Samuel R. Betts, &c.

"The libel of James Sprague, Charles Keen, David Crowell, and Daniel Butler, owners of the schooner John R. Watson, against J. Selby West, of said district, coal dealer, in a cause of contract, civil and maritime, alleges as follows:

"First. That in the month of December last, the said schooner lying at Philadelphia and destined on a voyage to New York, Richard Jones & Co. shipped on board the said schooner one hundred and ninety-four tons of coal,

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[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

or thereabouts, to be therein carried from Philadelphia to New York, and there delivered in like good order and condition (the dangers of the sea only excepted), to J. Selby West, or his assigns, to whom the same belonged, he or they paying freight for the same, at the rate of ninety cents per ton; and accordingly, the master of said schooner at Philadelphia, on the fifteenth day of December last, signed the usual bill of lading, a copy of which is hereto annexed.

"Second. That shortly afterwards the said schooner set sail from Philadelphia to New York with the said coal on board, and there safely arrived on or about the nineteenth day of December; and on the next day James Sprague, the master of said vessel, caused a written notice to be served upon J. Selby West, the consignee and owner of the coal, as follows:

"'New York, December 20, 1848. Sir: You will please take notice, that the schooner John R. Watson, under my command, and loaded with coal consigned to you, was ready to discharge cargo this morning, of which fact you have been duly notified. And you will further take notice, that demurrage will be demanded for every day she is detained. Yours, &c. James Sprague. To J. Selby West, Esq.'

"Third. That the said West accepted the said cargo, and commenced to receive the said coal, but refused to take it save in very small quantities and at irregular times, capriciously and vexatiously; and when urged and requested to take the same more expeditiously, replied, that he would take it when it suited him, and no faster, and would keep the schooner as long as he wanted to, for the captain could not help himself; and in accordance with such threat, he detained the said schooner until the fourth day of January, instant, on which day fifty tons of coal were still on board and were taken out by him and his agents, and the schooner completely discharged.

"Fourth. That during the whole time the said schooner was so detained, she was obliged to lie at the foot of Forty-Second street, in the North river, that being the place designated by the bill of lading, in danger of being frozen up and compelled to winter here; and her whole crew were detained at the expense of the vessel, and two extra men and a horse were kept constantly waiting on the dock during very severe and cold weather, ready to deliver the coal whenever the said West should take it away. And the said West was often notified by the master of the said schooner that said master was constantly ready to deliver said coal, and that the expense and damage of such detention would be demanded of him.

"Fifth. That the usual and sufficient time to discharge such a cargo of coal is four days, and these libellants claim to be entitled to have of the said West the damages sustained by them by reason of the unjust detention of said vessel beyond that time, which they allege amounts to the sum of two hundred and thirty-one dollars and upwards.

"Sixth. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States, and of this honorable court.

"Wherefore these libellants pray that a warrant of arrest in due form of law, according to the course of this honorable court, in admiralty and maritime cases, may issue against the said J. Selby West, and that he may be compelled to answer upon oath all and singular the matters aforesaid, and that this honorable court would be pleased to decree the payment of the damages aforesaid, with costs, and that he may have such other relief as in law and justice he may be entitled to recover. James Sprague."

On the hearing of the cause, it appeared on behalf of the libellants, that the John R. Watson took in at Philadelphia a cargo of coal belonging to respondent and consigned to him at New York. There was no stipulation in the bill of lading (which was in the usual form) relative to demurrage, detention, or lay days. The vessel arrived at New York, and on December 20, 1848, as stated in the libel, and again on the 21st, the respondent was notified in writing that she was ready to discharge. Three working days were enough to discharge the cargo, and the master and crew were at all times ready, but the vessel was not in fact discharged till January 4, 1849; for the reason that the respondent did not send carts enough to remove the coal as fast as it could be discharged.

The respondent denied the jurisdiction of the court; denied his liability for demurrage in the absence of an express contract; and justified his delay in receiving the cargo, on the ground of bad weather, bad streets, and the distance of the place where the vessel lay from his coal yard.

Other facts are stated in the opinion.

E. C. Benedict, for libellant.

H. Brewster, for respondent.

BETTS, District Judge. A cargo of one hundred and ninety-four tons of coal, belonging to the defendant, was shipped at Philadelphia on board the libellant's vessel. The master signed a bill of lading to deliver the same to the respondent at Forty-Second street, New York, for ninety cents per ton, freight.

The vessel arrived at the place designated on the 19th of December last, and the respondent, not being able to receive the coal at that place, ordered the master to moor at Twenty-Ninth street and unload there. The vessel took her berth at that place the same day, and the next morning was ready to commence discharging, of which a verbal notice, and afterwards a written one, was given the respondent, with further notice that demurrage would be claimed of him for any

unnecessary detention of the vessel. The written notice was sent the 21st. The respondent failed supplying the carts necessary to remove the coal, and the vessel was not fully discharged of her cargo until the 4th of January following.

Although the weather was at times stormy and the roads bad, yet, on the proofs, neither of these circumstances prevented unlading the vessel and removing the cargo at once; and it is well established by the proofs, that with ordinary diligence the cargo could have been delivered in three days. The libel alleges that four days was amply sufficient.

The libellants undoubtedly took the hazard of working weather. The evidence to that point is satisfactory, that coal was constantly unladen and carted from North river piers during those days; and a vessel of the burden of this one, coming to her dock the same day, and having one hundred and fifty tons on board, was completely discharged and sailed again within three days. The state of the weather, therefore, did not prevent the work being done.

The respondent was bound to take the risk of roads and means of transportation from the dock. He was to take the coal as delivered him at the vessel's side, and to supply means of removing it as fast as the vessel could be reasonably discharged. This is the general rule of maritime law (The Grafton [Case No. 5,656] [2] November, 1844), and the evidence in the present case shows it the established custom of the coal trade at this port.

The respondent had then the 20th, 21st, 22d, and 23d days of December, when the weather was suitable and the vessel in readiness to discharge, which could have afforded him time to take away the whole cargo. But, giving him four full days, including the 21st, and deducting Sunday, the 24th, and Christmas, the vessel should have been discharged the 26th, and her detention beyond that period was unnecessary, and caused by the fault and delinquency of the respondent.

The position is taken by the respondent, in objection to the claim of demurrage, that it is only recoverable on an express stipulation to pay it, and that the bill of lading being an ordinary one in this case, the libellants have no remedy against the consignees, beyond the freight stipulated to be paid.

It is not to be denied, that the practice would be more prudent, and liable to cause less disturbance to navigation and trade, if the parties, as suggested in some of the English cases, would note in the bill of lading or charter party, the time allowed for lading or unlading the vessel at her ports of affreightment or discharge, and also the consequences of overrunning that period. And probably, upon the more modern authorities (Abb. Shipp. 304; 3 Johns. 342), a consignee cannot be made liable on an implied obligation for demurrage, no express agreement or stipulation being made in the charter party or bill of lading, in respect to it or to lay days. But the doctrine is different in regard to the freighter. He is held liable to the vessel for any unnecessary detention in loading or unloading, although no express contract is made on the subject. Holt, Shipp. pt. 3, c. 1, § 25. To the same effect are the ancient ordinances, and the rules of other maritime countries. 1 Valin, 649, 650. And the English courts, though hesitating somewhat at terming the compensation demurrage, hold that the freighter or consignee who improperly detains a vessel, is liable to a special action on the case for the damage resulting from such detention. 9 Car. & P. 709; [11 Mees. & W. 498].[3] Courts of admiralty act upon the rights arising out of maritime transactions, without regard to modes or names of actions, and independent of all points of form. The suggestion that demurrage can be claimed upon the footing of express contract alone, is undoubtedly giving too narrow an effect to the term. Every improper detention of a vessel may be considered a demurrage, and compensation in that name be obtained for it. 2 Hagg. Adm. 317; [The Apollon] 9 Wheat. [22 U. S.] 362; Hooper v. 51 Cases of Brandy [Case No. 6,674]. Demurrage is only an extended freight or reward to the vessel in compensation of the earnings she is improperly caused to lose. Holt, Shipp. pt. 3, c. 1.

The jurisdiction of the court over sea freights and demurrage resulting from such voyages, it appears to me, is indisputable, and the branch of the defence resting on exceptions to the jurisdiction is overruled.

I shall accordingly decree against the respondent as owner of the cargo, damages by way of demurrage for the unnecessary detention of the vessel from the 26th of December to the 4th of January.

Various methods of computing these damages are referred to and adopted by the courts. The Anna Catharina, 6 C. Rob. Adm. 10; Holt, Shipp. 338, § 28; Abb. Shipp. 304; Hooper v. 51 Cases of Brandy [supra]. See, also, the case of The Rhode Island [Cases Nos. 11,740a, 11,744] note 1. The usual earnings of the vessel in her regular course of employ, is, perhaps, a method not less entitled to adoption than others frequently approved and acted upon. It is in proof that upon average voyages of from fifteen to eighteen days, this vessel was earning at that period about $10 per day. No doubt that is a low valuation of her worth to the owners, but it may be as safe a criterion to guide the judgment of the court in estimating the loss they incurred by being deprived of her services that period, as the opinion of witnesses to her charter value in herself by the month or day. It belongs to the libellants to give satisfactory proof to this point, and to supply

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[2] This case was afterwards affirmed on appeal to the circuit court.

[3] [From 8 N. Y. Leg. Obs. 241.]

a method of computation by which the court can ascertain the damages with reasonable precision.

Assuming that as the basis of computation, the detention of the vessel would deprive her of earning, as she was then fitted out, manned, and provisioned, from ten to twelve dollars per day. I shall allow for the nine days' detention one hundred dollars.

Decree accordingly.

[This cause was carried to the circuit court by appeal. The appeal, however, was abandoned, and the cause was settled without an argument.] [4]

Case No. 13,256.

SPRATLEY v. HARTFORD INS. CO.

[1 Dill. 392.] [1]

Circuit Court, D. Kansas. 1871.

PARTIES—ASSIGNMENT—INSURANCE—FIRE—PROOF OF LOSS—CONSTRUCTION OF POLICY.

1. An order on an insurance company, given by the assured, after the loss, to a creditor, directing the company to pay such creditor the whole amount due under the policy, makes the person receiving such order the assignee of the cause of action and the real party in interest.

[Cited in Board of Com'rs of Bartholomew Co. v. Jameson, 86 Ind. 165.]

2. On a plea that the proofs were not furnished as required by an insurance policy, plaintiff may show that partially defective proofs were accepted by the company, such acceptance being inferred from failure of the company to object to the same.

3. A policy describing "blacksmith and carriage makers' stock, manufactured and in process of manufacture," embraces unmanufactured or raw stock of the kind mentioned.

This is an action at law on a fire insurance policy.

Mr. McCahon and Mr. Fenlon, for plaintiff.

Mr. Wheat, for defendant.

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

DILLON, Circuit Judge. The court rules the following points:

1. Parties. — Real Parties in Interest. Where a statute of the state, applicable by express adoption to the practice in the federal court sitting therein, requires that actions shall be brought by "the real party in interest," an order on an insurance company, given by the assured to a creditor of his, after the loss, directing the company to pay such creditor the whole amount due under the policy, makes the person receiving such order an assignee of the cause of action, and entitles him, under the statute above mentioned, to sue on the policy, for the loss, in his own name. Distinguished from Thompson v. Railroad Co., 6 Wall. [73 U. S.] 134.

2. Acceptance of Defective Proofs of Loss. Where, in an action on an insurance policy, issue is taken upon a plea setting up that the proofs of loss were not furnished, as required by the policy, the plaintiff may show that proofs, in some respects defective, were accepted by the company as sufficient, and such acceptance may be inferred from the failure of the company to object to the proofs, and its placing its refusal to pay upon other grounds.

3. Construction of Policy as to Property Covered by It. A policy describing the property insured as "blacksmith and carriage makers' stock, manufactured and in process of manufacture, contained in a certain building," embraces unmanufactured or raw stock of the kind mentioned in the policy.

Case No. 13,257.

SPRIGG v. BANK OF MOUNT PLEASANT.

[1 McLean, 384.] [1]

Circuit Court, D. Ohio. Dec. Term, 1838. [2]

PRINCIPAL AND SURETY — SEALED INSTRUMENT—EQUITY—SUBROGATION.

1. Where an individual binds himself in a sealed instrument to pay a sum of money to a bank, as principal, he cannot, in equity, contradict the writing by showing that he was, in fact, surety.

[See Bank of Mount Pleasant v. Sprigg, Case No. 891; Sprigg v. Bank of Mount Pleasant, 10 Pet. (35 U. S.) 257.]

2. In such a case, the rule is the same in equity as at law.

3. A deed absolute upon its face, may be shown, by parol proof, to be in fact a mortgage; and this is admitted to prevent the fraud set up under the deed.

[See Bank of Mount Pleasant v. Sprigg, Case No. 891.]

4. In some cases a surety may compel the creditor to use active diligence against the principal.

5. And in all cases the surety, by paying the debt, is subrogated to the rights of the creditor.

6. But where all are principals, each stands liable for the debt, and no laches of the creditor can affect the liability of the obligors.

[This was a bill in equity by Samuel Sprigg against the Bank of Mount Pleasant.]

Mr. Hammond, for plaintiff.

Mr. Alexander, for defendant.

LEAVITT, District Judge. The case made in the bill is substantially as follows:

That in February, 1826, Peter Yarnall & Co. obtained a loan of $2,100 from the Bank of Mount Pleasant, and gave a single bill therefor, under seal, with the complainant, Richard Simms, Alexander Mitchell, and Z. Jacob, as

[4] [From 8 N. Y. Leg. Obs. 241.]

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

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

[2] [Affirmed in 14 Pet. (39 U. S.) 201.]

sureties in fact, though they acknowledged themselves in the obligation as principal debtors. The loan was for sixty days, by the terms of the bond; and the bill alleged that it was for the sole benefit of Yarnall & Co., and that the other obligors were only sureties; and that this was known to the bank; that when the bill became due, on the 21st of April, 1826, Yarnall & Co. paid, and the bank received the discount for the further period of sixty days: that from that time, at the expiration of each successive 60 days, the loan was continued, and the discounts so paid and received as aforesaid, till September or October, 1828; at which time Yarnall & Co. failed, and continued to be insolvent: that these extensions and continuances were granted by the bank to Yarnall & Co. without the knowledge or consent of the other obligors, or any, or either of them; and that they did not know of the non-payment of the bill till the time Yarnall & Co. failed: that from 1826 till 1828 Yarnall & Co. were in business, and perfectly solvent: and that if the other obligors had known of their failure to pay, they could have secured themselves. Complainant avers that these doings on the part of the bank were fraudulent as to him and his co-sureties, if the bank intended still to hold them liable: or, if such extensions were matter of contract with said Yarnall & Co. for the purpose of charging complainant with payment of said bill, he alleges that he is discharged from liability; and entitled to relief in equity, as it has been adjudged, that the foregoing facts are not available to him as a defence at law. The answer denies that Yarnall & Co. were received and treated by the bank as exclusively the principal debtors: and alleges that all the obligors were so considered; and that it was upon the faith of their contracting as principal debtors, that the bill was discounted: and, that if they had not so bound themselves, the loan would not have been made: and, that the obligors signed the bill with a full knowledge of its terms and the obligation it imposed: and having so contracted, are estopped from asserting that they signed as sureties merely. The answer denies that the extensions of the loan were without the knowledge of the complainant and the other obligors: denies also, that the bank knew anything of the insolvency of Yarnall & Co. till about the time suit was brought against complainant: denies any intention on the part of the bank to injure complainant by the extension of the loan; and avers, that the indulgence was granted on account of the confidence reposed in the obligors, and because they were all deemed to be principal debtors. The answer is not verified by oath. To the answer there is a general replication.

In the action at law, instituted by the bank against the complainant, on the bond in question, the pleas set up were substantially the facts contained in the bill as a defence. This court decided, that these facts were not a defence to the action; and the case being removed to the supreme court by writ of error, the judgment of this court was affirmed. It was there decided, that the complainant, having assumed in the obligation the character of a principal debtor, was precluded from showing that he was in fact only a surety. [10 Pet. (35 U. S.) 257.]

The complainant now insists, that though the defence set up, was not available to him, in the action at law, he is entitled to relief in equity. He claims, that the doctrine of estoppel is not recognized in courts of equity; and, that notwithstanding he admits himself to be a principal debtor, in the obligation, he is at liberty to show, that he was in fact only a surety; and as such, entitled to all the rights incident to that relation. It is claimed on the other hand, that complainant is estopped, as well in equity as at law, from denying the character which he assumes in the obligation: and that, upon the equity of the case, he is not entitled to relief.

In relation to the material facts involved in this case, there seems to be no ground for doubt or controversy. It is satisfactorily made out by the proofs and evidence, that the loan was obtained upon the application of P. Yarnall & Co. in the month of February, 1826: that at their instance, and upon the payment of the discounts by them, in advance, the loan was extended from time to time, till the fall of the year 1828: that the proceeds of the loan were passed to their credit in bank, and drawn for by their agent: and, the cashier thinks it was the understanding of the directors, that the money was for the use of Yarnall & Co., though he believes, that all the obligors were considered principal debtors. It also appears to have been the usage of the cashier, to open the account with and charge the proceeds of every loan to the first signer of the bond. It is also proved, that Yarnall & Co. failed in September or October, 1828, and that they have continued to be insolvent. It is not proved, that the complainant, or any of the obligors, who claim to have been sureties, had any knowledge of the extensions of the loan, or that it was with their consent.

No principle of law is better established, at this day, than that a creditor, by extending the time of payment, by agreement with a debtor without the consent of the surety, so as to suspend, even for a short time, his right to proceed against the former, discharges the surety from his liability. In the report of the case between these parties at law, 10 Pet. [35 U. S.] 257, the court say, "It falls within the settled rule of law in relation to sureties, that extending to the principal further time of payment, by a new agreement, will discharge the surety," and, although the court held in that case, that in the ordinary case of parties being bound jointly and severally in which all are prima facie principals, the remedy of the surety is in chancery, and not at law, yet a different doctrine prevails in Ohio. The case of the Bank of Steubenville v. Hoge, 6 Ham. (Ohio) 17, was an action of debt on a joint and

several obligation under seal. Oyer of the obligation was craved: and the defendants set up the fact of their being sureties and that the plaintiff had given time to the principal debtor, whereby they were discharged: and it was held that this defence might be made at law, as well as in equity. If the principle adverted to, was the only one presented in this case, the court would have no difficulty in coming to a decision. We could not hesitate to say, as the court said in the case just referred to in 10 Pet. [35 U. S.] if the defendant (complainant here) can be let in to set up, that he was surety only, the matter alleged is sufficient to exonerate him from liability in the present suit: we have no doubt, but the extension of the payment from time to time, was in effect, a suspension of the right of the bank to proceed on the bond; and therefore brings the case within the principle above referred to: if under the circumstances of this case, the complainant can be regarded as standing in a relation to the parties, different from what he has placed himself in the bond.

It becomes, therefore, a very material enquiry in this case, whether the complainant can avail himself of the matters attempted to be set up as a defence at law, as a ground of relief in equity. In the case between these parties at law, already referred to, the court say, in relation to the doctrine of estoppels: "It would seem in some measure to partake of severity, if not of injustice." But it is in reality founded upon the soundest principles, as a rule of evidence. That a party has, by his own voluntary act placed himself in a situation as to some matter of fact, that he is precluded from denying it: and in its application to the dealings and contracts of men in the affairs of human life, it is a salutary practical rule, that a man shall not be permitted to deny what he has once solemnly acknowledged. But it is claimed by the counsel for complainant, that this principle has no existence as applicable to cases in equity; that the doctrine of estoppel is not known there. It is said that the intimation of the court in the case referred to, sanctions the idea that the complainant is not estopped in equity, from showing the real character in which he signed the obligation in contradiction of the instrument. It may be remarked, in reference to this, that the question whether the defendant in that case was relievable in chancery, was not before the court for adjudication. Nor is it supposed that the court intended to give an opinion on that question, which should be regarded as authoritative. The remark of the judge is, that "a court of equity might allow him (the defendant,) to set up that he was only surety, and let him in to all the protections usually extended to sureties." It appears, however, from what precedes and follows this remark, that it was intended to apply to the case of a joint and several bond in the common form, and not to the case of a party expressly signing as a principal. In support of the doctrine that estoppels are not known in equity, a reference is made to Theobold's Treatise on Principal and Surety, p. 69 (117), where it is said: "If several persons are obliged under seal, and appear by the terms of their engagement to be principals, they are estopped from proving themselves essentially sureties; and, therefore, such as are essentially only sureties, cannot at law use in defence, matter which might entitle them to a relief, either partial or entire; but in equity where there is no estoppel, they are permitted to prove themselves sureties." It is obvious that this has reference to the case of a joint and several obligation, in the usual form, where all the obligors are, by legal intendment, principals, and does not apply to the case of a party expressly designating himself as a principal. And, although it is contended there is no legal difference between these cases, we think they are plainly distinguishable. In the case at law between these parties, the court remarking upon the principle contended for by complainant's counsel. say, that parties to a joint and several bond in the usual form, are principals only "as prima facie presumption of law;" and again, "in ordinary cases, when sureties sign an instrument without any designation of the character in which they become bound, it may be reasonable to conclude, that they understood that their liability was conditional, and attached only in default of payment by the principal. But when one who is in reality only surety is willing to place himself in the situation of a principal by expressly declaring upon his contract that he binds himself as such, there cannot be any hardship in holding him to the character in which he assumes to place himself." It is clear from this, that the court recognized the distinction adverted to. And it is equally clear, that the remark just quoted applies with the same force and truth to cases in equity and at law.

The assertion that there is no estoppel in equity must certainly be understood with some modification. In 2 Story, Eq. Jur. p. 746, the true principle is stated. It is there said that "the same general rule prevails in equity, as at law, that parol evidence is not admissible to contradict, qualify, extend, or vary written instruments; and that the interpretation of them must depend on their own terms." But, in cases of accident, mistake or fraud, courts of equity are constantly in the habit of admitting parol evidence, to qualify and correct, and even to defeat the terms of written instruments. And again, in the case of Douglass v. Scott, 5 Ham. (Ohio) 194, "the court say if an admission is so made, that it cannot be denied without a breach of good faith, the law enforces the rule of good words, as a rule of policy, and precludes the party from repudiating his representations, and denying the truth of his admissions." In none of the cases to which the court have referred is it laid down, that the doctrine of estoppel

is unknown in equity; on the contrary, it is expressly recognized. In 2 Johns. Ch. 222, the court say, "that a party is not estopped by the recital in a deed, which was not true in point of fact; but introduced through mistake or misapprehension;" so, in 5 Johns. Ch. 23, it is laid down, "that a general recital in a deed will not conclude a party, though the recital of a particular fact may estop him," the court do not say, there is no estoppel in equity, but distinguish cases in which it does or does not apply.

It may then be safely asserted, that courts of equity will disregard the principle of estoppel, only in those cases where it becomes necessary to prevent injustice, through accident, mistake, or fraud. The common exercise of chancery jurisdiction, in declaring a deed absolute on its face, as a mortgage only, has been referred to as analogous to that which is claimed by the complainant in this case. It will be found however, in all the cases referred to, that courts exercise this power only where it is necessary to prevent the perpetration of a fraud. In the case cited by complainant, 1 Wash. (Va.) 126, the court say, in deciding whether a deed should be considered as a mortgage, or an absolute purchase, they would look to the intention of the parties, and "would not suffer it to be changed by any form of words which might elude the justice of the court, in permitting a redemption," and in the case in 4 Johns. Ch. 167, it is laid down that "parol evidence is admissible to show, that a mortgage only was intended, and not an absolute deed, and that defendant had fraudulently attempted to convert the loan into a sale." And upon the same principle, courts of equity will interfere in many cases to prevent the bar of the statutes (of limitation) where it would be inequitable or unjust. Thus, for example if a party has perpetrated a fraud which has not been discovered until the statutable bar might apply at law, courts of equity will interfere and remove the bar out of the way of the injured party. 2 Story, Eq. Jur. p. 738.

We come now to the important enquiry, namely, whether the bank, in the transaction involved in this case, has been guilty of any fraud, either actual or constructive, as towards the complainant. If the affirmative of this proposition can be successfully maintained, the complainant is entitled to the relief which he seeks for: and the court will be bound to disregard the doctrine of estoppel, for the accomplishment of the great purposes of justice. If the imputation of fraud rests upon the bank, in this transaction, it is to be deduced from the fact, that although the complainant signed the bond expressly as a principal debtor, yet the bank knew he was really a surety, and with that knowledge, extended the time of payment without the consent of complainant. There is no allegation or pretence that the complainant acted under any misapprehension, as to the terms of the obligation, in becoming a party to it, or that the bank used any unfair means, in obtaining his name to it. He voluntarily placed himself in the situation of a principal, by declaring on the face of the bond, that he so contracted with the bank. It was in effect, a waiver of all the rights and protection, which, in becoming a party to a joint and several bond as a surety, in the usual form, he would be legally entitled to. The court can perceive no reason why a party may not thus voluntarily waive his rights. There is no principle of public policy violated in his doing so. The law recognizes certain rights as appertaining to one who becomes obligated as a surety. By a statute of Ohio, if sued with the principal, he may come into court and on adducing proof of the character in which he became a party to the obligation, may have the fact noted in the judgment; and thereby his property is protected from execution, till that of the principal is exhausted. And again—the law takes care that his rights shall not be jeoparded by any change in the original contract, without his consent. But if an individual, by his express contract agrees to forego these rights, may not the creditor treat him as occupying the relation in which he places himself? Instances of the waiver of legal rights, by individuals upon their own agreement, are of frequent occurrence. Take the familiar example of a debtor giving a cognovit. He thereby waives the right of being served with process: of making a defence to the action, of availing himself of any legal advantage at law; and, finally, by his express agreement to release all errors in the proceedings and judgment, he yields up the important legal right of prosecuting a writ of error to reverse the judgment. And as a further illustration of this principle, suppose the bank in this case (in accordance with an usage now common among the banks of Ohio,) had required of the parties to this bond, in addition to an acknowledgment, that they contracted as principal debtors, to sign a cognovit, authorizing the entry of a judgment against all, without distinction; could any of them set up their suretyship, and ask for the benefits and protection incident to sureties? Yet, in this, there would be no stronger or more valid admission of their being principal debtors, than if they had declared expressly in their bond alone that they obligated themselves, in that character. If the position urged by the complainant, in the case before the court, be tenable, then in the case here supposed, notwithstanding the double affirmation of their being principal debtors, they would be at liberty to controvert the fact, and claim the character of sureties. And even if a judgment had been entered in pursuance of the power to confess, it might be claimed that a court of

equity should interpose and vacate it, upon the ground, that though the parties by these solemn admissions, had made themselves principals, yet they were in fact sureties, and that was known to the bank. If fraud is imputable in such a transaction, it would certainly attach to the judgment, as well as to the bond and cognovit, and all the reasons urged for relief against the consequences of admission made in these instruments, might be urged with equal force in relation to the judgment. Yet it would not be seriously insisted, that this would present a proper case for the exercise of chancery jurisdiction, unless an actual palpable fraud was committed.

The court cannot keep out of view the real character of this transaction, as understood by the parties at the time. So far as the bank is concerned, it is evident, that the engagements of the obligors as principal debtors, was regarded as obligatory, and as giving the bank, the right to treat them, as such, to all intents and purposes. If it had not been so considered, it is obvious that the bank would not have extended the loan, from time to time, without the consent of all the parties to the bond. It was upon the faith of their contract as principal debtors, and the waiver of their rights as sureties, that the bank extended the indulgence. And may it not also be assumed, that the obligors viewed this bond, as differing in its character from a bond in the usual form? Could they fail to perceive, that something more was intended, than if the bond had been in the common form? Were they not notified by the very language of the instrument, that the bank considered and would treat them, as principal debtors? and if they did not intend so to be bound, why did they not object to the form of the bond: or, having executed it, with the understanding that they were assuming the characters of sureties, was it not due, in good faith to the bank that they should have given some intimation, that such was their understanding? It is laid down, by a celebrated writer on ethics, that the rule for the interpretation of a promise, is to consider it in the sense in which the promissor supposed the promissee understood it at the time. Though this is not the rule of law, in the construction of contracts, it may not be viewed, as wholly inapplicable, in an enquiry in which it is sought to ascertain the relative equities of parties. We think, that if the parties to the obligation, who claim that they are to be regarded merely as sureties, were apprized, that the bank recognized and considered them as principals, and as such gave them credit, by making the loan, and extending the time of payment, there can be no hardship, in forum conscientiæ, in holding them to that character. The bond in this case was in accordance with the form prescribed and used by the bank at that time. This form was, no doubt, adopted with the knowledge, that however desirable it might be to the bank, that borrowers should meet their engagements promptly, they would not always be punctual; and that extensions would be unavoidable. To obviate the necessity of taking new obligations, as often as debts arrived at maturity, and to prevent any legal advantages arising to sureties from these extensions, all the parties were required to assume the character of principal debtors. The bank had an unquestionable right to prescribe this, as the condition on which money would be loaned. And in reference to the complainant, it is inferrible, that he was apprized of the usage of the bank, in this respect, as it is proved by the cashier, that during the continuance of the loan to Yarnall & Co. he was a party to several other bonds discounted by the bank, similar in form, to the one in question.

In any aspect in which the court have been able to view this case, and the principles applicable to it, they cannot grant the relief prayed for. The injunction is therefore dissolved, and the bill dismissed, at the costs of the complainant.

This decree, on an appeal to the supreme court, was affirmed. 14 Pet. [39 U. S.] 201.

SPRIGG (BANK OF MOUNT PLEASANT v.). See Case No. 891.

SPRIGG (GOOD v.). See Case No. 5,532.

SPRIGG (SEMMES v.). See Case No. 12,-657.

Case No. 13,258.

SPRING et al. v. DOMESTIC SEWING MACH. CO.

[4 Ban. & A. 427;[1] 2 N. J. Law J. 274; 16 O. G. 721.]

Circuit Court, D. New Jersey. July 17, 1879.

PATENTS—PRELIMINARY INJUNCTION—FORMER DECREE ESTABLISHING VALIDITY—HOW OBTAINED—LACHES—ASSIGNMENT.

1. A decree sustaining the validity of a patent, entered upon an agreement between the parties, and vacating a decree in which the court had previously declared the patent void, should have very little weight in any court, when produced as an adjudication in favor of the validity of the patent upon a motion for a preliminary injunction.

2. Where the owners of a patent knew of the infringement, and for two years took no steps to stop it: *Held*, that they were thereby precluded from obtaining a preliminary injunction; *held* also that the subsequent purchasers of the patent succeeded only to the rights of their assignors, and were chargeable with their laches.

[Cited in Washburn & Moen Manuf'g Co. v. Griesche, 16 Fed. 670; Hurlburt v. Carter, 39 Fed. 803; Pope Manuf'g Co. v. Johnson, 40 Fed. 585.]

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

[This was a bill in equity by Charles Spring and others against the Domestic Sewing Machine Company for the infringement of letters patent No. 23,957, granted to complainants May 10, 1859. Heard on motion for a provisional injunction.]

George E. Betton, for complainants.
John Dane, Jr., for defendant.

NIXON, District Judge. I am not satisfied that this motion for a provisional injunction ought to prevail. It is asked for on two grounds: (1) on account of a decree of a court of equity, establishing the validity of the complainants' patent; (2) public acquiescence.

1. With regard to the judicial decree, the opinion of the circuit court for the district of Massachusetts was, first, against the patent, declaring it a nullity. Doubtless for proper and sufficient reasons, the decree was vacated and an order entered "that the agreement of the parties annexed to a petition marked B be confirmed, with the same effect as between the parties, as if the parties and things agreed and consented to in said agreement were now ordered, adjudged and decreed by the court." No criticism is intended upon the propriety of the decree itself, as between the parties, when it is said that it should have very little weight in any court when produced as an adjudication in favor of the validity of a patent.

2. As to public acquiescence, the affidavits filed in the case by the complainants to sustain this application, show that many have not acquiesced, and that the owners of the Spring patent have been aware of the alleged infringement of the defendant corporation for two years past.

Leaving out of view other depositions, the complainants have put in one by George E. Betton, sworn to September 14th, 1877, and one by Levi S. Stockwell, then president of the Howe Machine Company, sworn to October 7th, 1877, in both of which the infringement by the Domestic Sewing Machine Company is fully set forth. Mr. Stockwell affirms that the Howe Machine Company was for several years the licensee of Andrew and Charles Spring, and, that, after its extension, the company had become and was then the owner of one-half of the said patent. The bill of complaint claims that Mr. Betton was at that time the owner of the other half, so that we have proof produced by the complainants themselves that the owners of the patent, in the summer and autumn of 1877, knew of the alleged infringement, and, so far as it appears, took no steps to stop it. The present complainants have succeeded only to their rights, and are chargeable with their laches.

The application for an injunction must stand over to the final hearing; but, upon proof of any unnecessary delay on the part of the defendant company to put in their testimony, the complainants have leave to renew the motion.

Case No. 13,259.

SPRING et al. v. GRAY et al.

[5 Mason, 305.] [1]

Circuit Court, D. Maine. Oct. Term, 1830.[2]

AFFREIGHTMENT — PROFITS — "MERCHANTS' ACCOUNTS"—LIMITATION OF ACTIONS.

1. A special contract between ship-owners and a shipper of goods, to receive half profits in lieu of freight on the shipment for a foreign voyage, is not a case of merchants' accounts, within the exception of the statute of limitations.

[Cited in Blair v. Drew, 6 N. H. 242.]

[2. Cited in Arnett v. Zinn, 20 Neb. 594, 31 N. W. 241; Hurley v. Cox, 9 Neb. 233, 2 N. W. 707; and Smith v. Smith's Estate, 91 Mich. 11, 51 N. W. 695,—to the point that the object of statutes of limitations is to suppress fraudulent and stale claims from springing up at great distances of time, and surprising the parties, when all the proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time or other causes.]

This was an action of assumpsit [by Seth Spring and others against William R. Gray and others, executors of William Gray]. The declaration contained two counts: (1) Indebitatus assumpsit, for balance of the account annexed to the declaration. (2) Money had and received. The pleas were: (1) Non-assumpsit, and issue thereon. (2) Non assumpsit infra sex annos. (3) Actio non accrevit infra sex annos. (4) Non assumpsit infra sex annos et triginta dies. (5) Actio non accrevit in sex annos et triginta dies. Replication to the 2d, 3d, 4th and 5th pleas, that the accounts and promises in the declaration mentioned are and arose from such accounts as concern the trade of merchandise between merchant and merchant, their factors, and servants, &c. Rejoinder to the same pleas, that the accounts and promises in the declaration mentioned, are not, nor did they arise from such accounts as concern the trade of merchandise between merchant and merchant, as the plaintiffs in their replication have alleged, and of this the defendants put themselves upon the country. The plaintiffs joined the issue.

At the trial, the whole evidence was applied to the account annexed to the declaration. The first item of the account was for a loss upon a policy of insurance, underwritten by the testator, for the plaintiffs. The court having intimated, that such an item was not properly matter of account, it was abandoned by the counsel for the plaintiffs. The other items wholly respected the special contract hereinafter stated, and consisted of charges on the debit side of the account, and allowances on

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

[2] [Affirmed in 6 Pet. (31 U. S.) 151.]

the credit side of the account, as will appear in the transcript below.[3]

The special contract arose as follows: In the year 1810, the firm of Seth Spring & Sons, consisting of the plaintiffs, and of Andrew M. Spring, since deceased, were owners of the barque Morning Star, of which Andrew M. Spring was then master. In May of that year, they entered into a contract with the testator for the shipment of certain goods belonging to the testator in the Morning Star; and in pursuance of that contract the following papers were executed by the parties:

"Shipped in good order, and well conditioned, by William Gray of Boston, a native citizen of the United States of America, for his sole account and risk, in and upon the barque called the Morning Star, whereof is master, for this present voyage, Andrew M. Spring, now in the harbour of Boston, and bound for Algiers. To say. (The goods were here enumerated.) Being marked and numbered as in the margin, and are to be delivered in like good order and well conditioned, at the aforesaid port of Algiers, (the danger of the seas only excepted,) unto Andrew M. Spring, or to his assigns, he or they paying freight for the said goods, as per agreement endorsed hereon, without primage and average. In witness whereof, the master of the said barque, hath affirmed to four bills of lading, of this tenor and date; one of which being accomplished, the other three to stand void. Andrew M. Spring. Dated in Boston, May 26th, 1810."

Indorsed on this bill of lading, was the following memorandum:

"The proceeds of the within cargo, amounting to thirty-five thousand two hundred and two dollars eighty-three cents, as per invoice, cost, and charges, is to be invested in Algiers, or some other port, (after deducting all charges, consignee's commission included, except freight, and premium of insurance; neither of which two last mentioned charges are to be made on the goods,) and returned in the said barque Morning Star, to Boston, where Seth Spring & Sons (owners of said barque) are to receive one half the net profits thereon, in lieu of freight and primage, the voyage round. The consignee's commission to be two and a half per cent on the sales of the within cargo. And no commission to be charged in Boston, except what is paid an auctioneer. (Signed) Seth Spring & Sons. William Gray.

"Dollars, 35,202$^{83}/_{100}$."

(Copy of instructions on a separate paper.)

"Boston, May 26th, 1810. Capt. Andrew M. Spring: The cargo which I have shipped on board the barque Morning Star, under your command, you will proceed with to Algiers, and a market; there sell the same for the most it will fetch, and, after deducting the charges, (except freight and primage,) and two and a half per cent for your commissions, invest the net proceeds in brandy, wines, silks, and such other goods as are suitable for this market, if to be obtained: ship the whole on board the barque, and return back to Boston directly. Upon your arrival here, the whole cargo is to be sold; out of which I am to receive the first cost of the cargo now on board, agreeable to invoice; and one half the profits for risque and interest money. The other half of the profits the owners of said barque are to have, for freight and primage on the cargoes out and home. There is to be no division of the cargo or profits, until the vessel returns, or the transaction is closed. Upon your arrival in Algiers apply to our consul, Tobias Lear, Esq. and take his advice; if he recommends it, sell the cargo, and invest the proceeds as above mentioned; otherwise, proceed to some other market, as Mr. Lear shall advise; and, as soon as you have completed the business, proceed direct for this port. In case any unforeseen accident should take place, which, upon fair calculation will, or may, prove, that it will be for our mutual interest for you to alter the voyage, you have liberty to do it. Annexed, you have a list of my correspondents, through whom you may forward your letters to me. Committing you to Almighty Protection, and wishing you a

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[3] The account is as follows:

William Gray, Esq. of Boston, Merchant, in account with Seth Spring & Sons.

Dr.

Date	Item	Amount
1810. Sept.	For loss sustained on the sloop Francis, Capt. Ebenezer Jordon, master, which said Gray insured	$ 2,500 00
1811. Oct.	For 35,000 gallons olive oil in casks, delivered from barque Morning Star, William Nason, master, in Boston, at $1.25 per gallon	43,750 00
	For 127 cases do. delivered by same	1,270 00
	For 53,803 lbs. cotton, left with Mr. Lear, in Algiers, and afterwards paid for by the Dey of Algiers, to Commodore Stephen Decatur, and received by said Gray, at 30 cts. per lb	16,140 90
	For cash paid by Andrew M. Spring, to Bainbridge & Brown, merchants, England, and by them placed to the credit of Mr. Gray	2,000 00
	For cash paid Andrew M. Spring's commissions, 2 1-2 per ct. on said barque's outward cargo, as per agreement	880 00
1829.	Interest on loss on Fanny, 19 years	2,850 00
	Interest on one half the profits of Morning Star's voyage, as per agreement	14,758 41
		$84,149 31

Cr.

Date	Item	Amount
1811.	For amount of the outward cargo of the barque Morning Star, as per original invoice and bills of lading	$35,202 83
	For his half the profits of said Morning Star's voyage	14,469 03
1829.	For balance now due from estate of said William Gray	34,477 45
		$84,149 31

prosperous voyage, I am your friend, (Signed) William Gray."

"Received the original of the preceding instructions, which I promise strictly to observe and follow. (Signed) Andrew M. Spring."

The vessel sailed on the voyage, and arrived at Algiers. Part of the cargo was there sold, and the proceeds partly remitted to London, on account of Gray, and partly invested in oil on the return voyage, and delivered to Gray. The other part of the cargo was seized by the Dey of Algiers, and restitution of the amount of the value thereof was not received by Gray until 1817. The account was founded upon the transactions, as the plaintiffs considered them to be, at the final close of the adventure, and the receipts of all the proceeds by Gray. The particulars are not deemed important, farther than as they appear in the account annexed.

Upon the opening of the case by Shepley, for the plaintiffs, it was objected by Nichols and Webster, for the defendants, that the plaintiffs had not sustained their replication, and that the special contract and breach, so put in evidence, were not matters of account between merchant and merchant, within the purview of the statute.

In support of the objection, Nichols and Webster argued as follows:

To all the demands of the plaintiffs in this suit, we have pleaded, first, the general issue; and secondly, the statute of limitations. To this second plea, the plaintiffs have replied, merchants' account, and upon this replication we are also at issue. For the purpose of avoiding the labour of ascertaining, whether the defendants are at all indebted, or if indebted, to what extent, we move the court, upon the second issue, to direct the jury, that upon the plaintiffs' own showing, their cause of action is not excepted by the clause of the statute in respect to merchants' accounts.

It is admitted by the plaintiffs, that their claim is wholly founded on a contract of affreightment, endorsed on the bill of lading, which has been read. The question then is, whether this claim arises from "such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants." It is agreed, that there is no item of the plaintiffs' account within six years. And it is a grave question, whether there should not be some item within that time, even in the case of merchants' accounts, in order that they should be saved out of the general operation of the statute. The affirmative of this question is held in England, as appears by the case of Barber v. Barber, 18 Ves. 286; and also in New York, in Coster v. Murray, 5 Johns. Ch. 522. It was decided otherwise, in the case of Mandeville v. Wilson, 5 Cranch [9 U. S.] 15. But the point does not appear to have been at all discussed in that case; and we suppose that the supreme court of the United States would be still willing to consider it as an open question. We are aware, that in the supreme courts of Massachusetts and Maine the law is held in conformity with the decision in Mandeville v. Wilson. Bass v. Bass, 6 Pick. 362; Davis v. Smith, 4 Greenl. 292. But in the case in 4 Greenl. it was not the point before the court; and in that in 6 Pick., the court admits, that there is a great diversity of judicial opinion on the subject.

We do not, however, propose to discuss the point here; as we suppose, that this court will feel bound by the opinion expressed by the supreme court of the United States, till it shall be reversed in the same court. Taking it then for granted, that it is not necessary, that any item of the plaintiffs' demands should be within six years; if in other respects they are within the exception of the statute, the question is, whether this exception is at all applicable to such demands.

In order to arrive at the true meaning of this clause of the statute, we should consider, what were the probable reasons, which influenced the legislature in enacting it. It is well known, that merchants, having mutual dealings, frequently suffer their accounts to remain open for a great length of time; each anticipating further advances, by which the balance, from time to time, will be changed. It would be perfectly reasonable, that such accounts should not be considered within the general operation of the statute, upon the principle of there being a trust and confidence between the parties, that while the accounts remain open and unliquidated, no inference is to be drawn from the mere lapse of time, against the justice of the demands of either party. It would seem, therefore, that the accounts referred to in the statute were open and current accounts between merchants, having dealings together as such; and that there should be a chain of dealings, and not a single transaction, which, from the nature of the case, was to be settled without passing into an account. There must be a mutual and reciprocal credit given, a real mutuality and reciprocity existing in fact, and not merely in form. The actual case is to be regarded, under whatever form it be presented. If there have been mutual advances of goods or money, these may form the basis of merchants' accounts, and be within the exception of the statute, however informally the accounts may have been kept. If, on the other hand, there is no reciprocity in fact, no ingenuity of a party in throwing his demand into the form of an account, will enable him to evade the operation of the statute. For every transaction may be stated in the form of an account of debtor and creditor, and this principle is the basis of the whole system of book-keeping by double entry. The claim of the plaintiffs must be directly founded upon, and necessarily arise from, accounts. It must be a case, where, according to the old decisions, an action of ac-

count must be brought, or, according to the later decisions, an action of assumpsit, founded upon accounts.

In the next place we contend, that the exception in the statute applies only to "such accounts as concern the trade of merchandise." It must be a direct concern of trade; as, where one person entrusts another with his property to merchandise with, and to account for the proceeds; in which case, the person entrusted is bound, without any limitation of time, to render an account of the property. But whoever renders services to another, in respect to his property, in any other manner than in the way of trade or traffic, whether it be under a special contract or otherwise, he must bring his action for those services within the period prescribed by the statute, or his demand will be barred. If it be merely a contract by the owner of goods, to pay another for certain services in respect to the goods, whether for transporting them, insuring them, or laying out work and labour upon them in any way; this is not the sort of trade which is contemplated by the statute. These principles are supported by authority. Webber v. Tivill, 2 Saund. 124. Declaration for goods sold, and insimul computassent; held, that though the dealing between the parties concerned merchandise, and was between merchants, yet that was no reason, why it should be excepted out of the statute; for if it should, by the same reason every contract between merchants would also be excepted, which was not the intention of the statute. Accounts between merchants only are excepted, and not contracts likewise. Cotes v. Harris, Esp. N. P. 14, Bull. N. P. 149. The exception in respect to merchants' accounts applies only to cases of mutual accounts. This case is confirmed by that of Cranch v. Kirkman, Peake, 121. The following cases also support the doctrine, that the action must be founded upon accounts relating to the trade of merchandise, and that the accounts must be mutual; Ramchander v. Hammond, 2 Johns. 200; Coster v. Murray, 5 Johns. Ch. 522; Murray v. Coster, 20 Johns. 576; Ingram v. Sherard, 17 Serg. & R. 347; Foster v. Hodgson, 19 Ves. 180.

Let us try the present case by the foregoing rules. In the defendants' books, there is no account whatever between the parties. But the plaintiffs say, that in these books, an account is opened with the "adventure in the barque Morning Star;" in which the adventure is charged with all sums expended on account of it, and credited with the proceeds of the goods belonging to it; that the plaintiffs being entitled to half the profits of this adventure, they are interested in it as copartners, and that it is the same thing as if the account was with them directly; that in order to ascertain how much, if any thing, is due to the plaintiffs, it is necessary to go into a minute account of the voyage; and that, therefore, their claim is founded upon accounts between merchants relating to the trade of merchandise. It is true, that Mr. Gray had in his books an account with this adventure. But he had a similar account with every other adventure belonging to him. This adventure was, at all times, Mr. Gray's sole property; and the mere circumstance, that he was to allow the plaintiffs half the profits in lieu of freight, did not give them an interest in the adventure as copartners, or afford any proof, that there were mutual accounts between the parties. As the account is stated in defendants' books, it is neither in form, nor substance, a mutual account between Gray and Spring; but an account between a part of Mr. Gray's sole property, and sundry other persons or accounts. It is merely a convenient mode of ascertaining a result; and this form is adopted, because no transaction can be recorded in a merchant's books, kept in the Italian mode, in any other form than that of an account. If a merchant buys a bale of goods for himself, which he pays for in cash, this transaction is stated in his ledger in the form of an account of debtor and creditor. So if he loses his goods by fire or otherwise, he states the loss in his books in the form of an account. But such transactions can, in no degree, be understood as relative to the subject of accounts between merchant and merchant, so as to take the claim of any third person against him, on account of those goods, out of the statute of limitations. If this mode of stating an account would bring the plaintiffs' demand within the exception of the statute, then the same transaction would be a merchant's account or otherwise, not according to the real state of facts, but according to the peculiar skill of the accountant.

But the plaintiffs say, that in their books there is a current account between the parties, in which Mr. Gray is credited with the cost of the goods shipped, and with half the profits of the voyage, and charged with the proceeds of the goods, by which a large balance is deduced in their favour. This, we say, is an incorrect mode of stating the account, inasmuch as it is admitted, that the whole claim rests on the contract of affreightment; so that the relation of debtor and creditor is confounded with that of bailor and bailee, and the party is charged and credited with his own goods. There is no mutuality of accounts in this case. Supposing, what we allege to be the fact, that instead of a profit, there had been a loss on the voyage; then, upon the principle of mutuality, the plaintiffs would be liable for their proportion of this loss. But to this, they would of course object, as being no part of their contract.

In the next place, we think it very clear, that the claim of the plaintiffs is not founded upon any accounts relating to the trade of merchandise. It is founded on a simple, and not uncommon contract of carriage, and on a single transaction. The demand is merely for freight. It was no part of the contract that the plaintiffs should trade with the goods, but simply carry them as bailees. This is no more

a case of merchants' accounts relating to the trade of merchandise, than if it were a demand for an average loss by fire or other accident, under a policy of insurance. In that case, it might be necessary to go into a statement of accounts to ascertain the amount of the average. But that would not constitute such an account as is contemplated by the statute. It is true, if the loss were adjusted, and the assured should charge the assurer by consent, with the liquidated amount in account current, this might form an item of merchants' accounts, if connected with other dealings in the way of trade, like an old balance carried forward into a new running account. But till the loss is adjusted, the claim is wholly under the specific contract in writing; and so here, the claim is wholly under the contract on the back of the bill of lading, and not upon any accounts in relation to the trade of merchandise. If the sum due upon this contract could be made the subject of merchants' accounts, the same might be done with a note of hand, or any other mercantile contract. It is well known, that merchants are in the habit of stating accounts in their ledgers with notes receivable. But it never occurred to any one, that such entries constituted accounts between merchant and merchant relating to the trade of merchandise, so as to save those notes from the operation of the statute.

The plaintiffs further contend, that they stand not only in the relation of carriers, but of consignees, or factors; for the goods are consigned to Andrew M. Spring, one of the parties, for sale, and the proceeds of the sale are to be re-invested and brought home to Mr. Gray, in the Morning Star; that consequently, the plaintiffs are accountable for the sale of the goods, as well as their transportation. This we deny; for though Andrew M. Spring is consignee, it is by a totally separate contract from that of the plaintiffs as carriers, and a distinct compensation is to be paid to him in his separate capacity. The plaintiffs are, therefore, in no way answerable for his fidelity in this respect.

On the whole, we submit to the court with great confidence, that both upon principle and authority, the claim of the plaintiffs is barred by the statute of limitations, and that there is no pretence for considering it within the exception as to merchants' accounts.

Mr. Shepley, for the plaintiffs, argued in reply:

The clause in the Maine statute, relied upon by the plaintiffs, is in these words: "All actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors, or servants." These words are an exact transcript from the statute of 21 Jac. I. c. 16. "Such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants," are excepted out of the statute; and the rights of the parties remain the same, as if the statute had not been enacted. At least, this would seem to be the decision of a mind, unbiassed by construction or authority. There is nothing in the language of the statute, that restrains the exception to accounts, that are not stated; or to mutual accounts. They must be "accounts"; but it is quite certain, there may be accounts, which are confined to one of two parties interested in them; and it is equally clear, that these accounts may "concern the trade of merchandise." Does the phrase, "between merchant and merchant," imply, that the accounts must be entered on the books of each, or that there must be debts and credits on each side? May there not be dealings between merchant and merchant, and yet all the items of the dealings be on one side, in the account, or entry of them on books? It is not admitted, that the exception, when freed from the pressure of constructive cases, requires, that there should be even more than one claim or item of account; or that there should be any item within six years before action brought; or that the accounts, or claims, or dealings, should be placed in books of so many lines of writing. It is sufficient, that there is an account, or item of account. The plural, "accounts," was not used to designate a plurality of claims in each case; but because in designating the dealings, or claims, or accounts, between merchant and merchant, the plural is necessarily used to determine the character of the claim to be excepted. The account or claim must be between merchant and merchant, and must "concern" the trade of merchandise. It is not necessary, that it should be for a sale or purchase of merchandise. It is enough, that it arises out of, or "concerns," the trade of merchandise. It may be any claim, which naturally and usually results from the trade of merchandise, because it will then "concern" it. Where is the foundation in the language of the statute for all the decisions declaring, that the accounts must not be stated accounts; and that they must be mutual accounts; and that some item must be within six years; but in the ingenuity of counsel, and of the courts, in undertaking to determine what the statute should be, reasoning from the mischiefs, which they supposed the enacting power intended to remedy, instead of examining and deciding what the statute really was? This mode of construing the statute of limitations in all its parts unfortunately commenced early; and continued to be acted upon until the statute was nearly repealed. The supreme court of the United States has been forward in restoring it; and the same mode of reasoning and of deciding, which nearly destroyed the whole statute, has greatly limited and impaired the exception relating to merchants' accounts; and the same course of reasoning and deciding, which restores the statute to its original meaning and vigour, will also restore the exception. And the exception should be as fully restored and

relieved from the weight of authority, as the general provisions of the statute. Although it is believed, that such would be the legitimate construction of the statute, the plaintiffs' claim may be brought within the exception, as understood in the constructive cases. These cases are:

(1) A class of cases deciding, that stated accounts are not within the exception. Webber v. Tivill, 2 Saund. 122; Scudemore v. White, 1 Vern. 456; Chievly v. Bond, 4 Mod. 105; Welford v. Liddel, 2 Ves. Sr. 400; Farrington v. Lee, 2 Mod. 311.

(2) Another class decides, that the exception extends only to "mutual accounts" and "reciprocal demands." Cotes v. Harris, Bull. N. P. 149; Cranch v. Kirkman, Peake, 121; Catling v. Skoulding, 6 Term R. 189; and Ingram v. Sherard and Coster v. Murray, cited by opposite counsel.

(3) The cases of Catling v. Skoulding and Cranch v. Kirkman decide also, that the exception extended to other persons' accounts, than merchants, although the words of the statute are expressly so limited; and although it had been before held to extend to none but merchants, in cases, Sherman v. Withers, Ch. Cas. 152; Farrington v. Lee, 1 Mod. 270.

Having proceeded so far as to extend the exception to other accounts than those of merchants, it became necessary to place restrictions and limitations upon the exception; or the whole statute would, in effect, be repealed. There is, therefore, found—

(4) Another class of cases having a tendency, more or less direct, to show, that there must be some item of account within six years before action brought, to bring them within the exception. Welford v. Liddel, [supra]; Jones v. Pengree, 6 Ves. 580; Duff v. East India Co., 15 Ves. 199; Barber v. Barber, 18 Ves. 286; Foster v. Hodgson, 19 Ves. 180; Union Bank v. Knapp, 3 Pick. 112.

It will be difficult for any well balanced mind to examine the statute in the absence of all previous construction and authority, and find any ground whatever, for making a distinction between accounts partly more, and partly less, than six years standing; and all other accounts between merchant and merchant concerning the trade of merchandise. Such a construction introduces a limitation into the exception, almost as destructive of its original design, and as subversive of its language, as a class of repudiated cases has for a long time been, of the statute itself. The supreme court, in Mandeville v. Wilson, 5 Cranch [9 U. S.] 18, withstood this annihilation of the exception. And it has been followed by the supreme court of Maine, in Davis v. Smith, 4 Greenl. 292; and by the supreme court of Massachusetts, in Bass v. Bass, 6 Pick. 362. It is hoped, that the courts, in restoring the statute, and relieving it from a load of constructive cases, will also restore the exception, and afford it a like relief. And, as the United States courts may be regarded as returning first from cases to common sense, in construing the statute, it may be hoped they will do the same for the exception now under examination.

The evidence introduced exhibits an account on the plaintiffs' books, crediting the deceased with the outward cargo, and charging the return cargo, with some other items. Mr. Gray's books do not charge the plaintiffs; but the charges are made, and credits given, under the name of adventure by the barque Morning Star. There is no item within six years. There is a special agreement as the basis of these accounts, out of which they arise. The evidence shows, that both parties were merchants; and if these are such accounts, as the statute contemplates, they are undoubtedly accounts between merchant and merchant, their factors, or servants. It is the subject matter, and not the form, of the accounts or claims, upon which the statute acts. If the subject matter is of a character to be aptly described under the term "accounts," it is sufficient to answer that part of the description. Now the subject in litigation here is the transportation of a cargo from this country to a foreign country; a disposition or sale of such cargo there; the investment of the proceeds in a return cargo; the re-shipment and return of that cargo; and a sale of it here, to ascertain the profits of the whole adventure. From such transactions, there must arise accounts; and such accounts as would seem to be within the exception of the statute; and such accounts as must be within the reasoning and policy, which occasioned the introduction of the exception. For it is obvious, from the disasters to which such adventures are subjected, that many years might elapse, before the final acount of profit or loss could be made up. The evidence now introduced shows, that the accounts in this case could not have been settled for more than eight years after the contract; and the same causes might have postponed a settlement many years more. If these are accounts between merchant and merchant, are they not such accounts as "concern the trade of merchandise"?

The argument of the defendants is, that the accounts do not concern the trade of merchandise, but only the carriage or freight of merchandise. This is not admitted to be the proper construction of the contract. But suppose it were so, that the only obligation imposed upon the plaintiffs, was the carriage of the merchandise. Still, the contract contemplates the sale of the cargo; the re-investment of it, and the sale of the return cargo by some person, to accomplish the transaction. And until all this takes place, the accounts could not be made up; and the result could be obtained only by an examination of all the accounts arising from all these various transactions. The plaintiffs, therefore, had an interest in these accounts, by whomsoever they might be kept. They must have a right of examination into them. And if they were not to exercise any

agency in the sales, the accounts of such sales must be accounts between the parties; and they would be accounts "concerning the trade of merchandise." And the words of the statute would include such accounts. They would still be accounts between merchant and merchant, and in which both would be interested to establish their rights, and would be accounts "concerning the trade of merchandise." If, therefore, the true construction of the contract does exclude the plaintiffs from all responsibility respecting the sale of the property, it does by no means follow, that the accounts, which arise out of the sale, as well as transportation of the cargo, and expenses upon it, may not be accounts "concerning the trade of merchandise."

Accounts between merchant and merchant, their factors or servants, may obviously be such as concern the trade of merchandise, and not arise out of sales or purchases. One merchant may employ another at a foreign port to receive goods, pay freights on them, enter and pay duties on them, reship them to another port, pay wharfage, storage, insurance, &c.; and his compensation for his services may be agreed to be, on the profits of the adventures. Can there be a doubt, that such accounts would be within the words of the statute, and within the spirit of it? And would they not be liable to great delay in their settlement, and be within the class of claims, for the protection of which the exception must be supposed to have been introduced? Merchants' accounts, as well as those of their factors, or servants, must, in the common transactions of business, be made up of many items and claims, which do not arise from the sale or purchase of merchandise; and is the construction of the statute to be such, as would include in the exception a part of their accounts, and leave out other parts? Such a construction would ill accord with the liberal construction given to laws in relation to mercantile subjects. The contract is regarded as a mere contract of affreightment, by the defendants; and Andrew M. Spring as consignee, and responsible to Mr. Gray, as such, under a different contract from that of Seth Spring & Sons. The plaintiffs regard the whole as one contract, both on the back and in the bill of lading, and consider the whole together, as carrying into effect the agreement between the parties. They consider one of the inducements to make the contract on the back, to have been, the employment of one of their firm to make the sales and purchases abroad; together with the compensation to go to him as stipulated in the agreement, two and a half per cent commissions. "The proceeds of the cargo is to be invested in Algiers, or some other port," "and returned in the barque Morning Star, to Boston, where Seth Spring & Sons are to receive one half the net profits thereon, in lieu of freight and primage, the voyage round." "The consignee's commission, to be two and a half per cent on the sales of the within cargo." The consignee is bound by the agreement on the back of the bill of lading, and must act in obedience to it; for he is a party to it, as one of the firm of Seth Spring & Sons.

Acting under that agreement, and bound by it, signed by all the parties, he is an agent of all, and not of Gray only. The proper effect of all the papers being, to make him the common agent of all interested in the sale, and investment of the cargo. "The proceeds are to be invested" by whom? By him, who is appointed assignee by consent of all; by him, who is himself interested as a partner in one house, and who acts in the capacity of master of the vessel, and representative of that house, and consignee of the cargo. His accounts and proceedings are the accounts and proceedings of the parties themselves, who are interested in them. If the transaction does not constitute a partnership, as respects this particular adventure, which the plaintiffs think may be the truth in relation to it, still it does constitute a joint interest in the sales, investment abroad, and final sales, and in all accounts arising out of them. The accounts may be looked upon as accounts between a merchant and his factors or servants. The plaintiffs must have been as much interested in these accounts, as the servant of a mercantile house sent out to do its business in a foreign country, and having no interest in the property entrusted to him, other than the special property of a bailee; and such a servant's accounts seem to be within the exception in the statute. In whatever light the accounts may be viewed, there will be found the same reasons for considering them within the exception on account of the risk, delay, and impracticability of an early settlement, as apply to the open accounts of sales of merchandise between merchant and merchant.

STORY, Circuit Justice. The present case in the actual posture, in which it is presented to the court, resolves itself purely into a question of law; and has, accordingly, been so argued by the parties. And I shall at once proceed to declare the opinion, which I have formed on the point, and if the parties are dissatisfied with it, it is a great consolation to me, that the amount in controversy is sufficiently large to enable them to have it revised by the supreme court upon a bill of exceptions.

I own myself to be one of those, who consider the statute of limitations a highly beneficial statute, and entitled, as such, to receive, if not a liberal, at least a reasonable construction, in furtherance of its manifest object. It is a statute of repose; the object of which, is to suppress fraudulent and stale claims from springing up at great distances of time, and surprising the parties, or their

representatives, when all the proper vouchers and evidences are lost, or the facts have become obscure, from the lapse of time, or the defective memory, or death, or removal of witnesses. The defence therefore, which it puts forth, is an honorable defence, which does not seek to avoid the payment of just claims and demands, admitted now to be due; but which encounters in the only practicable manner such as are ancient and unacknowledged; and, whatever may have been their original validity, such as are now beyond the power of the party to meet, with all the proper vouchers and evidence to repel them. The natural presumption certainly is, that claims which have been long neglected, are unfounded, or at least, are no longer subsisting demands. And this presumption, the statute has erected into a positive bar. There is wisdom and policy in it, as it quickens the diligence of creditors, and guards innocent persons from being betrayed by their ignorance, or their over confidence in regard to transactions, which have become dim by age. Yet I well remember the time, when courts of law exercised what I cannot but deem a most unseemly anxiety to suppress the defence; and when, to the reproach of the law, almost every effort of ingenuity was exhausted to catch up loose and inadvertent phrases from the careless lips of the supposed debtor, to construe them into admissions of the debt. Happily, that period has passed away; and judges now confine themselves to the more appropriate duty of construing the statute, rather than devising means to evade its operation.

It appears to me also, that it is the duty of the court to adhere to the very terms of the statute, and not, upon imaginary equitable considerations, to escape from the positive declarations of the text. No exceptions ought to be made, unless they are found therein; and if there are any inconveniences or hardships growing out of such a construction, it is for the legislature, which is fully competent for that purpose, and not for the court, to apply the proper remedy. The statute of limitations of Maine (Laws 1821, c. 62) enacts that "all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors, or servants, &c., shall be commenced and sued, &c. within six years next after the cause of such actions and suits, and not after." The statute is pleaded in bar of the present suit, and the replication is, that it is a case of "merchants' accounts" within the exception, upon which the parties are at issue. And the question is, whether the facts prevent a case within the exception of merchants' accounts in the statute. The Maine statute is a mere transcript on this head of that of 21 Jac. I. c. 16. Upon that statute, an early doubt arose whether any other actions than actions of account were within the exception. The earliest decisions confined the exception to mere actions of account, which were at that time the common remedy for unsettled accounts. So it was held in Farrington v. Lee, 1 Mod. 269, 2 Mod. 312, and for a considerable time afterwards. Chevely v. Bond, Carth. 226, 4 Mod. 105; 1 Show. 341; Martin v. Delboe, 1 Mod. 71. But the doctrine is now well established, that it applies to actions of assumpsit, as well as of account. See 2 Saund. 125, etc., and notes 6 and 7 of Serg. Williams; Peake, 164; Mandeville v. Wilson, 5 Cranch [9 U. S.] 15. The exception was undoubtedly made for the benefit of merchants, and probably had principally in view cases of foreign trade, carried on through the instrumentality of factors and agents; for there was at that time very little inland commerce in the kingdom of England. In the course of such transactions, accounts would naturally arise, which, from the distance of the parties, might remain unsettled for many years. In Webber v. Tivill, 2 Saund. 125, Jones, who argued for the defendant, and whose argument was adopted by the court, said,—"The reason was, because it often happens that merchants, who are as partners, or hold correspondence one with the other in several parts of the world, may have accounts current between them for several years before they have an opportunity of meeting to state their accounts, and therefore the statute does not mean to limit their accounts." Every part of the exception is equally material; and it is not sufficient, that a plaintiff brings himself within one part of the description, if all parts are not applicable to him, in the predicament in which he stands before the court. He must by his replication aver, that it is a case of accounts; of accounts, which concern the trade of merchandise; of accounts between merchant and merchant, their factors, or servants.

In the first place, it must be a case of accounts. The saving, as has been justly remarked long ago, is not of actions, but of accounts. Webber v. Tivill, 2 Saund. 125; 1 Mod. 269, 270. The statute did not mean to except actions generally, between merchants, &c., but only such actions as respected accounts. This is the natural interpretation of the text, and it is confirmed by the preceding words; for the action of account, out of which the exception is carved, is founded solely on cases lying in account. The case, therefore, must be such as is properly matter of account, and not any special contract, which the party may afterwards throw into the shape of an account. The action of account at the common law lay only against bailiffs, receivers, guardians, and partners in trade, and other persons standing in the like relation, who received goods, merchandises, monies, &c., of the other party, to render an account thereof. But it was never supposed, that a special contract, which might alternately require an examination of accounts, or might be pressed into that shape, was within the reach of the exception. We must understand the statute in its obvious sense, as

saving accounts proper; that is, such as consist of debits and credits, properly arising in account, and not as saving all cases, where one man is accountable to another for his performance or non-performance of a special contract. That was so decided in Chevely v. Bond, Carth. 226, where a suit was brought on a bill of exchange, and there was a replication, to a plea of the statute, of merchants' accounts. But the court held, that bills of exchange for value received, are not such matters of accounts as are intended by the exception. The true object was to save such accounts only, for which an action of account would lie. It may be necessary in many cases, to make out an account, in order to decide a claim arising upon a contract; but that will not make it a matter of account. For instance, in ascertaining a partial loss, or average upon a policy of insurance, an account may be necessary; but no one supposes that would, as between the assured and the underwriter, constitute a case of "merchants' accounts" within the statute.

Then, under what circumstances does the exception apply to accounts? Does it apply to all matters properly and originally matters of account, without reference to the question, whether they have been stated, or closed, or are now open and current? The language of the statute is "accounts" generally, without any qualifying adjunct. But it has been held from the earliest times, that the exception does not apply to stated accounts. It was so decided in Webber v. Tivill, 2 Saund. 125, and that decision has never, on this point, been departed from. See Sandys v. Blodwell, W. Jones, 401; Martin v. Delbo, 1 Sid. 465, 1 Mod. 70; 1 Vent. 89; 1 Lev. 298; Farrington v. Lee, 2 Mod. 311, 312, 1 Mod. 268; Chievly v. Bond, 4 Mod. 105. The ground of that decision was, that as soon as an account is stated, and a balance agreed, it becomes a dead debt; and for this an action of debt will lie; and by parity of reason, an action of assumpsit also. It may also be illustrated by considering, that where an account has been stated between the parties, an action of account no longer lies (Com. Dig. "Accompt," E, 3; Godfrey v. Saunders, 3 Wils. 73, 94; Fitzh. Nat. Brev. 117, and note d), for the defendant may then plead quod plene computavit; and yet it is plain, that the exception was intended to be carved out of cases, for which an action of account lies, otherwise it would be nugatory.

Then again, does the exception apply to accounts closed, or only to accounts current? It may be admitted, as was decided in the case of Mandeville v. Wilson, 5 Cranch [9 U. S.] 15, that an account closed by a cessation of dealings between the parties is not an account stated. But that does not dispose of the question; for it is still open to consideration, whether any but current accounts are within the exception. Upon this point the authorities, both in England and America, are not uniform. The decision in [Mandeville v. Wilson] 5 Cranch [9 U. S.] 15, is, that the exception applies as well to closed, as to current accounts. That has been followed by the supreme court of Massachusetts, in Bass v. Bass, 6 Pick. 362; and of Maine, in Davis v. Smith, 4 Greenl. 292. But in an earlier case, Union Bank v. Knapp, 3 Pick. 96, 112, the former court held a different opinion. See, also, Cogswell v. Dolliver, 2 Mass. 217, and 5 Dane, Abr. p. 395, c. 161, art. 6, § 4.

In Sherman v. Sherman, 2 Vern. 276, Eq. Cas. Abr. 13, it was agreed, that though lapse of time might be a bar to a bill in equity for an account long after all dealings had ceased between the parties (see, also, Bridges v. Mitchell, Bunb. 217, Gilb. Eq. 224; Foster v. Hodgson, 19 Ves. 180); yet, that the statute of limitations was not pleadable, if it was a case of merchants' accounts. The same conclusion may be deduced from other early cases, though some of them probably turned upon other considerations. See Sandys v. Blodwell, W. Jones, 401; Martin v. Delboe, 1 Lev. 298, Sid. 465; 2 Keb. 674, 696, 717. Lord Hardwicke seems at one time to have inclined to the same opinion. See the case cited in 19 Ves. 185. But his deliberate judgment in Welford v. Liddel, 2 Ves. Sr. 400, was, that where all accounts have ceased for more than six years, the statute is a bar, and the exception applies only to accounts running within the six years; and then the whole account is saved as to antecedent items. He there said, that the object of the exception was to prevent dividing the accounts between merchants, when there were running accounts unsettled. This last opinion appears to have become, since that time, the prevalent opinion in England; and has been acted on by very eminent judges, not indeed without exception, for Lord Kenyon seems to have held a different doctrine (Catling v. Skoulding, 6 Term R. 193); but with such a weight of authority, as leaves little doubt, that it will be adhered to. I do not go over the cases. They are very ably collected by Mr. Chancellor Kent, in his judgment in Coster v. Murray, 5 Johns. Ch. 522. I have travelled over the same ground, and find nothing to add to, or subtract from, his observations. His own conclusion was, that the statute is a bar in all cases, where the merchants' accounts are closed, and not running within six years. If this case turned upon the point now under consideration, my official judgment would be controlled by the local decisions already adverted to, in Massachusetts and Maine; supported, as they are, by that of the supreme court of the United States. At the same time, I cannot but express a hope, that the question may be again re-examined, if it should ever be presented in any case from a state, where it is not yet fettered by any local authority. There is enough of doubt about it to justify an ample inquiry. See Astrey's Case, Freem. Ch. 55.

Then, again, does the exception apply to cases

of account, where the account is all on one side, or only to mutual accounts, or cases where there are mutual debits and credits? The doctrine of Jones, in Webber v. Tivill, 2 Saund. 125, was, that accounts between merchants only, (by which he meant mutual accounts,) and not contracts merely, were excepted; and his argument was adopted by the court. In Cotes v. Harris, Bull. N. P. 149, Mr. Justice Denison also held, that the exception extended only to mutual accounts and reciprocal demands. Mr. Chancellor Kent, in Coster v. Murray, 5 Johns. Ch. 522, adopted the same doctrine; and it was confirmed by the opinion of Mr. Chief Justice Spencer, in his well reasoned opinion in the same case upon the appeal, 20 Johns. 576, 582. The supreme court of Pennsylvania, have followed it in a very recent case. Ingram v. Sherard, 17 Serg. & R. 347. There are, perhaps, some decisions admitting of a different interpretation; but the present case does not require an absolute opinion upon this point. See Godfrey v. Saunders, 3 Wils. 94; Marston v. Cleypole, Bunb. 213; Martin v. Delboe, 1 Lev. 298; Sid. 465. The accounts must also be "such as concern the trade of merchandise," by the very terms of the statute. It is plain, therefore, that it does not cover all accounts. What are accounts, which concern the trade of merchandise? It seems to me, that they are such as concern traffic in merchandise, where there is a buying and selling of goods, and an account properly arising therefrom. Merchants may mutually buy and sell to each other, and mutual accounts may thus arise between them. Factors may buy and sell for the benefit of their principals; and thus may have debits and credits in account with them. Indeed, it is the common duty of factors and stewards to keep accounts, as well of what they receive, as of what they pay. That the exception applied only to the trade of merchandise was clearly the opinion of Lord Hardwicke, in Sturt v. Mellish, 2 Atk. 612, where the transaction was not a buying or selling of merchandise, but the mere receipt by the defendant of monies, which he was authorized to receive from a foreign government. In Bridges v. Mitchell, Bunb. 217, Gilb. Eq. 224, the court strongly inclined to think, that accounts between partners were not within the exception, as partners do not deal as merchants with each other, but as one merchant with others. Whether this doctrine as to partners be correct or not, the case still shows, that the court looked to the case of a traffic in merchandise, as the proper foundation of the account. In Crawfurd v. Liddel, cited in 6 Ves. 583, where the bill prayed an account of transactions under a patent for extracting oil from tar, and a plea of the statute was put in with an averment, that they were not "merchants' accounts," Lord Rosslyn allowed the plea as good. Indeed, it seems impossible to extend the exception to any other accounts than those, which concern the trade of merchandise, or buying and selling goods, without a departure from the sense and import of the words, equivalent to an entire rejection of them.

There is yet another qualification in the exception, and that is, that the accounts must not only concern the trade of merchandise, but be "between merchant and merchant, their factors, or servants." Who is a merchant within the sense of the statute, it is not now necessary to consider (see Marston v. Cleypole, Bunb. 213; Bridges v. Mitchell, Id. 217; Sturt v. Mellish, 2 Atk. 612; Anon., Freem. Ch. 22; Murray v. Coster, 20 Johns. 576; 1 Mod. 270; 2 Ch. Cas. 132; Cranch v. Kirkman, Peake. 164; 2 Inst. 379); for the parties to the present suit are admitted to be merchants; and the question is, whether the present was a transaction between them as merchants, or as merchant and factor, coming within the other descriptive words of the exception. It appears to me very clear, that the present transaction is not a case within the exception of the statute. It is not a case of accounts concerning the trade of merchandise. The plaintiffs were not the owners of the goods sold; but Gray was the sole owner. He was not their factor to sell or dispose of them. The goods were his own, and shipped on board of the vessel of the plaintiffs, who had no interest in them; but were merely to be paid freight according to the ratio of the profits made upon the adventure. There was, as between the plaintiffs and Gray, no trade or traffic of merchandise; but a mere special contract to receive half profits in lieu of freight. That Gray might be compelled to account to them for the half profits, so far as to ascertain the freight, does not bring the case within the exception. A mere bailiff may be compelled to account, and so a bailee, or depository; but this does not bring the case within the exception. The matter to be accounted for must concern the traffic of merchandise between the parties. It must be a case, where there arise properly debits and credits between them, on sales, or purchases, of goods. Unless this limitation be adopted, the exception in the statute would cover all contracts, however special, between merchants, from which there might arise some accidental accountability on some pecuniary claim between them; a doctrine, which has never yet been broached, and would be subversive of the leading objects of the statute, the security of all persons against stale demands. Upon a special contract, like the present, there is no ground to assert, that an action of account, at the common law, would lie; for Gray was not chargeable either as bailiff, or as receiver of the goods or monies of the plaintiffs. What he received was for his own account. He was not even to pay any part of the money, received as half profits, to the plaintiffs. It was all his own. He was only liable upon his special contract, for a sum to be paid to the plaintiffs in lieu of freight, equal to the half profits. The half profits, as such, did not belong to the plaintiffs; they were referred to only as a mode of ascertaining the amount of freight, which might become due.

It has been argued, that the plaintiffs and Gray were partners in the transaction, because they were to divide the profits. But it is clear, that no partnership was contemplated between them. They were not to divide the profits as such. But the profits were merely a mode of ascertaining the compensation for freight. And it has been often held, that such a case does not constitute a partnership. Gow, Partn. 19, 20, etc.; Rice v. Austin, 17 Mass. 197, 206. It has been argued, that the master, being the consignee of Gray, may be deemed a factor; and that all the plaintiffs are liable, as his co-factors or joint contractors, for his acts as factor. But the case is not so. The contract with the plaintiffs as ship-owners, for the shipment of the cargo on half profits in lieu of freight, did not bind them for the acts of Andrew M. Spring, as factor of Gray, although he was one of the owners. The contract between him and Gray, as consignee, was as distinct, as if he had not been a part owner or master of the vessel. The ship-owners, as such, are only liable for the acts of each other as ship-owners, and of the master, as master. If another character or agency is superinduced, the acts of the party in that character are res inter alios acta, and they are in no wise responsible therefor. The acts of Andrew M. Spring, as factor, did not affect the other plaintiffs with any responsibility, or create a privity with him in that character. If the present case can be maintained as a case of accounts within the exception, then in all cases of special contract, where by any ingenuity an account may be raised, or where there may arise collaterally, any form of ultimate accountableness, all security from the statute is gone. The statute may be evaded at the option of the party. He has only to change, not the form of his remedy, but the form of his declaration, to declare upon an indebitatus assumpsit upon an account, instead of declaring specially in assumpsit upon the original contract, and the bar of the statute is demolished. In the present case, if the plaintiffs had declared in assumpsit upon the special contract according to the facts, the statute would have been a perfect bar to such a declaration; for, (as was justly observed by Jones, in the argument in 2 Saund. 125,) the exception is not of contracts, but of accounts. By declaring in the shape of an indebitatus assumpsit, upon an account arising upon the very same contract, and the very same facts, according to the argument pressed upon the court, the bar is defeated. Thus, the original contract is, or may be, extinguished, when it is specially set up as the foundation of a suit; and yet it will be deemed to subsist as a perfect title, when it is introduced collaterally, though it then constitutes the sole foundation of the suit. It will be dead in form and substance as a contract, but will revive in form and substance as an account. If these difficulties could be overcome, (and to me they seem insuperable,) the other considerations above alluded to would be of very great weight. Here, the account, if any, was closed more than six years; it was not mutual; but all on one side. It was a single transaction, and open to all the objections, which weighed so strongly in Coster v. Murray, 5 Johns. Ch. 522; 20 Johns. 576, 582.

My judgment is, that the case established in evidence by the plaintiffs, is not sufficient to support the replication of merchants' accounts, and that the jury ought to find that issue for the defendants.

The district judge concurs in this opinion, and a direction will therefore be given to the jury accordingly.

The jury gave a verdict for the defendants upon the issue upon the replication; and gave no verdict upon the general issue, as it was thought unnecessary, the former amounting to a bar of the action.

[The judgment of this court was affirmed by the supreme court, where it was carried by writ of error. 6 Pet. (31 U. S.) 151.]

SPRING v. HOWARD. See Case No. 13,260.

Case No. 13,260.

SPRING et al. v. PACKARD.

SAME v. HOWARD.

[1 Ban. & A. 531;[1] 7 O. G. 341.]

Circuit Court, D. Massachusetts. Oct. 1874.

PATENTS—ANTICIPATION—EQUIVALENTS—TURNING LATHES.

1. In a patent for a lathe for turning irregular forms, the claim was, for "the combination of a griping-chuck, by which an article can be so held by one end as to present the other free to be operated upon, with a rest preceding the cutting tool, when it is combined with a guide cam or its equivalent which modifies the movement of the cutting tool, all operating together for the purpose set forth." The evidence showed, that prior to the invention, a lathe had been constructed and used for thirteen years, having the griping chuck, the rest, the cutting tool, and, instead of a guide cam, a fixed pattern, which was, at the date of the patent, a well-known equivalent for a cam pattern or guide: *Held*, that the invention patented was anticipated, and the patentee was not the first inventor of the improvements claimed, although the anticipating invention had been guarded from view, to conceal the mode of its operation.

2. The patent granted to Charles Spring and Andrew Spring, May 10, 1859, for improvement in lathes for turning irregular forms, *held* invalid for want of novelty.

[Cited in Spring v. Domestic Sewing Machine Co., 9 Fed. 505.]

[These were bills in equity by Charles Spring and others against James A. Packard and Charles Howard to enjoin the infringement of letters patent No. 23,957, granted to complainants May 10, 1859.]

George E. Betton, for complainants.

James B. Robb, for defendants.

LOWELL, District Judge. The plaintiffs are the inventors and owners of a valuable

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

and ingenious improvement in lathes, for turning irregular forms, for which a patent was issued to them May 10, 1859, but which they testify was completed in the summer of 1857. They describe the machine with fulness and accuracy in their specification. Its principal application was intended to be, and is, for turning sewing machine needles and similar articles, which are to be brought to a point, and the claim is for, "the combination of a griping-chuck, by which an article can be so held by one end as to present the other free to be operated upon, with the rest preceding the cutting-tool, when it is combined with a guide cam, or its equivalent, which modifies the movement of the cutting-tool, all operating together for the purpose set forth."

There is no doubt, upon the testimony, that the plaintiffs were the original and meritorious inventors of an improvement over the machines, then in general use, for turning sewing-machine needles. But a machine was brought forward by the defendants, which one Pernot swears he made in New York, in 1853, and operated there for thirteen consecutive years in turning needles, in great quantities, for several of the principal manufacturers of sewing machines, and which appears to contain all the elements of the plaintiffs' combination, working together in the same way, and producing the same results. The dates are proved by Pernot and by another witness, and corroborated by circumstantial evidence, and might have been disproved, if untrue, because the manufacturers could have testified concerning the needles which they are said to have bought of Pernot. No such contradiction is given. This machine has the griping-chuck, the rest, the cutting-tool, and, instead of a guide cam, a pattern, which, so far as this case is concerned, appears to be an equivalent; and, as we understand the testimony, it is, that a fixed pattern was, generally speaking, a well-known equivalent for a cam-pattern or guide in machines of this kind, at the date of the patent.

It has been argued, that Pernot's machine had no adjusting-screw. It had a screw, which, it is insisted, should be called a set screw, and which was, no doubt, less useful in some respects than the adjusting screw of the plaintiffs' machine. The plaintiffs, however, do not claim the adjusting-screw as part of their combination. Mr. Waters, being asked, whether it is part of the combination, says: "Hardly that, that is to say, hardly an element. I regard as essential, that the organization should be such as to admit of the convenient use of a screw; and that that screw should make a part of the organization, I regard as essential as an adjunct to the combination, so essential that, as I have said, I would not give a sixpence for any one of them, for the purpose of turning sewing-machine needles, without it."

It is, then, an important adjunct, rather than an essential element, and Pernot's screw was a sufficiently good adjunct to enable his combination to work successfully in making needles in the way of his business; and the difference in the screw would have been no defence, if his machine had been later in date than the patented one.

It is further said, that Pernot did not turn his needles to a point in the machine. He gives reasons for not doing this work, but says, that he did turn points for a carding machine; and that his lathe needed only a change of pattern to make it applicable to turning the points of needles. This is obviously true, and, as the particular form of pattern used was not of the essence of the invention, we are of opinion, that Pernot's machine contains the whole patented combination.

It is not denied that all the elements of the combination were old, and well known, before 1857; it is only contended, that the precise combination was new, as it undoubtedly was, to the trade generally, and to the patentees themselves; but, we are obliged to say, that Pernot's machine, which was not patented, and was somewhat guarded from view, perhaps for the very purpose that its mode of operation might not be generally known, was yet, by the law, such an anticipation of the plaintiffs' combination, that they were not the first, though they were original, inventors thereof.

Bill dismissed with costs.

[For other cases involving this patent, see Case No. 13,258, 9 Fed. 505, 13 Fed. 446.]

Case No. 13,261.

SPRING v. RUSSELL.

[1 Lowell, 258;[1] 8 Int. Rev. Rec. 193.]

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

CUSTOMS DUTIES — PORT OF ENTRY — RESHIPMENT TO ANOTHER PORT — APPRAISEMENT — ADDITION TO INVOICE VALUE.

1. Where goods are imported into a port of entry and warehoused there, and are intended to be and are transported to another port, in bond for rewarehousing, the entry is to be completed at the former port, and it is the duty of the collector of that port to have the goods properly examined, and if they are invoiced too low by more than ten per cent, to assess and levy the penal duty.

2. The collector of the second port has no authority to levy the penal duty on such goods by virtue of a new appraisement made under his own direction.

3. Articles 460 and 463 of the general regulations require a report to the treasury department in such cases, but there appears to be no law or regulation which authorizes a new levy of duties.

[Cited in Saltonstall v. Russell, 152 U. S. 628, 14 Sup. Ct. 734.]

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

4. Nor can the collector at the original port of entry make an addition to the invoice value, upon mere hearsay information derived from the collector at the second port, and without notice to the importer, and after the goods have left the first port.

5. At a port where there are no appraisers, a deputy-collector may examine goods entered for warehousing, to ascertain their dutiable value, as well as the collector.

The plaintiff [Charles Spring] bought 1,000 barrels of flour at Toronto, Canada, in March, 1867, and in April sold the same to J. G. Hall & Co. for exportation, both parties residing in Boston. In May, 1867, 237 barrels of this flour were shipped from Toronto for Boston, and entered at the port of Ogdensburg by a clerk of the railroad company in behalf of the plaintiff, who was not in fact aware of their arrival, and were forwarded to Boston in bond. There were no appraisers at Ogdensburg, and one of the deputy-collectors examined the flour and exhibited samples to competent judges, and being of opinion that the invoice value was correct, permitted it to be shipped. The business was conducted in the mode usual at that port. The officer did not certify his appraisement on the invoice, but the value and estimate of duties contained in the entry was the same as that in the invoice, and this was passed and the duties were estimated accordingly. The plaintiff entered the flour for re-warehousing at Boston, and before he did so asked leave to make an addition to the invoice value, but was told by the entry clerk, to whom persons usually apply for information in such matters, that he could not do so. J. G. Hall & Co., the purchasers of the flour withdrew and exported at different times all but sixty-three barrels, and these sixty-three were then sent to the appraisers in Boston, who found the value in the invoice too low by more than ten per cent. The defendant, who is the collector at Boston, then sent back to Ogdensburg the copies of the entry and invoice with the additions made by the appraisers here, and a deputy collector there, other than he who had made the original examination of the goods, assented to the additions, and noted them on the original invoice and returned the copies to the defendant [Thomas Russell], who thereupon levied and collected a penal duty of twenty per cent ad valorem on the whole 237 barrels, and refused to deliver the sixty-three barrels, then in his custody, until this sum was paid. Payment was made by the plaintiff under a protest in due form. No fraud was shown in any thing connected with the importation.

M. E. Ingalls, for plaintiff.
W. A. Field, for defendant.

LOWELL, District Judge. Transportation of goods duly warehoused at one port of entry to another port of entry in the United States to be again deposited in warehouse is authorized by section 2 of chapter 84 of the Laws of 1846 (9 Stat. 54), and section 5 of chapter 30 of the Laws of 1854 (10 Stat. 272), and is further regulated by Gen. Reg. Treas. Dep. (1857), arts. 432–472. From these acts and regulations it is clear that the entry at the port of importation is to be complete, and the duties are to be then and there estimated before any transportation can be allowed. Thus section 1 of the act of 1846, which is the first and principal warehousing act, provides, in terms, that the proper duties are to be ascertained on the due entry of the goods for warehousing, and it is obvious that this is the only safe and proper time and place for ascertaining the same; and such has been the universal practice. Articles 432, 438, 439, and 463 of the general regulations are very full and explicit on this point, and indeed it would be impossible to comply with the statute without such estimate being made, because the bond provided for by the act of 1854 (section 6), and prescribed by article 446 of the regulations, is conditioned among other things for the payment of the duties in a certain contingency, and they are to be ascertained and indorsed on the transportation bond. See also section 4 of chapter 147, Laws 1830 (4 Stat. 410).

Nor can it be doubted that it was the duty of the collector at Ogdensburg, if he found the invoice value less than the true market value by more than ten per cent to assess and levy the penal duty. The statute under which it was levied is section 9 of chapter 298, Acts 1866 (14 Stat. 330), and there are other earlier acts upon the subject, especially section 7 of chapter 80, Acts 1865 (13 Stat. 494), and these laws show that the penal duty is to be assessed as soon as the undervaluation is discovered; and article 439 expressly provides that such additional duty must be ascertained and paid before any withdrawal for transportation can be allowed.

The agreed facts, and the letter from Ogdensburg which was read by consent as part of the case, prove an examination at Ogdensburg, and for aught that appears a due examination there, and by the proper officer, a deputy-collector. Act Aug. 30, 1842, § 22 (5 Stat. 566). Some doubt was suggested whether the collector must not personally act as appraiser at a port where there are no permanent appraisers, but we see no reason why this should be the only function of the collector which he may not perform by deputy. It has been held that the deputy is the substitute for the collector, with the like powers and duties as his principal, so that an oath required by statute to be taken before the collector is well taken before his deputy, without proof of the absence or illness of the principal; and this on an indictment for perjury. U. S. v. Barton [Case No. 14,534]. Much more would this rule apply to a civil case in which it is not shown that the collector was present or capable of acting in the particular case.

No increase of dutiable value having been made at Ogdensburg when the goods were entered, the first question is, whether another deputy of the same collector there could afterwards raise the value upon information derived

from Boston, and without further actual knowledge or examination, and without notice to the importer that the goods were to be appraised anew.

[And we are of opinion that he could not. Although he had made no certificate of his appraisement upon the invoice, yet he had passed the goods, and they had gone out of his jurisdiction, and without saying that the collector might not certify his action nunc pro tunc, nor even that he might not, under some circumstances, and on notice, review his action, yet this certainly must be done in such a way that the rights of all parties should be saved, and must, besides, amount to a new finding, and not a mere formal act done upon hearsay, and without the experience of an independent judgment. It is clear, therefore, that the invoice value was not lawfully raised at Ogdensburg.][2]

The power of a collector to order a reappraisement of goods before they have gone out of the hands of the importer cannot now be doubted. Iasigi v. The Collector, 1 Wall. [68 U. S.] 375. But we are not prepared to say that this can be done on mere hearsay information, and without either a new examination of the goods, or of the books or papers of the importer, and without notice to him. The second appraisement should be made in the same manner and with the same care as the first, and a like regard must be had to the rights of the importer. We must hold this reappraisal invalid.

The next question is, whether the addition to the invoice value could be properly made by the appraisers here, and whether thereupon the defendant could and did lawfully assess and levy the additional duty. The regulations of the treasury department, already referred to, and especially articles 460 and 463, provide that a copy of the entry for transportation and of the invoice shall be sent to the collector here, and that he shall cause the goods to be again appraised in the same manner as if on an importation from a foreign port, and if it should appear by the report of the appraisers that the appraisement at the original port was too low, or the classification was improper, the collector shall call upon the appraisers for a statement of the grounds of their opinion, and transmit the same to the department for its consideration, and such investigation as may be necessary. These rules were not followed in this case. Instead of reporting to the department, the defendant reported to the collector at Ogdensburg, and upon his assenting to the addition, proceeded to assess the duty. We understand that this action of the defendant was in accordance with the practice at this port, and very possibly at others in like cases, but we have not been informed of any general regulation of the department which authorized it. Whether the secretary of the treasury could, by a general rule, lawfully authorize an assessment of duties upon the basis of an appraisement made at the port of entry for rewarehousing may admit of great doubt. We have seen no law which warrants any such proceeding, but on the contrary all the statutes appear to contemplate that the appraisal shall be at the port of original entry. It may be highly useful that a second appraisement should be made as a guard against fraud, and to secure, through the supervision of the department, that most important result, uniformity of action at all the ports of entry; and such we suppose to be the true object of the general regulations above referred to; but that the new appraisement can supersede or supplement the old in the action of the collector in the particular case, in the absence of fraud or collusion, is a proposition that we should be obliged to examine with great care, if this case required it; but it does not, for the regulations do not purport to authorize the action taken in this case. We have already seen that the collector at Ogdensburg was not authorized to make the addition, in the mode in which he did make it, and it is equally clear that no law or regulation that has been cited authorized the collector here to do so; and we are of opinion, therefore, that the assessment and levy were void, and that the plaintiff is entitled to recover the sum paid, with interest from the day of payment.

Judgment for the plaintiff.

[2] [From 8 Int. Rev. Rec. 193.]

SPRING (TRIPP v.). See Case No. 14,180.

Case No. 13,262.

The SPRINGBOK.

[Blatchf. Pr. Cas. 349.] [1]

District Court, S. D. New York. May, 1862.

PRIZE—PRACTICE—ORDER TO EXAMINE CARGO—DELAY—SHIP'S PAPERS—BELLIGERENT RIGHT OF SEARCH.

1. An order was made by the court in this case that the marshal open the packages of cargo found on board of this vessel, covered by two of the bills of lading found on board, and take an inventory of their contents, their contents not being specified in any papers found on the vessel.

2. A claimant in a prize suit can, under the rules of the court, cause the suit to be disposed of, if the libellants are guilty of any wrongful delay in its prosecution.

3. The right of a belligerent to visit and search a neutral vessel in time of war implies a power in the prize court of the belligerent to which a captured neutral vessel is sent for adjudication, to order, under reasonable precautions and forbearance, an examination of the cargo sufficient to ascertain its character, and then to employ evidence, so acquired, as further proof to establish the culpability of the voyage.

[Cited in The Peterhoff, Case No. 11,024.]

4. The belligerent right of search may be made efficient by an examination of the lading, as well as the papers of a vessel.

In admiralty.

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

BETTS, District Judge. A succession of motions and counter motions have been made by the respective parties to this suit, antagonistic to each other, and collateral to the main merits in issue on the pleadings, in some instances seeking to enforce the proceedings before the court with greater speed, and in others to obtain delay in the final hearing of the cause. Those subsidiary proceedings have resulted in placing the case before the court in this posture: (1) The libellants urge a postponement of the trial of the cause now standing upon the trial docket, on cross notices by the libellants and the claimants, until Mr. Upton, one of the counsel for the libellants, shall be relieved from detention as a witness, upon subpœna, before the solicitor of the treasury, on a public investigation now on foot before that officer, and be enabled to attend the trial of this suit, and, furthermore, until such search and examination of the cargo seized on board of the bark, as may be ordered on the motion therefor pending before the court, shall be fully made. (2) The claimants demand that the libellants proceed peremptorily to the trial of the cause, or that the same be dismissed from the docket.

In point of form it is not earnestly contended by the claimants that a reasonable and legal excuse is not supplied for delaying the hearing of the cause because of the detention of Mr. Upton from the sitting of this court, under a subpœna exacting his attendance before another tribunal, nor that such detention has been unreasonable in duration thus far; and it is, accordingly, considered that no laches are imputable to the libellants for that cause, and that they are entitled to a further continuance of the case until otherwise ordered by the court. But the claimants strenuously oppose the delay of the cause to enable the libellants to search and inspect the contents of the packages containing the cargo seized: first, because the law of nations denies to the captors the right to break the bulk of the cargo, or to use the contents of the lading as evidence, in the first instance, to establish the illegality of the voyage on which the vessel was arrested. This position is not maintained to that extent by all of the counsel for the claimants, but they concur in insisting and protesting that an order cannot now be made by the court, allowing the bulk of the cargo to be broken, by reason of the gross delay of the libellants in making application to the court for such authorization, and also because of the loose and inadequate frame of the papers upon which such application is now founded. The application by the libellants to have the cargo inspected does not, as it seems to be understood by the counsel for the claimants, embrace the whole lading of the vessel, but is limited to the packages mentioned in two bills of lading only (Nos. 3 and 4), because no invoices or bills of particulars among the ship's papers designate the contents of those packages. Nor does this motion pray for any stay in the regular course of the cause. If there had been any delinquency in the prosecution of the suit by the libellants, the claimant had a ready and adequate relief provided in the standing rules of the court, whereby they could, by their own affirmative action, have displaced the suit from the record, and compelled a restoration of vessel and cargo. Prize Rule, No. 23; Admiralty Rule (Supreme Court), No. 39; Admiralty Rule (District Court), No. 123. And they were under no compulsion to await the tardiness of the libellants, if any wrongful delays were practiced against them.

The general principle upon which a motion to the court to order a prize cargo opened, when under seizure, and charged with being composed of articles contraband of war, is grounded and sustained, was recognized during the present term in the case of The Peterhoff [Case No. 11,024]. The counsel for the claimants in that case protested against the rightfulness of the seizure of the vessel and cargo, and the regularity of a resort to the lading of the vessel for proof in preparatorio, but did not directly controvert the doctrine that the right of a belligerent to visit and search a neutral vessel in the time of war implies a power in the prize court of the belligerent, to which the neutral vessel is sent for adjudication, to order, under reasonable precautions and forbearance, an examination of the cargo, sufficient to ascertain its character, and then to employ evidence so acquired, in the way of further proof, to establish the culpability of the voyage. It is believed that the general principle is irrefragable, and equivalent to an axiom in the law of nations. Grave questions may, doubtless, present themselves as to the methods or processes by which the rule is to be administered; but errors or excesses of that character do not abrogate its validity, and generally only afford opportunity to the courts to repress an improper resistance in the wrong, or to redress it with adequate penalties or indemnification, when committed. The present motion does not present the occasion for discussing the general subject touching the import and extent of the right of visitation and search in the sense in which it is applicable to this class of cases. As a governing dogma of national right and law, it may fairly be understood to look to practical and useful results, and not to mean that a neutral vessel can be laden with contraband of war, and attempt to convey it ad libitum on the ocean, without being liable to account for navigating with such a cargo in the vicinity or direction of enemy ports, or ports convenient to the use of the enemy, unless, before she is seized, evidence aliunde as regards her equipment and lading be discovered, proving that her voyage was intended for the benefit of the enemy. A complete cover to the most injurious

frauds might thus be secured, if the offending vessel was adroit enough to carry no paper or person capable of supplying evidence of the culpability of her enterprise. The law authorizing a visitation and search is ample enough in its provisions, and is believed to be sufficiently distinct and efficient in its intent and policy, to enable prize courts proceeding under it to render its action a wholesome and conservative agency in preserving and promoting the common interests and purposes of the family of nations by whom it has been adopted. Its fundamental and controlling doctrines are laid down, with singular precision and unanimity, in the text writings and judicial adjudications of the principal jurists of Europe and America, that it will be sufficient for the purpose of the present inquiry to advert to some of those authorities, eminently reliable for their weight and general influence. Naturally, the first object of the visitation and search of a neutral vessel by a belligerent cruiser is to examine the ship's documents and papers, and to ascertain her nationality, her port of departure, her destination, her lading, and the evidence of its character and ownership, so far as those particulars are determined by the papers on board. The next step is, if circumstances of a suspicious bearing are discovered, indicating her employment to be in violation of good faith and honest neutrality, to seize the vessel and cargo and submit them to adjudication before a prize court of the belligerent power which makes the arrest. This right is conceded and exercised by all maritime nations, in time of war, in respect to the transportation by sea of contraband of war. Sufficient evidence of the generality and extent of this power is found strongly stated in the standard and most familiar authorities, domestic and foreign. 3 Phillim. Int. Law, pt. 10, c. 3, § 325; 1 Kent, Comm. 154; Wheat. Int. Law, pt. 2, § 15; The Maria, 1 C. Rob. Adm. 340; The Anna Maria, 2 Wheat. [15 U. S.] 332; U. S. v. La Juene Eugenie [Case No. 15,551]; Wheat. Capt. 94, art. 19; Halleck, Int. Law, c. 25. It will also be found that the right of search may be made effective by an examination of the lading as well as the papers of the vessel, restrained always within the limits of a fair and reasonable reserve. The Maria, 1 C. Rob. Adm. 340; The Anna Maria, 2 Wheat. [15 U. S.] 332.

I am of opinion that the libellants are entitled to an order of the court allowing them to have, under the superintendence of proper officers of the court, a view of the lading of the vessel, limited to the aforesaid packages contained in the bills of lading Nos. 3 and 4. It is therefore ordered that the marshal cause the packages found in the bills of lading Nos. 3 and 4, laden on board of the said vessel, and in his possession under her arrest, to be opened at a convenient time and place, in presence of the counsel for the respective parties and of the marshal, and that an inventory of the contents thereof be made in the presence of said parties, and that a report thereon be forthwith made by the marshal to the court, to abide the further order of the court in the cause.

[Subsequently the vessel and cargo in this case were both condemned. Cases Nos. 13,263 and 13,264. Upon appeal to the supreme court the decree against the vessel was reversed. 5 Wall. (72 U. S.) 1.]

Case No. 13,263.

The SPRINGBOK.

[Blatchf. Pr. Cas. 380.] [1]

District Court, S. D. New York. July 30, 1863.

PRIZE — CONTRABAND ARTICLES — DESTINATION — BLOCKADED PORT—FALSE PAPERS.

1. Vessel and cargo condemned on the following grounds: The vessel was, at the time of her capture at sea, knowingly laden, in whole or in part, with articles contraband of war, with intent to deliver such articles to the aid and use of the enemy.

[Cited in The Peterhoff, Case No. 11,024.]

2. The true destination of the vessel and cargo was not to a neutral port, and for trade and commerce, but to some port lawfully blockaded by the forces of the United States, and with intent to violate such blockade.

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

3. The papers of the vessel were simulated and false.

In admiralty.

BETTS, District Judge. This suit having been heard by the court upon the pleadings, proofs, and allegations of the parties, and evidence legally invoked therein from other cases, and the premises being fully considered, and it being found by the court, therefrom, that the said vessel, at the time of her capture at sea, was knowingly laden, in whole or in part, with articles contraband of war, with intent to deliver such articles to the aid and use of the enemy; that the true destination of the said ship and cargo was not to Nassau, a neutral port, and for trade and commerce, but to some port lawfully blockaded by the forces of the United States, and with intent to violate such blockade; and, further, that the papers of said vessel were simulated and false; therefore, the condemnation and forfeiture of the vessel and cargo is declared. Ordered, that a decree be entered accordingly.

[Judge Betts at a later day delivered a fuller opinion in this case. See Case No. 13,264.]

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

Case No. 13,264.

The SPRINGBOK.

[Blatchf. Pr. Cas. 434; [1] Betts' Pr. Cas.]

District Court, S. D. New York. July 30, 1863.[2]

PRIZE — ATTEMPT TO VIOLATE BLOCKADE — DESTINATION OF VESSEL—FALSE PAPERS— CONTRABAND CARGO.

1. Invocation of proofs from two other cases on the docket of the court for trial at the same time with this case, allowed, under the 33d standing rule of the court in prize cases. *Held*, that the inference was a fair one, that the cargo of the vessel in this case had the same destination which the court had found to be the destination of the cargoes in the other two cases, that is, to the enemy's country through a breach of the blockade.

2. In addition to the practice of invocation, it is the uniform practice of prize courts to take cognizance of the status of the claimants who appear before it, with a view to see whether they come with clean hands, or whether they have been before engaged in a traffic similar to that with which they are charged in the particular case.

3. The principles announced by this court in the case of The Stephen Hart restated and applied. [Cases Nos. 13,363 and 13,364.]

4. The well-settled rule of law is, that where contraband goods, destined for the use of the enemy, are found on board of a vessel, all other goods on board of that vessel belonging to the owner of the contraband articles, even those goods which are innocent, must share the fate of the contraband goods.

5. The penalty of contraband extends to all the property of the same owner, involved in the same unlawful transaction; and, therefore, if articles which are contraband, and are going to the enemy, are on board of the same vessel with articles which are not contraband, and all the articles belonging to the same owner, all will be alike condemned, the innocent articles being affected with the contagion of the contraband articles.

6. Alleged ignorance of the master as to the reason assigned for the capture of his vessel.

7. It is a principle of prize law, that a master cannot be permitted to aver his ignorance of the contents of contraband packages on board of his vessel, and that he is bound, in time of war, to know the contents of his cargo.

8. The cargo of the vessel was intended to be delivered in the enemy's country, by trans-shipment, at Nassau, into a vessel in which it should be carried through the blockade; and such was the intended destination of the cargo on its departure from England.

9. The papers found on board of the vessel, so far as they represent Nassau as the ultimate destination of the cargo, were false and simulated.

10. There was no bona fide intention of landing the cargo at Nassau, for sale or consumption there, so that it might be incorporated, at Nassau, into the common stock in that market; but, if it was to be landed there at all, it was only to be so landed for the purpose of being trans-shipped, in bulk, into another vessel, in pursuance of the original destination of the cargo to the enemy's country.

11. Defective character of the bills of lading and manifest of the cargo.

12. No invoices of the cargo were found on board of the vessel.

13. The absence from on board of a vessel in time of war of invoices of her cargo is laid down by all the authorities as being a suspicious circumstance as affecting the question of the honesty of the commerce.

14. In time of war a vessel should be furnished with documents showing the particulars of her cargo, especially where the vessel is documented for a neutral port in the vicinity of the ports of one of the belligerents, and that neutral port is one extensively used as a mere port of call and of trans-shipment for vessels and cargoes bound to ports of the enemy, and where the parties claiming to own the cargo have been engaged in previous adventures connected with running the blockade or introducing cargoes of contraband goods into the enemy's country.

15. The fact that the test oath to the claim in this case is made not by the claimants but by their proctor, and the peculiar language of the proctor's affidavit, commented on.

16. The contraband articles found on board of the vessel condemned, as having been destined for the enemy's country, and the entire cargo also condemned, as belonging to the owners of the contraband goods.

17. The vessel, in this case, was employed in carrying on the unlawful enterprise of transporting contraband articles on their way to the enemy's country, to be there introduced by a violation of the blockade, and she was so employed under such a state of facts as made her owners responsible for the unlawful transportation of the contraband articles, and for the acts of the master in relation to such transportation, to such an extent as to justify the condemnation of the vessel.

18. Formerly, the mere fact of carrying a contraband cargo rendered the vessel liable to condemnation, but the modern rule is different. The carrying of contraband articles is now attended only with loss of freight and expenses, unless the vessel belongs to the owner of the contraband articles, or unless there are circumstances of fraud as to the papers, and the destination of the vessel or the cargo, and thus an attempt, under colorable appearances, to defeat the rights of the belligerent.

19. Where the owner of the vessel is himself privy to the carriage of contraband, or where the master of the vessel, as the agent of such owner, interposes so actively in the fraud as to consent to give additional color to it by sailing with false papers, the modern relaxation in favor of the vessel no longer exists.

20. The master of the vessel, in this case, was carrying a cargo composed in part of contraband articles, under false papers. He, and the owners who appointed him as their agent, must be regarded as affected with knowledge of the contraband articles on board, and of their destination, to the same extent as if actual knowledge thereof were brought home to the master and the owners.

21. And the owners are responsible for the documenting of the cargo by the master, by means of the bills of lading, to a neutral port, when it was in fact destined, composed in part of contraband goods, to a port of the enemy.

22. If the owner of a vessel places it under the control of a master who permits it to carry, under false papers, contraband goods, ostensibly destined for a neutral port, but in reality going to a port of the enemy, he must sustain the consequence of such misconduct on the part of his agent.

23. From the moment a vessel, having on board contraband articles which have a destination to a port of the enemy, leaves her port

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

[2] [Affirmed in part and reversed in part in 5 Wall. (72 U. S.) 1.]

of departure, she may be legally captured; and it is not necessary to wait until the goods are actually endeavoring to enter the enemy's port, for, the transportation being illegal at its commencement, the penalty immediately attaches.

24. The privilege of further proof is always forfeited where there has been any deception or fraud.

25. Vessel and cargo condemned.

[In admiralty. See Case No. 13,263.]

BETTS, District Judge. On the 3d of February, 1863, in latitude 25° 35′ north, and longitude 73° 40′ west, the United States steamer Sonoma captured, as lawful prize of war, the bark Springbok. The place of capture was from 150 to 200 miles east of the port of Nassau, N. P. A libel was filed against the Springbok and her cargo on the 12th of February, 1863. The libel alleges that the bark, when captured, was "making for the harbor of Nassau." On the 26th of February, 1863, the court made an order that the cargo of the bark be unladen by the marshal, under the superintendence of the prize commissioners, and be stored in some suitable warehouse, and that an inventory of the cargo be made by the marshal. The reason for making this order was that the cargo was being damaged, by reason of the leaky condition of the deck of the vessel. The report of the prize commissioners, as to the discharge of the cargo under this order, was filed on the 9th of April, 1863, and was accompanied by a list of the packages and cases composing the cargo, and of their marks and numbers; but the packages were not opened. So far as this report shows, the cargo consisted of 4 cases of samples, 3 cases and 4 hogsheads of merchandise, 10 kegs of saltpetre, 15 barrels of mustard, 17 barrels of Epsom salts, 18 bags of pimento, 10 bags of cloves, 60 bags of pepper, 4 cases of root ginger, 2 cases of nutmegs, 220 bags of coffee, 150 chests and 150 half chests of tea, 2 cases of drugs, 1 coil of rope, 4 barrels of pork, 3 water casks, ½ of a barrel of pitch, 86 bales of dry goods, 641 cases of dry goods, and a quantity of tin plate in boxes, said to be 606 boxes. One of the cases of samples was marked, "B. W. Hart, Esq., Nassau." Eighteen of the cases of dry goods were reported as marked, "A." in a diamond, "S. I., C. & Co." On the 10th of March, 1863, a claim to the bark was filed on behalf of Thomas May and John E. Oxenberry, both of Falmouth, England, and of the personal representatives of Richard May, deceased, as owners of the bark. The claim set up that the vessel was a British vessel; that her owners were British subjects; and that, at the time of her capture, she was bound from London to Nassau, N. P., and was to have landed her cargo at Nassau, and that there, as to such cargo, her voyage would have fully ended. This claim on behalf of the owners of the vessel was made by James May, the master of the vessel, and the test oath to the claim was made by the master. In that oath he represents himself as the son and agent of Thomas May.

A claim to the cargo of the bark was filed on the 10th of March, 1863, by Mr. Archibald, the British consul at New York, who intervened for the interest of its owners, and set up that the cargo belonged to British subjects, but did not disclose the name of any owner, and alleged that the vessel was, when taken, on a legitimate voyage from one British port to another. The test oath to this claim was made by Mr. Archibald. On the 24th of March, 1863, a claim to the whole of the cargo was filed on behalf of Samuel Isaac and Saul Isaac, composing the firm of S. Isaac, Campbell & Co., of London, England, and Thomas Sterling Begbie, of London. This claim set forth that the claimants were British subjects, and owners of the whole of the cargo of the bark; that she was a British vessel; that the cargo was put on board at London, consigned direct to Nassau, N. P., another British port, where the whole of it was to have been landed, and the voyage as to the same was to have ended; that the whole was consigned to Benjamin W. Hart, their agent and consignee, at Nassau; and that the capture was unlawful, for the reason that the vessel and her cargo were, both of them, on a lawful voyage, under the British flag, between England and Nassau. This claim on behalf of the owners of the cargo was made by Mr. Kursheedt, their proctor, as their agent. He also made the test oath to the claim. This test oath sets forth, among other things, that the cargo of the bark was to be "landed permanently" at Nassau, and that "it was not intended that the said bark should enter, or attempt to enter, any port of the United States, or that her cargo should be delivered at any such port, but that the true and only destination of such cargo was Nassau aforesaid, where the said cargo was to be actually disposed of, and the proceeds remitted to said claimants;" that the "cargo was not shipped in pursuance of any understanding or agreement, either directly or indirectly, with any of the enemies of the United States, or with any person or persons in behalf of, or connected with, the so-called 'Confederate States of America,' but was shipped with the full, fair, and honest intent to sell and dispose of the same absolutely in the market of Nassau aforesaid." All the averments in this test oath are stated in it to be made by Mr. Kursheedt on information and belief; and in it he states that it is impossible to communicate with the claimants in time to allow them to make the claim and test affidavit, and that his information is derived from letters and communications very lately received by him from them, and from documents in his possession, placed there by the claimants.

There were found on board of the bark at the time of her capture a log-book, two cargo books, her register, her shipping articles, five bills of lading, a manifest of the cargo, a copy of a charter-party, a letter from Spyer & Haywood, as agents of the charterer, to Cap-

tain May; a letter from Spyer & Haywood, as agents of S. Isaac, Campbell & Co., to B. W. Hart, Esq., Nassau; and sundry other papers, such as a receipt for light duties, a certificate of the shipment of the crew, a clearance, some shipping bills, and a victualling bill. The log-book, the bills of lading, the manifest, the clearance, and all the other official papers of the vessel speak of her voyage as one from London to Nassau. The date of her clearance from London was December 8, 1862. The register of the bark describes her as a British-built vessel, registered at Falmouth on the 14th of March, 1860, and of the burden of 188.17 tons. The certificate of registry states that, at its date, Thomas May was sole owner of vessel; and there is an indorsement upon it, showing that on the next day, namely, the 15th of March, 1860, Thomas May, Richard May, and John E. Oxenberry became the registered owners. It appears, by the certificate, that Richard May was master of the vessel at its date, and, by indorsements on the certificate, that on the 17th of May, 1862, Thomas May was appointed master; and on the 19th of May, 1862, one Percival was appointed master; and that on the 25th of November, 1862, James May was appointed master. The charter-party is dated at London, November 12, 1862. The charter is from "W. Barter & Co., by authority of T. May," to Thomas Sterling Begbie, of London, for a voyage to Nassau, with a cargo of "lawful merchandise goods," the freight to be paid one-half in advance, on clearance, and the remainder, in cash, on delivery; thirty days running to be allowed the freighter for loading at the port of loading and discharging at Nassau. There is an indorsement on the charter-party, dated "London, 8th December, 1862," and signed "Spyer & Haywood," as follows: "Sixteen days have been expended in this port in loading and despatching the vessel, this day included." One of the letters found on board is signed "Spyer & Haywood, Agents for the Charterer," and is dated "London, 8th December, 1862," and is addressed, "Captain James May, barque Springbok." It says: "Your vessel being now loaded, you will proceed at once to the port of Nassau, N. P., and, on arrival, report yourself to Mr. B. W. Hart, there, who will give you orders as to the delivery of your cargo, and any further information you may require." The other letter is signed "Spyer & Haywood, Agents for Messrs. S. Isaac, Campbell & Co.," and is dated "London, 8 Decr., 1862," and is addressed "B. W. Hart, Esq., Nassau." It says: "Under instructions from Messrs. S. Isaac, Campbell & Co., of Jermyn street, we enclose you bills of lading for goods shipped per Springbok, consigned to you." The shipping articles are for "a voyage from London to Nassau, N. P., thence, if required, to any other port of the West India Islands, American States, British North America, east coast of South America, and back to the final port of discharge of cargo in the United Kingdom, or continent of Europe, between the Elbe and Brest, and finally to a port in the United Kingdom; voyage, probably, under twelve months."

The five bills of lading found on board were severally marked by the prize commissioners Nos. 2, 3, 4, 5, and 6, and are known by those numbers in the proceedings in the cause. Nos. 2, 3, and 4 are each of them marked, "Captain's Copy," and are not signed by the master. Nos. 5 and 6 are, each of them, signed by the master. No. 2 is a duplicate of No. 6, and No. 4 is a duplicate of No. 5. There is no duplicate of No. 3. It is supposed that Nos. 5 and 6 were those enclosed in the letter from Spyer & Haywood to Hart, as they are each of them signed by the master, and each has upon it a revenue stamp, while Nos. 2, 3, and 4 are wanting in said stamps, for the reason, probably, that they are merely copies retained by the master. In Nos. 2 and 6 the shippers are "Moses Brothers," and both of those bills of lading are indorsed "Moses Brothers," in blank. The shipment by bill No. 6 is "six hundred and sixty-six packages of merchandise, being marked and numbered as in the margin," to be delivered at Nassau, N. P., "unto order;" freight to be paid "as per charter-party." The margin of this bill specified 150 chests and 150 half chests of tea, 220 bags of coffee, 4 cases of ginger, 19 bags of pimento, 10 bags of cloves, and 60 bags of pepper. This enumeration covers 613 of the 666 packages. The remainder of the packages, 53 in number, are specified in the margin of the bill simply as 7 cases, 10 kegs, and 36 casks. The marks and numbers on all the packages are stated in the margin of the bill. The contents of bill No. 2. are the same in all respects as those of No. 6. Bill No. 3 is a "captain's copy," of which there was no original found on board. It is for two packages of merchandise, specified in the margin, one as "A." in a diamond, "264, 1 bale," and the other as "1,266, 1 case," shipped by "Spyer & Haywood." In all other particulars, this bill is like Nos. 2 and 6. It is not indorsed. Bill No. 4 is a duplicate of No. 5; No. 5 being signed by the master, and No. 4 being marked "Captain's Copy." The shippers are stated to be "Spyer & Haywood, as agents," and the shipment to be "one thousand three hundred and thirty-nine packages merchandise, as per indorsement." In the indorsement there is no specification of the contents of any of the packages, but they are merely stated to be 648 cases, 84 bales, 606 boxes, and 1 trunk. The marks and numbers on the various packages are given on the back of the bill. Only one of them has any address other than its mark and number, and that one is the trunk, which is marked "B. W. Hart." No. 5 is indorsed in blank by Spyer & Haywood. No. 4 is not indorsed. In all other respects, Nos. 4 and 5 are like the other bills. The manifest contains a list of the 2,007 packages covered by the bills of lading, and gives them the same marks and

numbers as the bills of lading do, but does not describe them any further than by stating them as so many cases, bales, boxes, chests, half chests, bags, kegs, and casks. It states Spyer & Haywood to be shippers of the 1,341 packages, and Moses Brothers to be shippers of the 666 packages, and that the entire 2,007 packages are consigned to "order." This manifest is dated "London, 8 Dec'r, 1862," and is signed "Spyer & Haywood, Brokers." The log-books speaks of the voyage on which the vessel was when she was captured, as one from London to Nassau. It shows that the crew came on board on the 8th of December, 1862; that the pilot came on board the next day; that then the vessel was towed down the river from London as far as Erith; and that, on the 10th of December, she was towed to Gravesend, and thence made sail, the pilot leaving her on the 12th. The sea log commences at noon of the 13th. On the 15th the vessel put into Falmouth on account of heavy weather, where she remained until the 23d, when she proceeded on her voyage. The last entry in her log is at noon on the 1st of February, 1863, in latitude 24° 18' north, and longitude 69° 04' west. The cargo books give the numbers and marks of each package composing the cargo, with the length, breadth, depth, and solid contents of each, but the packages are simply mentioned as cases, bales, bags, casks, and half barrels, without a designation of the contents, except in the instances of the 606 boxes of tin, the 220 bags of coffee, the 4 cases of ginger, the 10 bags of cloves, the 150 chests and 150 half chests of tea, the 60 bags of pepper, and the 3 cases of samples.

There were no invoices of any part of the cargo found on board of the bark. On the 12th of May, 1863, the court made an order, on the application of the district attorney, that the marshal cause the packages mentioned in the bills of lading marked Nos. 3 and 4, found on board of the vessel, to be opened and examined in the presence of the counsel of the respective parties; and that the marshal take an inventory of the contents of the packages in the presence of the parties, and make a report thereof to the court, showing the character and quantity of the contents of the packages. [Case No. 13,-262.] This order was made upon its being shown to the court that, on the unlading of the cargo by the marshal, 3 cases had been discovered containing brass army and navy buttons, some of which were stamped "C. S. N.," and others "A.," "I.," and "C.," respectively, and all of which purported, by the stamp on the inside, to be manufactured by S. Isaac, Campbell & Co., of London, and also 1 case of swords, 1 case of sword bayonets, 10 kegs of saltpetre, and 606 boxes of tin. On the 27th of May, 1863, the marshal's report of the examination of the packages mentioned in the bills of lading marked Nos. 3 and 4 was filed, accompanied by an inventory of their contents. The articles enumerated in that report which deserves especial mention are the following: 20 bales of "army blankets, butternut color"; 1 case of assorted needles, "manufactured by Isaac, Campbell & Co., London"; 1 case containing "about 320 gross navy buttons," and in regard to which the report says: "These buttons are of the sizes used in the United States navy. They are made of brass, and are marked on the under side 'Isaac, Campbell & Co., 71 Jermyn street, London.' On the upper side they are stamped 'C. S. N.,' with the impress of a foul anchor and two cannon"; 2 cases containing "about 616 gross army buttons," in regard to which the report says: "These buttons are of the kind used in the United States army. They are made of brass, marked on the under side 'Isaac, Campbell & Co., 71 Jermyn street, London.' On the upper side some are stamped 'I.,' others 'C.,' and others 'A.' "; 7 bales of "army cloth," in regard to which the report says: "This cloth is of the description used in the United States army, and is of red, yellow, dark blue, light blue, dark green, light green, and other colors"; 1 case, containing "1 dozen cavalry swords and 1 dozen cavalry bayonets, manufactured by Isaac, Campbell & Co."; 14 cases of "army brogans"; 1 case of "water-proof navy boots"; and 606 boxes of tin plate. The rest of the cargo, covered by the bills of lading Nos. 3 and 4, was reported to consist of envelopes, lead pencils, felt hats, woollen undershirts, men's white shirts, linen and spool thread, linen collars, woollen gloves, Congress gaiters, dry goods, scarfs, neck-ties, hair-brushes, men's drawers, and wrapping paper.

In announcing my decision in this case, just before the summer recess, I stated that the opinion of the court in full would be drawn up at a later day. In preparing that opinion, I find that, in a report of the appraisement of the whole of the cargo, made by the prize commissioners, and filed on the 14th of October, 1863, the 53 packages covered by the bills of lading Nos. 2 and 6, the contents of which are not mentioned in those bills of lading, nor in the report on the contents of the packages covered by the bills of lading Nos. 3 and 4, consisted of the following articles: 2 cases of oil of peppermint, 10 kegs of saltpetre, 15 casks of mustard, 17 casks of Epsom salts, 2 cases of calomel, 4 casks of carbonate of ammonia, 1 case of gum opium, and 2 cases of nutmegs. The marks and numbers on these 53 packages, as given in the report filed October 14, 1863, identify them with 53 of the packages specified in the marshal's report, filed April 9, 1863, the oil of peppermint being specified in the latter report as drugs, and the calomel, carbonate of ammonia, and gum opium simply as merchandise. The net weight of the saltpetre is stated in the report filed October 14, 1863, to be 1,080 pounds, and that of the coil of rope to be 554 pounds. It appears, by that report, that

what are called in the report of the marshal, filed May 27, 1863, 20 bales of "army blankets, butternut color," consisted of 540 pairs of "gray army blankets," and 24 pairs of "white blankets;" that there were 360 gross of brass navy buttons, marked "C. S. N.," 10 gross of army buttons, marked "A.," 397 gross of army buttons, marked "I.," and 148 gross of army buttons, marked "C.," being, in all, 555 gross; and that there were 8 cavalry sabres, 11 sword bayonets. 992 pairs of army boots, 97 pairs of russet brogans, and 47 pairs of cavalry boots. The entire appraisement of the cargo by the prize commissioners amounted to $184,141.-99, and they appraised the vessel at $7,500.

The depositions in preparatorio of James May, the master, Alexander C. T. L. Hertel, the mate, Patrick Kerns, the boatswain, and Henry Millichamp, the cook and steward, were taken on the 14th of February, 1863.

Upon the hearing of the cause, the counsel for the libellants and captors invoked into this case the proofs taken in the cases of The Stephen Hart [Case No. 13,364], and The Gertrude [Id. 5,369], which were on the docket of this court for trial at the same time with the present case. This invocation was made under the thirty-third standing rule of this court in prize cases, which provides, that "when the same claimants intervene for different vessels, or for goods, wares, or merchandise captured on board of different vessels, and proofs are taken in the respective causes, and the causes are on the docket for trial at the same time, the captors may, on the hearing in court, invoke, of course, in either of such causes, the proofs taken in any other of them, the claimants, after such invocation, having liberty to avail themselves also of the proofs in the cause invoked." The court permitted these invocations to be made. In the cases of The George, 1 Wheat. [14 U. S.] 408, and The Experiment, 8 Wheat. [21 U. S.] 261, the propriety of the practice of invoking testimony from the papers of other vessels in possession of the court is recognized; and, in the case of The Vriendschap, 4 C. Rob. Adm. 166, Sir William Scott permitted the captor to invoke the deposition of the claimant, made in a former case, in which he was owner and master, upon the principle that it was proper to use the deposition, not as decisive of the case then before the court, but as evidence not improper to be taken in conjunction with that which the case afforded. The Stephen Hart was a schooner, captured on the 29th of January, 1862, between the southern coast of Florida and the Island of Cuba. The claimants of the whole of her cargo were Saul Isaac and Samuel Isaac, composing the firm of S. Isaac, Campbell & Co., the same persons who claim to be the owners, jointly with Begbie, of the whole of the cargo of the Springbok. It also appeared, in the case of The Stephen Hart, that the brokers who had charge of the lading of her cargo were Spyer & Haywood, the same parties who appear as brokers of the cargo in the present case, and as shippers of a part of it, and as agents for Begbie and for S. Isaac, Campbell & Co. It appeared, in the case of The Stephen Hart, that S. Isaac, Campbell & Co. were dealers in military goods, and that the entire cargo of that vessel, consisting of arms, munitions of war and military equipments, was laden on board of her in England, under the direction of S. Isaac, Campbell & Co., in cooperation with the agents, at London, of the Confederate States, with the design that the cargo should run the blockade into a port of the enemy, either in The Stephen Hart, or in a vessel into which the cargo should be trans-shipped at some place in Cuba, and that S. Isaac, Campbell & Co. intrusted to the agent of the Confederate States in Cuba the determination of the question as to the mode in which the cargo should be transported into the enemy's port. The cargo of the Stephen Hart was condemned by this court, as lawful prize, on the ground that, being contraband of war, it was sent from England with an ostensible destination to Cuba, but with a real destination to the enemy's country, by S. Isaac, Campbell & Co. The Gertrude was a steamer captured on the 16th of April, 1863, in the Atlantic Ocean, off one of the Bahama islands, while she was on an ostensible voyage from Nassau, N. P., to St. John's, N. B. The libel was filed against her in this court on the 23d of April, 1863, and she was condemned, with her cargo, as lawful prize, on the 21st of July, 1863. No claim was put in to either the Gertrude or her cargo. It appeared that she cleared from Greenock on the 22d of January, 1863, for Nassau and Havana. She was registered at the custom-house in London, her certificate of registry being dated January 10, 1863, in the name of Thomas Sterling Begbie, as her sole owner, and she is stated in such certificate to have been built in Glasgow on the 6th of January, 1863. The testimony in the case of The Gertrude showed that she belonged to Thomas Sterling Begbie, of London; that her cargo consisted, among other things, of hops, dry goods, drugs, leather, cotton cards, paper, 3,960 pairs of gray army blankets, 335 pairs of white blankets, linen, woollen shirts, flannel, 750 pairs of army brogans, Congress gaiters, soda ash; 500 boxes of tin plate, and 24,900 pounds of powder; that she was captured after a chase of three hours, paying no heed to four guns that were fired by her captor, but endeavoring to escape; that, when captured, she was making for the harbor of Charleston, her master knowing of its blockade, and having on board a Charleston pilot under an assumed name; that her cargo was shipped at Nassau by Henry Adderly & Co., for St. John's, N. B., by a bill of lading to order, indorsed by them in

blank, and that she had on board a consignee's letter from Henry Adderly & Co., addressed to Messrs. W. & R. Wright, St. John's, N. B.

An examination of the marshal's report of the contents of the packages on board of the Springbok mentioned in the bills of lading Nos. 3 and 4, filed May 27, 1863, and of the prize commissioners' report of the contents of the packages composing the cargo of the Gertrude, filed June 1, 1863, discloses some singular facts. The report in the case of The Springbok specifies 18 bales of "army blankets, butternut color," each marked "A." in a diamond, and numbered 544 to 548, 550, 552, and 555 to 565. The report in the case of The Gertrude shows a large number of bales of "army blankets," each marked "A." in a diamond, and numbered with various numbers, scattered from 243 to 534, and then commencing to re-number again at 600. In the inventory and appraisement of the cargo of the Springbok, before referred to, filed October 14, 1863, these 18 bales of blankets are set out as being each marked "A." in a diamond, "G. C.," and numbered 544 to 548, 550, 552, and 555 to 565, and as being "gray army blankets." In an inventory and appraisement of the cargo of the Gertrude, made after her condemnation, and filed August 25, 1863, the bales of army blankets found on board of her are described as each marked "A." in a diamond, "G. C," and as being numbered with various numbers, scattered between 237 and 534, there being none higher than the latter number, and as being "gray blankets." So, also, in the cargo of the Springbok is found a bale marked "A." in a diamond, and numbered 779; while, in the cargo of the Gertrude are found bales, each marked "A." in a diamond, and numbered 780, 782, 784, 786, 788, 789 to 799. So, too, in the Springbok are found 9 cases, each marked "A." in a diamond, and numbered 976 to 984, and 4 bales, each marked "A." in a diamond, and numbered 985 to 987 and 989, all of which cases and bales are specified in the appraisement report of October 14, 1863, by the same marks and numbers, and the 4 bales are therein stated to be "men's colored travelling shirts." In the Gertrude are found 5 bales, each marked "A." in a diamond, and numbered 988, 990 to 992, and 998, and which, in the appraisement report of August 25, 1863, are specified by the same marks and numbers, and described as "men's colored travelling shirts." In the Springbok are found 4 cases of men's white shirts, each marked "A." in a diamond, and numbered 994 to 997. So, also, in the Springbok are found packages, each marked "A." in a diamond, "S. I., C. & Co.," and numbered 1221 to 1234, containing spool cotton and linen thread, and a package similarly marked, and numbered 1247, containing linen collars, and 3 packages similarly marked, and numbered 1267 to 1269, containing men's hose and gloves; also, 3 packages marked "A." in a diamond, and numbered 1264 to 1266, containing the navy and army buttons before mentioned; also, 9 cases, similarly marked (which, however, are specified in the report of October 14, 1863, as each marked "S. B." in a diamond, "S. I., C. & Co."), and numbered 1289, 1300, 1304, 1306, 1322, and 1351, and containing shirts and drawers; also, 2 cases, each marked "A." in a diamond, and numbered 1307 and 1308, containing hose; also, 6 bales of army cloth, similarly marked, and numbered 1400 to 1405; also, 1 case, similarly marked, and numbered 1406, containing cavalry swords and bayonets; also, 1 case, similarly marked, and numbered 1407, containing gloves, scarfs, &c.; also, 1 case, similarly marked, and numbered 1408, containing hair-brushes; also, 114 cases of Congress gaiters, similarly marked, and numbered 1309 to 1335, 1351 to 1435, 1437 and 1440; also, 14 cases, similarly marked, and numbered 1336 to 1349, containing army brogans; also, 1 case, similarly marked, and numbered 1350, containing water-proof navy boots. In the cargo of the Gertrude are found 35 cases of Congress gaiters, each marked "A." in a diamond, and numbered 1170 to 1204; also, 10 cases of army brogans, similarly marked, and numbered 1205 to 1214; also, 1 case, containing shirts, similarly marked, and numbered 1285. On board of the Springbok is found 1 bale of brown wrapping paper, marked "A." in a diamond (and which is specified in the report of October 14, 1863; as marked "A." in a diamond, "T. S. & Co."), and numbered 264. On board of the Gertrude are found a large number of bales of wrapping paper and other paper, marked "A." in a diamond, "T. S. & Co.," and numbered with numbers scattered between 1 and 170. In only one instance, so far as I have observed, is the same number found on a package in each cargo—the case of needles, in the Springbok, being marked "A." in a diamond, and numbered 998, and a case of men's colored travelling shirts, in the Gertrude, being also marked "A." in a diamond, and numbered 998. It would appear, from this comparison of the marks and numbers on the packages in the two cargoes, that the marking and numbering of a large portion of the packages composing both cargoes were parts of one single transaction, the numbers found in one cargo not being found in the other.

The object of the invocation into the present case of the Stephen Hart and the Gertrude is, as is claimed on the part of the libellants, to show that S. Isaac, Campbell & Co., who claim an interest in the whole of the cargo of the Springbok, were the claimants of the entire cargo of the Stephen Hart; that Thomas Sterling Begbie, who claims an interest in the whole of the cargo of the Springbok, and who appears to have chartered her from her owners for the voyage on which she was captured, was the sole owner

of the Gertrude; that Spyer & Haywood, who style themselves the agents of Begbie, the charterer of the Springbok, and also the agents of S. Isaac, Campbell & Co., in respect to the cargo of the Springbok, and who are also the brokers of that cargo, and the signers of its manifest, and the shippers, by the bills of lading, of a large portion of that cargo, were the brokers of the cargo of the Stephen Hart; and that there is the singular correspondence, which has been pointed out, between the marks and numbers on the packages in the Springbok and those on the packages in the Gertrude. The conclusion sought to be drawn from all these circumstances is that, as it is satisfactorily established that the cargoes of both the Stephen Hart and the Gertrude were, when captured, on their way to the enemy's country, into which they were designed to be introduced by a breach of blockade, and as S. Isaac, Campbell & Co. were interested in the entire cargo of the Stephen Hart, and are interested in the entire cargo of the Springbok, and as Begbie is interested in the entire cargo of the Springbok, and was the sole owner of the Gertrude, and as the brokers of the cargo of the Springbok are the same persons who were brokers of the cargo of the Stephen Hart, and as the cargoes of the Gertrude and the Springbok appear, to a large extent, to have been marked and numbered for shipment under a single system of marking and numbering, the inference is a fair one that the cargo of the Springbok had the same destination which this court has found to have been the destination of the cargoes of the Stephen Hart and the Gertrude. This inference I regard as a very proper one, and as warranted by the proofs invoked. In addition to the practice of invocation, it is the uniform custom of prize courts to take cognizance of the status of the claimants who appear before it, with a view to see whether they come with clean hands, or whether they have been before engaged in a traffic similar to that with which they are charged in the particular case. Thus, in The Juffrouw Elbrecht, 1 C. Rob. Adm. 127, the vessel was claimed as neutral property by a person who was said, by Sir William Scott, not to be a "novus hospes" in the court, but to have appeared in former cases, in one of which he had sworn that a vessel was his property, when it was proved in evidence that she continued to be the property of her former enemy owner. Sir William Scott says: "The effect of this experience on our parts will be not to shut the door against him, because every case is to be examined principally by its own evidence; but, at the same time, it would be wrong to set up technical rules against the rules of common justice and reason, and to consider him as a person whose claims in this court do not require an investigation peculiarly strict." So, also, in The Argo, 1 C. Rob. Adm. 158, Sir William Scott remarked, that the vessel was asserted to have been purchased in the enemy's country for parties claiming to be neutrals, whose transactions had appeared before the court, in other cases, not much to their advantage. He added: "Although it is not on considerations of this kind that I must determine the present case, I cannot entirely overlook the conduct of parties, as far as it has judicially pressed itself on my notice." "The circumstances of a case may be such as to make it utterly incredible, although there are confident attestations in support of it. The circumstances may be highly unnatural and irreconcilable with any view of a fair transaction. The court must undoubtedly be upon its guard against running wild upon mere general presumptions, but it must judge of the common transactions of life upon the same ordinary principles on which the probity and fairness of such matters is examined in the general practice of mankind." In The Rosalie and Betty, 2 C. Rob. Adm. 343, Sir William Scott says: "In considering this case, I am told that I am to set off without any prejudice against the parties from anything that may have appeared in former cases; that I am not to consider former circumstances, but to suppose every case a true one till the fraud is actually apparent. This is undoubtedly the duty, in a general sense, of all who are in a judicial situation; but, at the same time, they are not to shut their eyes to what is generally passing in the world—to that obvious system of covering the property of the enemy, which, as the war advances, grows notoriously more artificial. Higher prices are given for this secret and dishonorable service, and greater frauds become necessary. Old modes are exploded as fast as they are found ineffectual and new expedients are devised to protect the unsound part better from the view of the court. Not to know these facts, as matters of frequent and not unfamiliar occurrence, would be not to know the general nature of the subject upon which the court is to decide. Not to consider them at all, would not be to do justice. The very nature of the inquiry necessarily suggests something of this kind, for the inquiry is to see whether the property does bona fide belong to those who are ostensibly represented to be the proprietors. It is an inquiry, therefore, which is necessarily attended with some doubt in limine. No reasonable man will say that the court is to look at cases in the same manner where no special reason for fraud exists, and where the enemy is driven to it by a necessity that is notorious, as the only means of getting home his property, and when such artifices are not unfrequently known to prevail; and more especially when the persons appearing as claimants have been exposed to the experience of the court, as having engaged in such a trade, and do not stand before the court with those

general credentials which belong to the conduct of a pure and unimpeached neutrality. I am afraid the observation of those who attend this court will apply these remarks to the owner of the ship. The claimant of the cargo has not, in my recollection, appeared before the court on any former occasion. I do not say that the conduct of the owner of the ship will, in general, affect the cargo; but, if the parties appear bound up together, in an intimate connexion and co-operation, in measures which a court cannot see without disapprobation, such an occurrence cannot but form a foundation for the unfavorable reception of the case of a party so connected in that transaction." In the case of The Experiment, 8 Wheat. [21 U. S.] 261, which was a case of alleged collusive capture by a privateer, Mr. Justice Story, in delivering the opinion of the court, says: "It cannot escape the attention of the court that this privateer has already been detected in a gross case of collusive capture, on the same cruise and under the same commission. This is a fact of which, sitting as a court of admiralty, we are bound to take notice; and it certainly raises a presumption of ill faith in other transactions of the same parties, which can be removed only by clear evidence of honest conduct. If the circumstances of other captures during the same cruise are such as lead to serious doubts of the fairness of their character, every presumption against them is greatly strengthened; and suspicions once justly excited in this way ought not to be easily satisfied." In The Nancy, 3 C. Rob. Adm. 122, Sir William Scott alludes to the fact that the claimants in the case had not conducted themselves, in some cases which had come before the court, with that purity which ought to distinguish the conduct of considerable merchants. The case of The Nancy is cited with approbation in Mos. Contr. War, 99, as supporting the principle that the known character of the owners and agents of a vessel, as connected with contraband trade, is a circumstance to be considered upon the question as to whether there be so much reason to doubt the regular papers of the vessel as to warrant the court in disregarding them.

The principles laid down in the cases I have cited apply with peculiar force to the present case. I referred, in my opinion in the case of The Stephen Hart, to the manner in which the trade in contraband goods, and in running the blockade to the ports of the enemy had been carried on during the present war. A large portion of that trade has been conducted through the port of Nassau, the goods being sent from England to that port, and there trans-shipped in bulk into swift steamers, such as the Gertrude was, in which to be carried through the blockade. This course of trade has come to be a regular system, and when parties like S. Isaac, Campbell & Co. and Begbie are before the court, who have been engaged in carrying on that species of trade in other cases, it is impossible for the court to shut its eyes to the notorious character of the traffic, or to the unfavorable position occupied by the claimants.

I announced, in the case of The Stephen Hart, the leading principles of public law which apply to the present case, and also to the case of The Peterhoff [Case No. 11,024], and discussed them at considerable length. Those principles, as established by the highest authorities in England, as well as in this country, are, that articles contraband of war, destined for the aid and use of the enemy, and on transportation by sea to the enemy's country, are liable to capture as lawful prize of war, if seized while being so transported; that, if a cargo be despatched from a neutral port with an intention, on the part of the person despatching it, that, in violation of a blockade known to exist, it shall enter a port of the enemy, it may be captured as lawful prize; that contraband articles destined, on their departure from a neutral port, to be delivered to the enemy, either by being carried directly into a port of the enemy in the vessel in which they leave the neutral port, or by being trans-shipped, at another neutral port, into another vessel, are the subject of capture; that, if the contraband articles are really intended to be delivered to the enemy at some other place than the neutral port named in the papers of the vessel as the destination of the cargo, and that neutral port is to be used merely as a port of call or of trans-shipment and the goods are not to be delivered there for discharge and general consumption or sale there, and if, in that way, the representations contained in the papers of the vessel are false and fraudulent as to the real destination of the goods, they are liable to capture; that no principle of the law of nations, and no consideration of the rights and interests of lawful neutral commerce, requires that the mere touching at a neutral port, either for the purpose of making it a new point of departure of the vessel to a port of the enemy, or for the purpose of trans-shipping the contraband goods into another vessel, which may carry them to the destination which was intended for them when they left their port of departure, can exempt the goods from capture; that the division of a continuous transportation of contraband goods into several intermediate transportations, by means of intermediate voyages by different vessels carrying such goods, cannot cause a transportation which is, in fact, a unit, to become several transportations, although to effect the entire transportation of the goods requires several voyages by different vessels, each of which may, in a certain sense, and for certain purposes, be said to have its own voyage, and although each of such voyages, except the last one in the circuit, may be between neutral ports; that such a transaction cannot make any of the

parts of the entire transportation of the contraband goods a lawful transportation, when the transportation would not have been lawful if it had not been thus divided; that, whether the vessel is to stop at the neutral port merely as a port of call, and then go on to the enemy's port, or whether the cargo is to be trans-shipped, at the neutral port, to another vessel, to be transported to the enemy's port, there is, in either case, an absence of all lawful neutral commerce to a neutral port, and the transportation of the contraband goods is, in either case, to be considered as a unit, from the port of lading to the port of delivery in the enemy's country; that if any port of such transportation be unlawful, it is unlawful throughout; and that the contraband goods are subject to capture, as well before arriving at the neutral port as during their transportation by sea from such neutral port to the port of the enemy. I shall not recapitulate here the authorities and the reasoning on which these principles are upheld, but shall refer to my opinion in the case of The Stephen Hart, for their full exposition; and I do this the more readily, as the cases of The Stephen Hart and The Peterhoff, as well as this case of The Springbok, have, it is understood, been carried, by appeal, to the supreme court of the United States.

The first inquiry is, whether, upon these principles, the cargo of the Springbok is liable to condemnation. The contraband goods on board of the Springbok are alleged to be the army blankets, the navy buttons, the army buttons, the army cloth, the cavalry swords, the bayonets, the army brogans, the navy boots, the tin plate, and the coil of rope, to say nothing of the saltpetre and the drugs, which formed a portion of the contents of the packages covered by the bills of lading Nos. 2 and 6, the contents of which packages were not embraced in the report of the marshal filed May 27, 1863, but were only disclosed in the appraisal report of the prize commissioners filed October 14, 1863. While I do not decide that all of these articles are necessarily contraband of war, it is sufficient to say that some of them are clearly so. The well-settled rule of law is that, where contraband goods, destined for the use of the enemy, are found on board of a vessel, all other goods on board of that vessel belonging to the owner of the contraband articles, even those goods which are innocent, must share the fate of the contraband goods. Halleck, Int. Law, p. 573, c. 24, § 6. The penalty of contraband extends to all the property of the same owner, involved in the same unlawful transaction; and, therefore, if articles which are contraband, and are going to the enemy are on board of the same vessel with articles which are not contraband, and all the articles belong to the same owner, all will be alike condemned, the innocent articles being affected with the contagion of the contraband articles. 3 Phillim. Int. Law, § 277; 2 Wildm. Int. Law, 217; The Sarah Christina, 1 C. Rob. Adm. 237. As, in the present case, the entire cargo is claimed by the same owners, if the contraband articles are to be condemned as having been on their way to the enemy at the time they were seized, all the rest of the cargo must be condemned.

I now proceed to an examination of the depositions in preparatorio taken in the present case. Captain May says that he does not know on what pretence the capture was made. Hertel, the mate, says that the seizure was made on the supposition that the cargo was contraband of war. Kerns, the boatswain, says that he understood that the seizure was made because the bills of lading did not show what was in some of the cases on board. Millichamp, the cook and steward, says that he understood they were captured because they had goods contraband of war on board, and that he heard no other reason given. It is very singular that Hertel and Millichamp, both of them, assign the suspicion of contraband as the alleged reason for capture, and that Kerns assigns substantially the same reason, namely, that the bills of lading did not show the contents of some of the packages, while Captain May assumes not to know what reason was assigned for the capture. It is ascertained that there were contraband goods on board, and it also appears that the contents of a very large portion of the packages covered by the bills of lading are not disclosed in the bills of lading, or in any other papers on board of the vessel, and that the only articles which are specified either in the bills of lading, the manifest, the cargo books, or any other papers found on board of the vessel, are the tea, coffee, ginger, pimento, cloves, pepper, and tin. Captain May says that the vessel was bound to Nassau, N. P., when seized; that the voyage began at London, and would have ended at some port in the United Kingdom; that the cargo was general merchandise; and that he is not aware that she had any goods contraband of war on board. That she had contraband goods on board, and what they were, we have already seen. It is a principle of prize law, that a master cannot be permitted to aver his ignorance of the contents of contraband packages on board of his vessel; and that he is bound, in time of war, to know the contents of his cargo. The Oster Risoer, 4 C. Rob. Adm. 199. Hertel says that the voyage began at London, and was to have ended, according to the shipping articles, at any port of the United Kingdom of England or Ireland, or any port on the continent of Europe between Brest and the river Elbe; that the voyage was to Nassau; that he does not know where they intended to go after leaving Nassau; that they intended to discharge their cargo at that place; that it was a general cargo; that he has no knowledge, information, or belief as to the contents of the packages; that he took them all on board and gave receipts for them; and that, to the best of his knowledge, information, and be-

lief, there were on board no goods contraband of war. Kerns says that the vessel was bound to Nassau with a general cargo, the contents of which he does not know, and that he does not know that she had on board any goods contraband of war. Millichamp says that the voyage was from London to Nassau, and thence to any port in the West Indies, North America, or the United States, and thence back to any port in the United Kingdom, according to the shipping articles which he signed; that the cargo was all on board when he joined the vessel, except two cases or boxes, which were put on board the day before they sailed; and that he knows nothing concerning the cargo, or whether or not she had on board anything contraband of war. The two cases referred to by Millichamp are undoubtedly the two packages mentioned in the bill of lading No. 3, and which are the sole contents of that bill, one of them being the bale of brown wrapping paper, and the other being one of the two cases containing the army buttons. Bill No. 3 is dated December 8, while bills Nos. 2 and 6 are dated December 6, and bills Nos. 4 and 5 have no date. Captain May says that the vessel was consigned to B. W. Hart, Esq., Nassau, and the cargo to the order of the charterers, indorsed on the bills of lading; that the goods were to be delivered at Nassau for account and risk of Begbie & Co., of London, the charterers; and that he does not know to whom the goods would belong, if restored. Hertel says that the cargo was shipped by Spyer & Haywood, of London, consigned to B. W. Hart, of Nassau; and that it was to have been delivered at Nassau, but he cannot say for whose real account, risk, or benefit. Captain May says that there were three sets of either three or four bills of lading of the goods on board of the vessel; and that there were no false bills of lading, nor any signed other than those on board when she was taken. He also says that there were no papers on board showing the ownership of the cargo; and that the charter-party for the voyage was signed by Begbie & Co. The master and all on board knew of the blockade of the ports of the enemy.

I am entirely satisfied, from all the evidence in the case, that the cargo of the Springbok was intended to be delivered in the enemy's country, by trans-shipment at Nassau into a vessel in which it should be carried through the blockade, and that such was the intended destination of the cargo on its departure from England. The papers found on board of the vessel, so far as they represent Nassau as the ultimate destination of the cargo, were false and simulated. There was no bona fide intention of landing the cargo at Nassau for sale or consumption there, so that it might be incorporated at Nassau into the common stock in that market; but, if it was to be landed there at all, it was only to be so landed for the purpose of being trans-shipped, in bulk, into another vessel, in pursuance of the original destination of the cargo to the enemy's country. The port of Nassau was to be used only as a port of trans-shipment of the cargo. In the case of The Thomyris, Edw. Adm. 17, Sir William Scott says: "It is a clear and settled principle, that the mere trans-shipment of a cargo at an intermediate port will not break the continuity of the voyage, which can only be effected by a previous actual incorporation into the common stock of the country where the trans-shipment takes place. If there was nothing more than a trans-shipment of the cargo from one vessel to another, that will not alter the transaction in any respect, and it must still be considered as the same continuous voyage to the port where the cargo was ultimately to be delivered." Many authorities, to the same effect, were cited by me in the case of The Stephen Hart. The case of The Joseph, 8 Cranch [12 U. S.] 451, may also be referred to.

The absence from the bills of lading of all mention of the contents of any of the packages composing the cargo, except the tea, coffee, ginger, pimento, cloves, and pepper, and the fact that the manifest makes no mention of the contents of any of the packages, leads to the conclusion that, if the master did not in fact know what were the contents of the packages, his ignorance was a studied ignorance. But the more reasonable conclusion, in view of his declared want of information as to the cause of his capture, while the other witnesses frankly declare the cause to have been the suspected presence of contraband goods, or the defective character of the bills of lading, is that his ignorance is affected and not real. The circumstance that all the bills of lading say that the freight is to be paid "as per charter-party," shows that the charterer of the vessel, Begbie, must have been interested in the whole of the cargo. The inference that there was a single ownership of the whole of the cargo, although part of it was shipped in the name of Moses Brothers, and the rest of it in the name, some of Spyer & Haywood, and some of Spyer & Haywood, as agents, is deducible from the fact that Spyer & Haywood, as agents for the charterer, instructed Captain May, on his arrival at Nassau, to report to Mr. Hart for orders as to the delivery of the cargo; and from the further fact, that Spyer & Haywood, as agents for S. Isaac, Campbell & Co., enclosed in a letter to B. W. Hart the bills of lading Nos. 5 and 6, which comprise the entire contents of the cargo, except the two packages mentioned in bill No. 3, being the bale of brown paper and one case of the army buttons; and from the further fact, that Spyer & Haywood signed the indorsement on the charter-party, and also, as brokers, signed the manifest of the entire cargo. There was, therefore, a single ownership for the entire cargo, both contraband and non-contraband; and it is fair to infer, from all the

evidence, that there must have been a single destination for the whole of the cargo. If, therefore, any particular destination can, with certainty, be affixed to any portion of the cargo, the same destination must, on all the evidence, be ascribed to the whole of it.

The absence from on board of the Springbok of any of the invoices of the cargo is a fact of peculiar significance in the present case. The bills of lading mention no articles except the tea, coffee, ginger, pimento, cloves, and pepper. The manifest specifies nothing as to the contents of the packages. The cargo books only mention tea, coffee, ginger, cloves, pepper, and tin. If the invoices had been on board, they would, if they were as true and full as genuine invoices should be, have disclosed the full particulars of the cargo. The inquiry is a pregnant one: Why were the invoices not on board of the vessel? If they had been, their disclosure of the contraband articles could have worked no injury, if those contraband articles were not on their way to the enemy of the United States. What, then, is the proper inference to be drawn from the absence of the invoices? Most certainly, that the contraband articles which were in fact on board, and whose existence was not disclosed by the bills of lading. the manifest, or the cargo books. but whose presence would have been disclosed by true and proper invoices, were on board for some unlawful purpose and upon some unlawful destination. Such purpose could, on all the evidence in the case, only have been to supply the enemy of the United States. and such destination could only have been the country of the enemy. Captain May testifies to the existence of invoices, and says that he believes that invoices and duplicate bills of lading were to be sent to Nassau by mail steamer. Spyer & Haywood, as agents for S. Isaac, Campbell & Co., enclosed to B. W. Hart, of Nassau, in their letter to him of December 8, 1862, "under instructions from Messrs. S. Isaac, Campbell & Co.," "bills of lading for goods shipped per Springbok," but they did not enclose in that letter invoices of the goods covered by the bills of lading. Why should they not have done so, if the goods were, in the way of lawful commerce, to be landed at Nassau for sale or consumption there, and to be incorporated there into the common stock of that market? What other motive could there have been for sending the invoices by mail, as suggested by the master, while the bills of lading were sent by the vessel herself, except to conceal from the officers of any cruiser of the United States by whom the papers of the vessel should be examined on her voyage, all knowledge that contraband articles were on board? And what motive could there be for concealing that knowledge if, in fact, those contraband articles were not destined for the enemy of the United States, but were destined for use or sale at the neutral port of Nassau? The effect of the dissembling of contraband goods in the papers of a vessel is commented upon by Sir William Scott in The Richmond, 5 C. Rob. Adm. 325, and the absence from on board of a vessel in time of war of invoices of her cargo is laid down by all the authorities as being a suspicious circumstance, as affecting the question of the honesty of the commerce. 1 Kent, Comm. 157; Halleck, Int. Law, p. 622, c. 25, § 25. And, in some of the treaties of the United States with foreign countries, it has been provided that, in time of war, the vessels of both nations, being laden, must be provided, among other papers, "with certificates containing the several particulars of the cargo," "that so it may be known whether any forbidden or contraband goods be on board the same." The Amiable Isabella, 6 Wheat. [19 U. S.] 1; Treaty of 1795 with Spain, art. 17 (8 Stat. 148); Convention of 1800 with France, art. 17 (8 Stat. 186). The foundation of this rule of law, which exists and is to be administered, whether embodied in treaty stipulations or not, is that, in time of war, a vessel should be furnished with documents showing the particulars of her cargo, especially where, as in the present case, the vessel is documented for a neutral port in the vicinity of the ports of one of the belligerents. and that neutral port is one extensively used as a mere port of call and of trans-shipment for vessels and cargoes bound to ports of the enemy of the United States, and where, too, the parties claiming to own the cargo have been engageu in previous adventures connected with running the blockade, or introducing cargoes of contraband goods into the enemy's country.

The facts, that the original bills of lading Nos. 5 and 6 made out to "order," are indorsed in blank; that the bill of lading No. 2, which is a duplicate of No. 6, and is a "captain's copy," is indorsed in blank; that the very brief letter of instructions to Captain May from Spyer & Haywood, as "agents for the charterer," dated December 8, 1862, simply directs him to proceed to Nassau, N. P., and, on arrival, report yourself to Mr. B. W. Hart there, who will give you orders as to the delivery of your cargo, and any further information you may require; and that Spyer & Haywood, as agents for S. Isaac, Campbell & Co., sent to Hart the bills of lading for substantially the whole of the cargo, justify the conclusion that the cargo in bulk, as a whole, was put under the orders of Mr. Hart, not to be sold or used at Nassau, but to be forwarded by trans-shipment to some other destination. What was that destination? It is clearly indicated by the initials "C. S. N." stamped upon the 50,000 navy buttons, those initials standing for the words "Confederate States Navy," and by the initials "I.," "C.," and "A.," stamped upon the 80,000 army buttons, which severally represent the words, "Infantry," "Cavalry," and "Artillery." The destination of

those navy buttons was unquestionably the country of the enemy of the United States, which enemy styles itself "The Confederate States of America." The navy buttons must have been destined for the use of the navy of the enemy, and the army buttons were for the use of its army. Such destination was intended by S. Isaac, Campbell & Co., for the buttons are all of them stamped with their name and place of business in London. Such also was the only appropriate destination of the "gray" or "butternut color" army blankets. And all of those articles were to be made of use to the enemy by being introduced into the country of the enemy.

The fact that the claim of the Isaacs and Begbie is not signed by them, but is signed by Mr. Kursheedt, their proctor of record, and that the test oath to the claim is made by the proctor, has not escaped my attention. The claim states everything on information and belief. The test oath, although made on the 24th of March, 1863, forty days after the service of process on the cargo, states that it is impossible to communicate with the claimants, all of whom, it says, reside in London, in time to allow them to make the claim and test affidavit. Yet the affidavit made by the proctor states that his information as to the matters set up by him is derived from letters and communications then very lately received by him from the claimants, and from documents in his possession placed there by the claimants, and which authorize him to intervene and act as agent as well as proctor for them as to the cargo. It would seem as if the time which was sufficient for sending from New York to London intelligence of the capture of the cargo, and for sending back the letters, communications, and documents mentioned, but none of which were placed before the court, would have been sufficient to procure the signatures and oaths of the claimants of the cargo to a claim and a test affidavit. The same gentleman who thus acted as proctor in the case of The Springbok was the proctor for S. Isaac, Campbell & Co., in the case of The Stephen Hart. In that case a claim was put in to the cargo, signed at London, by Samuel Isaac, and the test affidavit thereto was made by him at London. I also find that the test oath made by Mr. Kursheedt in the case of The Springbok, and that made by Samuel Isaac in the case of The Stephen Hart, contain the same peculiar form of averment, that it was not intended that the vessel should enter, or attempt to enter, any port of the United States, or that her cargo should be delivered at any such port. I cannot but regard with suspicion the circumstances that the claim and oath are not made by the claimants, but by their proctor; that so unsatisfactory an excuse is given therefor; that the papers and documents which were so weighty in the mind of the proctor in inducing his oath were not put before the court; and that the test oath is so peculiarly worded.

Upon the whole case, my conclusion is, that there are abundant grounds for condemning, not only the contraband articles found on board of the vessel, as having been destined to the enemy's country, but also the entire cargo, as belonging to the owners of the contraband goods.

It is quite probable, from the coincidence of dates, that it was intended that the cargo of the Springbok should be carried from Nassau to the enemy's country by the Gertrude. Begbie, the owner of the Gertrude, sent her from Greenock, on the 22d of January, to Nassau. The Springbok, chartered by Bebgie, and with a cargo on board in all of which he had an interest, had sailed from Dalmouth for Nassau on the 23d of December previous. She was captured on the 3d of February, about 150 or 200 miles east of Nassau. The Gertrude would, in due course, arrive at Nassau but a few days after the Springbok.

It is claimed that the vessel is not subject to condemnation, even though she was carrying contraband articles intended for the enemy. It is urged that her owners had no interest in any of the cargo, and had chartered her for a voyage specifically to Nassau, where, by the charter-party, she was to deliver the cargo, and that neither her owners nor her master had any knowledge that she was carrying any contraband articles, much less that those contraband articles were leaving England on a destination to the country of the enemy. But the court is of opinion that, under all the circumstances disclosed in this case, the vessel must be held to have been employed in carrying on the unlawful enterprise of transporting contraband articles on their way to the enemy's country, to be there introduced by a violation of the blockade, and that she was so employed under such a state of facts as makes her owners responsible for the unlawful transportation of the contraband articles, and for the acts of the master in relation to such transportation, to such an extent as to justify the condemnation of the vessel. Formerly, the mere fact of carrying a contraband cargo rendered the vessel liable to condemnation, but the modern rule is different. The carrying of contraband articles is now attended only with loss of freight and expenses, unless the vessel belongs to the owner of the contraband articles, or unless there are circumstances of fraud as to the papers and the destination of the vessel or the cargo, and thus an attempt, under colorable appearances, to defeat the rights of the belligerent. The Ringende Jacob, 1 C. Rob. Adm. 89; The Jonge Tobias, Id. 329; The Franklin, 3 C. Rob. Adm. 217. In this last case, the owner of the vessel, who was not the owner of the cargo, was himself a neutral, and had entered into a charter-party for a voyage of the vessel from one neutral port to another neutral port. In

all these particulars, he occupied the position of the owners of the Springbok. But although, in the case of The Franklin, the vessel was ostensibly bound to a neutral port, Sir William Scott held that she was in fact bound to a belligerent port, and condemned her because she had on board contraband goods destined for a belligerent port. And he announces it as the settled rule of law, "that the carriage of contraband with a false destination will work the condemnation of the ship as well as the cargo." Where the owner of the vessel is himself privy to such carriage of contraband, or where the master of the vessel, as the agent of such owner, interposes so actively in the fraud as to consent to give additional color to it by sailing with false papers, the modern relaxation in favor of the vessel no longer exists. The Franklin, 3 C. Rob. Adm. 217, note; The Mercurius, 1 C. Rob. Adm. 288, note; The Edward, 4 C. Rob. Adm. 68; The Neutralitet, 3 C. Rob. Adm. 295. These cases are cited with approbation in Carrington v. Merchants' Ins. Co., 8 Pet. [33 U. S.] 495, 520, 521. In delivering the opinion in that case, Mr. Justice Story says: "The belligerent has a right to require a frank and bona fide conduct on the part of neutrals, in the course of their commerce, in times of war; and if the latter will make use of fraud and false papers to elude the just rights of the belligerents, and to cloak their own illegal purposes, there is no injustice in applying to them the penalty of confiscation. The taint of the fraud travels with the party and his offending instrument during the whole course of the voyage, and until the enterprise has, in the understanding of the party himself, completely terminated."

In the present case, we find that Begbie, the charterer of the vessel, is set up as the owner, jointly with S. Isaac, Campbell & Co., of the whole of the cargo; that Spyer & Haywood, the agents of Begbie, the charterer of the vessel, were also the agents of S. Isaac, Campbell & Co., the co-owners of the cargo; that Captain May, the master of the vessel, is the son of Thomas May, who is one of the three owners of the vessel; that Captain May signed bills of lading for 1,394 packages of merchandise, to be transported, in time of war, ostensibly to the port of Nassau, the principal port of call and trans-shipment for vessels and cargoes destined to ports of the enemy by a breach of blockade; that the contents of only 613 of the packages covered by the bills of lading were specified in them, the articles so specified being only the tea, coffee, ginger, pimento, cloves, and pepper; that he sailed with a manifest specifying not a single article contained in his cargo, but merely giving the marks and numbers on the packages, and describing them as cases, bales, boxes, chests, bags, kegs, and casks; that he sailed without any invoices containing the particulars of his cargo; that he was appointed to the command of the vessel, as he himself says, by her owners; that the only instructions he carried with him were instructions from Spyer & Haywood, as agents for Begbie, the charterer, to proceed to Nassau, and to report himself to Mr. Hart there, and receive orders from him as to the delivery of the cargo; that his failure to demand and carry with him full and clear invoices, containing full particulars of his cargo, was a deliberate one, because he says that the invoices were to be sent to Nassau by mail steamer, thus showing that he knew of the existence of invoices of the cargo; and that he declares his ignorance of the contents of the cargo, or that there were any goods contraband of war on board,—an ignorance which the court cannot, under the circumstances, regard as a real ignorance, and which, if it were a real ignorance, is inexcusable on the part of a master in time of war. The conclusion is irresistible that the master was carrying this cargo, composed, in part, of contraband articles, under false papers. He, and the owners who appointed him as their agent, must be regarded, under the circumstances, as affected with knowledge of the contraband articles on board, and of their destination, to the same extent as if actual knowledge thereof were brought home to the master and the owners. The master, and, through him, the owners, must be held to the same knowledge of the carriage by the vessel of the navy buttons, which could have but one destination, as if they had personally and knowingly put those articles on board. The master's ignorance that such navy buttons were on board, when he would have learned the fact if he had required the production to him, so that he might carry them on board of his vessel, of invoices containing full particulars of the cargo, was a wilful shutting of his eyes, under such circumstances as to make him and the owners of the vessel responsible for the carrying of whatever contraband articles should turn out to be on board, destined for the use of the enemy. Moreover, charged, as he and his owners must therefore be, with knowledge that the contraband articles were on board, and were going to the enemy, the owners must be held responsible for the documenting of the cargo by the master, by means of the bills of lading, to the neutral port of Nassau, when it was in fact destined, composed in part of contraband goods, to a port of the enemy. This was, on the part of the master, for whose acts the owners of the vessel are responsible, a carrying of the contraband articles under a false destination, and with false papers, thus bringing the case directly within the authorities before cited. If the owner of a vessel places it under the control of a master who permits it to carry, under false papers, contraband goods, ostensibly destined for a neutral port, but in reality going to a port of the enemy, he must sustain the consequence of such misconduct on the part of his agent. The Ranger, 6 C. Rob. Adm. 125; Jecker v. Montgomery, 18 How.

[59 U. S.] 110, 119; The Mercurius, 1 C. Rob. Adm. 80. In the Vrouw Judith, Id. 130, the principle is laid down by Sir William Scott, in respect to the act of the master of a vessel in breaking a blockade, that such act binds the owner, in respect to the conduct of the vessel, as much as if it was committed by the owner himself; that, if the master abuses his trust as to the powers with which the law invests him, it is a matter to be settled between him and the person who constituted him master; but that his act of violation is, as to the penal consequences, to be considered as the act of the owner. So, also, in The Columbia, Id. 154, it was held, by Sir William Scott, that the penalty of breaking a blockade attaches to a vessel by the conduct of the master, although the owner be ignorant of the blockade. The principle of that case was that, although the intention of the owner of the vessel may have been innocent, he will be penally affected by the misconduct of his agent, who has misused the trust confided to him, and that in such case, the act of the agent, such as the act of a master in breaking a blockade, affects the owner of the vessel to the extent of the whole of his property concerned in the transaction. The same general principle was recognized by this court in the case of The Hiawatha [Case No. 6,450], and by the supreme court, on appeal, in the same case. 2 Black [67 U. S.] 635, 678. Both courts held that the neutral owners of the cargo of the Hiawatha, though cognizant of the blockade, were responsible for the act of the master of the vessel in violating the blockade. The supreme court affirmed the decision of this court condemning both vessel and cargo, and declared that "the cargo must share the fate of the vessel."

The act of the master of the Springbok in signing bills of lading of the character of those which he signed, and in sailing with a manifest giving no information as to the contents of his cargo, and in not carrying invoices giving particulars of the cargo, and in then testifying to his ignorance as to what he had on board, can be regarded in no other light than as a concealment of the real character of the contraband goods, so as to subject the vessel to condemnation, as the result of such fraud, when, under other circumstances, she might go free, even though the goods were confiscated. Mos. Contr. War, 97, 98. It is well settled that, from the moment a vessel, having on board contraband articles which have a destination to a port of the enemy, leaves her port of departure, she may be legally captured; that it is not necessary to wait until the goods are actually endeavoring to enter the enemy's port; and that, the transportation being illegal at its commencement, the penalty immediately attaches. Halleck, Int. Law, c. 24, sec. 7, p. 573; 2 Wildm. Int. Law, p. 218; 1 Duer, Ins. 626, § 7; The Imina, 3 C. Rob. Adm. 167; The Trende Sostre, 6 C. Rob. Adm. 390, note; The Columbia, 1 C. Rob. Adm. 154; The Neptunus, 2 C. Rob. Adm. 110.

There has been no application made to the court for leave to furnish further proofs, but an appeal to the supreme court was taken within ten days after the decree was made. Moreover, I do not think this case is one in which the owners of either the vessel or the cargo have so conducted as to entitle themselves to supply further proof. The conduct of the master, representing the owners of the vessel, was such, in affecting his ignorance or concealing his knowledge of the contraband articles on board, as not to justify the favorable consideration of the court towards the vessel; and the owners of the cargo are not parties to whom any such favor can be accorded. The privilege of further proof is always forfeited where there has been any deception or fraud. The Eenrom, 2 C. Rob. Adm. 1.

The vessel and her cargo must both of them be condemned.

[An appeal was taken to the supreme court, where the decree of this court was reversed as to the ship, but without costs or damages to the claimants, and was affirmed as to the cargo. The cause was remanded for further proceedings. 5 Wall. (72 U. S.) 1.]

Case No. 13,265.

SPRINGER v. FOSTER et al.

[1 Story, 601.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1841.

CONFLICT OF LAWS—ATTACHMENT—INSOLVENCY—RULES OF COURT—PROCESS.

1. The insolvent act of Massachusetts of 1838 (chapter 163) does not dissolve an attachment in the courts of the United States, under the antecedent state laws adopted by congress.

[Cited in Perry Manuf'g Co. v. Brown, Case No. 11,015.]

2. The legislature of Massachusetts can promulgate rules for the state courts only, and cannot affect the validity or effect of process in the courts of the United States.

Assumpsit [by Benjamin H. Springer against Benjamin Foster and trustees]. The principal was defaulted; and the questions arising in the cause respected the liability of the trustees.

C. P. & B. R. Curtis, for plaintiff.

Mr. Fuller, Mr. Rand, and Mr. Fisk, for trustees.

STORY, Circuit Justice. This cause was argued at a former term upon two questions arising upon the facts. The first was, whether an attachment of property upon mesne process, issuing out of the circuit

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

court of the United States, was dissolved by the act of the defendant, Foster, in making an assignment under, and taking the benefit of, the insolvent act of Massachusetts of 1838 (chapter 163). The second was, whether the general assignment act of Massachusetts of the 15th of April, 1836 (chapter 238), was repealed by the insolvent debtor act of the same state, of the 23d of April, 1838 (chapter 163).

The latter question is one altogether dependent upon the local statute law of Massachusetts, the construction of which peculiarly belongs to the state tribunals. And as the very point is said to be now pending in judgment before the supreme court of the state, I shall reserve my opinion, until it has been disposed of in that court; for, upon all such questions, the constant habit of the courts of the United States is to follow the decisions of the state courts.

The other question is one peculiarly and properly belonging to this court. And upon it I have not the slightest difficulty. When the state processes and the proceedings thereon were originally adopted by the courts of the United States under the acts of congress, all the incidents thereto, then existing under the state laws, were by implication and intendment of law also adopted. But no changes of the state law, subsequently made, have been ever admitted to change the nature of the process, or the proceedings thereon, or the effects thereof, as they stood at the time of their original adoption, unless so far as they have been sanctioned or adopted by subsequent acts of congress, or by the rules and practice of the courts of the United States in conformity therewith. Such has been the uniform doctrine upon this subject in all the courts of the United States, and it has repeatedly received the sanction of the supreme court. The cases of Wayman v. Southard, 10 Wheat. [23 U. S.] 1; Bank of U. S. v. Halstead, Id. 51; U. S. v. January, Id. 66, note; Ross v. Duvall, 13 Pet. [38 U. S.] 45; Beers v. Haughton, 9 Pet. [34 U. S.] 329; and U. S. v. Knight, 14 Pet. [39 U. S.] 301,—are all in point to show the uniformity, with which this construction has been recognised in the courts of the United States. The insolvent act of Massachusetts of 1838 (chapter 163) could, therefore, have no effect to dissolve an attachment in the courts of the United States under the antecedent state laws, adopted by congress; since the legislature of Massachusetts can promulgate a rule only for the courts of the state, and cannot affect the validity or effect of process in the courts of the United States. This, in substance, was the opinion pronounced at the former argument.

The case must, however, upon the other point stand for the final decision of the supreme court of the state, upon the ground, which was stated when the case was first broken, at the argument at the former hearing.

[See Case No. 13,266.]

Case No. 13,266.

SPRINGER v. FOSTER et al.

[2 Story, 383;[1] 6 Law Rep. 107.]

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

FEDERAL COURTS — FOLLOWING STATE ADJUDICATIONS—INSOLVENCY—CONFLICT OF LAWS—COSTS.

1. The courts of the United States follow the decisions of the state tribunals in all questions dependent upon the local statute laws of the states.

[Cited in Perry Manuf'g Co. v. Brown, Case No. 11,015; Jewett v. Garrett, 47 Fed. 631.]

2. No state insolvent laws can discharge the obligations of any other contracts made in the state, than those, which are made between the citizens of that state.

[Cited in Hale v. Baldwin, Case No. 5,913; Baldwin v. Hale, 1 Wall. (68 U. S.) 232; Demeritt v. Exchange Bank, Case No. 3,780.]

[Cited in Deering v. Boyle, 8 Kan. 358; Felch v. Bugbee, 48 Me. 13; Hawley v. Hunt, 27 Iowa, 308; Savoy v. Marsh, 10 Metc. (Mass.) 595; Scribner v. Fisher, 2 Gray, 47.]

3. Where certain bills of exchange were drawn in Pennsylvania on a citizen of Massachusetts, and were accepted by him in Massachusetts, it was *held*, that it was not competent for the legislature of Massachusetts, by the insolvent act of 1838, to discharge the obligation of these contracts.

[Cited in Perry Manuf'g Co. v. Brown, Case No. 11,015.]

[Cited in Whitney v. Whitney, 35 N. H. 470.]

4. *Held*, also, that attachments made on these bills of exchange, by process issued from the courts of the United States, were not dissolved in consequence of the defendant taking advantage of the insolvent law of Massachusetts, although such attachments on process from the state courts would be dissolved.

[Cited in Perry Manuf'g Co., Case No. 11,015.]

[Cited in Howe v. Freeman, 14 Gray, 578; Wendell v. Lebon, 30 Minn. 240, 15 N. W. 112.]

5. Under the circumstances of this case, the trustee was allowed only the costs and expenses incurred by him before the attachment, and the usual sum allowed for his costs, as trustee in this suit.

The only questions in this case arose on the answers of the trustee, Charles Carter. In his first answer, at the October term, 1840, he in substance stated, that on or about the ninth day of November, in the year of our Lord, eighteen hundred and thirty-nine, the said Foster did execute and deliver to the said Carter, a deed of assignment of all and singular the property then owned by the said Foster, for the equal benefit of all the creditors of the said Foster, who should become parties thereto, agreeably to the statute of Massachusetts, passed on the fifteenth day of April, in the year eighteen hundred and thirty-six; and which said deed of assignment was duly executed by the said Foster and the respondent, and all the requisites of the said statute fully and completely complied with. That he held possession of the said property till a large portion

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

and all of the said property liable to attachment, was attached, and possession thereof taken by Daniel J. Coburn, a deputy of the sheriff of the county of Middlesex, in the said commonwealth of Massachusetts, upon a writ issued by the court of common pleas of the said commonwealth, against the said Foster, and in which the respondent was summoned as the trustee of the said Foster, and which suit was still pending; but the respondent was informed, and believed that the plaintiff therein has discontinued against him as trustee; and the said property was afterwards attached by the marshal of the United States for the district of Massachusetts, upon four several writs, all in favor of the present plaintiff, and against the said Foster, the first three of which writs were returnable to the May term of this court, then next after their issuing, to be held, and the last of which writs was that in the present suit. That all, or a major part of the said writs, had been entered in the proper courts, and were then pending, or judgment had been rendered thereon against the said Foster. That in all the said suits, the respondent had been summoned as the trustee of the said Foster, but that in one of the said actions, he had been informed, and believed, that the said plaintiff had discontinued against him as such trustee; that he had commenced suits for the recovery of the said property, against Benjamin F. Varnum, the sheriff of Middlesex, and the United States marshal as aforesaid, which suits were then pending before the supreme judicial court of this commonwealth; that previous to the service of the plaintiff's writ upon him, he had collected of the debts assigned to him by said Foster, by the said deed of assignment, about the sum of eleven hundred and twenty-seven dollars, which, subject to all costs and charges, was then in his hands for the purposes and trusts in the said deed of assignment mentioned and set forth, and which he claimed to hold in virtue of the said deed of assignment, for the said purposes and trusts. That since the making of the said deed of assignment to him by the said Foster, and since the issuing of the said Lowell's and the plaintiff's writs and the attachment of the said property as aforesaid, to wit, on or about the seventeenth day of August, now last past, the said Foster took the benefit of the insolvent law of this commonwealth, passed on the twenty-third day of April, in the year eighteen hundred and thirty-eight, and entitled "An act for the relief of insolvent debtors, and for the more equal distribution of their effects," and that the respondent was thereafter duly chosen and appointed the assignee of the said Foster, under the provisions of the said statute, and accepted the said appointment, and received from the master in chancery, to whom said Foster applied for the benefits of the said statute, a deed of assignment, and the requisite conveyances of all the property of the said Foster, whereby all the said property, under the said statute, became vested in him, the said Carter. In the second answer of the trustee, at the present term, he further stated certain facts, which sufficiently appear in the opinion of the court.

[See Case No. 13,265.]

Benjamin R. Curtis, for plaintiff.

Henry H. Fuller, for the trustee.

STORY, Circuit Justice. When this case was formerly before this court, the question was mooted, whether the act of Massachusetts of the 15th of April, 1836 (chapter 238), providing for the validity of general assignments, like that under which an assignment was made to Carter, as stated in his answer, was repealed by the subsequent insolvent act of the 23d day of April, 1838, ch. 163, the benefit of which had been sought by the defendant, Foster. The same question was then pending in the state court; and, as it was a question of local law, dependent upon the construction of a state statute, the case was ordered to lie over to await the final decision of the state court. That decision has now been made, and the act of 1836 has been declared to be repealed by the insolvent act of 1838. The whole protection, therefore, asserted by the trustee under the act of 1836, is gone, and the general assignment, made to him by Foster, is a mere nullity. So far, then, as the trustee's rights are concerned, and stated in his first answer, that assignment may now be laid entirely out of the case. But upon the second answer, divers other questions have been made, which it is the duty of the court now to consider. And, in the first place, it is said, that the plaintiff's attachment is gone by reason of the proceedings of Foster under the insolvent act, stated in the first answer, which has discharged the obligation of the contracts or drafts, or bills of exchange, upon which the present suit has been brought. These drafts or bills were drawn in Philadelphia, and by the plaintiff, who is a citizen of Pennsylvania, on Foster, who is a citizen of Massachusetts, and were accepted by him at Charlestown in Massachusetts, and of course, they are contracts made in, and governed by the law of Massachusetts. This is true in one sense; but it by no means follows, that it was competent for the legislature of Massachusetts, under the insolvent act of 1838, to discharge the obligation of these contracts. On the contrary, the settled doctrine of the supreme court of the United States is, that no state insolvent laws can discharge the obligations of any contract made in the state, except such contracts as are made between citizens of that state. This was the decision in the case of Ogden v. Saunders, 12 Wheat. [25 U. S.] 213, which was subsequently affirmed in Boyle v. Zacharie, 6 Pet. [31 U. S.] 348. These decisions have been repeatedly acted upon in this commonwealth. Braynard v. Marshall, 8 Pick. 194; Betts v. Bagley, 12 Pick. 578; and Agnew v. Platt, 15 Pick.

417. This objection, then, cannot prevail. Indeed, it does not appear by the trustee's answer, that Foster did ever obtain his discharge under the insolvent act. Then, is the attachment dissolved by the insolvent act of 1838? It may be admitted, that if this had been an attachment by process issued from the state court, it could have been dissolved by the fifth section of the insolvent act of 1838. But the question is a very different one in the case of process, which issued from a court of the United States. By the acts of congress, the state process, existing at the time when those acts were passed, was adopted, with all the rights and incidents then attaching thereto. But no subsequent repeal or change of such process by the state legislature, is, or can proprio vigore be of any validity or effect in the courts of the United States. On the contrary, the process and the incidents thereto, and the rights growing out of the same, remain the same in the courts of the United States, as they were at the beginning, notwithstanding any subsequent state legislation, unless, indeed, under the authority of some act of congress, the courts of the United States have adopted such state legislation, or it has been directly adopted by an act of congress. This was fully settled in the cases of Wayman v. Southard, 10 Wheat. [23 U. S.] 1; U. S. Bank v. Halstead, Id., 51; Beers v. Houghton, 9 Pet. [34 U. S.] 332; and U. S. v. Knight, 14 Pet. [39 U. S.] 301. So that there is no ground to assert that the insolvent act of 1838 has dissolved the present attachment, since that act has never been adopted by congress, nor received any sanction from this court, even if it had authority to adopt it, which I am far from supposing.

The case, then, is reduced to the simple consideration of the allowances to be made to the trustee. The first allowance claimed is for costs and expenses, incurred by the trustee in certain suits, which he commenced in the state courts, under the local attachments in those suits, which had been assigned to him by Foster, upon the general assignment. He failed in those suits, for the very reason that the assignment was adjudged to be a nullity. And certainly, there is no ground to assert, that against the plaintiff he has any claim to be remunerated out of the property, attached by him in the present suit, to reimburse himself for expenses, which, so far as the plaintiff is concerned, were tortious and injurious to him. It has been said that the assignment, although void as to debts due to other creditors, was good at the common law, as to other debts due to the trustee. But this was not made a ground of defence in the state court; and this court has no right to overhaul or re-examine the judgment rendered in those suits by the state court. It must here be treated as valid and conclusive against all right in the trustee to maintain it.

No objection is made by the defendant to the allowance of the costs and expenses incurred by the trustee under, or in virtue of the general assignment, before the plaintiff's attachment. It does not appear to me that he has a right to any costs or expenses, subsequently incurred under or in virtue thereof. They were not authorized by the plaintiff; and it does not follow that they were for his benefit. But if they were, I am not aware that after notice of the attachment, the trustee had any right to incur any costs or expenses on account of the plaintiff.

As to the supposed debt, due to the plaintiff on a note, stated in the answer, it is admitted in the evidence, that it is a mere indemnity or security for an outstanding claim against him, which may have been paid. And it is now admitted at the bar, that this claim has been paid; and therefore the note has ceased to have any farther validity. In point of law the debt is extinguished. Carter must therefore be adjudged as trustee for the full sum collected by him and in his hands at the time of the plaintiff's attachment, viz.: for the sum of $1127, deducting only the costs and expenses incurred by him in the collection before said attachment, and such a sum, as he is entitled to be allowed in the present suit for his costs as trustee.

SPRINGER (MATHEWS v.). See Case No. 9,277.

SPRINGFIELD FIRE & MARINE INS. CO. (LUCE v.). See Case No. 8,589.

SPRINGFIELD FIRE INS. CO. (CATLIN v.). See Case No. 2,522.

SPRINGPORT (AVERY v.). See Case No. 676.

SPROGELL (KROUSE v.). See Case No. 7,940.

Case No. 13,267.

Ex parte SPROUT et al.

[1 Cranch, C. C. 424.] [1]

Circuit Court, District of Columbia. July Term, 1807.

COMMITMENT—WHAT MUST STATE—SHIPPING—END OF VOYAGE—SEAMEN—DESERTION.

1. A warrant of commitment must state probable cause, supported by oath, must be under seal, and must limit the term of imprisonment. [See Ex parte Bennett, Case No. 1,311.]

2. A voyage is not ended until the cargo and ballast are discharged.

3. Quære, whether the authority to commit a seaman for deserting his ship is not limited to a justice of the peace.

Habeas Corpus. It appeared by the return that they were committed by virtue of the following warrant:

"Alexandria County—ss. You are required to receive into your jail and custody, Robert

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

Sprout and Thomas Bailey, two sailors belonging to the ship Alexandria, Captain William Weston, they being charged for neglect of duty on board, rioting and threatening to take the life of their captain and mate contrary to law. Given under my hand this 14th day of July, 1807. A. Faw. Captain James Campbell, Jailor."

Captain Weston appeared and prayed that they might be now committed, and grounded his motion on the following affidavit, viz.: "This is to certify that Robert Sprout and Thomas Bailey, seamen belonging to the ship Alexandria, under my command, did on the 14th day of July, 1807, desert from the said ship without leave of absence. W. Weston. Sworn to in court. 16 July, 1807. G. Deneale,"—and produced the shipping articles; and it was admitted that the cargo was not discharged.

Mr. Youngs, for the prisoners, contended that the voyage was ended as soon as the vessel arrived in port, before she had discharged her cargo; and that the remedy given to the master by the act of congress of July 20, 1790, § 7 (1 Stat. 134), for confining the seamen, does not apply to the period of time between the arrival and the discharge.

THE COURT discharged the prisoners on the ground of the defects in the warrant of commitment. It not being on oath, no time of imprisonment limited, and not under seal.

THE COURT refused to commit them again on the affidavit of the master, because they doubted whether the authority was not limited to a justice of the peace.

But THE COURT was clear that the voyage contracted for was not ended until the discharge of the cargo and ballast, if required.

Case No. 13,268.

SPURR et al. v. PEARSON.

[1 Mason, 104.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1816.

SEAMEN — CONTRIBUTION FOR EMBEZZLEMENT ON BOARD—WITNESS—INTEREST.

1. When an embezzlement takes place on board of a ship, the seamen are not liable to contribute out of their wages, unless it was caused by their fraud, connivance, or negligence; or, if the offender is unknown, unless a presumption of guilt is fixed upon all the crew, or at least on those, who are called upon to contribute.

[Cited in The Boston, Case No. 1,673; Edwards v. Sherman, Id. 4,298; U. S. v. Stone, 8 Fed. 251.]

2. One seaman may be a witness for another in any suit respecting the same voyage, although interested in the question, if not interested in the suit.

[Cited in The Boston, Case No. 1,673.]

This was an allegation for mariners' wages [by Elijah Spurr and others against Charles Pearson]. The libellants in February, 1816, shipped for a voyage in the ship Augusta, commanded by the respondent, from New Orleans to Havre de Grace, and from thence to Boston; and afterwards served on board the ship during the voyage. There was no dispute as to the sum due for wages; but the defence turned altogether upon the right of the master to retain their wages by way of contribution for an embezzlement, alleged to have been made by the crew during the voyage. It appeared in evidence that one trunk, and one case of goods of the value of $717, which were taken on board on freight at Havre were missing on unlading the cargo at Boston; but the loss was not ascertained until about ten days after the ship's arrival there. These goods were taken on board a day or two before sailing from Havre, and were stowed in the fore part of the ship, and secured, in the usual manner, by a strong partition or bulk-head, to prevent the crew from getting at them. Orders were repeatedly given by the mate not to have the bulk-head removed, without notice to, or direction from, him. The cook, Paterson, however, a day or two before sailing, and after the trunks were stowed, removed the bulk-head without any notice or direction for this purpose, under the pretence that it was more convenient to get wood in this way, than in an other. At the time, the ship lay in an enclosed dock, and there were three laborers from the shore to assist in the ship's work, during the whole day before she sailed; but they left the ship at supper-time. The officers of the ship did not know of the bulk-head being removed until the next morning. The trunks were so heavy, that they could not easily be removed without the assistance of two men; nor without so much noise, as must awaken the crew, who were sleeping in the forecastle, if done during the night. During the homeward voyage some bonnet trimmings, and some chenille cord, were seen in the possession of Charles Bush, one of the libellants; and some chenille cord and a pair of gloves, in that of James Hamilton, another of the crew. These goods were of a description, as it was alleged, similar to those stolen. Both Hamilton and Bush were in the watch, having care of the ship the night before the departure from Havre. It was not proved that any of the libellants, except so far as the preceding evidence implicated them, were concerned in the transaction, and Luke Wales, one of the libellants, had liberty to go on shore the night on which the embezzlement was supposed to have been made, and did not return until the ship was under way for sea. The owners of the ship had, previous to the commencement of this suit, paid to the consignees the value of the packages so stolen. Hamilton, after the ship's arrival at Boston, was arrested for the theft, on the complaint of the master; and was, at the hearing, in prison under an indictment found against him.

Mr. Munroe, on behalf of respondents, objected to the evidence of any of the crew in

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

this case, considering them all, as liable to contribute to the loss, and contended that evidence, given by any one of them of embezzlement by any of the rest, was illegal, and ought not to be received. Thompson v. The Philadelphia [Case No. 13,973]. That they being all ordered to be on board, any accident happening to the cargo in consequence of the negligence or misconduct of any part of them, rendered them all accountable. Mariners v. The Kensington [Id. 9,085]; Crammer v. The Fair American [Id. 3,347]; Wilson v. The Belvidere [Id. 17,790]; Brevoor v. The Fair American [Id. 1,847].

Mr. Fales, on behalf of libellants, contended, that by the laws of England a seaman was accountable for his own individual conduct alone. Thompson v. Collins, 1 Bos. & P. (N. R.) 347; Abb. Shipp. 326, and notes. That, if the whole crew were in any instance answerable in a body for embezzlement, it was only, when it was uncertain, which of them committed the offence. That in this case it was well ascertained who did commit the offence; and that the respondent had precluded himself, by his prosecution of Hamilton, from alleging his ignorance of the offender. That the decisions cited for the respondent were supported by no others in this country, and were much weakened by the authorities adduced against them. That this case ought not, therefore, to be affected by them, but should be decided on general principles.

Mr. Munroe, in reply, argued, that it could not be inferred from the prosecution of Hamilton that the respondent considered him, as the only guilty one of the crew; he was arrested in consequence of some of the articles which were lost, having been found in his possession: that it was conceded by the other side, that the whole crew knew of Hamilton's having these articles, and if so, it was their duty to inform, or they made themselves parties to the guilt, and were, consequently, all liable to the contribution: that the cases, cited by the counsel for the libellants, were decisions at common law, and, therefore, could not avail to contradict those decided in the admiralty.

STORY, Circuit Justice. An exception has been taken to the competency of some of the crew, who have been sworn as witnesses, upon the general ground, that it is against the policy of the law to allow mariners engaged in the same voyage to be witnesses for each other. And some of the authorities cited do certainly go to the length of asserting, that in suits, where the mariners have a common interest in the point in contest, they cannot be permitted to testify for each other. This is assuming a rule different from the common law, which does not reject the testimony in like cases, unless the witness have a direct interest in the event of the suit. If he have an interest in the question, the objection goes to his credit only, and not to his competency. If, indeed, the maritime law does entertain another doctrine, it might be proper to adhere to it. But it is incumbent upon those who assert it, to establish the existence of such a doctrine. The Consolato del Mare (Casaregis' Ed. c. 221; Boucher's Ed. c. 224, § 620) declares, that mariners may be witnesses for each other after the voyage is ended, where they are not interested in the event of the suit, nor have any expectation of gain or profit thereby.[2] This seems consonant with the rule of the common law. The civil law does not enumerate, among its exceptions to testimony, that, which is now contended for. While it sedulously guards against a person's being a witness in his own cause, or in one, from which he can derive benefit (nullus idoneus testis in re suâ intelligitur, Dig. lib. 22, tit. 5, c. 10; Dom. bk. 3, arts. 6, 8, § 3), and excludes the testimony of persons standing in domestic relations with the parties (etiam jure civili domestici testimonii fides improbatur, Cod. de Test. lex. 3; Poth. Pand. 643, art. 6, § 1; idonei non videntur esse testes, quibus imperare potest, ut testes fiant, Id.; Dig. lib. 2, tit. 5, bk. 8; Ferrière, voce "Témoin"; Dom. bk. 3, art. 8, § 3; 1 Poth. Ouvr. 404), it exempts from this latter prohibition mariners in causes of the owner or master of the ship (Cod. lib. 11, tit. 5, c. 3; Peck. ad Rem Nauticam, 397; Casaregis, Disc. 19, notes 28, 29; Cleirac, Contr. Marit. bk. 145, c. 8; Loccen. de Jure Marit. c. 10, § 6. See also, Laws of Wisbuy, art. 9, and 1 Valin, Comm. 302, 303).

The silence of the civil law in such a case is entitled to great consideration; for that law forms the foundation of the maritime usages of all Europe; and if to this we add also the silence of the positive codes of all the great maritime powers, every doubt, which may properly be indulged on this subject, is strengthened and increased. In the researches, which I have been able to make in the ancient and modern codes of commerce, not a single instance has been found, in which the exception contended for has been promulgated or enforced. Under these circumstances I should hesitate a great while, before I should abandon the rule of the common law, which stands strongly supported by principle and authority. Hoyt v. Wildfire, 3 Johns. 518; Abb. Shipp. (Am. Ed.) 1810, p. 540, note. The objection, therefore, to the competency of the witnesses is overruled.

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[2] "Ancora più un marinaro può fare testimonio all' altro poi siano usciti del viaggio, con che non fusse interessato nel contratto nel quale sarà dato per testimonio, nè che spettassino danno, nè utile." And Casaregis, in his explanation or commentary, says: "Un marinaro, terminato il viaggio, può testificare per l'altro." And Boucher translates the chapter thus: "Encore plus, le marinier peut servir de témoin à un autre marinier après le voyage, pourvu encore qu'il ne soit point interessé dans la contestation, ni qu'il n'espère point de dédommagement ou profit."

But the most important question still remains; whether in any cases, and if so, in what cases, seamen are compellable to contribute their wages to indemnify the owner and master for embezzlements of the cargo of the ship. There can be no doubt, that if an embezzlement be traced home to a particular mariner, he is responsible for the full value. And in a suit for his wages the admiralty will make the proper deduction, or even under some circumstances sustain a direct suit for recompense in damages. In cases of aggravated and inflamed plunderage, the maritime law imposes the additional forfeiture of the whole wages. Consolato del Mare (Casaregis' Ed.) c. 164; Id. (Boucher's Ed.) c. 167. And the last clause in the usual shipping articles is meant to enforce this regulation. Abb. Shipp. (Am. Ed. 1810) Append. No. 8; Thompson v. Collins, 1 Bos. & P. (N R.) 347. In like manner, a mariner may be compelled to recompense the owner and master for any other loss, sustained by his fault, fraud, or negligence. Bellamy v. Russell, 2 Show. 167; Lane v. Cotton, 1 Ld. Raym. 650, per Gould, J.; Molloy, bk. 2, c. 3, § 13; Cleirac, Judgm. of Oleron, art. 11, pp. 27, 28. And if the fault, fraud, or negligence be very gross, and injurious, it may produce a total forfeiture of wages. In each of these cases, however, it seems, that neither public policy nor principle would extend the contribution, or forfeiture, beyond the parties immediately in delicto; and that as to the rest of the crew, who are innocent, the same rules ought to apply, as if the offence were committed by mere strangers; in which case it is admitted on all sides that no contribution is due.

But it is asserted, that another doctrine has received the sanction of authority; and that the policy of the law obliges mariners, engaged for the voyage, to be responsible for each other, so as to sustain the claim in such cases for a general contribution by the whole crew. Some of the cases cited establish a general contribution, even when some of the crew were in a situation to repel every presumption of guilt; while others seem to proceed upon the ground, that as it could not be fixed upon any person in particular, the presumption of guilt equally attached to all. Mariners v. The Kensington [Case No. 9,085]; Crammer v. The Fair American [Id. 3,347]; Sullivan v. Ingraham [Id. 13,595]; Abb. Shipp. (Am. Ed. 1810) p. 526, note 2. On the other hand, the doctrine of a general contribution for embezzlement has been recently questioned or denied in the courts of common law. Thompson v. Collins, 1 Bos. & P. (N. R.) 347; Lewis v. Davis, 3 Johns. 17. And the present cause now stands before me upon a doubt, suggested by my learned brother, as to the solid foundation of the rule, by which he has felt himself heretofore bound to decide. Under these circumstances it has become the duty of the court to review the grounds of the decision; and to ascertain, if possible, what the maritime law has pronounced upon the subject.

It is remarkable, that in the civil law, where the subject of the thefts of mariners, and the consequent responsibility of the owner and master to the shipper, are distinctly treated of, not the slightest allusion is made either in the text, or in the most approved commentaries, to a general contribution. Dig. lib. 4, tit. 9, cc. 1–7; Dig. lib. 14, tit. 1, cc. 1–7; Dig. lib. 47, tit. 5, lex unica; Peck. Ad Rem Naut. H. T. The same silence, at least as far as my inquiries have extended, pervades, not only the positive codes of all Europe, but all the elementary writers upon maritime law, with the exceptions hereafter taken notice of, even where they discourse upon the subject of embezzlements, from the epoch of the Consolato del Mare to our own times. Consolato del Mare (Casaregis' Ed.) cc. 59, 77, 164, 195; Id. (Boucher's Ed.) cc. 62, 80, 167, 198; Targa, c. 17, § 12; Roccus de Nav. notes 40, 62; Laws of Wisbuy, art. 47; Casaregis, Disc. 23, note 81; Kuricke, 714, note 9; Id. 719; Straccha de Nautis, pt. 3, note 18; Stypmn. Jus. Marit. pt. 4, c. 17, p. 571; Loccenius Jus. Marit. lib. 3, c. 8, f. 1037. See, also, the Laws of Oleron, of the Hanse Towns, of Wisbuy, of France, of Rotterdam, in Cleirac, Malyne, Peters' R. (App.), Magens and Sea Laws; Rhodian Laws, in Sea Laws, p. 199, etc., and particularly section 1, arts. 19, 20, p. 207, and section 2, arts. 2, 3, p. 209; art. 50, p. 233; Peck. Ad Rem Naut. tit. Rhod. Jus. Navale, arts. 1, 2, 3; Malyne, 103, 104; Collection of Sea Laws in Malyne, 55, 56; 1 Emerig. 381, 604. The natural inference from these considerations would seem to be, that the rule of construction if ever established, has not been as universally adopted into the maritime law, as some of the recent authorities would lead us to imagine.

Molloy (book 2, c. 3, § 9, cited also in Sea Laws 455) has been supposed to support the rule in its most enlarged extent. But even admitting his authority, which is certainly questionable, it may well be doubted, if the obscure terms, in which he has expressed himself, warrant such an inference. He barely states, that, "if the goods are so embezzled, or so damnified, that the ship's crew must answer, the owners must deduct the same out of their freight to the merchants, and the master out of the wages of the mariners." And he adds, "for before the mariner can claim his wages out of what the ship hath earned, the ship must be acquitted from the damage, that the merchant hath sustained by the negligence or fault of the mariners; and the reason is, for that as the goods are obliged to answer the freight, so the freight and ship are tacitly obliged to clear the damage; which being done, the mariners are let in for their wages."

Molloy has not attempted to enumerate the special cases, in which the crew are liable for goods embezzled; and if he is to be un-

derstood to assert in the reason given in the close of the passage, that the seamen are liable to a deduction of their wages in all cases, where the ship and freight, or rather the owner and master, are liable for damage of the goods, his position is not law. It seems to me that his real meaning is, that the seamen are responsible only, when the damage has been sustained by their own fault or negligence. And the learned Mr. Chief Justice Kent has placed this doctrine upon its true footing. Lewis v. Davis, 3 Johns. 17. Molloy, therefore, may be safely dismissed without further comment.

Valin, however, speaks in a more clear and decisive language. After remarking, that embezzlements are very common in voyages from America (the American colonies of France), and that it is extremely rare, that the offenders are discovered, he says, that the policy adopted to indemnify the shippers, when the thief cannot be ascertained, is, to apportion it upon the whole crew indiscriminately, as well the captain, as the officers and seamen, according to the ratio of their respective wages. And he adds, that this apportionment is made upon the captain and officers, not from any suspicion, that they are concerned in the offence; but to make them more attentive, from personal interest, to prevent embezzlement by the crew. And he distinctly admits, that no contribution can be claimed, when the goods have been stolen by a particular person. 1 Valin, Comm. 459, 460. The authority of Valin stands deservedly high from his general accuracy and learning. But it is not quite clear, whether he means here to speak of a general rule of the maritime law or French law, or of a particular custom in the American trade. If the latter be his meaning, and there is much probability in the supposition, it has nothing to do with the question before the court. This supposition derives some confirmation from the fact, that neither Emérigon nor Pothier, in treating upon the general subject, refer to any such apportionment. 1 Emérig. 381, 604; Poth. Louage Marit. p. 2, § 2, note 153; Id. p. 3, § 2, note 178. But let us proceed to consider the doctrine of Valin, assuming him to pronounce it as a general rule of the maritime law. It must be admitted in the first place, that he does not contend for a contribution, when the offence is fixed upon an individual; but only when the author is unknown. In the next place, he makes no distinction as to contribution, whether from the facts of the case the presumption of committing the offence rest upon the whole, or a part of the crew, or upon mere strangers; and yet a distinction in the latter case is strongly upheld by principle and authority. In the third place, he cites no authority for his doctrine; and no inconsiderable difficulty attends it, since it derives no support from other maritime jurists, or from the acknowledged principles, that regulate the contract for hire. Why should a mariner, any more than any other laborer on wages, be responsible for the acts of others, in which he has had no participation or connivance? If he has been guilty of fraud, or negligence, or has connived at, or aided in, the embezzlement, he may be justly charged upon the general principles of the contract. But if nothing of this sort be justly imputable to him, it is not easy to perceive, why he should be responsible for those, over whose actions he has no legal control. And whatever may be the policy of including the officers of the ship in the general contribution, it remains to establish its legal propriety and justice.

It is certain, that the doctrine of Valin has not been incorporated into the English maritime law; or, at least, its existence is nowhere clearly stated, or proved. And it has been very pointedly remarked, "that if such be the rule of law, it is scarcely possible, but that it must have been often mentioned in our (English) books, and as well known, as any rule of maritime law, since frequent occasions must have arisen for the application of it." Per Chief Justice Mansfield, in Thompson v. Collins, 1 Bos. & P. (N. R.) 347. And in the very case, in which this remark was made, it was manifestly the opinion of the whole court, that no such rule existed. The construction, too, put by the court in that case, upon the last clause in the shipping articles (which is also in the usual shipping articles in the United States), negatives altogether the notion of any joint responsibility. That construction is, that the words are to be referred respectively to every seaman, who shall plunder, embezzle, or commit an unlawful act; so as to make each person answerable only for his own default. It appears to me, that this decision is founded in sound reasoning; and if so, it must entirely supersede the supposed rule of contribution now contended for, in all cases governed by the shipping articles; since it is the law of the contract, and excludes every contradictory implication.

Nor does the supposed rule of contribution gain any additional force from the analogous cases, where compensation is made by the officers and crew for losses occasioned by bad ropes, or negligence in hoisting or storing goods. Notwithstanding the language in some of the authorities, it may well be doubted, if the contribution in those cases extends beyond the persons, by whose fault or negligence the damage has been occasioned. See Wilson v. Belvidere [Case No. 17,790]; Laws of Oleron, arts. 10, 11, 27; Laws of Wisbuy, art. 49; Malyne, 103; Sea Laws in Malyne, 55; 2 Valin, Comm. 79, 161; Casaregis, Disc. 23, note 65, et seq.; Consolato del Mare (Casaregis' Ed.) c. 24; Id. (Boucher's Ed.) c. 247.

Upon the whole my opinion is, that the rule of contribution, as contended for at the argument, and as asserted by Valin, cannot be sustained as a general rule of the mari-

time law; that it has not that general sanction, or universal use, which entitles it to such a consideration; and that it has not such intrinsic equity or justice, as that, in the absence of direct authority, it ought to be adopted as a limit upon judicial discretion. On the contrary, it seems to me, that the true principles, which are to govern in these cases, are those of the general contract of hire; and that the most, that the maritime law has done, is to enforce these principles, by allowing the owner and master to make an immediate deduction from the wages of the offending parties, instead of driving them to the circuity of an action for damages. The result of this opinion is, that where the embezzlement has arisen from the fault, fraud, connivance, or negligence of any of the crew, they are bound to contribute to it, in proportion to their wages: that where the embezzlement is fixed on an individual, he is solely responsible: that where the embezzlement is clearly shown to have been made by the crew, but the particular offenders are unknown, and from the circumstances of the case, strong presumptions of guilt apply to the whole crew, all must contribute. But that where no fault, fraud, connivance, or negligence is proved against the crew, and no reasonable presumption is shown against their innocence, the loss must be borne exclusively by the owner or master: that in no case are the innocent part of the crew to contribute for the misdemeanors of the guilty; and further, that in a case of uncertainty, the burden of the proof of innocence does not rest on the crew; but the guilt of the parties is to be established beyond all reasonable doubt, before the contribution can be demanded. In delivering this opinion, I am fully aware, that it encounters that of learned judges, for whom I entertain the most entire respect and deference; and the weight of their judgment has induced me to pause at every step of the investigation. But after much deliberation I have pronounced the opinion, which has my most unhesitating assent. It stands supported, as I trust, by the negative testimony of the oracles of the civil and maritime law; and by the positive adjudications of some of the most respectable judicatures of our own country, and Great Britain. Thompson v. Collins, 1 Bos. & P. (N. R.) 347; Abb. Shipp. p. 4, c. 3, § 5; Lewis v. Davis, 3 Johns. 17.

It will now become necessary to apply these principles to the present case. In the first place, the cook was grossly disobedient as well as negligent, in removing the partition, by which the loss was occasioned. He ought, therefore, to contribute to the whole extent of his wages. In the next place, there is a vehement suspicion attached to Hamilton and Bush, as being either principals, accessories, or connivers in the embezzlement. The goods, found in their possession, are said to be of the same description as some of those stolen. Under such circumstances, it is incumbent on them to explain the manner, in which these goods came into their possession; and, if they fail so to do, the presumption of their innocence is not maintained. In respect to the rest of the crew, as neither the time, manner, nor circumstances of the embezzlement, are distinctly proved, it is difficult to charge them with fraud, negligence, or connivance. It is the undoubted duty of mariners to attend carefully to the preservation of the ship and cargo. But the general presumption of law, that every man does his duty, ought to prevail in their favor, until the contrary is shown. The burden of proof, to establish the right of contribution, rests in this case on the respondent; and, as he has not supplied that proof, a decree must be pronounced, that the libellants, with the exception of Bush and Hamilton, recover their wages. Under the circumstances, no costs are to be allowed to either party.

SQUANKUM & FREEHOLD MARL CO. (HORTON v.). See Case No. 6,710.

SQUAUGH (UNITED STATES v.). See Case No. 16,370.

Case No. 13,269.

In re SQUIRE.

[3 Ban. & A. 133;[1] 2 O. G. 1025.]

Circuit Court, E. D. Missouri. Oct. 22, 1877.

PATENTS — CONTEST — REMEDY IN EQUITY — PRACTICE.

1. A bill filed under section 4915 of the Revised Statutes is an original and not an appellate proceeding; and in such a proceeding it is proper to take the testimony before an examiner.

2. The practice, in such a proceeding, is governed according to equity rules, and a party contesting the petitioner's right to a patent cannot confine him to matters existing of record in the patent office, or in the supreme court of the District of Columbia.

[Cited in Butler v. Shaw, 21 Fed. 327; Butterworth v. U. S., 112 U. S. 50, 5 Sup. Ct. 31; Gandy v. Marble, 122 U. S. 439, 7 Sup. Ct. 1292.]

3. Section 4915, of the Revised Statutes must be construed to mean that when an application is refused by the commissioner (as in cases of interferences), or by the supreme court of the District of Columbia (as in other cases), the applicant may have remedy by bill in equity.

4. Such a case having been presented by a bill in equity and notice given, as prescribed, the subsequent proceedings must be such as pertain to equity causes.

5. The court will receive all the proceedings had before the patent office, and, when an appeal lies to the supreme court of the District of Columbia, all the proceedings had before that court, together with all new and additional testimony taken in the equity proceedings.

John J. Squire and one McDonough were in interference in the patent office upon their

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

several applications for patents. The decision of the commissioner was adverse to Squire, who thereupon brought a bill under section 4915 Rev. St., and gave the proper notice to McDonough, who appeared and answered. The question arising whether Squire could introduce testimony in this proceeding other than that given before the commissioner, Squire moved for the appointment of a special examiner, under the amended 67th rule, which motion was opposed by McDonough.

S. S. Boyd, for the motion.
West & Bond, contra.

TREAT, District Judge. It appears that Squire and McDonough made separate application for a patent substantially for the same device. The examiner of interferences decided in favor of Squire. Upon appeal, the board of examiners-in-chief, sustained by the acting commissioner, reversed the decision of the examiner of interferences. Thereupon Squire instituted this suit, under section 4915, of the United States Revised Statutes, for a decree in his favor for a patent for his invention, as specified in his claim, or for such part thereof as he may be found entitled to. The petitioner now moves for an examiner to take testimony, to which motion McDonough, who has received due notice, being the "adverse party," appears and objects, on the ground that the proceedings in this suit are substantially an appeal from the patent office, to be determined solely by the matters of record in that office, with no new or independent testimony admissible. It is, therefore, for this court to decide what, under the United States patent laws, is the appropriate mode of proceeding in such a case, and what testimony can be received. Section 4886 prescribes for what, and under what, facts and circumstances, a patent may be procured. Section 4893 states what preliminary steps are to be had for the purpose. Section 4904 provides the course to be pursued when, in the opinion of the commissioner, an interference may exist. The primary examiner must first pass upon the case; then, if appeal is had, the board of examiners-in-chief must decide. Section 4909 gives the right of appeal in cases like that now before the court to the board of examiners-in-chief, and section 4910 from said board to the commissioner in person. There is a marked distinction running all through the patent laws between cases where interferences are supposed to exist and where applications for patents are made, no interferences appearing. Thus section 4911 reads: "If such party" (applicant), "except a party to an interference, is dissatisfied with the decision of the commissioner, he may appeal to the supreme court of the District of Columbia, sitting in banc." Section 4915 must be construed distributively, viz.: When application is refused by the commissioner (as in cases of interferences), or by said supreme court (as in other cases), "the applicant may have remedy by bill in equity, and the court having cognizance thereof, on notice to adverse parties, and other due proceedings had, may adjudge," etc.

Such a case having been presented by a "bill in equity," and notice given as prescribed, the "due proceedings" to follow must be such as pertain to equity causes. Reference to section 4918 supports this view, for it provides for relief by a "suit in equity," notice and "due proceedings had according to the course of equity." The system permits appeals to run the indicated course to the supreme court of the District of Columbia in all cases except those of interferences. In the latter, if the commissioner decides against either of the applicants, he may have his remedy by "bill in equity," with "due proceedings had," as in the other cases he may proceed by such a bill after said court, on appeal, has passed upon the controversy. So, when interfering patents have been granted, remedy by "suit in equity," under section 4918, is allowed, "on notice to adverse parties and other due proceedings had according to the course of equity."

It would seem, therefore, that the course of proceeding in either case is clear—viz., "according to the course of equity." Even in the absence of these explicit terms it would be apparent that a suit in equity would have to be governed in its proceedings by equity rules. A manuscript decision by Justice Nelson, in the case of Atkinson v. Boardman [Case No. 607], has been produced, wherein section 16 of the act of 1836 (5 Stat. 123), and section 10 of the act of 1839 (5 Stat. 354), were under consideration. So far as the point now before this court is concerned, those sections and the opinion of Justice Nelson are very pertinent and applicable, for sections 4915 and 4918 contain substantially the same language, and are in reference to the same subject—indeed, a revision mainly of those sections of the prior acts.

Justice Nelson held: "The question before the commissioner and chief justice contested was a question of fact—namely, which of the parties was the first and original inventor. The same question is now before us, resting upon the proofs which were before the commissioner, and also additional testimony taken since the filing of the bill. * * * The provisions of the acts of congress, already referred to, allowing the party failing in his application, to file a bill, do not restrict the hearing, in this court, to the testimony used before the commissioner. Either party, therefore, is at liberty to introduce additional evidence, or rather, to speak more accurately, the hearing is altogether independent of that before the commissioner, and takes place on such testimony as the parties may see fit to produce agreeably to the rules and practice of a court of equity. The evidence before the commissioner is not evidence here, except by consent of parties. It is taken, generally, without much regard to formality, and is ex

parte, and, even if permitted to be used here, not entitled to the credit of proof taken in the usual way."

In Ex parte Greeley [Case No. 5,745], a decree for a patent was sought after an appeal had to the supreme court of the District of Columbia. The bill was filed under section 52 of the act of July 8th, 1870, being the same as section 4915 of the Revised Statutes, and the United States circuit court, in stating the case and referring to the foregoing section 52, incidentally remarked that "it is virtually an appeal from the decree of the supreme court of the District of Columbia rejecting the application for a patent." So far as ascertainable from the reported case, only the records of the patent office, the proceedings in the supreme court of the District of Columbia, and the affidavit of the complainant in support of his bill, were before said circuit court.

Section 43 of the act of July 8th, 1870, now section 4905 of the Revised Statutes, authorizes the commissioner of patents to "establish rules for the taking of affidavits and depositions required in cases pending in the patent office; and such affidavits and depositions may be taken before any officer authorized by law to take depositions to be used in the courts of the United States, or of the state where the officer resides." The sections following provide the modes of enforcing the attendance of witnesses.

Hence, all the proceedings had before the patent office should be received, together with such other testimony as may be taken in the progress of this suit. When the United States circuit court for the district of Massachusetts spoke of the case before it as "virtually an appeal," it did not determine that no new testimony was allowable, nor that the cause was to be governed solely by rules pertaining to an appeal.

In stating that the case was "virtually an appeal," no more was meant than that the object of the bill was to secure a different result from that which the patent office and the supreme court of the District of Columbia had allowed. In that sense alone was there a virtual appeal.

The case before Justice Nelson was, in the then condition of the statutes, for an allowance of a patent which had been refused; the sections of the then existing statute being what, under subsequent legislation, have become sections 4915 and 4918 of the Revised Statutes. This is a case, however, as was that before Justice Nelson, for a patent which had been refused. The refusal here was on the ground of interference. Irrespective of the ground of refusal, and irrespective of the fact that an appeal may or may not lie to the supreme court of the District of Columbia, and, also, irrespective of the fact that interfering patents may have been issued, the complaining party may have his remedy in equity under section 4915 or 4918, as the case may be, and the proceedings will be of the same character. The court will receive all the proceedings had before the patent office, and when an appeal lies to the supreme court of the District of Columbia, all the proceedings had before that court, together with all new and additional testimony taken in the equity proceedings. If this be not so, then no force is given to the legislative will which permits suits in equity after decision by the patent office and the said appellate court. A United States circuit court proceeds not as an appellate tribunal, but as a court of original jurisdiction.

The motion is granted.

Case No. 13,270.

SQUIRE v. ONE HUNDRED TONS OF IRON.

[2 Ben. 21.] [1]

District Court, S. D. New York. Nov., 1867.

SALVAGE—AGREEMENT—JURISDICTION.

1. Where the libellant, who owned some blocks, let them to parties who were endeavoring to get off a wrecked vessel which they had bought, at Nassau, N. P., to be used in getting the vessel off, at so much a day, the vessel to be responsible for the hire and for the safe return of the blocks: *Held*, that he had no claim to recover, as a salvor, the price agreed upon, or for the loss of the blocks, either in personam against the parties who owned the wreck, or against property saved from her.

[Cited in The Marquette, Case No. 9,101; The Williams, Id. 17,710; The Louisa Jane, Id. 8,532.]

2. The clause making the vessel responsible for the blocks and for their hire, did not create any hypothecation of her which a court of admiralty can enforce.

[Cited in The Marquette, Case No. 9,101.]

In admiralty.

BLATCHFORD, District Judge. This is a libel for a salvage compensation, filed against one hundred tons of iron, alleged to have been saved from a steamer called the Agnes Louisa, at Nassau, N. P., and against Henry N. Farr, John C. Rahming, Walter Rahming, Henry Rahming, and Oliver M. Pettit. The return of the marshal to the process issued on the libel, was, that he had attached the property proceeded against, and had served the process personally on Walter Rahming and on Pettit. The substance of the libel is, that the vessel was stranded and wrecked near Nassau; that the libellant, in April, 1865, was the owner of certain blocks, of the value of $965, which the respondents, at that time, procured from him at Nassau, for the purpose of saving the wreck, promising him that they should be used in such service, and that he should receive $5 per day per pair, and $1,300 out of the materials which should be saved out of the wreck, and should obtain his compensation out of the wrecked property when saved; that the respondents saved various materials from the

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

wreck, and one hundred tons of the same, called old iron, had been brought to New York; that the respondents totally lost the libellant's blocks in and about the wreck and while saving the materials thereof; that the per diem compensation due to the libellant for the use of the blocks amounts to $2,457, besides the $1,300 to be paid out of the savings of the wreck, making his total claim, with the value of the blocks, $4,722; and that he claims a hypothecation of the one hundred tons of iron to pay his demands, and has, by way of maritime lien thereon, a right to attach it and have it sold to pay his demands.

The only answer put in in the case is that of John C. Rahming, as claimant of "about thirty-three tons of old iron," attached in the cause, who answers on behalf of himself and Walter Rahming, Henry Rahming, and Pettit. This answer denies all the allegations of the libel, except that the claimant purchased the steamer, and has saved some things out of her and brought them to this district, and avers that no person who was owner of the steamer hired any blocks from the libellant, and that some blocks of the libellant's, of small value, were used, and their use was of little or no value.

The libellant has been examined as a witness on his own behalf, and testifies that the steamer was ashore and a wreck in the ocean, outside of the harbor of Nassau, and that, in April, 1865, after the respondents John C. Rahming and others had purchased the vessel at an admiralty sale, the respondent Farr, who was her master, hired seven blocks from him, under a written agreement, of which the following is a copy: "Nassau, April 15th, 1865. This is to certify that I, as master and head wrecker of the steamship Agnes Louisa, have agreed with Captain Richard Squire, for the hire of seven large blocks, at the rate of $5 per day per pair, for the use of said blocks, to be used in endeavoring to get the above steamer off of the beach at Hog Island, said ship to be responsible for hire and damage, also for safe return of said blocks to him in good order. Capt. H. N. Farr, for ship and owners." Squire testifies that these blocks were taken by Capt. Farr under this agreement, and were used on the vessel in endeavoring to get her off, from the date of this agreement, until he, Squire, left Nassau, December 18th, 1865; that the blocks have never been returned to him; and that, the day before he left Nassau, he demanded the blocks from the Rahmings, and they begged him to leave them, and said they would send them to him at New York. Another witness testifies that, on that occasion, the Rahmings told Squire they would pay him for the blocks if he would leave them.

This is the substance of the case for the libellant. Although he swears, in his libel, that the agreement was that he should receive, for the use of his blocks, $5 per day per pair, and $1,300 out of the materials saved from the wreck, yet, in his testimony, he does not pretend that any such agreement in reference to $1,300 was made, and the agreement he proves is a written one, specifying no other compensation than $5 per day per pair. So, too, in his libel, he swears, that the agreement was that he should obtain his compensation out of the wrecked property when saved. The agreement he proves is an absolute one to pay him $5 per day per pair at all events, and he testifies that he never proposed to Henry Rahming that the compensation for the blocks should depend on the success in getting off the wreck, and never altered his original agreement, and never told any one that the compensation was to depend on such success.

It is perfectly clear that the libellant has no claim as a salvor. He merely hired his blocks for a fixed compensation to parties who were endeavoring to get off the vessel. He was to be paid at all events, whether the vessel was saved or not. Besides, if he could claim as salvor against the iron attached, there is no proof in the case that such iron was a part of the vessel in question. He has, however, no claim which he can recover in this suit, either in rem or in personam, for the hire of his blocks or for their value, on the principle of recovering for a salvage service. The Independence [Case No. 7,014].

In regard to the claim of the libellant to recover, either in rem or in personam, upon some other ground than for a salvage service, I am unable to perceive any principle upon which he can so recover in the admiralty. The contract was not one for repairs, supplies, or other necessaries furnished to the vessel, in the sense in which, either by the general maritime law, or by the 12th rule of the rules in admiralty prescribed by the supreme court, the furnishing of such articles gives a right of action in the admiralty. And, granting that Capt. Farr had authority to make the agreement he did, I do not think that the clause in the agreement which makes the vessel responsible for the hire of the blocks and for damage to them and for their safe return, creates any hypothecation of the vessel, which a court of admiralty can enforce.

The libel must, therefore, be dismissed, with costs. It may be that the libellant has a valid claim against some person or persons for the use and value of his blocks, but, if so, he has clearly mistaken the forum in which he can obtain relief.

Case No. 13,271.

SQUIRES v. The CHARLOTTE VANDERBILT.

[3 Wkly. Law Gaz. 343.]

District Court, S. D. New York. 1859.

ADMIRALTY JURISDICTION — WHARFAGE IN THE HOME PORT.

[The federal courts sitting in admiralty have no jurisdiction of a libel in rem to enforce a claim for wharfage accruing while the vessel was lying in her home port, and within the jurisdiction of a state. Following and applying Allen v. Newberry, 21 How. (62 U. S.) 244 and Maguire v. Card, Id. 248.]

[This was a libel by Richard Squires against the Charlotte Vanderbilt to enforce a claim for wharfage.]

The libel was filed in this cause to recover $195.49 for wharfage, alleging that the steamboat belonging to the port of New York for some time past has been and now is lying in the port of New York, and the said libelant has during that time furnished a berth for said steamboat to lie at one of the wharves of the said city, the wharfage whereof amounts to $195.49, and that said wharfage was necessary for said steamboat.

The claimant appeared in the action, but a default was entered against her for failing to answer. The claimant's proctor applied on the pleadings and an affidavit for an order setting aside the libelant's proceedings, and for the dismissal of the libel as not within the jurisdiction of the court.

Mr. Andrews, for libelant.

Beebe, Dean & Donohue, for claimant.

BETTS, District Judge. The libel is palpably inadequate and irregular in particulars of form vital to its maintenance in this court. It does not aver any right of property in, or trust, or authority in respect to the berth occupied by the vessel in this harbor or the wharfage supposed to have accrued from such occupation, nor agency or authority from which his right to demand or collect the money if due may be implied. Nor is the frame of the libel in conformity to the positive requirements of the rules of court. Sup. Ct. Adm. Rule 23.

These imperfections may be cured by amendment on proper causes and excuses shown the court for the irregularity in pleading, and, therefore, if there was a color of right to the remedy sought by the action, the court would relieve the party from the consequences of his faults in pleading upon terms that are equitable between the parties. But the decisions rendered by the supreme court of the United States at its last session (December term, 1858), have settled the rule of law that actions of the character of the present one are not within the admiralty jurisdiction of the court (Allen v. Newberry [2 How. (43 U. S.) 244]; Maguire v. Card [Id. 248]), and accordingly no ratification of the informalities of the pleading can avail the libelant to any serviceable end. He has brought his suit before a tribunal incompetent to take cognizance of the subject matter.

The vitality of those decisions must also counteract and displace all value to any permissive grant of authority to the admiralty courts to take cognizance of that subject, if such power be deducible from the 12th rule in admiralty; as a regulation out of the competency of that court to make cannot avail in law any more for a qualified period than absolutely and without limitation. The solemn adjudication of the supreme court having now determined that the admiralty tribunals never were clothed with the legal right to take cognizance of questions of liens or contracts of affreightment, or for supplies furnished a vessel in her home port, while engaged in the purely internal commerce of the state where she belongs, it cannot be maintained that a mistaken sanction of the exercise of such authority in a rule of court, can be made available or effective in opposition to such solemn judgments. It is accordingly ordered that the further prosecution of this action be perpetually stayed, and that the claimant and her sureties in the suit be discharged, with costs.

SQUIRES (FIELDS v.). See Case No. 4,776.

SQUIRES (HANKIN v.). See Case No. 6,-025.

SQUIRES (HULBURT v.). See Case No. 6,-855.

Case No. 13,272.

SRODES v. The COLLIER.

[9 Pittsb. Leg. J. 73; 2 Pittsb. Rep. 304; 3 West. Law Month. 521.]

District Court, W. D. Pennsylvania. July 16, 1861.[1]

MARITIME LIENS—STATE LIEN FOR SUPPLIES—MORTGAGE—PRIORITIES—NOTES TAKEN—LIEN FOR INSURANCE—ATTORNEY'S FEE.

1. A mortgage upon a vessel, recorded under the act of July, 1850 [9 Stat. 440], in the distribution of the fund arising from the sale of the mortgaged vessel, must be postponed to the liens for supplies and repairs under the acts of Pennsylvania for the attachment of vessels, even though the indebtedness for the supplies or repairs may have accrued subsequent to the recording of the mortgage.

[Cited in The Hiawatha, Case No. 6,453.]

2. A mechanic having a lien upon a vessel, who receives a note for the same, cannot institute proceedings against such vessel, until the maturity of the note, but may intervene, notwithstanding the note may not be due, and be paid out of a fund, where the proceedings have been instituted by other parties.

3. Under the Pennsylvania attachment act of 1858, the acceptance of notes or other securities for an existing demand, which would entitle the party to a lien upon a vessel, is to be regarded as a collateral matter, which can in no way work a satisfaction or extinguishment of the lien within the two years given by the act, until the indebtedness represented by such notes, &c. be fully paid.

4. Hence, the fact that the note-taker includes an indebtedness against another vessel, not embraced in the libel, will not prevent a recovery upon the original demand, so long as the note remains in the hands of the lien creditor. Neither would the fact that the mechanic had indorsed a new note, which the owner of the vessel had negotiated, and with the proceeds lifted the original note given to the former for his demand, and that, thus, the original note had passed into the hands of the owner and maker.

5. A mechanic may proceed upon his original lien, even though he may have taken a note

[1] [Affirmed in Case No. 13,272a.]

and receipted his original bill, if it be not shown that there was a contract to take the less security and release the better.

6. The assignee of a boat note may, without losing his lien, under the act, renew his note held by him, and pass the original to the maker.

7. It is sufficient evidence that the articles were necessary, under this act, to show that the articles, &c., for which a lien is claimed, were ordered and furnished, and that from their nature they seem to be necessary.

8. To maintain a lien for insurance, the insurer must hold a note, or other acknowledgment of indebtedness, given for the premium of such insurance, totally disconnected from all other transactions between the parties, whether insurers of other boats or articles, or otherwise.

[Cited in The Jennie B. Gilkey, 19 Fed. 131.]

9. The lien for supplies will not follow portions of a vessel which may have been used in the construction of a new vessel.

10. No attorney's fee can be paid to intervenors under this act, but one attorney fee being allowable in a case; and the fees of sheriff in such cases can not exceed one dollar for each person served.

This was a libel in admiralty.

The facts of this case are fully detailed in the following report by John H. Bailey, Esq., commissioner, to whom the matter was referred:

"To the Hon. Wilson McCandless, Judge of said Court: In pursuance of an order of your honorable court, made in the above cause, on the 26th day of last month, by which it was referred to me to ascertain and determine the amounts due the libellants and intervenors, and whether any have or are entitled to priority of payment, and to classify the different claims and appropriate the money in court, if sufficient to pay the whole of said claims; and if not, to ascertain the pro rata amounts coming to the said parties, and make report of the same to the said court, without delay, I proceeded to the discharge of the duties so enjoined, and beg leave to submit the following:

" 'Report: The claims presented for allowance, consist of (1) Seamen's wages, and herein of a claim of Thomas Adley. (2) Alleged maritime liens, being for wharfage at the port of Pittsburgh, and hospital dues arising under the act of congress of July 16, 1798. (3) Attachments by domestic creditors, under the state laws for the attachment of vessels, out of the district court of Allegheny county, and court of common pleas. (4) Mortgage against said vessel in favor of James Laughlin, trustee of the Pittsburgh Trust Company, and the Merchants' & Manufacturers' Bank of Pittsburgh, dated December 30, 1859, and recorded in the custom house of the port of Pittsburgh, January 4th, 1860.' Considerable testimony was taken on the hearing before me, which is herewith filed, and made part of this report. Respecting the libels for wages of John M. Srodes, Patrick Crawford and Thomas Hanna, there was no controversy, and that of Thomas McCloskey has been allowed among the liens under the state law, that claim having also intervened there. The claim of Thomas Adley having been objected to, I have disallowed, the service being in no sense maritime in its character. The claim for wharfage was not disputed, nor any objection made thereto; and that for hospital dues, though not presented in any formal manner, it was agreed by the counsel of the parties, should be allowed.

"Before proceeding to consider the objections urged against the several libels filed, I propose to pass upon a preliminary question, which is urged with great zeal—that is, the question of priority between the attachments under the state law, and the mortgage, which has intervened. It is contended that the act of congress of July 29, 1850, was designed to give a recorded mortgage priority over everything but a strictly maritime lien against the mortgaged vessel; that the recording operates as a delivery of possession, and that claims of domestic creditors, such as are provided for by the state law for attachment of vessels, not being recognized and enforced in admiralty, must be postponed to a recorded mortgage. We must then examine the question of priority thus raised. I may state that on or about July 14, 1860, the steamboat Collier was attached by the sheriff of Allegheny county, upon process issued out of the district court and court of common pleas of said county. Subsequently, on the 1st day of March, 1861, by consent of the libellants and intervenors in said courts, (as will appear by copy of their agreement, part of the testimony filed,) the lien of the sheriff was released, and the vessel attached by the marshal upon process out of this court. By this means, the attachments out of the state courts have arisen, and been brought here for allowance, rather informally, it is true, but yet without any objection as to the mode pursued. By the established law, and by virtue of the twelfth rule in admiralty, ordered by the United States supreme court, 'where by the local law, a lien was given to material-men for supplies, repairs, &c., the libellant might proceed against the ship and freight in rem,' with all the effect and rights, as though he had an original maritime lien. It was a question in the case of Dudley v. The Superior [Case No. 4,115], whether those having original admiralty liens, and those who obtained theirs under the local law, did not occupy the same rank of privilege. Under such a state of the case, it would seem clear that the liens given by the municipal law, if enforced in admiralty, would take precedence of a mortgage. Now, by the modification of the rule, ordered to take effect about a year since, the remedy in admiralty only would seem to be taken away. There would seem to be no reason why the modification should have at all impaired the rights of such libellants, as against the remnants and surplus remaining in the registry after satisfaction of the maritime liens. But let us consider the nature of a mortgage of this character, and the arguments advanced in its support. The precise status of a mort-

gage of a vessel in a state, where, as in Pennsylvania, there are no statutory provisions for its enforcement, would seem to be a matter surrounded with considerable doubt. The mortgagee can not proceed in admiralty by libel to enforce his rights. He may be a claimant against libels filed, or he may intervene against the proceeds of the mortgaged vessel. His remedy in any other case would seem to be solely by action in debt, or in equity. Bogart v. The John Jay, 17 How. [58 U. S.] 401; Schuchardt v. The Angelique, 19 How. [60 U. S.] 241. He can not, therefore, have a maritime lien in the correct meaning of the term.

"But it is contended that the privileges of such a mortgage have been much enlarged by the act of congress, passed July 29, 1850, and that since its passage, such mortgage is entitled to payment out of the surplus, next after a bottomry-bond. I have failed to perceive the accuracy of this argument. The act provides that 'no bill of sale, mortgage, hypothecation or conveyance, shall be valid against any person, other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale be recorded.' There is also a proviso that the lien by bottomry 'shall not lose its priority, or be in any way affected by the provisions of this act.' To my mind, this act has rather restricted than enlarged the energies of an unrecorded mortgage, and that such was the effect intended. Nor can it be claimed that the act intended to confer any greater rights upon a mortgage recorded under its provisions, than it possessed while unrecorded, before its enactment. It does not say that it shall enjoy such and such privileges, if the terms of the act be pursued, but that it shall not have such and such rights, unless a prescribed process be observed. This would have been absurd, had it not been supposed that these rights did attach to the mortgage, (though unrecorded,) before the passage of this act. For instance, the recording of such a mortgage would now visit with notice of its existence, a subsequent purchaser from the mortgagor, while an unrecorded mortgage would be of no avail against him, without he had express notice thereof. Before the passage of the act, such unrecorded mortgage was considered good against even a bona fide purchaser without notice.

"It is argued, however, that the proviso to the first section contains the necessary implication, that were it not for its terms, even the lien by bottomry, if unrecorded, would have been postponed to a mortgage, and hence the latter must at least follow next in rank to bottomry. This is answered—in the first place, by the view already taken, that the act was not intended to create any new rights in behalf of such contracts; and, also, by the fact that the proviso was doubtless intended only to clear up a doubt that might have arisen from the general words of the act, whether lien by bottomry might not have been included within its terms, and the necessity enjoined upon the holders of such securities to record them, in order to render themselves safe. Again: A bottomry bond has priority over the liens of material men, upon a foreign vessel; and to elevate a mortgage to the next rank, would require that it, too, should postpone material men. It is quite clear that it never possessed any such energy, for it can only proceed against the remnants after such claims are fully satisfied. The Charles Carter, 4 Cranch [8 U. S.] 328; [Schuchardt v. The Angelique], 19 How. [60 U. S.] 241; [The Monte Allegre], 9 Wheat. [22 U. S.] 635. The act of 1850 was not passed to marshal the liens which arise under the maritime law, or to classify maritime contracts. Its purpose was very different from that suggested by the argument I have sought to answer. It was designed to set at rest many of the troublesome doubts that hung around the rights and liabilities of the mortgagees of vessels, and to prevent the continuance of secret liens upon such property, impairing its value, and often bringing heavy losses upon innocent purchasers. Its operation would seem to include every case where a transfer or incumbrance, absolute or qualified, is made in writing, and, therefore, capable of being recorded, with the exception (arising from its very nature) of a bottomry-bond, created in a foreign country, for the sole purpose of furnishing 'wings and legs to the forfeited hull to get back, for the benefit of all concerned,' and expiring with the life of the vessel. It will be seen that the act creates no new privileges for even this favored maritime contract, but it is left with precisely the rights it had before, or to use the terms of the proviso, 'not in any way affected by its provisions.' Every consideration which would favor the priority of those furnishing supplies or repairs in a foreign port, over a mortgage, will apply with almost equal force in favor of the priority of the material-man in the home port, as against the remnants or surplus, to which both he and the mortgagee must alike look for relief. He, too, furnishes the substance, needed to preserve the life of the vessel; he, too, enables her to perform her maritime mission, 'to plough the seas and not to rot in the docks'; and he, too, surely should be enabled to look to that, to whose value his means and his labor have contributed, as against one whose claim may have arisen from circumstances far removed from the maritime uses of the vessel. Should we regard a mortgage of a vessel as a defeasible bill of sale, it would seem entirely clear that no greater rights could be ascribed to such qualified owner, as against material-men, than to one having the absolute property in such vessel. As the vessel is liable in the hands of the owner to a lien under the state law for materials, &c., there would seem no sufficient reason why a mortgagee should stand in any better attitude as to such creditors. Moreover, the amended twelfth rule in admiralty, before

referred to, which allows to material-men in the home port a proceeding in personam, recognizes the existence of a right enforcible in admiralty, which we have seen is not the case with a mortgage.

"I would refer to the case of Marsh v. The Minnie [Case No. 9,117], where the subject is ably examined, and also to Reeder v. The George's Creek [Id. 11,654]. The rule laid down in this latter case, as to the rights of mortgagees under the act of 1850, seems to me to cover the whole ground: 'That the act was intended to give recorded bills of sale or mortgages of vessels priority over any subsequent conveyance of them, made by those in possession, and over any rights acquired in them by general creditors, by judgments and by execution.' I must, therefore, hold that the mortgage here must be postponed to the attachments out of the courts of the state, whether the debts were contracted before or after the recording of the mortgage.

"I have thought it best to set out at some length the reasons which have impelled me to this conclusion, though for the purposes of this case, it would have been sufficient for me to have relied upon the judgment of this honorable court in Wilson v. The Grand Turk [Case No. 17,805], at No. 1, May term, 1860, where this very point was passed upon, and adjudicated, and the conclusion reached that a mortgage, similar to the present, must be postponed to attachment, under the state law, out of our state courts.

"The demands of Davage & Roberts, John C. Boyd, and A. Fulton, are undisputed. In all other cases in the state courts, notes were given by the owner of the Collier to the several mechanics for the amount of the work, and labor done, and materials furnished, as the case might be. Many of these cases differ in their details, raising various questions upon the construction of the act of assembly of this state, respecting the attachment of vessels, passed June 13, 1836, and especially of this supplement, dated April 20, 1858.

"The first question raised is the general one, whether the acceptance of a note by a mechanic for work done to a vessel, does not extinguish his lien. It is well settled, that taking a security from a debtor, of the same rank with an existing indebtedness, will not extinguish such indebtedness without such be the agreement of the parties. In no case here has there been any such substantive proof presented, except in two instances, where receipts were given, as will appear hereafter. But could any doubt exist upon this question, the act of 1858 has placed it at rest. Section 5 expressly provides that the lien 'shall exist in full force and effect as if no such security had been given.' So long, therefore, as the note or other obligation so given, shall remain in the hands of the lien creditor, the lien would still subsist. In a number of the cases, the notes or drafts received have not yet matured, and it is urged that parties in this position can not receive the amount of their demands here. It seems to me that where a mechanic, having a lien upon a vessel, receives a note for the amount of his claim, he can not institute proceedings against such vessel until the maturity of such note; but where proceedings are commenced by a third party, I can see no reason why he should be deprived of his money, simply because he has consented to give time to his debtor, which can in no way injure, but may much benefit other creditors. The owner of the Collier also owned another steamboat, the Vulcan, which has been sold on process out of this court, and whose proceeds are here for distribution, in No. 2 of May term, 1861. Most of those who have issued attachments in our state courts, and against the Collier, have like attachments against the Vulcan. In the course of their dealings, they have received from the owner of the two boats, one note covering the demands against both.

"It is contended that though the act of 1858 may sustain a lien in favor of mechanics who may have accepted notes for their demands, yet in order to sustain the original lien, the note must be specific and confined exclusively to the particular debt for which it is given, and if the party chooses to accept a note, which combines an indebtedness arising from repairs, &c., to another boat, his lien for the repairs made is gone. Bungling and obscure, as this act certainly is, I do not think language could more plainly express the design of the legislature to give the mechanic, and others named, a subsisting lien upon the vessel for repairs; and during the time limited, beyond any peradventure or contingency, so long as he did not assent to an extinguishment of his original claim. So emphatically is this stated, that it would almost seem as though the legislature had designed to deprive the mechanic of even the right to release his lien; for section 5 of the act reads: 'The taking or receiving of any note, &c., in settlement of a debt comprehended in any of the above enumerated classes, shall in no wise invalidate the lien given by this act.' It seems to have been the purpose to give the mechanic as many securities for his repairs, &c., as the debtor had it in his power to offer, and yet that the lien should still subsist against the vessel for the two years specified in the act. The policy of such a discrimination in favor of one class of creditors may well be debatable, but I have had no difficulty, from a careful study of the act under consideration, in arriving at the conclusion above expressed. There will be found filed with the testimony in this case exhibit 'X., J. H. B. Clk.,' a receipt of G. B. Kurtz for the amount of his claims against both the Collier and Vulcan, to the effect, 'Dec. 18, '60, rec'd payment.' This receipt is explained in the evidence to have been not for money, but for a note received for the gross sum of his demands at that

date. As a question of fact, I have no difficulty, from the testimony on this point, in determining that 'there was no contract to take the lesser security and release the better;' that 'there was no consideration given or intended to be given for the relinquishment of one of the mechanic's securities, nor did such an act enter into the contemplation of either of the parties at the time of the settlement.' Under the ruling in such circumstances of Grier, J., in Sutton v. The Albratross, 1 Phila. bottom of page 423, the giving of the receipt in this case cannot deprive the mechanic of his lien.

"These considerations dispose of the demands of the following parties: G. W. Coffin, G. W. Motherall & Co., G. B. Kurtz, and J. H. Jenks. Long & Duff, it seems, settled with the owner of the two boats every six months, and if the account was large enough, received a note for the amount; hence. they hold several securities of this character, the last of which is not due. It also appears that when one of these six months notes would mature, the same would at times be renewed, or extended by a new note, if the boat-owner's necessities demanded it. It does not appear that any of these notes, at any time, passed from the hands of Long & Duff, except into that of the owner, when a note was lifted or renewed.

"It is contended that where the note originally given has passed into the hands of the maker by renewal or otherwise, the lien for that indebtedness is gone. Andrew Adley's case differs from that of Long & Duff, in that, for his own accommodation and benefit, he discounted his notes received, with some of the banking institutions of the city. The note given in January last was also discounted. but was lifted before maturity by Mr. Adley. There is a class of cases here which differs in important particulars from most of those considered above, but the points raised in the last two cases will be covered in the consideration of this case, which includes Fitzsimmons & Morrow, J. S. Pringle, A. Hartupee & Co., Douglas & English, J. Irwin & Sons, and Wm. Nelson. These cases differ somewhat among themselves in their details, and I may lean a little more strongly against a particular case than the facts proven may warrant. With this explanation, the facts respecting these cases, as well as I can gather them, seem to be as follows: Notes were given, generally every six months, upon the settlement of the account between the parties arising out of repairs, &c., to the two boats for the current half year. These notes were discounted for the holder's benefit. When one of these notes would mature in the hands of the banking company, or was about to mature, the maker would call upon the original payee of the paper and obtain his indorsement upon new paper for the whole or some less sum, (as he might be able to pay a part upon account.) This new paper the owner of the boats could get discounted, and with the proceeds would lift the preceding note. In some, if not all instances, the first paper given was a note by D. Bushnell, agent, the owner of the boats, Jos. Bushnell, residing in Cincinnati. When this would mature, a draft by D. Bushnell, agent, on Jos. Bushnell, Cincinnati, would be the paper upon which the indorsement of the lien creditor would be obtained—and so each time a note or draft would fall due, Jos. Bushnell thus apparently meeting his paper at Cincinnati, as it matured. The drafts were generally discounted at Pittsburgh, and the proceeds transmitted to Cincinnati, to take up the old draft. In all the cases thus far spoken of, without exception, the notes or drafts, representing the existing liability for which a lien is claimed, are the property of the several libellants, and also, with the exception of J. Irwin & Sons, and Douglas & English, have been brought into court, and are now in the possession of the clerk of this court.

"It is contended upon these facts, that these libellants are but the accommodation indorsers of Mr. Bushnell, and in such relation, their original lien is gone. There is really no substantial difference between these cases, and that of Mr. Adley. It can make no difference to the creditors or defendant whether Mr. Bushnell got new notes discounted with the indorsement of A. Hartupee & Co. upon them and paid the discount, or whether he renewed the notes directly with A. Hartupee & Co., adding in or paying to them the discount, and they subsequently get them discounted. A. Hartupee & Co.'s liability would be neither greater nor less in either case, and their relation to all the parties to the transaction would be precisely the same.

"In the view I have taken above respecting the design of the legislature, this giving of notes for an existing demand, which would entitle the party to a lien upon the vessel, is to be regarded as entirely a collateral matter, which can in no way work a satisfaction or extinguishment of the lien within the two years, given by the act, until the indebtedness represented by such notes be actually paid. Regarding this, then, as collateral matter, no transactions between debtor and lien creditor, respecting these notes, save payment, can invalidate the lien of the mechanic, so long as the notes remain in his hands, at the time he claims upon his original demand, ready to be brought into court, and surrendered. How far the holder of such note could be considered the assignee or indorsee of a boat note, entitling him to a lien in the third class of section 1 of the act, is an entirely different question. To put any other construction upon this act, would be to enforce a technical rule to the injury of the parties for whose benefit the act was designed, not only, not in pursuance of the requirement of the statute. but in conflict with its spirit, and for the benefit of creditors, whose rights have been in no way affected

or impaired by the acts of the mechanics, to whom the notes were originally given.

"In the case of A. Adley (just considered with others,) in the July note, 1860, he gave a receipt, 'Received payment,' (exhibit 'J. H. B. Cl'k.') which is explained by the testimony that no money was paid therefor, and also by receipt in the case of the Vulcan, into which the Collier account thus receipted is carried, and receipted 'Received payment by note at four months,' thus showing the whole transaction. Such a case, as we have seen in that of G. B. Kurtz, can not affect the claim of the mechanic to his lien. The libel of Thomas Snowden shows that for the work done and materials furnished by him, a draft was finally given—being the renewal of a note first given, and that said draft is in the hands of and is owned by Park, McCurdy & Co. Treating Park, McCurdy & Co., as the real libellants, the question arises, have they a lien for this draft in their hands? I have allowed this claim under the express language of the fifth section, which provides, 'that the taking of any note, &c., in settlement of a debt comprehended in any of the above enumerated classes,' shall not invalidate the lien given. The original note in the hands of the assignee of the mechanic being within the third of the 'enumerated classes,' the taking of the draft in 'settlement' of the same, would seem to fall within the fifth section, being for 'a debt comprehended' in the third of 'the above enumerated classes.'

"It is contended that for all claims for work, materials, or supplies, the admiralty rule, that the libellants must prove that all such things furnished were necessary, should be applied. In the first place, it may well be urged that the parties having proven that the materials, &c., were ordered and furnished and used upon the boats, and that from their nature the materials seem to be necessaries, this would be a compliance with the rule, and moreover, the act provides a lien for 'all debts contracted by the owner, &c., for or on account of work and labor done, &c., in building, equipping, &c., of the boats'; and therefore it is not at all important to the mechanic whether they were necessary or not. It is sufficient for him that they were ordered and furnished, and it is no fault of his if useless things were furnished. The debt, therefore, has been contracted, and that fact entitles him to his lien.

"The only two remaining libellants in the state courts, are the Citizens' and the Monongahela Insurance Companies. It will be seen by the act of 1858, that insurers of a vessel seem to have got in by one of the not infrequent mistakes in this act. They come in the third class, but unlike the others, they draw their lien from the fact that they have taken a note for the insurance, and not because of the insurance, and without the taking of the note they would have no lien. As the note, then, is their principal contract, I think that should be specific and individual, and not so commingled with other transactions as to be indivisible. It is not enough to be able to say, 'here is a note for $1,000; in it there is included for insurance of the Collier, $200.' You could not extinguish the original debt, viz., the note—in the higher security, viz., the judgment, and have it delivered over to the debtor upon paying the judgment; for a portion of it is for matters not involved in the judgment at all. It seems to me that the libellant should be able to come into court, and present the ground of his demand, entirely distinct from every other transaction. The claims of the insurers here, are to be found in two or three different notes, united, as in the instance of the Citizens' Insurance Company, with other premiums and discounts. The last notes held by each, however, come within the rule laid down above. These are separate from all claims arising from other sources, and these I have allowed, deducting the abatement for returned premium—the boats having been sold before the expiration of the risk. All of the account, filed in the case of J. Irwin & Son, except the last two items, was furnished for the steamboat Black Diamond, which boat it seems was taken to pieces and considerable portions of her used in the construction of the Collier.

"It is contended that the lien for supplies will attach to the parts of the vessel, and should be paid out of the proceeds of the Collier. I have not been able to perceive the force of the position, and have, therefore rejected all items that were not expressly furnished to the Collier."

* * * * * * * * *

The following opinion (McCANDLESS, District Judge), approving and adopting the views set forth in the report of the commissioner, was filed July 16, 1861.

PER CURIAM. I have considered this case, and the report of the commissioner is confirmed for the reasons assigned by him. A final decree is ordered accordingly.

NOTE [from 9 Pittsb. Leg. J. 73]. The sheriff of the county, in making up his costs in this case, has taxed $11.16 in each intervening claim. Exception has been taken thereto. It appears that this sum is made up of attorney's fees, $3; writ, $1.25; prothonotary's costs, $1.91; sheriff, $5.—total, $11.16.

It appears that the state act, establishing the fees of the sheriff, has made no provision for the case of attachments of vessels, and the sheriff has charged the fees usually taxed by marshals of the United States. Taking, however, the fees allowed the sheriff for our guide, he could be entitled to no more than one dollar for each service; and, having two parties here upon whom to serve the monitions, I have allowed that sum for each.

I can see no warrant for allowing an attorney's fee to each intervener, thus making several attorney's fees in one case, and that is not the practice in this court, and should not be anywhere. I have therefore struck out this fee, and taxed in the case of each intervener as follows: writ, $1.25; prothonotary, $1.91; sheriff, $2,—total, $5.16, instead of $11.16.

Whereupon, I, John H. Bailey, clerk of the said court, do respectfully certify and report that I have, as above set forth, ascertained the amounts due the several libellants and interveners in this cause, and I do further certify and report that the schedule hereunto annexed, and marked "A," and made part of this, my report, contains a statement and account of the moneys so found due the several parties, as aforesaid, to which for greater certainty I refer. All of which is respectfully submitted. John H. Bailey, Clerk.

[Upon an appeal to the circuit court, the judgment of this court was affirmed. Case No. 13,-272a.]

Case No. 13,272a.

SRODES v. The COLLIER.

[9 Pittsb. Leg. J. 193; 2 Pittsb. Rep. 318; 4 West. Law Month. 120.]

Circuit Court, W. D. Pennsylvania. Dec., 1861.[1]

MARITIME LIENS — MORTGAGES — LOCAL LIENS — PRIORITIES—WAIVER—ASSIGNMENT —LIMITATIONS.

[1. The act of July 29, 1850, which requires every bill of sale, mortgage, hypothecation, or conveyance of a vessel to be registered or enrolled in order to have any validity as against a purchaser without notice, does not give a force or validity to a domestic mortgage, which it has not at the place of its execution.]

[2. A mortgage recorded under the act of 1850 must be postponed to liens for supplies, repairs, etc., under the statutes of Pennsylvania relating to the attachment of vessels.]

[3. By the express provisions of the Pennsylvania statutes relating to liens upon vessels, such liens are not lost by taking the notes of the owner for the amount thereof.]

[4. An admiralty court regards equitable claims with the same favor as a court of chancery, and will enforce claims for which liens are given, in the hands of an assignee, although the thing itself may not be legally assignable.]

[5. A bill of goods furnished to a boat, when in port, cannot be tacked to other bills, made more than two years before, for the purpose of saving the whole from the statute of limitations.]

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

[These were appeals in admiralty from the judgment of the United States district court, of July 16, 1861 [Case No. 13,272], confirming the report of the commissioner, Mr. John H. Bailey, which report, with a full syllabus of the points ruled therein, was published in our paper of September 16, 1861, being No. 9, page 73, of this volume. That judgment being now affirmed in the circuit court, we need only to refer to our former publication for full statement of the questions of law decided.

GRIER, Circuit Justice. These cases involve the same questions, differing only in immaterial circumstances. The very able report of the master was confirmed by the district court. The exceptions to that report, and the principles on which it is founded, are now to be considered:

1. The claim of the libellant, as pilot, was properly allowed. The attachment and lien creditors might have intervened as claimants, in the original suit, and contested the libellant's claim for wages against the vessel. But they have not done so. They are now, before us only ex gratia, on petition to have the remnant of the fund in the registry of the court delivered to them according to the order of their respective claims. The district court might have relieved itself of the trouble of distributing this surplus by ordering it to be delivered over to the sheriff, who had attached the vessels on domestic liens. But the proceedings in the state courts being withdrawn, the petitioners may call upon the court to appropriate the fund to those entitled to receive it. See Schuhardt v. Babbidge, 19 How. [60 U. S.] 239.

2. The chief complaint against the appropriation made by the master's report, is, that he has postponed the claims of the mortgagees to that of the other lien creditors. The act of assembly of 1836, relating to the attachment of vessels, subjected them to a lien for work done in repairing, furnishing and equipping them, &c.; but limited this lien or privilege to the commencement of her first voyage. On the 20th April, 1858, a supplement to this act was passed, applicable only to vessels navigating the rivers Allegheny, Monongahela, or Ohio, in this state, by which they are encumbered with liens for every possible debt or contract made concerning them. They are ranged into five classes, too large to be specially enumerated, and it is not necessary for the purposes of this decision. It is sufficient to say that all the debts claimed as liens, came within the act, except the mortgages. We need not speculate on the regard that would be paid to these secret domestic liens in a port of another state, or in case of a purchaser without notice at a foreign port. By this act these secret liens, with which the boat may be covered, have a life of two years given them, whether she remains within the state or home port or not. The maritime liens being first satisfied, the surplus in the registry of the court should be distributed to the parties having these liens, in their order.

By the law of Pennsylvania there can be no valid mortgage of a chattel unless possession accompanies the deed, and the act of 1858 gives him none. If the mortgagee were in possession he would be treated as owner and be personally liable for the debts of the boat. This act makes the boat debtor for everything done to or for her, and these liens would attach to the boat whether in his possession or that of the mortgagor. A mortgagee may take possession of the vessel by virtue of his deed, but till he does so he has neither a general nor a special property, any title to, or lien upon the boat. The act of congress of July 29, 1850 [9 Stat. 440], which requires every bill of sale, mortgage, hypothe-

[1] [Affirming Case No. 13,272.]

cation or conveyance of a vessel, to be registered or enrolled, in order to have any validity as against a purchaser without notice, does not give force or validity to a domestic mortgage of a vessel which it had not by the law of the place where it was executed. The sole object of this act of congress is to protect purchasers against secret liens. Whether the hypothecations or liens given by this act of assembly could have any validity even here, as against a bona fide purchaser without notice, unless they had been registered according to the act of congress, we need not here decide. In many states a mortgage of a chattel is a valid security without possession. But to have any effect except inter partes, and those having notice, this act requires their registry. If it were not a valid lien or hypothecation by the state law, the act of congress gave it none. The registry of these mortgages consequently gave them no more effect than they had before. It was only notice to a purchaser that the mortgagee had no lien. The mortgagees in this case had no right to claim the money representing the boat till all just claims, which were debts of the boat, having a lien on it by virtue of this act of assembly, have been first paid and satisfied. The balance, given to the mortgagees, is given because, as between them and the owner, they would have a right to take possession of the boat, subject to the liens, and consequently may have the balance of the money representing her.

It is objected that many of these accounts, for which this boat was attached, had lost their lien in consequence of notes given by the owner, which were renewed from time to time but not paid. To this objection the fifth section of the act of assembly referred to is a complete answer, viz: "That the taking or receiving of any note, bill of exchange, or other writing, in settlement of a debt, comprehended in any of the above enumerated classes, shall in no wise invalidate the lien given by this act, but the same shall exist in full force and effect, as if no such note, bill of exchange or other writing had been given." Although the master of a vessel as such has no lien for his wages, by the maritime law, this act gives a preference "to all hands or persons employed" on a boat, whether as "master, clerk, or otherwise," consequently his wages as such master were properly allowed, for the three months. On these western rivers, a boat must be always under direction of a pilot, and in many cases, the pilot performs the functions of master, having a certain established rate of wages, for his services as pilot, and an addition thereto for his services as master. For the first, he may have his lien by the maritime law—for the latter, he has a preference by the local law to the extent of three months' wages. I see no reason why an assignee of any of these accounts for which a lien is given, may not have a right to stand in the place of his assignor. It is true the thing is not legally assignable, but a court of admiralty regards equitable claims with the same favor as a court of chancery.

The objection by the insurance companies is also overruled. There is nothing on the face of the report to show a mistake of law or facts, and nothing produced before this court to show error. The bills, bonds, notes, &c., enumerated in the third class of liens, must "have been signed and given in the name and for and on account of such ships," &c. The master very properly says that where "the note is the evidence of the contract which binds the boat, it should be specific and individual," and that "it is not enough to present a note of $1,000 with the allegation that it includes $200 for the insurance of the Collier." We see no error in this decision.

The exceptions to the decision of the master, with regard to the accounts of Fulton & Son, and of Irwin & Son, which were in part over two years old, are also overruled, for the reasons stated in the report—a bill of goods furnished to a boat, when in port in 1860, cannot be tacked to other bills, made in 1858, more than two years ago, to save the whole from the limitation of two years.

The judgment of the district court is therefore affirmed, and the clerk is ordered to pay the money in court, according to the report of the master.

SRODES v. The VULCAN. See Case No. 13,-272.

Case No. 13,272b.

In re STACK.

[Cited in Re McKenna, 9 Fed. 36. Nowhere reported; opinion not now accessible.]

STADACONA, The (UNITED STATES v.). See Case No. 16,371.

Case No. 13,273.

In re STAFF et al.

[5 Ben. 574;[1] 43 How. Pr. 110.]

District Court, S. D. New York. March 29, 1872.

AUDITING ASSIGNEE'S ACCOUNTS—EVIDENCE.

1. On the auditing of the accounts of an assignee before the register, a bill for attorney's services was offered in evidence, but without full proof as to what the services were for which the items in the bill were charged. No one objected to the bill, on behalf of the creditors: *Held*, that the bill was evidence of the items of alleged services and disbursements, but would amount to nothing, without evidence as to the occasion and necessity and value of the services.

2. The duty of the register was not merely to adjudicate as to the bill, on the evidence submitted to him, but to examine the account, for the purpose of ascertaining, in any way he might be able, what sum ought, in fairness, to be allowed.

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

[In the matter of John J. Staff and John J. Staff, Jr., bankrupts.]

By I. T. WILLIAMS, Register:

[2] [I, the undersigned register, in charge of the above-entitled matter, do hereby certify that pursuant to the directions of the district judge in this matter under my certificate therein of February 13th, I proceeded to the audit of the accounts of the assignee, which were duly filed with me on the 11th day of January, 1872. Whereupon the said assignee offered himself as a witness, and was examined by Mr. Whitehead, who stated that he appeared for Mr. Malcolm. At the close of his testimony, the assignee stated that this was all the testimony he had to offer. Mr. Whitehead then called Mr. Malcolm, who being sworn, was examined by Mr. Whitehead. At the close of the testimony of Mr. Malcolm, Mr. Whitehead offered in evidence a bill of the items of the claim of Mr. Malcolm, which was filed with me by the assignee as one of the vouchers of his said account, on the 11th day of January aforesaid. But I declined to permit the paper to be read as evidence of the facts that might be therein stated. To this ruling Mr. Whitehead excepted, and desired me to certify the point to the district judge for decision.

[And I further certify, that the grounds of the said decision are as follows: I have examined the paper as a voucher, and was familiar with its contents. It is duly receipted, and its validity as a voucher, i. e., as proof that the assignee did in fact consent that Mr. Malcolm should retain out of the sum of $1,339, which he claims to have collected, the sum of $893 86/100, as and for his professional services in and about collecting the same, all this was before the court at the time the case was sent back to me with directions to "audit the account of the assignee, including the item for the amount allowed by him to Mr. Malcolm," which I construe to mean, to take testimony concerning the services claimed to have been rendered, and determine the value thereof. 3 Denio, 391. I could not think this paper per se evidence of the truth of whatever might be written therein, nor could I think that it became so upon the evidence given by Mr. Malcolm, to wit: "I performed the professional services mentioned in Exhibit A" (the paper in question). "These professional charges and disbursements were made in and about collecting this very money. * * * I am acquainted with the value of professional services in the city of New York. In my opinion, the charges were very moderate. If the fund had been larger, I should have charged a larger sum." If such testimony would make a paper admissible as evidence of the truth of whatever might be written upon it, a witness, when called upon the stand, has only to produce a paper upon which he has written what he wishes to prove, swear that what is therein written is true, and hand it up to be read as his testimony in the case. But as the paper is before the court as one of the vouchers of the assignee, we may look into it for the purpose of ascertaining what it would prove if admitted in evidence, for this will obviate the necessity of sending the case back to the register in case the district judge should be of opinion that the register erred in refusing to receive the paper as evidence of the truth of its contents. The first item is as follows: "1869, February 9. To services in the proceedings to obtain injunction against bankrupts and against sheriff of the city and county of New York, to prevent sale of property in his hands under the execution, $100.00." He tells us here in what matter he rendered services for which he charged the assignee $100, but he does not tell us what services they were—what he did for which he charges this $100. These words, if incorporated into his testimony, would not throw the faintest light upon the matters now under inquiry. He says his services in a certain matter were worth $100, but that anyone else may say what his services were worth in that matter, he must know what was done in it. Every other item of the bill is open to the same criticism.

[The last item of the bill is as follows: "To five per cent. in collecting moneys from the bankrupt, $66.69." This item is open to still broader criticism. If this item may not be proven by the paper offered, clearly the whole paper is inadmissible. But what alone would be fatal to a large part of this claim is the fact that it nowhere appears upon whose retainer the services were rendered. True, the bill is made out to "Charles H. Bailey, assignee of John J. Staff and John J. Staff, Jr.," and no doubt Mr. Malcolm must be understood to assert and maintain that he rendered all of the services, and made all the disbursements now claimed for, for and at the request of the assignee. But he has not sworn to that, and will not probably do so, as one-third of the whole amount of them were rendered and disbursed before Mr. Bailey was elected assignee. The first meeting of creditors was held, and Mr. Bailey was elected assignee, on the 3d day of November, 1869. His election was approved and he received his assignment on the 11th of the same month. The first item of this claim is $100 for services rendered on the 9th day of February previous, the very day the petition in bankruptcy was filed. If from this we infer that Mr. Malcolm was acting for petitioning creditors, the record shows that it was a case of voluntary bankruptcy. And again, if from this we infer, that he was acting for the bankrupts, his bill as well as the record shows, that Mr. Byrne was the bankrupt's solicitor, and that Mr. Malcolm was acting adversely to them; but upon whose retainer, prior to the

[2] [From 43 How. Prac. 110.]

11th of November, is left entirely to conjecture. But all the items of the bill of a later date are open to criticism scarcely less unpleasant. All of the services seem to have been in the bankruptcy court and in the bankruptcy proceedings, and don't seem to have been in anywise unusual in character. Assuming that everything was done by Mr. Malcolm which his bill would, in any view of it, indicate, I think, that $250 over and above disbursements is as high a sum as I have ever certified, or as this court has ever allowed for similar services in bankruptcy. The disbursements charged subsequent to the 11th of November (including a charge of $19^{85}/_{100}$, as paid register, which, I presume, means commissioner) amount to the sum of $29^{30}/_{100}$, which added to the said sum of $250 amount to the sum of $279^{30}/_{100}$. But, on the other hand, if the district judge shall be of opinion that the rejection of the bill, as evidence of the recitals therein contained, be correct, then, clearly, there is no evidence before me upon which an audit may be founded, and it will seem to be necessary to remit the case for further proceedings.

[I did not cross-examine either the assignee or Mr. Malcolm, and no one appeared on the part of the creditors to do so. Nor did I call other witnesses as to the value of the professional services, or as to what services were, in fact, rendered. And in view of a return of the case for further proceedings, by way of auditing the account, I crave the judgment of the court as to the duty of a register in regard to such cross-examination, and in regard to calling witnesses in case none appear on the part of the creditors.

[Upon the question here presented, I beg to submit the following:

[The duty enjoined upon the register is to audit, not simply to adjudicate; to hear and examine, not on one side only, but on both sides. The duty is not only judicial but ministerial, administrative. I know of no statute or judicial writing in which the word "audit" is applied to the action of a court; ex vi termini, it implies executive as well as judicial action. If the act of auditing implied only judicial action, no more would be required of the register than that he take such evidence as the assignee, on the one hand, and the creditors, on the other, saw fit to submit, and pass upon the same, basing his decision upon such evidence alone. But an auditing officer proceeds to examine an account for the purpose of ascertaining in any way he may be able without regard to established forms or technical rules, what sum ought in fairness to be allowed. This is the course universally pursued by the auditing officers of corporations, civil or municipal, and it has grown into an established usage or custom. The word, as used in the act and general orders, is, no doubt, used in this accepted sense, as there is no other established sense in which it can be used. If this view of the case be correct, it is clear that the parties objecting to the item of Mr. Malcolm's claim do not suffer a default, or any consequence of a default, by not appearing before the register at the hearing, and urging their objections, nor for this omission on the part of the creditors is the duty of the register in any degree lessened or mitigated, but rather increased.

[But this view of the case places the register, in case of the non-appearance of the objecting creditors, in a position which the profession do not readily accept. They inquire: "Who objects?" "Is the court to object to the items of the account it is sitting to pass upon?" "Is the register to act as court and counsel?" What I desire is, that these questions should be authoritatively answered and settled by the district judge. Experience has shown, that creditors simply in their character as creditors will rarely, if ever, appear, or in anywise interfere in the administration of an estate which the court has taken under its bankruptcy jurisdiction. The reason for this is clearly discernible in the provisions of the act itself. The English bankruptcy system, upon which our own is modeled, as well as the bankruptcy system of every other civilized country, is said to be "a system for the speedy distribution of the effects of an insolvent trader among his creditors." The court, as its first act, seizes upon the estate of the debtor, brings it within its jurisdiction and control and thereby charges itself with the duty of a just, full and complete administration of such estate in the interest of all concerned. Thus, duties, executive in their character, devolved themselves upon the judges of bankruptcy courts. And it was not until the practical operations of the system had effectuated at least four legislative revisions of the law, that parliament accepted the fact that creditors, as such, would not (for it was then, as it is now, altogether impracticable), so participate in the proceedings as to relieve the judges of the variant, and sometimes apparently conflicting, duties of a judicial and ministerial officer, that a new class of officers were called into being who were especially charged with the administrative duties of the court. These officers were, as are the registers under our own act, deprived of the strict judicial function of deciding an issue duly framed, but upon them were devolved only those quasi judicial functions which our act calls "administrative duties."

[Auditing the accounts of an assignee is clearly among these administrative acts, which pertain thus peculiarly to the register. But if the register has only to hear such testimony as may be offered on the part of the assignee on the one side, and by the creditors on the other, he ceases to be an administrative officer, and assumes purely judicial functions. And if the practice of the bar and the decisions of the court all tend in that direction, it is clear, that our bankruptcy system will soon be stript of all that distinguishes it favorably from the system of the collection of debts, which preceded it. That system required each creditor to

go into court with his individual claim, and prosecute that claim, in person or by attorney, under the penalty of its total loss, in case he failed at all times so to appear to prosecute the same. The multiplicity of suits of this character, and the immense labor and expense attendant upon them, in a country whose trade and commerce was so extensive as was that of England, led to the enactment in that country of bankruptcy laws as early as the year 1542. But, in the interests of "state rights," we have been deprived in great part of this powerful and effective aid to commerce, until we are now compelled to accept of experiences, other than our own, to guide us in interpreting and administering our law. And if, under the influence of old habits, we permit the functions of these administrative officers to fall into disuse, we shall, instead of following the model we have adopted, which has been so useful in promoting the commercial interests of England, render our own act not only powerless for good, but so harmful to commerce, that its repeal will be demanded. Respectfully submitted.][2]

BLATCHFORD, District Judge. In regard to the matters presented by the certificate of the register herein, of March 29th, 1872, the paper A, as referred to by Mr. Malcolm, may properly be regarded as evidence of what items of services Mr. Malcolm claims to have rendered and what disbursements he claims to have made, and as evidence of the items of alleged services and disbursements for which the assignee claims to be allowed, in his accounts, the sum of $893.86, as paid out by him to Mr. Malcolm. But the items all of them require to be explained, as to the occasion and necessity and value of the services, and the occasion and necessity and amounts of the disbursements, and how they came to be rendered and made, and whether they are, in any event, proper items for this account of the assignee, or whether they ought to be compensated through some other form of proceeding. The paper and its items, without such explanations, amount to nothing. So far as testimony given may explain any item in the above respects, that item and such testimony may be received in evidence together, for whatever together they may properly indicate.

The register's views in regard to his duty in auditing an account are correct.

The matter is remitted to the register for further proceedings.

Case No. 13,274.

In re STAFFORD.

[13 N. B. R. (1876) 378.][1]

District Court, E. D. Michigan.

BANKRUPTCY—FEES—REGISTER.

Registers may take cognizance of uncontested petitions filed by attorneys against the assignee, to compel the payment of their fees and disbursements.

[Cited in Re Austin, Case No. 662.]

[In the matter of Henry A. Stafford, a bankrupt.]

On exceptions to the decision of the register refusing to act on the petition of William H. Parks for an order requiring the assignee to pay him seventy-five dollars for his services in making the schedules filed by the bankrupt. Similar exceptions were filed to the decision of the same register declining to act on a petition of the same parties in the case of the Michigan Iron Company, for an order allowing a claim for professional services, disbursements, expenses, and fees, incurred in obtaining an order restraining certain sales of the bankrupt's property on execution. The register declined to act upon these petitions, on the ground that they should have been brought before the court, and that he had no authority to act unless under a special order of reference.

BROWN, District Judge. By section 4 of the bankrupt act [14 Stat. 519], in which the powers of registers in bankruptcy are defined, after the enumeration of certain specified matters, a general power is given them "to sit in chambers, and dispatch, there, such part of the administrative business of the court, and such uncontested matters as shall be defined in general rules and orders," to be made by the supreme court. This power given to the supreme court it had not exercised in its general rules and orders adopted prior to April, 1875, but the power of the register to act upon petitions of this kind was, notwithstanding, asserted by the district court of southern New York. In re Lane [Case No. 8,042]. In the opinion of Judge Blatchford, the power of the register to make an order, upon the petition of the solicitor for the bankrupt, directing the assignee to pay certain fees of officers, was embraced within the power given by section 4, "to make all computations of dividends and all orders of distribution," and "to audit and pass accounts of assignees," and under the power given him by general order No. 5, to conduct proceedings in relation to "taking evidence concerning expenses and charges against the bankrupt's estate, auditing and passing accounts of assignees, and proceedings for the declaration and payment of dividends."

This case was followed by my learned predecessor (In re Noyes [Case No. 10,371]), where the question arose upon the application of the assignee for the settlement of his account, and the power of the register to hear such application was affirmed. In the Case of Rosenberg [Id. 12,056], the attorneys for the bankrupt applied to the register for an order of payment by the assignee of the bill of items of disbursements for clerk's, register's, and marshal's fees, etc., to which the assignee objected that the bankrupt had paid his

[2] [From 43 How. Prac. 110.]

[1] [Reprinted by permission.]

attorneys a sufficient sum to cover those items. In this case Judge Blatchford held that the matter should be brought before the court by petition, which would then be referred to the register to take testimony. This was probably because the application was contested. Whatever doubts may have existed under general order No. 5, prior to April, 1875, with respect to the power of the register in uncontested matters of this kind, are resolved by the amended order adopted at that date. By this order, the power already given to the supreme court by section 4, and never, until then, exercised, was assumed by the supreme court, and the duties of the register extended to the dispatch "of all administrative business of the court in matters of bankruptcy, and making all requisite uncontested orders therein which are not by the acts of congress concerning bankruptcy required to be made, done or performed by the district court itself," subject, however, to the control and review of this court. By the amendment of general order No. 8, adopted at the same time, it was provided that "if any party interested adversely to such order shall not, before the hearing of the application therefor, give reasonable notice in writing to the register that he intends to contest the same, and objects to its being heard by the register, the same shall be heard by the register as by consent." The language could scarcely be broader. It applies to all uncontested orders concerning the winding up of the bankrupt's estate, which are not required to be specifically made by the court, and I think clearly embraces the petitions in question.

The exceptions to the decision of the register are therefore sustained, and an order will be entered directing him to act upon the petition in each case.

STAFFORD (BLAKE v.). See Case No. 1,504.

STAFFORD (CRESCENT CITY ICE CO. v.). See Case No. 3,387.

STAFFORD (GOFF v.). See Case No. 5,504.

Case No. 13,275.

STAFFORD v. PAWTUCKET HAIR-CLOTH CO.

[2 Cliff. 82.] [1]

Circuit Court, D. Rhode Island. June Term, 1862.

DAMAGES—EXCESSIVE—PREJUDICE OF JURY—NEW TRIAL.

1. Where damages awarded by a jury are excessive, the error may in many cases, and under most circumstances, be obviated by remitting the amount of the excess; but where the circumstances clearly indicate that the jury were influenced by prejudice, or by reckless disregard of the instructions of the court, that remedy cannot be allowed.

[Cited in Arkansas Val. Land & Cattle Co. v. Mann, 130 U. S. 75, 9 Sup. Ct. 460.]

2. Where such motives and influences appear to have operated on the jury, the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their entire finding.

[Cited in Arkansas Val. Land & Cattle Co. v. Mann, 130 U. S. 75, 9 Sup. Ct. 460.]

3. Excessive damages having been the foundation of the opinion of the court setting aside the verdict of a jury, and the verdict having exceeded in amount the damages laid in the writ, a remittitur is not the proper remedy, but a new trial should be granted.

[Cited in Ohio River R. Co. v. Blake (W. Va.) 18 S. E. 960.]

[See Howard v. Robertson, Case No. 17,-198a.]

Action to recover damages for the infringement of a patent on an improvement in hair-cloth looms. Defendants [the Pawtucket Hair-cloth Company] pleaded the general issue, and gave notice that they should prove the complainant [Rufus J. Stafford] not to be the original and first inventor of the improvement. Pitman, District Judge, presided at the trial, which was had at the November term, 1860, and charged the jury. Verdict for complainant for the sum of $2,500.

A motion for new trial was made, and the cause came before the court upon that motion. Numerous exceptions were taken to the instructions given to the jury by the judge presiding at the trial; and the rejection of the verdict was also asked upon the ground of excessive damages awarded by the jury, as indicating prejudice upon their part, or misapprehension of the case.

The only reason for setting aside the verdict, distinctly announced in the opinion of the court, was that of the amount of damages.

B. F. Thurston, for plaintiff.

Bradley & Metcalf, for defendants.

CLIFFORD, Circuit Justice. A new trial is asked, among other reasons, because the damages awarded by the jury in the cause are excessive, and indicate a total misapprehension of the case, and the evidence in this regard, as shown by the report of the evidence.

In substance and effect the charge of the court directed the jury to confine their attention to one machine, and they were expressly told that the court could see no particular proof of actual damages. Looking at the whole case, it is quite clear that the damages are greatly excessive, and plainly the finding was without sufficient evidence to justify it, and contrary to the charge of the court. Such errors may in many cases and under most circumstances be obviated by remitting the amount of the excess, but where the circumstances clearly indicate that the jury were influenced by prejudice or by a reckless disregard of the instructions of the court, that

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

remedy cannot be allowed. Where such motives or influences appear to have operated, the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their entire finding.

After careful consideration of the evidence and the circumstances of the trial, we are constrained to come to the conclusion that the case falls within the latter rule. Parties have a right to an impartial trial, and where the finding of the jury is so excessive, and so wholly opposite to the charge of the court, it is not possible to say that the requirements of the law in that behalf have been fulfilled.

In view of the whole case we are of the opinion that the verdict must be set aside and a new trial granted.

On a subsequent day of the term, the court pronounced the following additional opinion in this case:—

CLIFFORD, Circuit Justice. Since the order of the court setting aside the verdict and directing a new trial in this case, it has been suggested by the plaintiff that the opinion of the court given on the occasion contains an error of fact. Regarding the suggestion as a very proper one, we have reviewed the matter and are satisfied that the suggestion is well founded. Evidence was offered by the plaintiff tending to show that the corporation defendants had used some sixty or more machines embracing the principle embodied in the machine of the plaintiff; but the error of fact is not of a character to affect the judgment of the court. Excessive damages was the foundation of the opinion of the court, and the error of fact now corrected is only one of the reasons which led the court to that conclusion. Considering that the verdict exceeded the damages laid in the writ, we are still of the opinion that the order made was correct, and that a remittitur is not, under the circumstances, the proper remedy. Parties have a right to a full and impartial trial, and we are not satisfied that the requirement has been fulfilled.

Let the entry stand as originally directed.

STAFFORD (UNITED STATES v.). See Case No. 16,372.

Case No. 13,276.

STAFFORD v. WATSON.

[1 Biss. 437;[1] 2 Chi. Leg. News, 385.]

Circuit Court, N. D. Illinois. March, 1864.

DEMURRAGE — ABANDONMENT OF LIEN — ACTION AGAINST SHIPPERS.

The owner of a vessel, having abandoned his lien on the cargo for demurrage, cannot maintain an action for damages against the shippers, who were merely agents.

[Cited in Irzo v. Perkins, 10 Fed. 781; The William Marshall, 29 Fed. 330.]

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

Appeal from decree of the district court, dismissing the suit. [Case unreported.]

In admiralty.

DAVIS, Circuit Justice. This is a suit, in personam, brought to recover damages, in the nature of demurrage, on account of the alleged detention of the brig Banner, owned by libellant, at Port Colborne. The cargo of the brig was corn, which was shipped on the 1st of May, 1863, at Chicago, by the respondents, as agents and forwarders, and consigned to H. Stearns, Montreal, in care of the Welland Railway Company, at Port Colborne, and was to be delivered at Port Colborne at the agreed rate of seven and a half cents per bushel. Outside of the terms of the bill of lading, there is proof that the respondents had no interest whatever in the corn, having purchased it for the consignee for a small commission. The brig arrived at Port Colborne in due course of navigation, and was detained there some eleven days, because the railway company could not receive the cargo. The vessel, on her arrival at her place of destination, could have been unloaded in twenty-four hours if the usual and proper facilities had been furnished, and when the master ascertained that he would be detained unreasonably, he telegraphed the fact to the libellant, who called on the respondents, and wished them to consent that the destination of the brig should be changed to Buffalo, or some other port where she could be unloaded with dispatch. They replied that they had no power to authorize such a change; that they had purchased the grain for their correspondent in Montreal, and had no interest in it; but were, nevertheless, willing to write to Montreal for instructions. It does not appear in proof that such a correspondence was opened, or that the libellant wished it done.

The vessel, after a detention of over eleven days, voluntarily delivered her cargo, getting pay for freight, but not for demurrage. Time is often of great importance in commercial transactions, and, during the season of navigation, the owner of a vessel suffers damage for every day that she is unreasonably detained. The owner of the cargo is bound to furnish all reasonable facilities for unloading, when the port of delivery is reached, and, for a non-performance of this obligation, the injured party has his remedy under the name of demurrage. If demurrage was due at all there was a lien on the property, and the master could well have refused to deliver it without payment for his detention. But this lien, if one existed, was abandoned. No attempt has been made to fasten liability on the owner, but it is sought in this action to charge the respondents in person. This cannot be done. The bill of lading disclosed that the shippers were agents, and had no concern with the property. The fair interpretation of the contract is, that the owner was to be held responsible for all defaults, and not the shipper.

If the owner was a foreigner, yet the ves-

sel had the remedy in its own hands. To hold that an agent who buys produce and ships it for another, having no concern with it afterwards, is responsible for the damages growing out of a failure of the owner to cause delivery within a reasonable time, without an express stipulation, would be effectually to end all purchases on commission.

With such a liability hanging over him, no one, in view of the limited compensation received, would engage in the business. There is always more or less detention at Port Colborne, and it is very easy for carriers, if they wish to contract for the personal liability of the shippers, beyond the lien on the cargo, to provide for it by express stipulation in the bill of lading.

In this case the carrier not only had a lien on the property for his freight, but for the delay in procuring a delivery of the property; and, having voluntarily chosen to abandon this lien, he cannot now seek to charge a party who had no interest in it, and no control over it.

The judgment below is affirmed.

STAFFORD JUSTICES, The (STRODE v.). See Case No. 13,537.

STAFFORD NAT. BANK (MERCHANTS' & MANUFACTURERS' BANK v.). See Case No. 9,438.

Case No. 13,277

The STAG.

[Blatchf. Pr. Cas. 625.] [1]

District Court, S. D. New York. Feb. 23, 1865.

PRIZE—VIOLATION OF BLOCKADE.

Vessel and cargo condemned for violation of the blockade.

In admiralty.

BETTS, District Judge. This vessel was captured January 20, 1865, about simultaneously with the preceding vessel, the Charlotte, and upon the same cruising ground, and by part of the same United States war vessels, as prize of war, and was sent into this port for adjudication, where she was libelled, and arrested by process of the court on the 28th day of January last. The same order of procedure was followed in this case as in the preceding one, and, in due course of practice, an interlocutory decree of default was rendered by the court against the vessel and cargo, February 14, 1865. It is needless to recapitulate the exact steps pursued. No ship's papers were taken from the prize other than a register, executed at Wilmington, North Carolina, December 17, 1864, by the Confederate custom-house, transferring the vessel, as one of British build, from John Fraser & Co., and stating that Richard H. Gale, a citizen of the Confederate States, and apparently a commissioned officer of the rebel navy, was her master; and two letters from the secretary of the navy of the Confederate States,—one dated December 6, 1864, and one dated December 12, 1864,—both addressed to the said Gale at Wilmington, and each recognizing him as commander of the Stag, in the service of the Confederate States; and a letter from William H. Peters, as agent of the navy department at Wilmington, North Carolina, dated December 12, 1864, to the said Gale, as captain of the Stag, directing him to take the ship directly to sea in the Confederate service; and another letter of similar purport, from the same navy agent, dated at the navy department, Wilmington, December 16, 1864, reiterating to Captain Gale, in command of the vessel, to dispatch her immediately, in the rebel service, to Bermuda.

The depositions in preparatorio of Stephen Brewster Coltman, first officer, Richard Bell, second officer, and Hardy Mermetstein, third officer, of the Stag, were taken in the cause, before the prize commissioner in this district, on the 1st day of February, 1865, and were duly returned and filed in court. No other sworn proofs were presented in the case, except the affidavit of the prize master accompanying the delivery of the prize and her papers. The vessel was captured by United States ships of war, about 1 o'clock a. m., on the 20th of January, 1865, off Smithville, North Carolina, while coming out of Wilmington in evasion of the blockade of that port. She had recently made two voyages between Bermuda and Wilmington, breaking the blockade of the latter port. She was equipped, commanded, and sailed as a British ship, and had on board both a British flag and a Confederate flag, and wore the latter flag in rebel waters. The master of the vessel resides in the United States. He received his appointment to her at Wilmington, and took command of her there. The vessel and cargo were English property, and the crew, excepting the master, were Englishmen. All of the crew knew that Wilmington was under blockade, and that North Carolina was in a state of war with the United States. The statements of all the witnesses concur substantially in these facts, and there is nothing in their depositions calculated to detract from the credibility of the testimony against the prize. There is, accordingly, no ground to question the culpability of the ship and cargo, or that they are rightfully subject to condemnation and forfeiture. Decree accordingly.

STAHL (UNITED STATES v.). See Case No. 16,373.

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

Case No. 13,278.

STAINTHORP et al. v. ELKINTON.

[1 Fish. Pat. Cas. 349.] [1]

Circuit Court, E. D. Pennsylvania. Oct., 1858.

PATENTS — COMBINATION CLAIMED — USE BEFORE AND AFTER PATENT GRANTED.

1. A machine, which, if used after the grant of letters patent, would not infringe the combination claimed therein, can not be invoked to destroy the patent, if used before it.

2. Stainthorp's patent for "improvement in machines for making candles" examined and sustained.

[Cited in Thayer v. Wales, Case No. 13,871.]

This was a bill in equity [by John Stainthorp, John W. Hunter, and Stephen Seguine against George M. Elkinton] filed to restrain the defendant from infringing letters patent [No. 12,492], for an "improvement in machines for making candles," granted to John Stainthorp, March 6, 1855.

The claims of the patent were as follows: "(1) The employment of pistons formed at their upper end into molds for the tips of candles, in combination with stationary candle molds, to throw out the candles in a vertical direction, substantially as set forth in the specification. (2) The combination of the rack, tip bar, and clasps, constructed and arranged, substantially as, and for the purposes described in the specification."

George Harding, for complainants.
Theodore Cuyler, for defendant.

GRIER, Circuit Justice. The complainant has not claimed specifically the combinations of pistons with stationary molds and clasps to receive and hold the candles when thrust upward, as he might have done. If it were necessary to support his case, the court might find precedents for evading, by a liberal construction, the positive requirement of the statute that the patentee "shall specify and point out the part, improvement, or combination, which he claims as his own invention." But I prefer a decision which will not make a dangerous precedent to avoid a hard case, and this more especially as the statute provides an ample remedy for imperfect specifications.

The infringement of the first claim of the patent is not denied, but it is contended that the complainant is not the first inventor of the combination claimed therein. This claim is for the employment of pistons formed at their upper ends into molds for the tips of candles, in combination with stationary molds to throw out the candles in a vertical direction. The defendant has entirely failed to prove that this combination of devices was ever used before complainant's patent.

Short made some abortive experiments to perfect a machine, by which candles might be pushed out of the molds; but like his numerous other attempts at invention, it was abandoned as worthless, after filing a caveat.

It required no very great inventive powers to discover that candles might be pushed out of a mold as well as pulled out; that they might be popped by an impulse from beneath as well as by a pressure from above; or that, if candles were not to be drawn out by the wick, the popping process, if at all necessary, could be produced by the first impact of the piston from beneath.

The patentee does not claim to be the first who conceived the idea of pushing a candle out of the mold by a piston; but he has succeeded in inventing a labor-saving machine of great practical value, by a combination of devices; using a hollow piston with a mold for the tip, in combination with stationary molds. Short had some idea of a machine to push the candles out of cylindrical glass molds, but never perfected an invention containing the combination of devices claimed in this patent.

Hewitt only started or popped his candles by an impact from beneath, and then drew them out by hand, lifting them by the wick. Morgan's machine used a piston, but not in combination with tips and stationary molds. None of these abandoned experiments or machines would infringe the combination of devices claimed in this patent, if used, nor can they be invoked to destroy it.

Let a decree be entered according to the prayer of the bill.

[For other cases involving this patent, see Cases Nos. 13,279–13,281, and 13,872.]

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

Case No. 13,279.

STAINTHORP et al. v. HUMISTON.

[1 Fish. Pat. Cas. 475.] [1]

Circuit Court, S. D. New York. March, 1859.

PATENTS — NOVELTY — PRESUMPTION AS TO SUBSEQUENT PATENT.

1. The grant of a subsequent patent covering a given device, is evidence, that, in the opinion of the commissioner of patents, the device is substantially different from that described in a prior patent.

2. The novelty of Stainthorp's invention for making candles examined and sustained.

[Cited in Thayer v. Wales, Case No. 13,871.]

This was a bill in equity [by John Stainthorp and Stephen Seguine against Willis Humiston] filed to restrain the defendant from infringing letters patent [No. 12,492], "for improvement in machines for making candles," granted to John Stainthorp, March 6, 1855. The claims of the patent may be found in the report of the case of Stainthorp v. Elkinton [Case No. 13,278], and are also quoted in the opinion.

George Gifford, for complainants.
Charles M. Keller, for defendant.

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

HALL, District Judge. The bill in this case was filed for an injunction and account, and is founded upon a patent for "a new and useful improvement in machines for making candles," granted to the complainant, Stainthorp, on March 6, 1855. A "caveat" in respect to this invention was filed by Stainthorp, November 18, 1853, and the application on which the patent was issued has the date of November 15, 1854.

The patent embraces two distinct claims: First, the employment of pistons formed at their upper end into molds for the tips of candles, in combination with stationary candle molds, to throw out the candles in a vertical direction, substantially as set forth in the specification; and, second, the combination of the rack, tip bar, and clasps, constructed and arranged substantially as described, and for the purposes specified in the specification.

The defendant is a manufacturer of candle-molding machines, and claims to be the inventor of machines which he manufactures. He produces three patents issued to himself—one of December 23, 1851, for the employment of gripes for griping wicks, and drawing and suspending the candles on the frame above the molds, until the next series of candles are made; one of April 4, 1854, for an apparatus for stretching the wicks for candles, and for a centering bar or plate, with a stop or guide for centering the wick, in combination with the wick stretcher; and one of July 24, 1855, for making the top of the piston or tip mold in which the candle rests movable on the piston, so that it may remain in contact with the candle, while the piston is slightly depressed or lowered to bring it up with a sudden blow, to start the candles from the molds; also, in contradistinction from clamping the wicks, or from a tip bar or supporter, the clamping of the candles themselves in the position in which they are forced from the molds, and thus holding them until ready to be removed, by which means greater facilities for pouring into or filling the molds are retained, and the dangers of breaking the candles, or their tips, are avoided.

There is no evidence of the infringement of the second claim of the patent under which the complainants claim. This claim is for the combination of the rack, tip bar, and clasps found in the Stainthorp machine; and as neither the tip bar, nor any mechanical equivalent, is found in the defendant's machine, there is clearly no infringement of that claim. In the defendant's machine, the bodies of the candles are clasped and compressed, and are thus held in the desired position, while the tips remain untouched and unaffected; and in the complainants', the bodies of the candles are not at all compressed, and the sole pressure is that of the weight of the candles upon the tip bar, and which affects the tips only. The two devices and their modes of operation are, therefore, sufficiently distinct to allow each to be secured by a separate patent; and this must have been the opinion of the commissioner of patents, who granted the patent covering the defendant's device, after the issue of that under which the complainants claim.

It is conceded that there is an infringement of the first claim of the complainants' patent, if the patent itself can be sustained; and the defense in respect to this claim is want of novelty. It is insisted that the combination covered by the first claim, is to be found in the Morgan machine and in those of Whitfield & Hewitt. The defense was made in the case of Stainthorp v. Elkinton [Case No. 13,278], in the Eastern district of Pennsylvania, and was, after argument, overruled by Judges Grier and Cadwalader. The testimony in that case is the same that it is in this. The complainants have, therefore, the authority of that decision directly in point, in answer to such defense; and after as careful an examination of the case as my engagements have allowed me to give, I can find no sufficient reason for sustaining the defense in opposition to that decision.

In neither of the machines referred to was there the same combination, organization, mode of operation, as that in the machine patented by the complainants. Whitfield & Hewitt's machines had not the same device, nor did either of them operate in the same way. The pistons, or mandrels, in those machines were so worked as to supply the place of the "popping" operation upon the hand mold, but they did not throw out the candles in substantially the manner in which that operation is performed by the Stainthorp machine.

The Morgan machine did not throw out the candles in a vertical position, and although the rammers there used in connection with the short pistons, to which, during the operation of the machine, they were temporarily attached, operated to throw out the candles horizontally, by an operation quite like that which throws them out vertically in the Stainthorp machine, they were not attached to stationary candle molds; nor, taking the whole operation together, was it substantially like the operation of the Stainthorp machine. It must be conceded that with all these prior machines before him, an intelligent, thoughtful person, practically acquainted with the whole art and process of candle making, and constantly superintending and aiding in the operation of several of the prior machines, might, without the exercise of any extraordinary power of invention, devise and perfect the organization covered by the first claim of the Stainthorp patent, and that, looking now at the several prior machines in connection with that of Stainthorp, it appears somewhat strange that the invention perfected by him was not sooner produced. But this is true in respect to many important inventions, and, upon the whole case, I am of the opinion that inven-

tion was required to produce the organization and device covered by the first claim of Stainthorp; that the defense of want of novelty has not been made out; that the defendant has infringed, and that the complainants are entitled to a decree. The machine of the defendant contains substantially the same combination as that covered by Stainthorp's first claim; the introduction of the loose tips and slot being an improvement upon the device patented by Stainthorp. This last improvement was, I think, properly patented by the defendant. It is doubtless true, that the same result is produced in the complainants' machine, by the use of the flange at the bottom of the piston rod, or rammer, in connection with the arrangement which allows the requisite end-play to the piston rod, or rammer, and this produces the sharp hammer stroke, which, in its operation or effect, is equivalent to the operation of "popping" in the old hand machines. This arrangement and device now adopted in the complainants' machine, and devised and adopted before his application for a patent, is neither described in Stainthorp's specification, nor shown upon his drawing, and if it appeared in the working machine in use prior to Humiston's patent, this was not probably brought to the knowledge of the commissioner, and would not, therefore, affect his decision upon the defendant's application for a patent. But whether that patent was or was not properly granted, is not now in issue, and need not be discussed.

Decree for complainants, according to this opinion.

[For other cases involving this patent, see Cases Nos. 13,278, 13,280, 13,281, and 13,872.]

Case No. 13,280.

STAINTHORP et al. v. HUMISTON.

[2 Fish. Pat. Cas. 311.] [1]

Circuit Court, N. D. New York. Oct., 1862.

PATENTS—INJUNCTION—ACCOUNT.

Although the defendant's machine may infringe, yet if it contain other valuable improvements not covered by plaintiffs' patent, an order for account and security may be substituted for an injunction.

[Cited in Hoe v. Boston Daily Advertiser Corp., 14 Fed. 916; Campbell Printing-Press & Manuf'g Co. v. Manhattan Ry. Co., 49 Fed. 933.]

[This was a bill in equity by John Stainthorp and Stephen Seguine against Willis Humiston.] Motion for a provisional injunction to restrain the defendant from infringing letters patent [No. 12,492] granted to John Stainthorp, March 6, 1855, for an "improvement in machines for making candles." The motion was based upon prior adjudications, two of which are reported. Stainthorp v. Elkinton [Case No. 13,278], and Stainthorp v. Humiston [Id. 13,279].

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

M. B. Andrus and George Gifford, for complainants.

M. P. Norton, for defendant.

HALL, District Judge. I still retain the opinion (expressed in Stainthorp v. Humiston [Case No. 13,279] decided in the Southern district of New York, March, 1859), that the Humiston machine is an infringement of the first claim in Stainthorp's patent, but, as the defendant's machines contain other valuable improvements which are not patented to Stainthorp, an injunction might operate to the prejudice of the actual rights of the defendant without being as useful to the complainants as an account of profits, and security for their payment to the complainants, under the final decree in this case.

There are now also presented by the defendant, several affidavits of mechanical experts tending to show that the Humiston machine is not an infringement of the complainants' rights; and, although these affidavits have not shaken my faith in the correctness of my former decision, they afford an additional reason for making an order for an account and security, rather than an order for an injunction.

If a proper bond shall be given, according to the order to be entered on this motion, the injunction will not issue. If such bond be not given within fifteen days after service of a copy of the order, an injunction will go.

[For other cases involving this patent see Cases Nos. 13,278, 13,281, and 13,872.]

Case No. 13,281.

STAINTHORP et al. v. HUMISTON.

[4 Fish. Pat. Cas. 107.] [1]

Circuit Court, N. D. New York. June, 1864.

RULES OF COURT—PATENTS—CITIZENSHIP OF PATENTEE—RECORD OF NATURALIZATION—ALIENS—WORKING MODEL — IMPROVEMENT — ORIGINAL COMBINATION.

1. The sixty-ninth rule in equity does not allow the production of such proof at the hearing as was formerly allowed in the high court of chancery in England.

2. Where a record of naturalization was offered at the hearing to rebut proof that the patentee was not a citizen of the United States: *Held*, that such record could not be given in evidence, as a matter of right.

3. As, however, the defendant insisted upon other grounds of defense: *Held*, that the record of naturalization might be received upon the payment by the complainant of all costs incurred by the defendant in proving alienage.

4. If a subject of Great Britain becomes naturalized in the United States, but afterward resides in Canada, he is, while resident in Canada, entitled to take out Canadian letters patent as a subject of the Queen of Great Britain, for it is the settled doctrine of the English law that natural born subjects owe an allegience which is intrinsic and perpetual, and which can not be divested by any act of their own.

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

5. Upon the question of identity of machines, or of mechanical devices, the mode of operation and the result produced are important considerations, and if they are both clearly and substantially different, when the material or substance brought under their operation is the same, the question of identity must ordinarily be determined in the negative.

6. The use of a working model for two or three hours by way of experiment, is not a reduction of an invention to practical use.

7. The improvement of one element of a combination, though meritorious, does not give the right to use or appropriate the original combination.

8. Under the term "pistons," Stainthorp embraces not only the pistons proper, which fit the lower portion of the stationary candle molds, and the inner portion of which forms the tip molds, but also the pipes or hollow rammers, serving as piston rods, to which the pistons proper are attached.

9. The novelty of Stainthorp's patent for "improvement in machines for making candles," granted March 6, 1855, examined and sustained.

10. The candle machines described in letters patent granted to Willis Humiston, July 17, 1855, infringe the Stainthorp patent.

This was a bill in equity [by Joseph Stainthorp and Stephen Seguine against Willis Humiston], filed to restrain the defendant from infringing letters patent for "improvement in machines for making candles" [No. 12,492], granted to John Stainthorp, March 6, 1855. A motion for an injunction in the same case is reported [Case No. 13,280].

M. B. Andrus and George Gifford, for complainants.

M. P. Norton, for defendant.

HALL, District Judge. This is a suit in which the plaintiffs ask for an injunction and account, and it is founded upon a patent "for a new and useful improvement in machines for making candles," granted to the plaintiff, Stainthorp, March 6, 1855.

The patent was granted to Stainthorp, as a citizen of the United States, and the defendant, by his answer, not only denied the alleged infringement and interposed the defenses of want of novelty and want of utility in the patented invention, but also insisted that the patent was void, because the patentee was not a citizen of the United States, but was a subject of Great Britain at the times he applied for and obtained his patent as a citizen of the United States.

To sustain this latter defense, the defendant produced evidence showing that the patentee was born in England and was of English parentage; that on July 10, 1855, he applied for, and on September 24, 1855, received, from the Canadian authorities a patent for his invention on the allegation, verified by his oath, that he was a subject of the Queen of Great Britain and Ireland and a resident of Canada.

No evidence to show that the plaintiff, Stainthorp, had been naturalized under the laws of the United States was offered until after the plaintiff's counsel had concluded his opening argument, and one of the counsel for the defendant had spoken for some time in making his argument in behalf of the defendant. The plaintiff's counsel then produced and offered in evidence a duly certified copy of the record of the naturalization of the plaintiff, Stainthorp, on October 10, 1840. The defendant's counsel insisted that this evidence could not be received at that stage of the proceedings, except upon terms of paying costs; but the counsel for the complainants insisted that he could give the record in evidence as a matter of right. The defendant, not desiring an opportunity to produce proofs in respect thereto, it was agreed, after some discussion, that if the court should be of the opinion that this record was not admissible in evidence as the plaintiff's right, and without terms, at that stage of the proceeding, it should be received nevertheless, and the terms on which it should be received be prescribed by the court on the decision of the cause. Under that agreement the argument proceeded, and this preliminary question, as well as the questions involving the merits of the controversy, is now to be decided.

If the defendant, on the production of this record of naturalization, had elected to abandon his defense, he would probably have been entitled to require the payment of all his costs subsequent to the filing of his answer, as the condition upon which this record should be received. But this he did not elect to do, and the evidence must now be received upon the payment by the plaintiffs of the fees of all the witnesses whose testimony was taken for the purpose of proving the alienage of Stainthorp, and of the officer for taking such testimony, and also the further sum of $100, as the estimated expenses of the defendant (other than such fees) in procuring and taking such testimony. These terms are imposed upon the ground that such record could not be given in evidence as a matter of right, after the argument had commenced; and I am inclined to think that the 69th equity rule does not allow the production of such proof at the hearing as was formerly allowed to be done in the high court of chancery in England.

There is nothing in the defendant's proof to overthrow the proof of citizenship furnished by this record, or to show that his oath to the application for his patent in Canada, was false. His application in Canada was made some months after his patent in the United States had been issued; and the evidence in the case shows that he removed to, and carried on business in Canada, and was married there, all which is consistent with the hypothesis that he became an actual resident of Canada after his patent was granted here, and before his application for a patent in Canada was there made. If so, he was, while resident in Canada, a subject of the Queen of Great Britain and Ireland, for it is the settled doctrine of the English law that natural born subjects owe an allegiance which is intrinsic and perpetual, and which can not be divested by any act of their own.

Blackstone (volume 1, pp. 370, 371) says that this natural allegiance "can not be forfeited, canceled, or altered, by any change of time, place, or circumstance, nor by any thing but the united concurrence of the legislature;" and that "it is a principle of universal law that the natural born subject of one prince can not, by any act of his own, no, not by swearing allegiance to another, put off, or discharge his natural allegiance to the former, for this natural allegiance was intrinsic and primitive, and antecedent to the other, and can not be divested without the concurrent act of that prince to whom it was first due."

The question of the novelty of the invention patented to Stainthorp, arising upon substantially the same proofs as have been produced in this case, was before the circuit court of the United States for the Eastern district of Pennsylvania, in the case of the present plaintiffs and one John W. Hunter, against George W. Elkinton [Case No. 13,278], and in the circuit court of the United States for the Southern district of New York, in the case of the same plaintiffs against the present defendant [Id. 13,279]. In both, the decision was in favor of the patentee, but the effect of the decree in these cases, as an estoppel, was waived by the plaintiff's counsel on the hearing of this case; and this waiver has imposed upon this court the duty and labor of a re-examination of that question in the present case.

Upon the question of identity of machines, or of mechanical devices, whenever that question arises in a patent case, the mode of operation and the result produced, are important considerations; and if the modes of operation, and the results produced, are both clearly and substantially different, when the material or substance brought under their operation is the same, the question of identity must ordinarily, at least, be determined in the negative; and this is generally true, whether the invention patented is an organized machine, or an improvement upon an existing machine; and whether the patent is for a machine or a mechanical device, new in all its parts, or merely for a combination of two or more well-known existing machines or mechanical devices.

In this case the plaintiffs' alleged rights of action are based wholly upon the first claim in the Stainthorp patent; and that claim is for a combination only. It is, as has been said, a patent for an improvement in candle molding machines; and the patentee has claimed two distinct combinations. The construction of a machine for making mold candles, embodying the invention claimed, is fully described in his specifications, with reference to the annexed drawings and the letters marked thereon; and this description sets forth the mode of constructing, not only the parts covered by the patent, but also portions of such machine which were before well known, and in respect to which no invention is claimed. The patentee then states the invention, or what he claims as his invention, as follows, viz.:

"Having thus fully described my invention, what I claim as new and desire to secure by letters patent, is:

"First. The employment of the pistons D, D, formed at their upper ends into molds for the tips of the candles, in combination with stationary candle molds, to throw out the candles in a vertical direction, substantially as herein set forth. I do not claim the use of clasps separately considered, but I do claim:

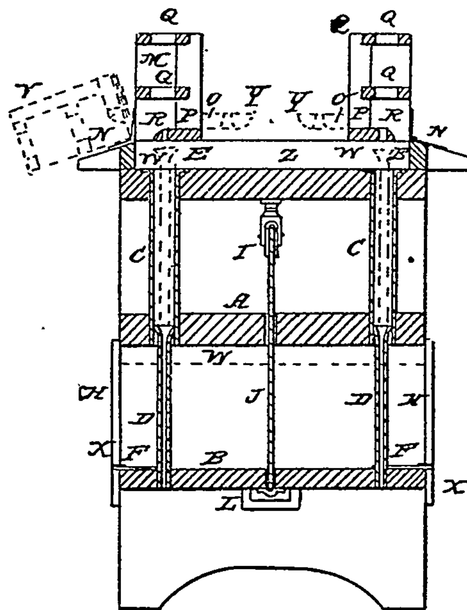
"Second. The combination of the rack, tip bar, and clasps, constructed and arranged substantially as described, and for the purposes specified."

It would be difficult, if not impossible, to explain fully the state of facts upon which this question of novelty arises, without reference to exact drawings exhibiting the plaintiffs' alleged invention, and the construction of the several machines, the prior existence of which it is insisted ought to defeat the plaintiffs' action.

The question will therefore be discussed with reference to the drawings and models, given in evidence, but no detailed description of them will be attempted.

The language of the specification of Stainthorp, and the drawings annexed, clearly show, that under the term "pistons D, D," he embraces not only the pistons proper which fit the lower portion of the stationary candle molds, and the inner portion of which forms the tip molds, but also the pipes or hollow rammers serving as piston rods to which the piston proper is attached. Indeed,

[Drawing of patent No. 12,492 granted March 6, 1855, to J. Stainthorp; published from the records of the United States patent office.]



the argument upon both sides has proceeded upon that hypothesis, and properly so, for it is entirely clear that the specification requires its adoption.

The claim alleged to be infringed is that of the invention of the combination, or, in the language of the patentee, the employment of the combination of the pistons D, D (including the pipes or rammers, the piston rods as well as the pistons proper), formed at their upper ends into molds, for the tips of candles with stationary candle molds, to throw out the candles in a vertical direction, substantially as set forth in the specification.

The employment and operation of these pistons in combination with stationary candle molds, substantially as described in Stainthorp's specification, results in throwing the candles from the molds in a vertical direction, by mechanical force applied to raise these pistons D, D.

In the Morgan machine one element of this combination, stationary candle molds, is not found. In view of this fact, and of the additional fact that the mode of operation and construction of this very complicated and cumbrous machine are entirely different from those of the machine patented by the plaintiff, I feel no difficulty in saying that the Morgan machine is not, in respect to the combinations mentioned in the first claim of Stainthorp's patent, substantially identical with that of Stainthorp.

The Whitfield machine contains the combination of stationary candle molds with the pistons containing the tip mold, but its mode of operation is widely different from that of the Stainthorp machine. The combination of the piston and mold is not arranged or employed for throwing the candles out of the mold. The motion of the piston is so limited that its use is of little or no value beyond the effect of detaching the candles from that part of the mold to which it adheres, when cooled. This is effected by raising the candle instead of depressing it (as is done in the old hand machine by the operation termed "popping"), and the candle is drawn out of the mold by the strength of the wick instead of being forced out by the upward movement of the piston. The mode of operation of the Whitfield device is, therefore, entirely different from that of Stainthorp's. Beside, the machine of Whitfield never went into practical use. Although, a working model was made in or about the year 1849, and was soon after used for two or three hours in making candles, by way of experiment, the machine may well be considered as but an abandoned experiment. The inventor was then, and for some twelve years afterward, engaged in the manufacture and sale of the common hand-stand candle machine, and yet he did not manufacture or sell this machine, or procure a patent for his supposed invention; and no one, it is believed, would now use a machine of that kind whatever might be the excellence of its mechanical construction.

The Hewitt machine, so far as it affects this case, was, in its construction and mode of operation, similar to the Whitfield machine, and performed only the like operation of starting or popping the candles by the upward pressure of the tip mold for a short distance at the bottom of the mold, which forms the body of the candle. It does not appear that this machine, although described, in 1831, in the journal of the Franklin Institute, ever went into practical operation; and upon the proof in this case it can not be considered as much more than an abandoned experiment, indicating progress in the direction of Stainthorp's invention. Stainthorp's invention though first embodied in a machine of very rude and imperfect mechanical construction was early put in practice, and, although the imperfect mechanical construction of his machine was for a considerable time unfavorable to its introduction into general use, the principle of the invention was found practically useful. A better mechanical construction, a better choice in the selection of the mechanical device for raising the pistons, was desirable, and was afterward adopted; but the combination of the first claim, substantially as described in his specification, is found in his present machine and in those of the defendant.

But conceding that the devices of Hewitt and Whitfield are to be treated as completed inventions, I do not think they invalidate the Stainthorp patent. The pistons and tip molds of Stainthorp were different from the tip molds, plugs, or mandrels of the machines of Hewitt and of Whitfield, and they were not mechanically the same, for they were different in the modes of construction and operation, and performed entirely different functions. They were different in construction and mode of operation, and this different construction and mode of operation were adopted for a specific purpose—for the production of a specific effect—which could not have been produced by the Hewitt or the Whitfield machine. The result to be produced by the one was entirely different from that produced by the others, and was valuable; and the combination had never before been made with like elements or applied to the same purpose, and was therefore clearly patentable. Ex parte Mackay [Case No. 8,836].

Upon the question of infringement I think there can be no doubt. This question must rest upon the substantial identity of the combination and device described in the first claim of Stainthorp's patent, its mode of operation, and results. It does not depend upon the mode of clasping and holding the candles after they are ejected from the molds, or upon the particular character or construction of the mechanical powers applied to force the pistons upward through the molds.

The ground on which it was most strenuously urged that the defendant had not in-

fringed was, that the pistons and pipes in the two machines, and which are both embraced in the term pistons in the Stainthorp patent, and are described as tip molds and driving rods in the defendant's patent, are not identical, because the connection between the tip mold and pipe or piston rod in the Stainthorp machine is close and rigid, while in the defendant's machine they are loosely and more or less remotely connected by a universal joint, which allows a slight lateral or oscillating motion in the tip mold while the rod moves in a direct line, and also effects the purpose of giving a sharp blow to start or pop the candles in consequence of this joint being so constructed as to allow the drive rod to move upward a very short distance before its shoulder strikes the tip mold.

In the Stainthorp machine this sharp blow, desired for the starting process, was provided for solely by allowing about one-fourth of an inch end play to the piston rod or pipe at the point near its lower end, where it was connected with the machinery for raising it upward; and in the defendant's working machine exhibited at the hearing, there was, in addition to the end play allowed at the universal joint before referred to, an additional end play of a sixteenth to an eighth of an inch at the point at or near its lower end, where it was connected with the machine for raising the drive rod and tip mold through the candle mold.

In other words, about a quarter of an inch of end play was allowed the drive rod in both machines; in the Stainthorp machine it was all allowed at the lower connection, and in the defendant's it was about equally divided between the upper and lower connections of his drive rods.

It is apparent upon the proofs in this case, that the defendant's machine has the same combination as that patented to Stainthorp; that its mode of operation and its results are the same; and that the change introduced by the defendant by the adoption of the loose connection and universal joint referred to, if of sufficient utility to sustain a patent, is but an improvement upon the invention of Stainthorp.

If the machine be defective in its construction or operation, so that the candles when raised nearly or quite out of the molds are deflected from the line of the piston or drive rod, this joint and its loose connection may be a valuable improvement; and if no end play, or insufficient end play, be allowed at the bottom of the drive rods or pistons, the end play allowed at the joint may also be of service. But this leaves Stainthorp's original combination still existing, and this new device of the defendant was only patentable as an improvement in one of the elements of that combination, and gave the defendant no right to use Stainthorp's patented combination, without a proper license. The improvement of one element of a combination, though meritorious, does not give the right to use or appropriate the original combination. Gorham v. Mixer [Case No. 5,626].

The defendant's patents do not aid him in his defense. They do not come in conflict with the views I have taken of the case. They may be valid for useful improvements in the candle machine, and these improvements may be necessary to the construction of the best candle machines in use, but if so, these patents give the defendant no right to use the invention patented to Stainthorp.

On the question of utility, there can be no doubt. The device patented, in connection with the other parts of the machine described in the specification of Stainthorp, was and is of great utility, whether used in connection with the device for holding the candles described in Stainthorp's specification, or that used in the defendant's machine.

That the agreement made upon the settlement of the former decree against the defendant in this suit constitutes no defense, is too clear to need argument.

The plaintiffs are entitled to a permanent injunction and to a decree for an account, and I do not feel at liberty, without the plaintiff's consent, to withhold the injunction until this case can be decided on appeal.

[An appeal was taken to the supreme court, where it was heard on motion to dismiss. The motion was granted. 2 Wall. (69 U. S.) 106.]

[For another case involving this patent, see Cases Nos 13,871 and 13,872.]

Case No. 13,282.

STALKER v. The HENRY KNEELAND.

[3 Betts, D. C. MS. 26.]

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

CHARTER PARTY—WHAT CONSTITUTES—PAROL EVIDENCE OF CONSIDERATION — MORTGAGEE CONSIDERED AS OWNER—SUBROGATION—COMPETENCY OF WITNESSES.

[1. The cardinal elements of a valid charter party are a definite voyage to be performed and a definite compensation to be paid by the charterer.]

[2. An agreement which exhibits on its face no other object than to assign to one of the parties all the freight earned by a vessel up to certain specified sums, and one-half of all above them, may be a sufficient contract of hypothecation or mortgage, but is not a charter party, with the privilege of a lien. It is only a personal covenant, and to be enforced as such.]

[3. Where a written agreement purports to be a charter party, but does not embody the elements necessary in law to make a charter party, and is also loose and informal in character, it is competent to show, by parol evidence, that the consideration for the agreement was collateral to it, and consisted in an advance of money.]

[4. The owner of a ship, who has pledged her to two different parties to secure debts due each of them from him, stands indifferent in point of interest as between them, and is a competent witness in a suit involving their respective claims upon the vessel.]

[5. The policy of the law is to regard the legal title to a vessel as the controlling one, for the purpose of protecting all who give credit to

her owners or have remedies against them. Therefore, very slight acts of possession by the mortgagee will be considered as placing him in that position, and subjecting him to those liabilities. But, to charge him personally, there must be some unequivocal act of possession.]

[6. Where a person lends securities for the general use of a ship owner, who gets them discounted and applies part of the proceeds in satisfaction of a bottomry upon the ship, this raises no equity in behalf of the lender to be subrogated to the lien of a bottomry creditor.]

[This was a libel for breach of charter party by Thomas Stalker against the ship Henry Kneeland,—Miln and others, claimants.]

Before BETTS, District Judge. I. The agreement articled upon record by itself does not constitute a charter party.

(1) Cardinal elements to that contract are a definite voyage to be performed and a definite compensation to be paid by the charterer. The Tribune [Case No. 14,171]; Abb. Shipp. 166, 167; Holt, Shipp. pt. 36, c. 1, § 5.

(2) The written stipulations, which must control, have no coincidence with the printed articles, and cover plainly some special contract in which the parties are mutually interested, and not a letting of the ship for hire.

(a) The agreement reserved nothing certain for the ship.

(1) The charterer engages "to furnish the vessel all the cargo the ship may obtain." This does not bind him to lade the ship or supply her any cargo, and is, indeed, senseless as a stipulation.

(2) The charterer engages to pay "all the freight the ship makes over $2,000 from Gibraltar or $3,000 from Mediterranean ports, to be equally divided between him and the owner; i. e. unless the ship makes those sums the owner receives only half her freight.

(3) There is no stipulation by the charterer to load the vessel, or bear any losses, if she fails proving a cargo. The agreement upon its face exhibits no other object than to assign to the libelant all the freight earned by the vessel up to the limited sums, and one-half of all above. This may be a sufficient contract of hypothecation or mortgage, but is no charter party with the privilege of lien. It is only a personal covenant and to be enforced as such. Abb. Shipp. 170.

II. The libel avers that the consideration was collateral to the agreement, and that the libelant advanced $3,000 to the owner, for the uses of the vessel, which sum was to be secured and reimbursed him under the stipulations of the contract.

(a) I see no objection to proofs in support of the contract, aliunde the written agreement. Those papers are usually loose and informal. They fix outlines of argument, and intermediary matters, to sustain and give them life, may be established extraneously. So is case of The Tribune [supra].

(b) Libelant may therefore prove he advanced the consideration for charter at time it was executed, and that reserved freights were to cover such advance.

(c) But, can Robertson, the owner, be a witness to make such proof? He has no interest which will be fixed or directly affected by the event of the suit. If the contract in question operates in rem it binds the ship, as to him, for the repayment of the $4,275.31 advanced under it by libelant, and the ship was previously bound by mortgage to claimants for $2,000. He admits obligation of both hypothecations, and is he incompetent to give evidence which may secure the libelant priority over the claimants? If his evidence, by attaching the libelant's demand to the ship, exonerated him personally, he would not stand neutral between the two parties, for the benefit to him would be according to the relative magnitude of the demands, and it would be more to his interest to have the greater satisfied than the less. So are the cases, for they exclude a witness where there is not an equipoise of interest in the opposing ones, being unequal in degree. 4 Starkie, Ev. 751, 752; 1 Phil. Ev. 54; 2 Johns. 394; 16 Johns. 94, 95; Greenl. Ev. p. 264, § 420. Robertson, then, as a party who has pledged the ship to the libelant and claimants, to secure debts due each from him, is indifferent in point of interest, and a competent witness between them. The difference in the magnitude of the debt does not affect his competency, for he is absolutely bound to each for so much of the debt as is not satisfied by the ship. If, then, the libelant holds the ship, and her value is exhausted in paying the $4,000, the witness is personally liable to claimants for his $2,000; and if the claimants retain the ship for satisfaction of their $2,000, the witness is liable to the libelant for so much of his debt as remains unpaid. This doctrine is plain, if both parties are mortgagees or holders by hypothecation. Nor is it varied in principle, if this be a charter party, which displaces the mortgagee; for a grantor can, by his testimony, establish a conveyance which divests the rights of a prior grantee or alienee, when he does not discharge his own liability to such alienee. Cases above cited.

III. Robertson was, at the time the contract was entered into with libelant, owner of the ship in possession and documentary. The policy of the law is to regard the legal title as the controlling one, for protection of all giving credit to owners, or having remedies against them; and therefore will consider very slight acts of possession by a mortgagee as placing him in such position and under such liability. But there must be some unequivocal act of possession by the mortgagee to charge him personally, and e converso, to give the advantage of occupancy. No such plain and direct act is proved anterior to the letter of instructions to the master of November 11, when claim-

ant assumed the positive and full control of the vessel. In the interim the claimant could have no higher right or interest in respect to the ship than that of mortgagee out of possession. The interest of the libelant is of no higher character. He is chargeable with notice of the paper title to the ship, for that would be first looked to, at her home port, in taking a security on her, and, accordingly, his claim cannot supersede the claimants', unless intrinsically of a higher quality. Upon all the testimony, I am satisfied his claim was a mere loan of negotiable paper, and the special agreement, under the name of charter party, was framed to secure the loan. This, not having the proper attributes of a charter party, can operate only as an hypothecation or mortgage posterior in time and effect to that of the claimants.

IV. The libelant does not entitle himself to the advantage of the previous bottomry bond. He did not discharge it directly, nor did he advance money for that specific purpose. He loaned securities for the general use of the owner, who got the securities discounted, and applied part of the proceeds in satisfaction of the bottomry. This raises no equity in behalf of the libelant to be subrogated in place of the bottomry creditor.

V. The libelant may be entitled to all the residuary interest of the owner in the vessel after satisfaction of the claimants' mortgage, but this court cannot state an account with the mortgagee, or between the parties or decree relief on that equity. This libel must accordingly be dismissed, with costs.

Case No. 13,283.

STALKER et al. v. MAXWELL.

[3 Blatchf. 138.][1]

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

CUSTOMS DUTIES—DISCRIMINATING DUTY—REPEAL—PROTEST.

1. The discriminating duty of 10 per cent. imposed on merchandise imported in certain foreign vessels, by section 11 of the act of August 30, 1842 (5 Stat. 561), is not abolished by the act of July 30, 1846 (9 Stat. 42).

2. Such discriminating duty continues, even though the general tariff of duties be altered.

3. Requisites of a protest against the imposition of duties, stated.

[See Bangs v. Maxwell, Case No. 841.]

This was an action [by Thomas Stalker and others] against [Hugh Maxwell] the collector of the port of New York, to recover back discriminating duties exacted on invoices of bales and cases of licorice root, imported by the plaintiffs from Amposta, in a Spanish vessel.

BETTS, District Judge. Section 11 of the act of August 30, 1842 (5 Stat. 561), imposes an additional or discriminating duty of ten per cent. on merchandise imported in vessels not of the United States, unless they are entitled, by treaty or act of congress, to be entered on payment of the same duties as shall be paid on goods imported in vessels of the United States. The protest asserts that this discriminating duty is illegally imposed, because the act of July 30,1846 (9 Stat. 42), establishes rates of duties repugnant to those created by the eleventh section of the act of August 30, 1842, and, both by implication and direct enactment, repeals that provision of the antecedent act.

We are of opinion, that there is no repugnancy in the provisions of the two acts, as the discrimination objected to relates to the vessel, and, whether the tariff of duties be increased or reduced by subsequent legislation, the additional ten per cent. is to be imposed when the goods are imported in foreign bottoms. The same method of estimating or determining the duty is to be pursued under the rates prescribed by either act.

By section 3, of the act passed August 3, 1846 (9 Stat. 50), all discriminating duties in respect to Spanish vessels, except those coming from Cuba or Porto Rico, are repealed. This importation was from Amposta, and, although there is nothing in the case negativing the existence of a port of that name in Cuba or Porto Rico, or asserting that this cargo came from Spain, yet as we possess no historical or topographical information of such a port in either island, and as the commodity imported is a product and article of commerce of Spain, and is not generally understood to be a tropical product, and as Amposta is a place in Catalonia near the Mediterranean, the reasonable presumption is that the exportation was from Spain. The probability is, that these facts were not adverted to at the custom-house, and that the duties were imposed by mistake. But, conformably to the doctrine uniformly laid down by this court, in actions against the collector, to charge him personally with the amount of duties illegally received, the court cannot regard any particular that is not designated specifically in the protest. As the plaintiffs did not make it a ground of objection to the duties, that this vessel did not come from Cuba or Porto Rico, and did come from Spain, they cannot demand a judgment for the duties against the collector individually. The relief of the plaintiffs, under this position of the case, should be by application to the secretary of the treasury for a remission of the duties. Judgment for defendant.

STALY (UNITED STATES v.). See Case No. 16,374.

STANARD (WRIGHT v.). See Case No. 18,094.

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

Case No. 13,284.

STANBACK v. WATERS.

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

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

SLAVERY—ACTION FOR ENTICING SLAVE—PLEADING—SCIENTER.

1. In an action on the case for receiving the plaintiff's slave in Virginia and bringing him into the District of Columbia, it is not necessary to prove that the defendant knew the slave to be the slave of the plaintiff, although the scienter be averred in the declaration.

2. Difference between the enticing of a servant and the abduction of a slave.

3. In an action for enticing the plaintiff's slave from the service of the plaintiff, knowing him to be the plaintiff's slave, the scienter must be proved.

Action on the case [by George Stanback against Joseph Waters] for enticing away and receiving the plaintiff's slave, named Williamson, in Virginia, and bringing him into the District of Columbia. The 1st count was for enticing Williamson from the service of the plaintiff, knowing him to be the plaintiff's slave. The 2d count was for receiving the slave and bringing him into the District of Columbia, knowing him to be the plaintiff's slave.

Mr. Taylor, for defendant, prayed the court to instruct the jury that the plaintiff was not entitled to recover unless he should satisfy them by evidence that the defendant, at that time, &c., knew that Williamson was the slave of the plaintiff; which instruction the court gave (nem. con.).

But upon reflection, THE COURT (THRUSTON, Circuit Judge, contra) was of opinion, that the scienter in the 2d count was immaterial, and therefore need not be proved; because the receiving the slave and bringing him away, is a sufficient cause of action. The forms of declarations for enticing a servant from the service of his master, always aver the scienter; because the cause of action is the plaintiff's loss of service; a particular and personal cause of action, not grounded upon a violation of the right of property, but of the right of service. The defendant's knowledge that the plaintiff had that right of service is, therefore, in such a case, material; but if a defendant violates my right of general and absolute property in a chattel, it is not a necessary ingredient of the cause of action, that he should know that it was my property.

Mr. Neale and Mr. Mason, for plaintiff.

Mr. Taylor, for defendant, cited Com. v. Turner, 5 Rand. (Va.) 678.

STANBERY (TAGGART v.). See Case No. 13,724.

STANCHFIELD (HOME INS. CO. v.). See Case No. 6,660.

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

STANDARD SUGAR REFINERY (GREENISH v.). See Case No. 5,776.

Case No. 13,284a.

STANDEFER v. DOWLIN.

[Hempst. 209.][1]

Superior Court, Territory of Arkansas. Jan., 1833.

ATTORNEY—AUTHORITY QUESTIONED—AFFIDAVIT—GROUNDS OF BELIEF.

1. The authority of an attorney in a suit may be questioned by affidavit, or the production of sufficient proof, and he be required to show such authority.

2. An affidavit, stating that the party was informed and believed, and had good reason to apprehend that an attorney had no authority, is not a sufficient foundation for a rule against the attorney to show his authority.

3. In such a case, the grounds of the belief, and the reasons inducing the apprehension, should be stated, so as to enable the court to judge whether a rule ought to be granted.

Appeal from Washington circuit court, in an action by Thomas Dowlin, for the use of John McPhail, against Abraham Standefer.

Before JOHNSON, CROSS, and CLAYTON, JJ.

OPINION OF THE COURT. During the process of the cause, and previous to the rendition of judgment, the defendant filed his affidavit and moved the court to rule McPhail, or the counsel for the plaintiff to file a warrant of attorney to authorize them or some of them to collect the debt. In his affidavit, the defendant states, "that he is informed and believes, that the above suit has been instituted against him by John McPhail, and the counsel of said plaintiff, without any lawful authority from said plaintiff, and that he has good reason to apprehend that if the debt in this declaration should be paid to the said McPhail or to said attorney or counsel, that the said McPhail or said attorneys could not execute any legal acquittance for the same." The motion of defendant for the rule to file the warrant of attorney, or to show the authority for commencing the action was overruled, to which the defendant excepted, and after judgment was rendered against him, he appealed to this court. The correctness of the decision of the court below, overruling the defendant's motion, is the only point to which our attention has been drawn.

The uniform and settled practice here, in accordance with the practice in most, if not all of the states of the Union, is to proceed in the cause, upon the appearance of an attorney of the court for either of the parties, without requiring him to file his warrant, or to show the authority for prosecuting or defending the suit. Chief Justice Kent observes, in the case of Denton v. Noyes, 6 Johns. 308, that "by licensing attorneys the court recommended them to the public con-

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

fidence, and if the opposite party, who has concerns with an attorney in the business of a suit, must always, at his peril, look beyond the attorney to his authority, it would be productive of great public inconvenience. It is not usual for an attorney to require a written warrant from his client. He is generally employed by means of some secret confidential communication. The mere fact of his appearance is always deemed enough for the opposite party and for the court." But it cannot be doubted that a defendant may, by a sufficient affidavit, or the production of sufficient proof, question the authority for bringing and prosecuting the action. This is expressly asserted by the same eminent judge, in the case to which reference has just been made. Did the affidavit of the defendant, in the present case, lay a sufficient foundation to call upon the court to grant the rule? We think not. It is true he stated he was informed, and believed, and had good reason to apprehend, that the suit had been instituted without any authority from the plaintiff in the action. But this, in our judgment, was not sufficient. He should have stated to the court the ground upon which his belief was founded, and the reasons which induced him to apprehend that no authority existed for prosecuting the suit. He would then have enabled the court to form a correct judgment whether the rule ought or not to be granted. To permit the defendant to question the authority to bring the suit on affidavit, merely stating his belief that the authority did not exist, without showing the ground and reason of that belief, would be productive of great public inconvenience, and hold out strong temptations to perjury for the sake of delay. We think the court correctly overruled the motion of the defendant, on the ground of the insufficiency of the affidavit upon which the motion was based. Judgment affirmed.

[See Case No. 4,041a.]

STANDING BEAR v. CROOK. See Case No. 14,891.

STANGE (UNITED STATES v.). See Case No. 16,375.

STANHOPE (HEYDOCK v.). See Case No. 6,445.

Case No. 13,285.

STANLEY v. HEWITT.

[21 Jour. Fr. Inst. (1836) 165.]

Circuit Court, E. D. New York.

PATENTS—VALIDITY—PRIOR USE—PUTTING OUT ON TRIAL—EFFECT OF CLAIMING TOO MUCH.

[1. Where the subject of invention was a cooking stove, *held*, that putting a number of them out on trial in several families for the purpose of experiment and improvement was not such a public use as would result in a dedication to the public.]

[2. Where plaintiff, by using various devices that were old, had formed a combination which would have been patentable as such, but, instead of claiming a combination only, claimed the entire thing described, as consisting of constituent parts which he himself had invented, *held*, that the patent was void for claiming more than the real invention.]

[3. The patent to Henry Stanley, dated December 17, 1832, for an improved rotary cooking stove, is void.]

This was an action founded upon a patent granted to the plaintiff, Henry Stanley, by the United States, the 17th December, 1832, upon a specification and application made to the patent office the 11th of October, 1832, for an improved rotary cooking stove. The plaintiff, by several witnesses, proved the originality of the invention in him, its importance and usefulness, and that the defendant had, from patterns taken from the plaintiff's stove, made and caused to be made and sold a large number of stoves, and was still pursuing the business. The defendant, to show that the plaintiff's patent was void, called Elisha Town and his son, and others, to prove that in 1823 and 1824 he invented and procured to be cast a rotary stove, and that the plaintiff's stove revolved like it; also a Mr. Gould, to prove that the plaintiff took the collars and flues in the cap of his stove from said Gould's stove, and also other witnesses to show that the plaintiff, as well as others, had used the collars and flues long before the plaintiff's improved cooking stove was invented; and also that the defendant attempted to show that the plaintiff had sold his stoves and given his invention to the public before he applied for his patent.

The plaintiff, in reply, called numerous witnesses to show that Town's stove, whatever it was, was useless, and had been abandoned as such; and that the plaintiff had no knowledge of it when he made his invention and improvement; and that his stove, in all the important improvements by him claimed, was wholly unlike Town's stove; and that collars and flues were not claimed by him as his invention, independently of his rotary plate in which they were attached; and that when they were put upon the Gould stove it was done at the plaintiff's suggestion; and that all the stoves delivered out before the application for the patent were delivered to be used on trial, and with a view to test the utility of its improvements. The trial was a very labored one, and occupied five or six days; but finally resulted in a question of law, growing out of the wording of the specification, which appeared to have been drawn up by the plaintiff without proper legal advice.

On the part of the plaintiff it was insisted that the claim, in his summary, was for a combination of certain improvements he had made in the cooking stove, connected together and attached to the top or cap of his stove, put in motion; and that it was the combination which he claimed, and not the parts forming the combination separately, and that his specification would bear that construction.

On the part of the defendant it was insisted that the plaintiff had so worded his specification that it would not bear that construction, and that it really claimed the different parts comprising the top and cap of the stove separately and independently of any combination, and that his specification was otherwise defective.

S. P. Staples, J. P. Hill, and J. R. Staples, for plaintiff.

R. M. Sherman, Hugh Maxwell, Mr. Ormsby, and Mr. Harris, for defendant.

THOMPSON, Circuit Justice, in the progress of the cause, gave his opinion that putting the stoves out on trial and for the purpose of experiment and improvement was not such a public use of them as would be considered as a dedication to the public; that the plaintiff was justified and had a right to test the utility of his invention, and see what improvements might be made before he applied for his patent, and that this was an article which would be tested by being put into several families, where it might be differently used by different housekeepers.

In charging the jury, THOMPSON, Circuit Justice, after stating the case and the difficulties arising from the obscurity of the language employed in the summary of the specification, remarked that in all cases where consequences of great importance to the parties were involved the jury must expect that the views of each would be presented with great earnestness and zeal. Nor is it surprising (said he) that in such controversies, matters not materially connected with the merits of the issue should be brought before the court and jury during the progress of the trial.

These remarks are applicable to the case now under consideration. It evidently involves matters of importance to the parties concerned, and has been accompanied by circumstances having no material bearing upon the questions in issue. We, however, are to examine the controversy, and determine it by the law and the evidence, without reference to extrinsic matters having no bearing upon its merits. And in this view of the subject, it is of no consequence whether the plaintiff, Mr. Stanley, has or has not accumulated a fortune as the fruits of his invention. If by his own talents, industry, and perseverance he has produced a machine, useful in itself, and approved of by the public, he is entitled to the protection of the law, so far as he has rights to be preserved and guarded. And if, on the other hand, he has interposed claims which cannot be the subject of legal sanction, he must abide by the consequences of his fault or misfortune. I state to you, gentlemen, in the outset, that this is not a case free from difficulties. But I have the consolation of knowing that my decision of the matter need not be final, and that any mistakes committed here may be reviewed and corrected by another tribunal, where I, too, shall have an opportunity of considering the subject with more care.

In my view of the case, much evidence has been introduced upon both sides which is entirely irrelevant. The plaintiff's rights, whatever they are, depend upon his patent; and if he has any by his patent, and has not abandoned them to the public, he is entitled to protection. I confess to you that my own prepossessions lean towards useful improvements, and I would construe the patent act with a liberal spirit and expanded views. It is a beneficial law, having its foundations in public policy. Its object is to encourage the enterprise of ingenious men, that the results of their labours, being brought into view, may be first enjoyed by the inventors for a limited period, and then dedicated to the public benefit forever afterwards. Nevertheless, I do not mean to say that all patents are to be protected at all events, but those only are to be sustained which have the sanction of law. It is a well-known fact that patents are granted at the patent office, not after an examination into their merits, but upon ex parte statements, and hence their real claims may be afterwards investigated with proper strictness in a court of law.

There are some general rules always to be observed while considering this subject. In the first place, to entitle a patentee to maintain an action for a supposed violation of his rights, his invention must be both useful and new; not that its usefulness is to be scanned with a critical eye, to ascertain a given amount of benefit to be derived from it, but the invention must be useful, as contradistinguished from that which is frivolous, or wholly worthless. If not frivolous, or entirely useless, the requirements of the law in this particular are complied with. With regard to the invention before us, it is clearly useful. This is proved by the testimony of witnesses on all sides. It is proved, also, by the great extent of the plaintiff's sales, by the favour of the public, which has been liberally bestowed upon it, and by the palpable imitations of the plaintiff's models in the case under consideration.

If the plaintiff has legal rights here, there can be no doubt that they have been violated by the defendant. There is no substantial difference between the stove made by the defendant, and that invented by the plaintiff; the one is a copy of the other. And as to the extent of the violations, there is as little doubt. If you believe the testimony of Mr. Randal, the defendant sold a hundred stoves before the commencement of this suit, if his own declarations are to be credited, for he told the witness in express terms not only that a hundred stoves like these had been sold in Vermont, but that they had been sold by him. If this witness, therefore, is worthy of credit (and he stands entirely unimpeached in every respect), there can be no doubt that the plaintiff's rights have been violated by the defendant, if, in fact, it shall appear that he has any which the law can protect. But the

great question is whether he has any such rights, and the solution of that question is to be found in the patent itself. And here I may remark that much has been proved and said in relation to the inventions of Town and Gould. The evidence upon these points is only important is one point of view, and in that it will be here considered. It shows that the materials, or component parts, of Stanley's stove are not in themselves new; and if the plaintiff claims a combination of things, he has evidently taken old materials to form his machine with, whatever it may be.

In relation to this part of the case, I would observe that the particular words used in the specification and summary of this patent are of no importance. The office of words is to convey ideas, and our province is to determine what the party intended to express by the language employed. Did the patentee intend to claim the discovery of a principle, in the abstract or philosophical sense of that term? Or did he intend to describe a contrivance, or machine, new and useful in reference to the purpose for which it was produced? He claims in his summary "the revolving top plate" as a constituent part of his invention, and the first inquiry is whether, before the use of Stanley's stove, a contrivance had been used by which the utensils to be heated had been brought over the fire by means of a top revolving upon its centre. If the patentee claims this revolving motion as his own discovery, in its application to a cooking stove, he evidently includes in his patent that which is not his own discovery; for Town's stove had a revolving top, or drum, intended to accomplish the same object, by means somewhat similar. It is very possible that Town could not maintain a patent for that invention, because he long ago gave it up, and abandoned it to the public. He did not, however, abandon it to the plaintiff, and all other persons might use it as well as he. If Town's discovery was abandoned, the only claim to it which Stanley can maintain is the use of the thing as a part of his combination; and here we must determine what Town's invention was.

It is evident that he invented a revolving drum or top of a stove, to convey vessels to and from the fire by a rotary motion, and concentrate the heat around them when placed there. This contrivance he gave up, or abandoned, because it was useless,—that is, useless in its then combination, though not in the abstract,—for the principle or contrivance, as to the revolution, remains. As a cooking machine, the stove of Town was good for nothing; but its revolving motion might be made useful when brought in connexion with other constituents properly adapted to the objects in view. The same remarks are applicable to the raised covers or collars, and the flues. Each of these was old, and each had before been used, either by itself or in other combinations. Stanley himself had used the collars in his own stove, as far back as the year 1828. So had Wilson, and this part of the machine is confessedly old. So with regard to the flues. If Stanley was the inventor of these, he had abandoned them to the public long before the date of his patent, and he cannot, therefore, now claim them as the subject of a patent. But the question is whether Stanley does claim these materials or constituents as his invention, for if he does his patent is void. He would then claim as his own the discoveries of others, or endeavor to maintain that which he had by use dedicated to the public.

If, on the other hand, the patentee claims a combination here, and nothing more, then I have no hesitation in saying that his rights are secured. If he goes for the elements or constituents of his machine, his patent is void; but if he merely claims a new combination of old materials, his rights may be protected. The patent itself is somewhat obscurely drawn, but the invention is useful and meritorious, and I am disposed to give it all the protection which the law will allow. A liberal construction should be given to these instruments, nor should a severe criticism be bestowed upon language used, for the most part, by the inventors themselves, who are, in many cases, altogether unskilled in the use of technical terms. We are always to ask ourselves on these occasions, what was the intention of the writers, and, if. that be discovered, the particular words used are altogether unimportant.

With these views, and under these considerations, I proceed now to give you my notions as to what this patent contains. It concludes with a summary in the following words: "The principle for which I claim the invention, and for which I ask letters patent," is "the revolving top plate or fixture into or on which are placed the principal utensils used in cooking," &c.

By the patent law, the party is required to describe that which he makes, that the public may understand the thing, and be able to construct the like after the patent shall have expired; and hence there is a necessity for a proper observance of this requirement of the act. In this case the plaintiff claims the specific thing set forth in the summary, and we must turn to the specification in order to understand what that thing is. The term used in the summary is "principle," but a reasonable interpretation must be given to it, or no sensible exposition of the party's meaning can be obtained. He evidently did not intend to claim the discovery of an abstract thing or entity, but some tangible mechanical contrivance, described in the specification. By "principle" he evidently intended a contrivance or thing described; and as there is no magic in words, we may fairly give this interpretation to the term used.

The plaintiff then patents this "revolving top plate," with its collars and flues, but instead of describing his invention as it really is, a combination, he described the constituent

parts. His improvement consists of a combination, and he should so have described it, and I have no doubt that a specification may be drawn which will secure all his rights. If the plaintiff had properly described his invention as it actually exists, his patent would have been good, for then the combination would have appeared.

But, in order to help out this part of the case, the drawings have been referred to. They show the combined thing, it is true, but the specification is silent as to the drawings, which are not necessarily to be taken as a part of it. If the specification itself made reference to the drawings, then they would become a part of it, and might be referred to for the purpose of elucidating anything obscure in the description. But here the description is perfect without a drawing, and most probably a mechanic could make the contrivance, without resorting to the drawings at all for explanation. The specification very clearly describes the revolving top plate, part by part, and in the summary the plaintiff claims the entire thing described; not as a combination, but as consisting of constituent parts, which he himself had discovered. Here lies his error, and upon this ground his action must fail. That my views on this subject may be clearly understood, I adopt the language of Lord Eldon in the case of Hill v. Thompson, 3 Mer. 622, as containing what I consider a concise summary of the law on this point. He observes that: "The judge, in his direction to the jury, has stated it as the law on the subject of patents, first, that the invention must be novel; secondly, that it must be useful; and thirdly, that the specification must be intelligible. I will go further, and say that not only must the invention be novel and useful, and the specification intelligible, but also that the specification must not attempt to cover more than that which, being both matter of actual discovery and of useful discovery, is the only proper subject for the protection of a patent. And I am compelled to add that if a patentee seeks by his specification any more than he is strictly entitled to, his patent is thereby rendered ineffectual, even to the extent to which he would be otherwise fairly entitled. On the other hand, there may be a valid patent for a new combination of materials previously in use for the same purpose, or for a new method of applying such materials. But, in order to its being effectual, the specification must clearly express that it is in respect of such new combination or application, and of that only, and not lay claim to the merit of original invention in the use of the materials. If there be a patent both for a machine, and for an improvement in the use of it, and it cannot be supported for the machine, although it might for the improvement merely, it is good for nothing altogether, on account of its attempting to cover too much."

After a full view of this case, I am compelled most reluctantly to come to the conclusion that the plaintiff has undertaken to secure more than he has a right to claim, and in my view of the law he cannot recover. He should have patented his combination, and not his constituent parts. I regret this result the more because I consider that the plaintiff has invented a machine or contrivance ingenious in itself, and highly useful for the purposes to which it is to be applied. I would protect him if I could conscientiously do so under the views of the law which I have taken, and I consider the whole matter rather as a question of law for the court than as a question of fact for the jury. If, however, the parties prefer to go to the jury upon any of the matters in issue, they have a right to take that course; but I would choose, if I could, to put the cause in that shape which would be most likely to secure the plaintiff's rights, if I have mistaken the law applicable to the case, or given an incorrect construction of the patent.

(The plaintiff voluntarily submitted to a nonsuit, with leave to move to set it aside hereafter.)

NOTE. The above opinion, expressed to the jury in said cause, was taken down at the time by one of the counsel for the plaintiff, was then shown to Judge Thompson, by him examined and approved, and is published as corrected by him. S. P. Staples.

[See Case No. 13,286.]

STANLEY (LESTER v.). See Case No. 8,277.

STANLEY (UNITED STATES v.). See Case No. 16,376.

Case No. 13,286.

STANLEY v. WHIPPLE.

[2 McLean, 35;[1] 2 Robb. Pat. Cas. 1.]

Circuit Court, D. Ohio. Dec. Term, 1839.

PATENTS — INVENTION — CORRECTED SPECIFICATIONS—UTILITY—NEW TRIAL—PLEADINGS.

1. To entitle an individual to an exclusive right, under the patent law, his invention must be substantially different from any machine or thing in use.

2. A patent is void where, in his specifications, the patentee claims more than he has invented.

3. Under the patent law of 1836, a patent which contains corrected specifications, has relation back, and, for all legal purposes, covers the whole time, from the emanation of the first patent, which, for defective specifications, had been declared void.

[Cited in Hussey v. Bradley, Case No. 6,946; House v. Young, Id. 6,738; Bowman v. Read, 2 Wall. (69 U. S.) 604.]

4. In such case a contract to sell the right is made good by the second patent.

5. A patent, to be valid, must be of some utility.

[Cited in Rowe v. Blanchard, 18 Wis. 442.]

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

6. The books of a party are not evidence, unless made so by a call to produce them, &c.

7. A verdict will not be set aside where the evidence conflicts. It was for the jury to weigh the evidence. A declaration must contain a statement of facts, which in law, gives the plaintiff a right to recover.

8. This is the question to be answered on a demurrer. But after verdict, defects, in substance, are cured, if, from the issue in the case, the facts omitted, or defectively stated, may fairly be presumed to have been proved on the trial.

[Cited in Illinois Cent. R. Co. v. Simmons, 38 Ill. 244; McClure v. McClure, 19 Ind. 188; Pennsylvania Co. v. Ellett, 132 Ill. 163, 24 N. E. 562.]

9. Where a contract binds the defendant to pay five dollars for each stove sold, as in this case, the special contract need not be declared on; the amount received may be recovered on the general count for money had and received.

[See Ames v. Le Rue, Case No. 327.]

[10. Cited in Allen v. Blunt, Case No. 217, to the point that, if the damages are slightly more than the court deem proper, they are not to be regarded as a ground for a new trial.]

[11. Cited in Brooks v. Bicknell, Case No. 1,944, to the point that specifications which show the parts patented, and so clearly describe their structure as to enable a person, possessing ordinary skill, to construct such an article, are sufficiently certain to answer all legal requirements.]

[This was an action by Henry Stanley against Emor Whipple. Heard on motion in arrest of judgment.]

Mr. Chase, for plaintiff.

Messrs. Storer & Eells, for defendant.

OPINION OF THE COURT. The defendant's counsel moved the court for a new trial, on the following grounds: First, that the verdict of the jury is against law and evidence; second, the damages given by the verdict are excessive; third, because the court erred in its instruction to the jury to exclude the evidence from the defendant's books; fourth, because the court erred in its instruction to the jury, that the second patent, if valid, had relation back to the time when the first patent was obtained.

The court will consider the first and fourth grounds in connection. The contract, on which this action is brought, is dated the 3d of October, 1832, in which Stanley agrees to sell to the defendant the right of making and vending a stove, for which he claims a patent (which patent is not yet obtained) in the city of Cincinnati, Ohio, &c., for which the defendant agrees to pay five dollars for each stove that he shall make and sell, &c. The plaintiff, after proving the contract, and giving it in evidence, introduced his patent, dated the 28th November, 1836. This patent is objected to on the ground, that its date is long subsequent to the date of the contract; and, it is contended, that it does not make good the right of the plaintiff from the time he originally applied for a patent and obtained one, which proved to be inoperative and void. It appears the first patent of the plaintiff, for his invention was obtained the 17th December, 1832; and which was declared to be void and inoperative by the circuit court of the United States, for the Southern district of New York, on the ground that the specifications claimed more than the patentee had invented. And, particularly, that he claimed, as his invention, a rotary top, &c., which was in use before he set up any right to it. The plaintiff, after this decision, obtained another patent, on different specifications, dated as above. It is insisted that the specifications of the second patent are defective, and that the plaintiff cannot sustain an exclusive right under it. The court think that, on this ground, the second patent is not objectionable. The specifications show clearly what parts of the stove the patentee claims to have invented; and the stove is so clearly described, in its structure, as to enable a person, possessing ordinary skill in the construction of stoves, to build one; and this is all the certainty which the law requires.

Under the thirteenth section of the patent law, passed the 4th July, 1836 [5 Stat. 122], the second patent has relation back to the emanation of the first patent, as fully for every legal purpose, as to causes subsequently accruing, as if the second patent had been issued at the date of the first one. It is under this patent, then, that the right of the plaintiff must be examined. In the defence it is strongly insisted, that the contract was made with a reference to the stove for which the first patent was obtained, and that the specifications, used in the first patent, were supposed, by the defendant, to be the improvements of the plaintiff, and constituted the consideration of the contract; and that, as these specifications were limited to the parts of the stove invented by the plaintiff, by reason of which the first patent was void, there was a failure of the consideration of the contract. The contract was respecting "a stove for which the plaintiff claims a patent." There was no description of the constituent parts of the stove, or of the parts which the plaintiff claimed as his invention, in the contract. Whatever remarks may have been made by either of the parties, while negotiating respecting the contract, it is very clear that such remarks cannot be given in evidence. The contract was reduced to writing, and there is nothing ambiguous on its face; the parties, therefore, cannot, by parol evidence, change, in any respect, the clear import of the written agreement. The defendant, in his advertisements respecting the stove, calls it "Stanley's patent stove." The second patent legalizes the rights of the patentee, from the date of the first patent; and, if this effect be given to it, it must sustain the contract made in this case. Stanley having an exclusive right, could convey it in whole, or in part. And it must be immaterial to the defendant whether the right of the plaintiff

was made good by the first patent, or, by relation, under the second patent. It appears a stove was invented by Towns and Gould, in 1824, which had a rotary top, but it seems not to have had any of the improvements which the plaintiff claims to have invented in his second specifications. Nor is it proved that there was any stove in use, prior to that of the plaintiff's, with a rotary top, moved by a cog and pinion, and put in motion by a crank; or which contained a combination of parts, or application of principles, simliar to those in the plaintiff's second and corrected specifications. The lever applied on the top part of the stove, which several of the witnesses speak of, as an improvement on Stanley's invention, was subsequently applied; and was done to evade Stanley's patent, as some of the witnesses expressly state. If it was, in the language of the witnesses, an improvement upon Stanley's plan, of course, it must have been subsequent to it. The jury were instructed that a mere formal difference can not be protected by a patent. That the difference must be substantial; and that, if they shall find that a stove was in use prior to the plaintiff's invention, substantially like his, he can claim no exclusive right under his patent. There was, however, no such evidence before the jury; and, on this part of their verdict, there is no ground of complaint.

But, it is contended, that the invention must be shown to be of some utility; and that, in this respect, the plaintiff has failed.

It was wholly unnecessary for the plaintiff to introduce any evidence to prove that which the defendant so repeatedly and publicly admitted. In his advertisement of this stove, he speaks of it as one of the most useful inventions; and that, in the parts of the country where it had been introduced, it had superseded all others. And, in addition to this, he states, that he has evidences of the great utility of the stove, from gentlemen of great respectability in our eastern cities; and he publishes the certificates of more than twenty citizens of respectability in Cincinnati to the same effect. We are satisfied, therefore, that the verdict of the jury should not be set aside on any of the arguments urged, under the first and fourth grounds assigned.

The ground that the court erred in excluding the copy from the books, as evidence, will be next considered. The counsel do not contend that the books are, in themselves, evidence; but they insist that the copy from them, attached to the deposition of the book-keeper, which he swears is a true copy, is made evidence by the counsel of the plaintiff. The counsel for the plaintiff did not call for the books, or ask a single question in regard to their contents. How, then, has he made the books evidence? He admonished the book-keeper, some time before his deposition was taken, to be cautious in his statements, as there was some discrepancy in a deposition, or depositions, which he had formerly given on the subject; and the counsel advised him to refresh his memory by a reference to the books. This does not make the books, or their contents, evidence in this cause; and, consequently, the court, very properly, excluded the above copy from the jury.

The counsel insist that the damages are excessive, and that, on this ground, a new trial should be granted. The damages assessed by the jury, being fifteen thousand dollars, are large; and it is a subject of regret, that a less sum had not been found. But we must look into the evidence, and see whether the verdict is sustained by it. The depositions of Snyder, Woodruff, and Roff, go the whole length of the verdict. And although the defendant's witnesses place a lower estimate on the number of stoves sold, yet they do not speak positively; and, if they did, it was the province of the jury to weigh the evidence. Where the evidence sustains the verdict, the court cannot say that the jury should have given greater weight to other parts of the testimony, which would have limited the damages assessed to a less sum. This verdict, though large, we cannot say is against evidence, or, that it is not supported by the evidence; and the motion for a new trial is overruled. A motion, in arrest of judgment, has, also, been made and argued; and the ground is, that the plaintiff does not aver in his declaration that he ever obtained a patent, or had an exclusive right to the stove, which was the subject matter of the contract. In the first count is stated, in the words of the agreement, that the plaintiff sold to the defendant the right of making and vending a stove, for which he claims a patent (which patent is not yet obtained) in the city of Cincinnati, &c., for which the defendant agreed to pay five dollars for each stove that he should make and sell. The allegations in the second and third counts, are substantially the same. The fourth count is for money had and received. A declaration is a statement of facts, which, in law, gives the plaintiff a right to recover. And, if a demurrer had been filed in this case, the only question would have been, does the statement of facts, in this declaration, give the plaintiff, in law, a right to recover. And we will first consider the question as if raised by demurrer. Suppose the plaintiff, on the trial, had, after proving the contract, introduced evidence that, at the time the contract was entered into, he did claim a patent right for the stove, and had here closed his evidence. Could he have recovered? If he could not recover on this evidence, can the declaration be sustained? It is materially defective, if, to lay the foundation of a recovery, the proof must go farther than the allegations it contains. This is, therefore, a safe and sure test of the goodness of the declaration.

The plaintiff, on the trial, did not stop, on showing that he claimed the patent right. This was, in fact, shown by the contract itself. But he gave his patent in evidence, and proved that he not only claimed a patent, but that he

had obtained one, which was the evidence of his exclusive right. The declaration does not aver that a patent had been obtained, nor that the exclusive right was vested in him. And if he did not possess the exclusive right, there was no sufficient consideration to support the contract. It is an instrument not under seal, and does not, on its face, purport a consideration.

We think the declaration is defective in not containing the necessary averments; and if the question had been raised by general demurrer, the objection must have been fatal. But the point is brought to our consideration after verdict, on a motion in arrest of judgment; and it is important to inquire, whether the defect is cured by the verdict. The statute of jeofaile cures all defects of form, but a verdict often cures matters of substance. This is done by a legal intendment after verdict. Mr. Chitty (volume 1, Pl. 712) says, that where there is any defect, imperfection, or omission, in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts defectively, or imperfectly stated, or omitted, and, without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission, is cured by the verdict. 1 Saund. 228, n. 1. And again, he remarks, the expression, cured by verdict, signifies that the court will, after a verdict, presume, or intend, that the particular thing which appears to be defectively, or imperfectly stated, or omitted, in the pleading, was duly proved at the trial. And such intendment must arise, not merely from the verdict, but from the united effect of the verdict, and the issue upon which such verdict was given. On the one hand, the particular thing which is presumed to have been proved, must always be such as can be implied from the allegations on the record, by fair and reasonable intendment. In illustration of this rule several cases are referred to, and, among others, one from 2 Bing. 464. The plaintiff in an action of assumpsit stated, that he had retained the defendant, (who was an attorney,) to lay out seven hundred pounds in the purchase of an annuity, and that the defendant promised to lay it out securely; that the plaintiff delivered the money to the defendant accordingly, but that the defendant laid it out on a bad and insufficient security. After verdict, it was objected, on a writ of error, that no consideration appeared in the declaration; that it was not averred that the promise was in consideration of the retainer, nor that the retainer was for reward; but the court held that it was absolutely necessary, under the declaration, that the plaintiff should have proved, at the trial, that he had actually delivered the money to the defendant, and that the latter had engaged to lay it out; that the delivery of the money, for this purpose, was a sufficient consideration to support the promise; and that, although it was not expressly alleged in the declaration, it was, in fact, the consideration for the promise, the court would intend, after verdict, that such was the consideration. And so in the case under consideration. The declaration does not aver that the plaintiff had obtained a patent, or that the exclusive right was vested in him; but he states that he claimed a patent, and that the defendant possessed and enjoyed the right under the contract; and from these statements, and the issue that was made up, the court must presume that, on the trial, the exclusive right was proved to be in the plaintiff. The plaintiff's title was defectively set out, and, in such cases, after verdict, the court will presume that the facts showing the right were proved on the trial. This intendment, we think, is fairly presumed from the allegations on the record.

As, in our opinion, the defect in the declaration is cured by the verdict, it is unnecessary to say any thing on the general count for money had and received. To recover, under that count, it is necessary to show that money has been received; but a jury might well infer the receipt of the money from the fact of the sale of the stoves. And, although the contract was special, yet, if it appear to be executed, and not open and subsisting, it is a well settled principle that the plaintiff may recover on the general count, for money had and received. If the action be brought for a breach of the contract, and it has not been put an end to, by the act of the party, the remedy is on the contract, and not on the general count. In this case the plaintiff claims a right to recover only five dollars for each stove which the defendant has made and sold. He, therefore, goes for the money received, and not for damages for any other violation of the contract.

The motion in arrest of judgment is overruled.

[For another case involving this patent, see Stanley v. Hewitt, Case No. 13,285.]

Case No. 13,287.

STANLEY RULE & LEVEL CO. v. BAILEY.

[14 Blatchf. 510;[1] 3 Ban. & A. 297.]

Circuit Court, D. Connecticut. June 21, 1878.

PATENTS—GRANT OF EXCLUSIVE RIGHT TO MAKE AND VEND—ACTION AGAINST PATENTEE FOR INFRINGEMENT—CONTRACT—BENCH PLANE.

1. B., a patentee, granted to S. the exclusive right to make and vend the invention during the life of the patent, for a royalty. S. sued B., in equity, alleging that he was infringing the patent: *Held*, that, whether S. was a licensee or a grantee, he was suing B. on an infringement, and that the court had jurisdiction of the suit.

2. The conditions in the instrument executed by B. to S. were held to be conditions subsequent, and it was held that such right as

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

passed to S. remained till a forfeiture was enforced.

3. The Victor plane, covered by letters patent granted to Leonard Bailey, December 12th, 1876, is an infringement of the third and fourth claims of the reissued letters patent granted to Leonard Bailey, June 22d, 1875, the original patent having been granted to him August 6th, 1867.

[This was a bill in equity by the Stanley Rule & Level Company against Leonard Bailey for the infringement of reissued letters patent No. 6,498, granted to defendant June 22, 1875, the original letters patent, No. 67,398, having been granted August 6, 1867.]

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

William E. Simonds and Charles Levi Woodbury, for defendant.

SHIPMAN, District Judge. This is a bill in equity to restrain the defendant from an alleged infringement of the plaintiff's exclusive right to make and vend the bench planes for which reissued letters patent No. 6,498, dated June 22d, 1875, were granted to the defendant. The original patent was dated August 6th, 1867. The plaintiff is a Connecticut corporation. The defendant is a citizen and inhabitant of the town of Hartford, in this district. On May 19th, 1869, the defendant, being then and now the owner of said reissued letters patent, granted, by instrument in writing, to the plaintiff, "the exclusive right to make and vend said planes, (spokeshaves and veneer scrapers,) on the conditions and for the considerations hereinafter specified, said right to continue during the life of the patents above referred to, or any extensions thereof; that said Stanley Rule and Level Company agree to make and keep on hand a sufficient stock of said planes, (spokeshaves and veneer scrapers,) to supply all demands for the same, and to use diligence in the sale of them at their warehouses, to keep an accurate account of all sales made of said planes, (spokeshaves and veneer scrapers,) and to pay to said Leonard Bailey, his heirs, executors, or administrators, the sum of five per cent. on the prime cost of manufacturing said planes," &c., as a royalty for said exclusive use, to render an account of sales once in six months, and to pay such royalty within thirty days after the date of the semi-annual accounts. If the patentee should make any improvements upon said planes, the plaintiff had the right to use the improvements upon the same terms as hereinbefore expressed, and without additional royalty. The bill alleges, that, by virtue of this agreement, the plaintiff became the equitable owner of the reissued patent, and that the defendant is infringing its exclusive right by the manufacture and sale, in large numbers, without its permission, of planes made according to and containing the patented invention, or material and substantial parts thereof.

It is agreed, that the defendant is estopped to deny the novelty of said patented invention. He admits, in his answer, his title to the letters patent, and that he entered into said agreement, and that he has made and sold planes called the "Victor plane," but denies that they are an infringement of the reissued patent. The answer alleges, that the plaintiff has violated its agreement, and has, therefore, no right to have the aid of a court of equity against the defendant. By amendments allowed when the case was argued, this general averment was made definite and explicit. Further time was not asked in which to take additional testimony.

It is not necessary, in this case, the patentee and legal owner of the patent being the alleged infringer, to determine whether, under the recited agreement, the plaintiff is the grantee of such an exclusive right that it can bring suit in its own name alone against strangers who are infringers, or is, as is claimed by the defendant, merely a licensee. In this case, the patentee is the alleged infringer, and the circuit court has jurisdiction of the cause, whether the plaintiff is grantee or licensee. When the patentee has infringed his license, and, while holding the legal title to the patent in trust for his licensee, has been faithless to his trust, "courts of equity are always open to the relief of such a wrong. This wrong is an infringement. Its redress involves a suit, therefore, arising under the patent laws, and of that suit the circuit court has jurisdiction." Littlefield v. Perry, 21 Wall. [88 U. S.] 205, 223.

It is objected, by the defendant, that the bill is defective, inasmuch as the exclusive grant or license was granted under certain conditions, and it is not affirmatively averred that the plaintiff has kept and fulfilled the conditions, and thus has a continuing right to the enjoyment of the license. Assuming that the terms and considerations of the agreement, in regard to the exercise of diligence in the sale of the planes, and in regard to the payment of royalties, were conditions, and that, for the non-payment, or other non-performance a forfeiture might be enforced, as for condition broken, the conditions were plainly conditions subsequent, and, until a forfeiture is enforced, the right or title which had theretofore vested remains in the licensee. Littlefield v. Perry, 21 Wall. [88 U. S.] 205. In this case, no notice had been given by the defendant, before the date of the suit, of any intention to claim a forfeiture.

The substantial question in the case is that of infringement, and the decision of this question depends much upon the construction which shall be given to the reissued patent in view of the state of the art at the time of the invention. The portion of the invention which is in controversy relates to the means of adjustment to its work, of the plane iron, in a bench plane having double irons, or a compound plane

iron. A compound plane iron, which is an old device, consists of the cutting iron, and an upper cap iron, or break iron, which does not cut, but, by its bevel edge, turns and breaks the shaving, so that it shall not run into the fibre of the wood. The cutting iron is thus allowed to make a smooth cut. Speaking very generally, the two irons are united by means of a screw, one iron or the other having a longitudinal slot, so that the relation of the cutter to the cap iron may be changed when the cutter is worn away by use. The means of adjustment are for the purpose of adjusting the plane iron to its work upon the wood, in accordance with the desire of the workman to make a deep or shallow cut.

Two planes are referred to as showing the existing state of the art prior to the invention of the plane of 1867. One was an invention of Mr. Bailey, patented in 1858. In this plane, the two irons were united by a screw, before being inserted in the stock. The plane iron had a centrally located, longitudinal slot, with a circular enlarged orifice at its upper end. The cap iron had a broad-headed clamp screw, the diameter of the head of the screw being greater than the width of the slot, while it was small enough to pass through the orifice at the upper end of the slot. The double iron was firmly secured in the stock by a cap lever. Thus the two irons can be adjusted to each other before being inserted in the stock, and are detachable from the stock, when united. This is the ordinary, and an old, form of compound plane iron. In such a double iron the screw is substantially a part of the cap plate. The plane iron was adjusted by the motion of a travelling seat or bed, which was attached to the stock, the travelling seat being moved to and from the throat of the plane by a lever.

The Hunt plane of 1860 had a compound plane iron, not detachable from the stock, when united. The two irons could not be fastened together, or firmly adjusted, relatively to each other, before being inserted in the stock. When placed in the stock, they were both fastened by a screw to a moving slide, which was a part of the stock. The plane iron was adjusted to its work by a screw mechanism operating upon the moving slide or seat.

The invention of 1867 discarded a travelling seat or slide, and an adjustment of the plane iron by means of frictional contact between itself and the travelling seat, as in the plane of 1858. It connected the adjusting mechanism directly with the cap plate. The compound plane iron of the patent of 1858, that is to say, one in which the double irons were adjustably united before being inserted in the stock, was adjusted by means of a bent lever attached to the stock, and connected with the cap plate, and operated by screw mechanism. Overlying the longitudinal slot in the plane iron was a mortise in the cap iron. One end of the lever entered into the mortise, and, as the lever was moved, it positively and directly operated upon the cap iron, and moved forward and downward both cap iron and plane iron, which were clamped together and formed a compound plane iron. The invention consisted of the adjustment of the plane iron in the ordinary compound plane iron, by means of a lever and screw, or equivalent mechanism, which was positively connected with the cap iron at a point always the same, and acting upon the plane iron immediately through the cap plate thus connected with the lever. Adjustment through a travelling seat and its contact with the compound plane iron was abandoned, and adjustment was effected by a lever and screw, or its equivalent, positively acting upon the cap plate. The patentee caused his lever to act upon the cap plate through a mortise in the plate. Modifications of this method of connecting the adjusting mechanism with the cap plate could easily be suggested by mechanical skill, which would not vary the principle of the invention. If the lever should be connected with the cap plate upon its under face, or should be connected by a pin which was attached to the plate and extended through the slot, the principle of the invention would be unchanged. Equivalent mechanism, known at the date of the invention, which accomplished in the same way, and by the same mechanical means, the same result of adjustment by its direct and positive action upon the cap iron at a point always the same, the plane

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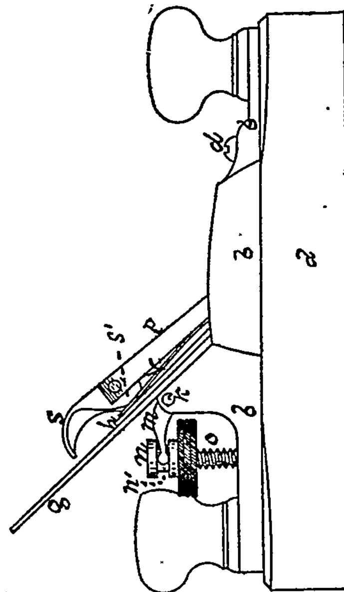
[Drawing of reissued patent No. 6,498, granted June 22, 1875, to L. Bailey, published from the records of the United States patent office.]



iron having variable relations with the cap plate, and thus with the adjusting mechanism, is protected by the patent.

The third claim of the reissue, is for "the combination of the nut n, lever m, and plate h, with the plane iron, substantially as described." The fourth claim is for "the combination of the plane iron, plate h, (cap plate,) and lever m, substantially as described." Construed in connection with the descriptive part of the specification, and in view of the state of the art, the fourth claim is for the combination, substantially as described, of the cutter iron and cap iron, adjustably united by a screw in the cap iron to the plane iron, (being the ordinary compound plane iron,) and the lever operating, by positive connection with the cap iron, to adjust the cutting iron up and down between the same limits as those in which the cap iron can move.

The infringing device, called the "Victor plane," was patented to Leonard Bailey, December 12th, 1876. It has the compound plane iron of the Bailey patent of 1858, and substantially the double iron of the patent of 1867, with the exception that there is no mortise in the cap iron. The plane iron is adjusted by means of a gear wheel, carrying a crank pin, and secured to the stock by means of a short shaft. The crank pin is connected to a pitman which moves forward and backward, and has at its lower end a circular orifice for receiving the broad head of the screw which clamps the cap iron and plane iron together. Power applied to the gear wheel moves the crank pin and pitman, and, consequently, the screw head, which is a part of the cap plate. The cap plate is adjustably united to the cutting bit by the friction of the screw head, and through the cap plate the cutting iron is moved. The impulse is not directly imparted to the cutting bit, which receives its impulse because it is clamped through the slot, by the screw, to the cap plate. The adjusting device is positively connected with the cap plate and adjustably connected with the plane iron, the cap plate and plane iron are kept in contact with each other by the strong clamp of the screw head, and motion is imparted to the plane iron by means of the positive connection of the adjusting mechanism with the cap plate. As stated by the plaintiff's expert, "in the Victor plane, the impulse of the adjusting device is imparted, through the medium of the cap plate, by a mere inversion of the parts shown in the Bailey reissued patent, that is to say, in the Victor plane the screw is a part of the cap iron, and forms a projection thereon, extending through the slot in the plane iron, and into a mortise in the adjusting device, whereas, in the reissued patent, a projection on the adjusting device extends up through a slot in the plane iron into a mortise in the cap iron; and, in both devices, the result is precisely the same, to wit, the adjustment of the plane iron through the medium of the cap plate."

It is obvious, that the Victor plane is not the Bailey plane of 1858, neither is it a reproduction of the Hunt plane of 1860. In that plane, the adjusting device was attached to a travelling bed; and, furthermore, while the Hunt plane has a compound plane iron, it has not the compound iron of the three Bailey planes. The Hunt plane has a compound plane iron in which the two irons cannot be united before they are inserted in the stock. This peculiarity made this plane practically unsuccessful, and, although, theoretically, the Bailey invention may be attached to the Hunt plane, I do not believe that, practically, such a combination would be successful.

The adjusting mechanism of the Victor plane is a well known equivalent for the lever and screw of the Bailey plane of 1867.

The defendant claims that the plaintiff has violated its agreement, in not using due diligence to sell the Bailey planes, and in devoting its time and attention improperly to a sale of a competing plane. The testimony shows that this averment is not at all sustained by the facts.

Let there be a decree for an injunction and an account, in respect to the third and fourth claims of the patent.

Case No. 13,288.

STANLEY RULE & LEVEL CO. v. DAVIS.[1]

Circuit Court, D. Connecticut. 1877.

PATENTS—ANTICIPATION—EXCESSIVE BREADTH OF CLAIM—SPIRIT LEVELS.

[The Hosmer patent of November 11, 1862, for an improved mode of adjusting the spirit vials in the stocks of spirit levels, *held* void, because the claim is so broad as to cover various prior constructions, and because, if there was any patentable invention, it was not definitely distinguishable from that which was claimed without right.]

[This was a bill by the Stanley Rule & Level Company against Leonard L. Davis, for infringement of a patent relating to spirit levels.]

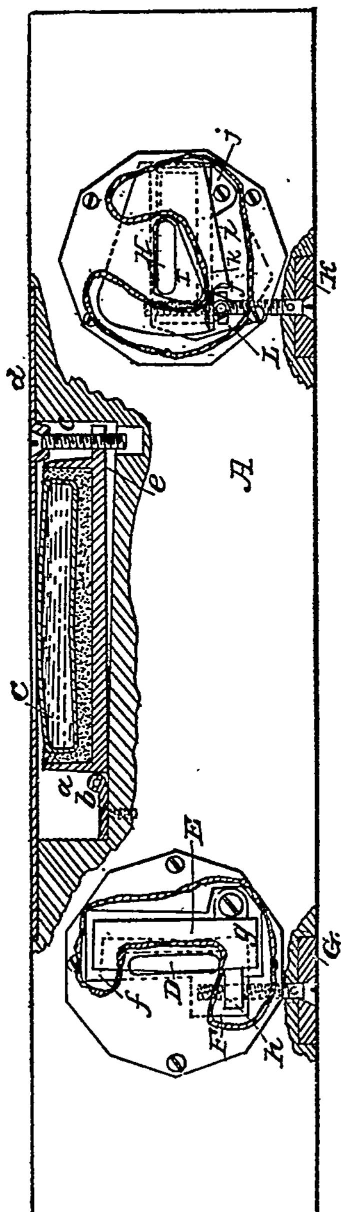
Charles E. Mitchell, for plaintiff.

A. L. Soule, for defendant.

SHIPMAN, District Judge. This is a bill in equity to restrain the defendant from an infringement of letters patent [No. 39,906], which were granted to Thomas N. Hosmer, dated November 11, 1862, for an improvement in spirit levels, and which patent was duly assigned to the plaintiff on October 16, 1871. The important question in the case is as to the validity of the patent. If the patent is valid, there is a manifest infringement by the defendant. The material portion of the specification is as follows: "This invention relates to an improved mode of securing and

[1] [Not previously reported.]

[Drawing of patent No. 39,906, granted Nov. 11, 1862, to T. N. Hosmer; published from the records of the United States patent office.]



adjusting the glass spirit bulbs or vials in the stock of the implement, whereby the bulbs or vials may be very readily replaced if broken, and when fitted in the stock, capable of being adjusted in proper position, so that it may answer the purpose for which they are designed. To enable those skilled in the art to fully understand and construct my invention, I will proceed to describe it:

"A represents a rectangular block of wood of any proper dimensions, and having a rectangular bar opening or mortise in its upper surface, in which an oblong metal box is fitted and secured at one end by a hinge or joint. The opposite end of this box is retained in proper position by a screw, which passes through a plate on the upper surface of the box, and which serves as a cover for the opening or mortise, the screw passing through a hole in a projection at the end of the box, said hole being provided with a female screw. Within the box the spirit bulb or vial is placed, and secured in position by being imbedded in plaster of Paris, as usual. The bulb or vial is adjusted perfectly parallel with the bottom of the block by turning the screw, and said bulb or vial, when thus adjusted in the block, forms, in connection therewith, what is commonly termed a 'spirit level.' In case of any inaccuracy in the position of the bulb or vial, or in the block, it will be seen that the bulb or vial, by adjusting the screw, may always be kept in proper relative position with the under side of the stock; and, in case the bulb or vial should be broken, it may be readily replaced by a new one, and the latter adjusted in proper position without any difficulty whatever. This result is not attained by the ordinary spirit levels, which have their bulbs or vials permanently secured in them, and require to be adjusted by a mechanic, or one skilled in the art." The claim is: "The securing of the glass spirit bulbs or vials of spirit levels, plumbs, grading implements. &c., in their stocks or blocks, by having the boxes in which said bulbs or vials are placed fitted in recesses in the stocks or blocks on a hinge, screw, or pivot, and adjusted and secured in proper position by a screw, substantially as herein set forth." The invention relates to the ordinary carpenter's level, in which the box containing the bulb glass is fitted in a recessed stock. The obvious idea of the inventor was to make an improvement upon the levels formerly in use, which had their bulbs or vials permanently secured in stocks. and which could not be adjusted except by a displacement of the vial, or an alteration of the stock, and to accomplish this improvement by having the box which contained the bubble glass fitted upon a hinge, screw, or pivot, and adjustable by means of a screw, so that the position of the bubble glass can always be regulated at pleasure.

It is clearly proved that, prior to Hosmer's invention, levels were made by Daniel Davis. with the bulb fastened in boxes, and secured in a recess in the stock by a screw, at one end, acting as a hinge or pivot, and a screw with a spiral spring at the other end, acting as an adjuster; and that levels had also been made by one Deane, with the bulbs fastened in boxes, and secured in a recess in the stock by screws, with spiral springs at each end, either screw acting in securing or adjusting the bulb, as occasion might require. These two levels are unpatented. So far as the means by which adjustability of the bubble case

is obtained, the three levels are substantially alike. The bubble case is adjusted in proper position, in the patented instrument, by a screw passing through a hole at one end of the box, which screw acts upon a hinge or pivot at the other end. In each of the other levels, the adjusting device is a screw with a spiral spring, and the box is fitted in the recess, at the other end, upon a screw, which is the equivalent of the hinge or pivot of the Hosmer level, and is recognized as such in the patent. It is admitted by the plaintiff that, if the Deane or Davis level had been patented, the Hosmer level would have been tributary to such patent; but it is contended that the Hosmer level is an improvement upon its predecessors, and therefore is a patentable invention. The claim of the patent does not specify the improvement, but is broad enough to include every bubble glass fitted in a recessed stock upon a hinge, screw, or pivot, and adjusted by a screw which operates substantially like the patented invention; and if this method of making levels, whereby the bulbs may be replaced or adjusted, had been in fact invented by Hosmer, he could properly have made such a claim. But the invention which is stated in the claim was anticipated by others.

The difference between the Deane or Davis level and the Hosmer level consists in this: that in the unpatented levels the screws which regulate the bubble case perform also the office of securing the face plate of the box to the stock. In the Hosmer level, the face plate is secured to the stock, and the regulating screw is a separate and independent screw. In other words, in the Hosmer level, the face plate is fixed, and in the Deane and Davis levels the face plate is movable. The fixed face plate also involves the necessity of a change of location of the regulating screw, which in the patented instrument, passes through the face plate in a projection at the end of the box.

It is claimed by the plaintiff that the fixed face plate is a manifest improvement upon the pre-existing levels which have been mentioned, and that an essential part of the invention consisted in passing the adjusting screw through such a plate, and in a projection at the end of the box. It may be true that the fixed face plate is an improvement, not in respect to the general method by which adjustability is produced, which, as has been said, is substantially alike in the three levels, but in the instrument as a whole; and without undertaking to decide a question which is immaterial in the present case, I think it might be shown, that, in consequence of the fixedness of the face plate the Hosmer level is an article more convenient, more durable, and less liable to need repair, than the Deane or Davis level. But the level which was manufactured by J. & H. M. Pool in the year 1830, and which has been since made and sold by H. S. Delano, of Easton, Mass., consists of a bulb box, with a fixed face plate, fastened to the stock by a hinge at one end, and adjusted by a screw passing through the arm of the bulb box into a female screw in the wood of the stock. This bulb box was placed upon the stock, and the whole instrument is like the plaintiff's level, except that the latter is placed in a recessed stock. The patented invention (if invention there was, and not a mere change of location, producing no new result) consisted in placing the Pool device in a recessed stock, and thus was simply a combination of the fixed face plate of the Pool level, its adjusting screw and hinge, and the old recessed stock. There is, however, no mention of this combination, nor of the actual invention, in the specification or in the claim. The claim is broader than the invention, and does not distinguish between what is old and what is new. If any part could be rightfully claimed, it is not "definitely distinguishable" from the part which is claimed without right. Hill v. Thompson, 3 Mer. 629; Evans v. Eaton, 7 Wheat. [20 U. S.] 356; Rumford Chemical Works v. Lauer [Case No. 12,135]. The bill should be dismissed.

Case No. 13,289.

STANLEY WORKS v. SARGENT et al.

[8 Blatchf. 344;[1] 4 Fish. Pat. Cas. 443; Merw. Pat. Inv. 116.]

Circuit Court, D. Connecticut. April 25, 1871.

PATENTS—VALIDITY—ANTICIPATION—UTILITY.

1. The letters patent granted to William H. Hart, July 4th, 1865, for an improvement in door or shutter bolts, are valid.

2. The invention covered by that patent consists in making the barrel in which the bolt slides of one long piece of sheet metal, with prongs passing through holes in the plate, by which it is riveted to the plate itself.

3. Such invention is not antedated by a wrought-iron bolt, in which the main barrel was short, and there was an additional barrel, as a guide, near the staple, both of the barrels being secured to the main plate by flanges riveted to it.

4. Nor is it antedated by a wrought-iron bolt, in which the main barrel consisted of four pieces of metal, and there was a fifth piece of metal for a guide, although the barrels were riveted by prongs to the main plate.

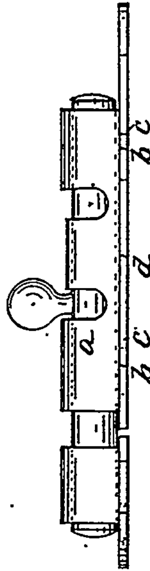
5. Nor is it antedated by a cast-iron bolt, in which the barrel and the plate are cast in one solid piece, the flanges of the barrel forming the plate and the under side being open.

6. The result of the new organization of the common door-bolt, in this case, was considerable and useful, the new article had superseded the old ones in the market, and it could be manufactured with less expense. It was, therefore, held to be sufficiently new and original to support a patent.

[Cited in Monce v. Adams, Case No. 9,705; Washburn & Moen Manuf'g Co. v. Haish, 4 Fed. 908; Simmonds v. Morrison, 44 Fed. 761.]

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 8 Blatchf. 344, and the statement is from 4 Fish. Pat. Cas. 443.]

[Drawing of patent No. 48,555, granted July 4, 1865, to W. H. Hart; published from the records of the United States patent office.]



[This was a bill in equity filed to restrain the defendants from infringing letters patent [No. 48,555] for "improvement in door bolt," granted to William H. Hart, July 4, 1865, and assigned to complainants. The claim of the patent was as follows: "Making the barrel of a door or shutter bolt of one piece of sheet-metal, punched, formed, and secured to the plate d, substantially as described."] [2]

Charles E. Mitchell and Benjamin F. Thurston, for plaintiffs.
John S. Beach, for defendants.

SHIPMAN, District Judge. The parties in this case are both corporations. The plaintiffs are the owners of a patent for an alleged new and useful improvement in door or shutter bolts, and have brought their bill against the defendants, alleging an infringement by the latter, and praying for an injunction and an account. The patent was originally issued to one William H. Hart, on the 4th of July, 1865, and passed to the plaintiffs by assignment.

The specification does not describe the invention with the greatest precision, but the invention itself is so simple, that there is no difficulty in understanding it. It consists, as I understand it, in making the barrel in which the bolt slides, of one piece of sheet metal, with prongs passing through holes in the plate, by which it is riveted to the plate itself. The defendants claim that there is no novelty in this device, or, at least, none worthy of being dignified with the name of invention. They produce two wrought iron bolts, which, they insist, antedate the invention of Hart. The barrel proper on these bolts, produced in evidence by the defendants, is short, and, to secure firmness and accurate movement of the bolt into the catch-piece or staple, a guide, or short additional barrel, is placed at the end of the plate nearest the catch-piece or staple. But the main barrel, and the guide, or short barrel, are both secured to the main plate by flanges riveted to the latter. On the other hand, the barrel on the plaintiffs' bolt consists of one long piece of sheet metal, extending nearly the entire length of the plate, with prongs passing through the latter, by which both are firmly riveted together. No additional short barrel or guide is necessary. To this extent the invention of Hart is clearly new. It is true, that the wrought iron bolts of English manufacture, which were in use before Hart's invention, had barrels riveted by prongs to the main plate; but, in every instance, the main barrel was short, or, rather, it consisted of three short guides or staples, within which the bolt moved, one of them being cut open at the top, for the knob of the bolt to pass through, as the bolt was advanced or retracted. In these English bolts, therefore, the barrel proper, if it can be so called, consisted of four pieces of metal; and, in addition to these, a fifth piece constituted the guide or short barrel near the forward end of the main plate. They are, therefore, widely different, in construction, from Hart's invention.

The cast iron bolts exhibited on the hearing were equally dissimilar. It is true, that the form of the barrel, when viewed from the upper or outer side, resembles Hart's, but that and the plate are cast in one solid piece. Indeed, the plate is nothing more than flanges of the barrel, by which the latter is fastened to the door or shutter. The under side is entirely open. The whole thing is clumsy and unlike the bolt of the plaintiffs.

Utility is not an infallible test of originality. The patent law requires a thing to be new as well as useful, in order to entitle it to the protection of the statute. To be new, in the sense of the act, it must be the product of original thought or inventive skill, and not a mere formal and mechanical change of what was old and well known. But the effect produced by a change is often an appropriate, though not a controlling, consideration in determining the character of the change itself. In this case, the result of what may not improperly be called the new organization of the common door bolt by Hart, was both considerable and useful. The evidence abundantly shows, that the new article, to a great extent, superseded the old ones in the market. It can be manufactured with less expense. It is, certainly, a much more neat and compact article than any in prior use. An inspection of his new bolt, in contrast with the old

[2] [From 4 Fish. Pat. Cas. 443.]

ones produced at the hearing, clearly shows, in my judgment, that these advantages resulted from the changes made by Hart, and claimed in his specification; and, though this reconstruction of a well-known article shows no very brilliant inventive skill, yet I think, it is sufficiently new and original to support the patent.

An injunction must, therefore, issue, as the infringement is conceded, and a reference be made to a master to take and state an account.

STANNARD (BLACKBURN v.). See Case No. 1,468.

Case No. 13,290.

STANNARD v. The JOHN HART.

[Cited in The Richard Doane. Case No. 11,-765. Nowhere reported; opinion not now accessible.]

Case No. 13,291.

STANNICK v. The FRIENDSHIP.

[Bee, 40.] [1]

District Court, D. South Carolina. Aug. 18, 1794.

NEUTRALITY LAWS—FOREIGN COMMISSION—VESSEL ARMED AND FITTED OUT IN THIS COUNTRY—RIGHT TO BRING IN PRIZES.

A French armed ship, duly commissioned, but fitted out here, may bring in and carry away her prizes, without being subject to the jurisdiction of this court.

In admiralty.

BEE, District Judge. The libel states that this ship, belonging to British subjects, was captured on the high seas on the 26th June last by the privateer schooner Montagne, and brought into Charleston. That said schooner was formerly called the Robert, is American built, wholly fitted for war in this port, and despatched from hence on a cruise, without having any legal commission: contrary to the laws of the United States, and to the regulations established by the president; and contrary also to the law of nations, &c. Libel denies that any commission issued to a vessel thus equipped could be legal, as against nations at peace with the United States. It sets forth an equipping in this port by taking off quarter deck, cutting port holes, and arming with fourteen carriage guns. It states that she was officered and manned here, and sailed from hence on the 4th March last, on a cruise, and returned on the 26th April following, as a French privateer, without having in the meantime entered any port or place within the jurisdiction of France. Restitution is prayed of the Friendship and cargo, with damages. The regulations of the executive of the United States respecting the equipment in our ports of vessels belonging to foreign powers are filed with the libel as an exhibit.

A plea to the jurisdiction of the court has been put in, and it alleges that at the time of this capture, the schooner was, and now is, duly commissioned by the French republic; that she was legally fitted out, belongs to French citizens, and authorized to cruise against the enemies of France. That by the law of nations, the treaty with France, and the sixth section of the act of congress of 5th June last [1 Stat. 384], this court is precluded from holding plea of the present matter. With the plea are filed, as exhibits, a copy of the commission to La Montagne, registered on the 25th March last, and a condemnation of the schooner Robert as French property, at Nassau in New-Providence, on the 26th July, 1793. This sentence is conclusive against any pretence that this schooner was American property; because by the revenue laws of the United States, she could never become such. But it is contended that this case is like that of Jansen v. Vrow Christina Magdalena [Case No. 7,-216], and must be decided upon the same principles. But the law there laid down, and supported by 1 Vatt. Law Nat. 144, 5, and 2 Vatt. Law Nat. 7, 8, is that if a neutral nation grants the privilege of equipment in her ports to one belligerent, she must grant it to another; by treaty with France, no citizen of the United Netherlands could have been allowed to arm against her: of course, the rule of neutrality required that France should not arm in our ports against the Dutch. The only feature in this case resembling that of Jansen v. Vrow Christina Magdalena [supra], is that both privateers were originally fitted out here. There the equipment was made by American citizens; here the property is French, and the commission expresses an arming for her own commercial protection, as well as for the purpose of cruising against enemies of France. This brings her within the very regulations relied upon by the lebellants, the fifth clause of which allows that any vessels of France of a doubtful character, as being calculated for commerce or war, may be equipped in our ports. The sixth clause excludes from this privilege all powers at war with France, and seems thereby tacitly to admit that such French vessels might arm here. The officers of the customs appear to have thus distinguished, for they have given no notice of the equipment of the Montagne to the governor, or district attorney, which the instructions say they shall do, in case of any contravention thereof. If this be so. shall the subsequent commission lessen a right to capture? I think not. If, indeed, the capture had been made before the commission was received. a question might have arisen between the captors and their sovereign, the latter of whom might, perhaps,

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

have claimed. Much stress has been laid upon the date of this commission. It issued from the marine office in France on the 5th December last, was examined and certified by the governor of Guadaloupe on the 10th of March (six days after the schooner sailed from hence), and registered at Point-à-Petre on the 25th of March. This was twenty-one days after the sailing from Charleston, and gives sufficient time for receiving the commission at Point-à-Petre, previously to the capture of the ship Friendship, on the 26th of June following. In Jansen v. Vrow Christina Magdalena [supra], our treaty with Holland was infringed; and though, by the law of nations, the bringing infrà præsidia of a neutral nation might justify restitution in any case, yet our treaty with France (17th article) has expressly altered that law in cases like the present, where the commission was granted in a French port to French citizens.

Upon full consideration of the pleadings, arguments, and evidence of this case, I am of opinion that the libel must be dismissed.

STANSBURY'S CASE. See Case No. 17,709.

Case No. 13,292.

STANSBURY v. TAGGART.

[3 McLean, 457.][1]

Circuit Court, D. Ohio. July, 1844.

VENDOR AND PURCHASER — DEFECT IN TITLE — RIGHT TO WITHHOLD PURCHASE MONEY—NOTICE — CLAIM FOR CONVEYANCE — ADVERSE POSSESSION—TAX TITLE.

1. A purchaser of land, with a full knowledge of the title and of certain pretended claims, who receives a deed, cannot withhold a part of the purchase money on account of the alleged defect.

2. He must seek redress on the warranty, should he suffer damage by the adverse claim.

3. Until the adverse claim shall be established, there is no ground to injoin the recovery of the purchase money.

4. Where a purchase is made of land to be paid for in carpenter's work, the deed to be made when the work was done, until the work is done, there is no ground on which to claim a conveyance.

5. A possession under such a purchase without deed cannot, by lapse of time, ripen into a title.

6. The purchaser's possession is the possession of the vendor, the same as landlord and tenant.

7. But possession under a deed is adverse.

8. The nature of the possession is always ascertained, when the statute or lapse of time is pleaded.

9. A tax title is utterly void, if the land be sold in a wrong name, under a wrong assessment.

In equity.

Mr. Stansbury, for plaintiff.

Mr. Taylor, for defendant.

OPINION OF THE COURT. This is an injunction bill, in which the complainant asks that certain incumbrances paid off by him, on a tract of land purchased from the defendant, shall be set off against a judgment for the purchase money. In the action at law (Taggart v. Stanbery [Case No. 13,724]), the complainant set up the same matters in defence, but the court held that, as the defendant Stanbery had accepted a deed for the land, with a full knowledge of the alleged incumbrances, and having long been in possession, he could not set up this defence in an action for the consideration money. The main facts in the present case are not dissimilar to those in the case at law. In 1830, one Graham purchased from Cadwallader Wallace, the agent of the defendant, a tract of land. The complainant purchased Graham's interest, and became responsible for the payment of the purchase money. In his letter to Wallace, the agent, the 26th March, 1833, the complainant says, "Having purchased from Mr. Graham his right, I am authorised to receive a deed for lot 4, upon my paying $401 67, with interest," &c.; "and this I am willing to pay on receiving a good title to the land." He further remarks, that "on the 27th November, 1809, Alexander M'Laughlin made an agreement for the sale of the land with Lemuel Kirkland, who shortly after took possession, and has held possession ever since. And although he does not pretend that he has performed the work mentioned in the contract, or that he has paid any money to M'Laughlin, or to any other person, he now claims the land as his own," &c. "Kirkland's chief reliance is upon his peaceable possession of twenty-three years;" and he remarks, "I am of opinion, that neither the statute of limitations, or the tax sale, will protect Kirkland against the claim of the true owner of the land. But from the time which has elapsed since the date of the contract, the law may raise a presumption that the contract has been complied with." But he says, "I am nevertheless willing to pay the money due on your contract with Graham, and receive a general warranty deed; or I will take a quit claim, pay one half of the money due, and run all risks." He proposed to institute a suit for the recovery of the land, and if he should fail, he presumes "that he shall have no difficulty in obtaining the repayment of the money, interest, &c., from the grantor."

In his letter to the agent, dated 16th July, 1833, he says, "It will be very difficult to get along with an ejectment in the name of Taggart, as the large parchment deeds would have to be sent on to Philadelphia," &c.; and he suggests, that the difficulty would be obviated by executing a deed to him, and he gives a description of the property, which he requests may be inserted in the deed. By a letter, August 9th ensuing, the complainant re-

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

quests that the deed might be executed to his son, who would execute a mortgage to secure the payment of the purchase money. On the 20th of the same month, Wallace, as the agent of Taggart, executed a deed for the land, containing covenants of a general warranty, and against incumbrances.

On the 27th of November, 1809, Alexander M'Laughlin, as appears from a contract under seal, sold lot No. 4, to Samuel Kirkland, for the consideration of five hundred and ten dollars, to be paid in carpenter or house joiner's work, at Philadelphia prices, when required. When payment was made, a deed in fee simple was to be executed. Shortly after the contract of purchase, Kirkland entered into the possession of the land, built a cabin, and cleared about thirty-five acres. He continued in possession twenty-three years. Some time after the contract, Kirkland was employed as a carpenter, on a house which M'Laughlin was building in Zanesville, but he was discharged from the work. It does not appear how long he worked, nor for what cause he was discharged. That he could not have labored on the house more than a few days is probable, and it does not appear that he has ever paid, or offered to pay, in work or otherwise, the purchase money. On the 31st of December, 1832, the land was sold for taxes to James Holmes, for twelve dollars and thirty-five cents, as the property of William Rodgers and John Holmes. Whether the complainant instituted an action of ejectment does not appear; but it is presumed he did not. He purchased the claim of Kirkland, as he alleges, for four hundred dollars, and the tax title for nineteen dollars. These sums, with the interest thereon, are claimed as an equitable off-set against the judgment. At the time M'Laughlin sold the land to Kirkland, he owned only one third of it—one third being owned by Taggart, and the other by Grey and Taylor. It is proved that M'Laughlin, at the time of the contract with Kirkland, had a power of attorney to sell from the other proprietors, but, in the sale, he does not assume to act as their agent. The purchase of the claim of Kirkland by the complainant was made, not only without the knowledge of Taggart, or his attorney, but against an express arrangement on the subject. On the repeated applications of the complainant to Wallace, the agent, the deed was executed before the consideration money was paid, in order that an ejectment might be brought against Kirkland. The deed being obtained, no suit was instituted, but Kirkland's claim was purchased. Under such circumstances, whether in law or equity, the transaction should be scrutinized, and no allowance made to the complainant, unless it shall clearly appear that the incumbrance purchased, was bona fide, and could be legally enforced. With this view we will examine the claim of Kirkland. That under the contract he had no right to a conveyance from M'Laughlin is clear. No part of the consideration is pretended to have been paid, and, until such payment, the deed, by the terms of the contract, was not to be executed. It is true payment was to be made in work when required, but this does not change the principle of law applicable to such contracts. Suppose the consideration was to have been paid in money when required; could the purchaser before such payment, or a tender of it, demand a conveyance? The only excuse alleged by the complainant in this respect, for the default of Kirkland is, that he was discharged from laboring on the house of M'Laughlin, in Zanesville, and has not since been required to do work as a carpenter or joiner. The circumstances under which he was discharged, are not stated. He may have been found incompetent, unfaithful, or worthless, which not only authorised his discharge, but rendered it necessary. But however this may be, there is no excuse given for the non-performance of his contract by Kirkland, on which can be founded an equitable claim for a title. He had been in possession twenty-three years, under a contract of purchase, no payment having been made, and this was all his pretence of right. The indifference shown by Kirkland, as to the payment of the consideration, coupled with the lapse of time, effectually barred his claim for a title. After the lapse of twenty-three years, except under extraordinary circumstances, it is too late for the vendee to ask a decree for a conveyance, on the offer to pay the consideration. The changes in the value of the land, and the interest of the vendor, as in this case, constitute an insuperable objection to the favorable action, in his behalf, of a court of equity.

The principal stress in the argument is laid on the possession of Kirkland. It is insisted that that possession ripened into a perfect title under the statute of limitations.

M'Laughlin owned only one third of the land sold, being a tenant in common with Taggart, Grey and Taylor. And although he had a power of attorney from his co-tenants, to sell the lands generally, in Ohio, in which they were interested, yet in making the sale in question, he did not act under this power. He sold the land in his own right. Now it is clear, as against M'Laughlin, the statute did not run. Kirkland's possession was not adverse to M'Laughlin's right. The entry being made under him, until the payment of the consideration and the execution of the deed, the possession of Kirkland was the possession of M'Laughlin. In this respect, the rule of law is the same, as between landlord and tenant. But it is insisted, that if the possession did not protect Kirkland against M'Laughlin, it was adverse to his co-tenants. And this is attempted to be sustained on the ground that the sale by M'Laughlin was an ouster of his co-tenants; and that the statute begins to run from the time of such ouster. If this be admitted, does it follow that the benefit of the statute enures to Kirkland? He enters, in effect, as the tenant of M'Laughlin, claiming

the land, it is true, by purchase from him. He claimed the land as his own, but he claimed it only as a purchaser, without deed, not having paid any part of the consideration. His purchase must necessarily be referred to as showing the nature of his entry and claim. Had he entered under a deed from M'Laughlin, his possession would have been adverse to all the tenants; but, in many respects, bearing the relation of tenant, he can set up no title hostile to that under which he entered. He could not protect himself by purchasing a title paramount to M'Laughlin's. Failing to comply with his contract, he was liable to be turned out of possession, and made responsible for the rents and profits of the land while he occupied it. A claim of protection under the statute need not be sustained by a valid title; but the claimant must act bona fide in asserting an adverse title. He must believe that his title is valid. If he enter under another's title, he asserts such title, and not his own. This is peculiarly the case with a tenant, and also of a purchaser who has neither received a deed nor paid any part of the consideration.

It appears that after the purchase by Kirkland, a partition of lands owned by M'Laughlin, Taggart, Grey and Taylor was made, and the tract now in controversy was allotted to Taggart. He, as well as the other tenants, being non-residents, were within the savings of the statute; so that if Kirkland's possession were adverse to all the tenants, except M'Laughlin, still the statute does not operate. This is conclusive as regards the assertion of any title by Kirkland under the statute. Lapse of time, under the circumstances, cannot avail him. All presumption of payment is rebutted by admitted facts, and gross negligence rebuts any equitable considerations favorable to the purchase. But it is said if Kirkland had been ejected from the premises, that he would have been entitled to compensation for his improvements. In estimating this compensation, the rents would have been taken into the account, and a moderate computation of rents would, in twenty-three years, have overbalanced a reasonable charge for improvements. Little more than thirty-five acres of ground were cleared, and the buildings were cabins of the most ordinary kind. There is no evidence that the tax title, for which the sum of sixteen dollars was paid by the complainant, was valid. The land seems not to have been sold as the property of the owners, but as belonging to other persons. The mere certificate of sale, which upon its face seems to be invalid, without any other evidence of its legality, did not constitute an incumbrance which the complainant, by paying, could charge against the vendor. A payment being voluntary, and without notice to authorise such a change, must appear to have been made, to remove a legal incumbrance. The deed executed by Wallace to the complainant, contained covenants of general warranty, and against incumbrances. After receiving it without objection, and holding under it for years, it is too late to object that it did not contain a covenant of seizin. The deed was obtained by the complainant, before he paid the consideration, to enable him to bring an action of ejectment against Kirkland. This allegation is made by the complainant, and it shows why the covenant of seizin was not inserted, if the complainant, under the contract with Graham, had a right to require it.

Under all the circumstances of the case, it appears that the claim of Kirkland had no foundation in law or equity, and that such is the character of the tax title, and consequently the payments made by the complainant, to remove these pretended incumbrances, were made in his own wrong, and cannot constitute a charge against the defendant.

The injunction is dissolved, and bill dismissed at the complainant's costs.

Case No. 13,293.

In re STANSELL.

[6 N. B. R. 183.] [1]

Circuit Court, W. D. Michigan. 1872.

BANKRUPTCY—PETITION BY SECURED CREDITOR.

A debt wholly or in part secured, either by levy under an execution, by pledge of personal property or mortgage upon real estate, will sustain a petition for an adjudication of bankruptcy. The better practice is, when the debt is fully secured, to waive the security in the petition, but this is not necessary to its support.

[Cited in Phelps v. Sellick, Case No. 11,079; Re McConnell, Id. 8,712; Re California Pac. R. Co., Id. 2,315; Re Broich, Id. 1,921; Re Crossette, Id. 3,435.]

[Cited in Paddock v. Stout, 121 Ill. 574, 13 N. E. 182.]

[Appeal from the district court of the United States for the Western district of Michigan.

[In bankruptcy.]

Mr. Atwell, for creditors.

Mr. Ballard, for debtor.

EMMONS, Circuit Judge. The only question which arises on this appeal is, can one whose debt is fully secured become a petitioning creditor for an adjudication in bankruptcy? The petition was dismissed in the district court upon the ground that he could not. The creditor had obtained judgment for his debt and levied upon property so much encumbered that no bids could be procured. It is found that its value, beyond the encumbrances, exceed the amount of the judgment. The creditor, however, disagreed in opinion with the witnesses, and, waiving his security by an amendment of the petition, asks to be permitted to stand as favorably in court as if he had no judgment and

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levy. The particulars of the practice need not be mentioned, as these facts sufficiently present the point for judgment.

The reason why a secured creditor cannot petition, is said to be that his debt is not within the meaning of section thirty-nine "provable under the act" [of 1867 (14 Stat. 517)]. The last clause of section twenty-two, it is said, prohibits the proof in whole or in part of secured claims. The learning and accuracy of the judge from whose judgment this appeal is taken, has caused me to go carefully over all the accessible judgments in reference to this question, and to review opinions I have before formed and expressed in regard to the sections involved. They have been so repeatedly analysed in printed judgments, it is deemed unnecessary to reproduce them here. I concur fully in the interpretation which reads section twenty and the forms twenty-one and twenty-five as requiring all creditors, secured and unsecured alike to prove their claims, and which construes the last clause of section twenty-two, prohibiting the proof of any part of a secured claim, to mean only that the creditor shall not be admitted to share in the assets except for the just balance beyond his security.

I should, however, deem the concurring judicial construction of the statute sufficient to constrain acquiescence in it if I did not wholly concur with its principle. In this circuit I think it has been uniform, with the exception of the judgments of the learned judge who decided this case. The following citations being part only of a still greater number, authorise a decision here on the ground that so many rulings ought to put the question at rest. An intelligent outline of the practice in proving this class of claims, and the argument which sustains it, is found in the opinion of Register Hesseltine, in Re Bridgman [Case No. 1,867], approved by Erskine, J. It rules the point directly raised upon an application to make proof by a secured creditor. In re Ruehle [Id. 12,113] decides the same question, and holds expressly the security need not be released before proof. In Markson v. Heany [Id. 9,098], Dillon, J., arguing a question of jurisdiction over the mortgage property of a bankrupt in another state, says: "The debt of the mortgagee is provable, and such proof does not waive his lien." In order to prevent the latter consequence, of course the lien should be stated, and this is implied in the opinion of Benedict, J., in Re Bigelow [Id. 1,396], which has been the leading one on this subject. A corporation held stocks in pledge for a debt, and applied to have them sold that it might prove for a balance. He held that it must first prove its claim. He considers the apparently conflicting provisions of the law, and says the last clause of section twenty-two does not prohibit the proof of the claim before the register, but only the admission ultimately of the creditor to share in the assets beyond what is justly due. Lowell, J., in Re Alexander [Id. 161], has also had the question before him. The only point was whether a secured creditor might petition for a balance of over two hundred and fifty dollars, and as his reasoning in holding that he could, seemingly tended to exclude one wholly secured, he added that he did not wish to be understood as saying that such a creditor could not sustain a petition if he offered to waive his security. That where the lien was created by attachment, levy or otherwise by operation of law, the mere proof of the debt, without mentioning it, would be a sufficient waiver; but that when it existed by contract, as in the case before him, it ought to be expressly waived. That a secured creditor could sustain a petition is fully said in the judgment in Rankin v. Florida, A. & G. C. R. Co. [Id. 11,567]. In that case the petitioning creditor held secured bonds. There was no offer, as in the case before us, to waive the security. Frazer, J., sustained the proceeding. He said that a claim which might in any mode be proved, when the necessary steps had been taken to authorize it, was one provable under section thirty-nine. See, also, In re Winn [Id. 17,876]. In Re Bloss [Id. 1,562], Longyear, J., made a similar ruling, holding, first, that a secured debt, like an unsecured one, would authorise a petition, and second, that when the lien, as in this case, was created by levy, an original petition for adjudication will per se waive it as fully as an unconditional proof of the debt before the register. In re Snedaker, 3 N. B. R. 155, the supreme court of Utah, in a judgment of more than ordinary elaborateness in this class of cases, held that the secured creditor who was proceeding to foreclose his mortgage in another territorial court, must come in and prove his claim or abandon his rights. It is said that the statute and forms twenty-one and twenty-five so demand. Bump, Law & Prac. Bankr. (4th Ed.) 54, after citing the cases In re Bloss and Rankin v. Florida, A. & G. C. R. Co. [supra], to the point that a secured creditor may petition, subsequently adds, that if the debt is wholly secured, or is contingent, it is insufficient; and cites Sigsby v. Willis [Case No. 12,849], decided by Hall, J., and Avery v. Johann [Id. 675], by Miller, J. The first concerns a contingent debt only. The other did dismiss a petition which was in fact secured, not because it was so, but on the ground that in the peculiar circumstances of that case the remedy was ample at law. We should, with Bigelow, J., in Re Alexander, disclaim authority to reject a petition on any such ground. This, however, is immaterial here. Neither case in the slightest degree sustains Bump's intimation that a fully secured debt will not sustain a petition.

I find but one counter judgment, and that is In re High [Id. 6,473], by the learned judge who decided this cause in the district court. That was an application by bill to have mort-

gaged property sold that the complainant might prove for a balance. This case is like In re Bigelow [Id. 1,396], in which a contrary ruling is made. In re High [supra], the bill was sustained upon the ground that the complainant had no remedy by proof before the register for a secured claim. While the difference between these judgments results only in varying modes of doing precisely the same thing, there is in it less of practical importance. The one demands a new suit by bill and answer, with separate references to examining masters for testimony by which the secured creditor's claim is proved, and by the court adjudicated without release, agreement with the assignee, or sale of the security. It is like the proof before the register, all preparatory to those things. The other, through the instrumentality of the register and the forms pointed out by the statute, and the orders of the supreme court, performs identically the same judicial functions resulting in a like order or decree. It is a mere matter of practice. I do not understand the decisions which hold that a bill like that sustained in Re High & Hubbard should be dismissed, go upon any jurisdictional reasons which deny the power of proceeding in that mode; but as saying only that as the statute and forms clearly contemplate the proof before the register of secured as well as unsecured claims, and as this is the more simple and expeditious form, they reject the most expensive and circuitous proceedings by an original bill. But when this difference leads to a denial of substantial right, and excludes every secured creditor in the nation from the protection and benefits of this statute, while at the same time they are subjected to its power and their claims cut off by the discharge, it arises in importance second to no other single question I have had occasion to consider under it.

The exigencies of our commerce and business, it seems to me, demand a different reading, or an early amendment of the law. There are hundreds of millions of secured railroad and other corporate bonds afloat in the country. In many localities the great bulk of our bankers and brokers make loans in the aggregate of vast sums upon government bonds and stocks, and upon bills of lading and warehouse receipts as collaterals. The greater share of the more permanent debt of the whole country is secured by mortgage. To exclude this great mass of claims from the power of launching, and the protections and benefits of the proceeding, is so manifestly without the intention of the law, that we should go confidently forward to that limit where construction ends and interpolation and erasure commence in pursuit of a different meaning. We had occasion, in Linn v. Smith [Case No. 8,375], to show how universally this class of laws, both in England and here, had associated the right of petitioning for an adjudication with a subjection of the debt to discharge by a decree. To enforce the one and deny the other would be as impolitic and unjust as it would be anomalous.

Irrespective of these views I should sustain this petition upon the doctrines ruled by Longyear, J., in Re Bloss [Id. 1,562], and the case of Stewart v. Isidor [5 Abb. Pr. (N. S.) 68], cited and approved by him. Barrett, J., of the supreme court of New York, goes carefully over the English and American cases, and holds that proof of the debt in bankruptcy, without mentioning the security, is a waiver of the lien. See, also, In re Brand [Case No. 1,809], and Wallace v. Conrad [3 Brewst. 329], where the doctrine of implied waiver by proof in bankruptcy of the secured debt without stating the lien, is stringently applied.

Here there was an express waiver in the petition. This I think the better practice, when it is conceded that the security exceeds the debt, but by no means necessary upon principle to the support of the petition. Certainly it should not be required where it is inadequate. It would compel a release where the statute expressly authorises its retention.

Decree below reversed and adjudication ordered.

Case No. 13,294.

In re STANSFIELD.

[4 Sawy. 334;[1] 16 N. B. R. 268.]

District Court, D. Nevada. Sept. 25, 1877.

BANKRUPTCY—PROVABLE DEBT—JUDGMENT—DISCHARGE—EFFECT OF—OPPOSING DISCHARGE.

1. Where an assignee permits a foreclosure suit, pending at the time bankruptcy proceedings are begun, to go to final decree without intervening, he agrees to that mode of ascertaining the value of the property subject to the mortgage lien, and the amount of the debt the creditor may prove. After a sale under the decree and the application of the proceeds to its payment, the unpaid balance is a provable debt.

2. A judgment recovered pending the bankruptcy proceedings, in a suit begun before and based upon a provable debt, is itself provable.

[Cited in Boynton v. Ball, 121 U. S. 468, 7 Sup. Ct. 984.]

[Cited in Wells v. Edmison (Dak.) 22 N. W. 501; Leonard v. Yohnk, 68 Wis. 587, 32 N. W. 702.]

3. A creditor having such a judgment or unpaid balance of a decree, has an interest in the question of discharge and a right to be heard thereon.

4. Such judgment and unpaid balance will be released by a discharge duly granted to the bankrupt judgment debtor.

This is a motion to dismiss the specifications filed in opposition to the bankrupt's discharge, upon the ground that the opposing creditor has not a provable debt, and consequently no interest in the question of discharge. The petition for an adjudication was filed against the bankrupt May 21, 1874. With his own consent he was adjudged a bankrupt the same day. At the time the

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petition was filed two suits were pending against Stansfield, wherein J. H. Rice was plaintiff. Both suits were begun April 30, 1874. One was a foreclosure suit, and the other an action at law upon promissory notes. In the latter suit Stansfield appeared and filed a demurrer May 11, 1874, which having been overruled, and he failing to answer within the time allowed, judgment upon his default was entered against him July 27, 1874. In the former suit William Stansfield and wife appeared and demurred May 11, 1874. The demurrer was overruled and a final decree entered July 30, 1874. The mortgaged property was sold under the decree, and after applying the proceeds to the payment of the debt of Rice, an unpaid balance remained of over $7000. The decree directed that the unpaid balance should be docketed upon the coming in of the sheriff's return, and the plaintiff have execution therefor. By section 5119 of the Revised Statutes, the discharge releases the bankrupt from all debts which were or might have been proved against his estate. The debts for which the decree and judgment were rendered were provable, and had they not been put into judgments would have been barred by the discharge; except, of course, that Rice would have had the proceeds of the mortgaged property to apply to the payment of one of them.

Lewis & Deal, for the motion.
Charles N. Harris, opposed.

HILLYER, District Judge. Treating the balance docketed in the foreclosure suit as substantially a judgment (1 Comp. Laws Nev. § 1309), the question upon this state of facts is, whether the bankrupt's certificate, if obtained, will discharge these judgments of Rice?

And this involves an inquiry as to whether the debts which did exist at the filing of the petition in bankruptcy, upon which the judgments are based, are so merged in the judgments that they can no longer be said to be "debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy." Section 5067. Are the judgments new debts, or the old debts in a new form?

In England, the cases all agree that against such judgments the defendant may have relief by motion for a perpetual stay of execution, which is always granted. Bouteflour v. Coates, Cowp. 25; Blandford v. Foote, Id. 138; Willett v. Pringle, 2 Bos. & P. (N. R.) 193, and many others. But, as an English statute formerly prescribed this relief, the cases, it is said, come with less authority than they otherwise would. Clark v. Rowling, 3 N. Y. 216.

In America, a decided weight of authority holds that, to do justice, the courts will look behind the judgment in cases like the present, and if the debt upon which it is founded would have been barred, the judgment is barred.

All the authorities agree that the cause of action is merged in the judgment, and can never be the basis of another suit between the same parties.

But, while adhering to this doctrine, all of our state courts, except those of Maine and Massachusetts, recognize the limitation to it, that the judgment procured pending the question of discharge is discharged when the cause of action would have been. Cases directly in point are: Ewing v. Peck, 17 Ala. 339; Imlay v. Carpentier, 14 Cal. 173; Dresser v. Brooks, 3 Barb. 429; Clark v. Rowling, supra; Fox v. Woodruff, 9 Barb. 498; Downer v. Rowell, 26 Vt. 397.

Other cases, involving the same principle, hold that the courts will look behind the judgment to see whether the debt is one which the discharge would release, and give relief to the debtor or creditor as justice shall require. Betts v. Bagley, 12 Pick. 572; Owens v. Bowie, 2 Md. 457; Bostwick v. Dodge, 2 Doug. [Mich.] 331; Parks v. Goodwin, 1 Man. [Mich.] 35; Wyman v. Mitchell, 1 Cow. 316; Raymond v. Merchant, 3 Cow. 147.

The result of the cases is thus stated by Mr. Freeman in his work on Judgments (section 245): "It has been uniformly held that whenever a cause of action, existing at the time of filing the debtor's petition, was of such a nature that the discharge would have affected it, any judgment recovered thereon prior to the decree of discharge will be affected to an equal extent, and that within the meaning of those laws (bankrupt and insolvent laws) such judgments are never to be regarded as new debts, arising subsequently to the filing of the petition."

Opposed are cases in Maine and Massachusetts upholding the technical doctrine of merger, and refusing to recognize the limitation or exception to the doctrine which has been stated above. Bradford v. Rice, 102 Mass. 472, and cases cited; Pike v. McDonald, 32 Me. 418; Uran v. Houdlette, 36 Me. 15.

In the courts of the United States the decisions since the passage of the present bankrupt act [of 1867; 14 Stat. 517] are not uniform. Supporting the doctrine that the debt is not merged in the judgment, so as to defeat the operation of the discharge, are the following cases: In re Brown [Case No. 1,975]; In re Vickery [Id. 16,930]; In re Crawford [Id. 3,363]. Opposing are In re Leibenstein, [Case No. 8,218]; In re Williams [Id. 17,705]; and In re Gallison [Id. 5,203].

Prior to the present bankrupt act an almost unbroken current of authorities sustains the doctrine that judgments obtained pending the bankruptcy proceeding, and before the bankrupt receives and has an opportunity to plead his discharge, are affected by the discharge just as the debts upon which they are founded would have been. The only doubt, now, arises in dealing with section 5106 of the bankrupt act, which provides that pending suits against him shall be stayed, upon the application of the bankrupt.

Does the fact that the bankrupt may have a stay of pending suits until the question of his discharge is decided, amount to an opportunity of pleading his discharge, so that a neglect to apply for a stay is a neglect to avail himself of a defense to the suit? The affirmative of this proposition is maintained forcibly in the above cited cases of Bradford v. Rice and In re Gallison. I am not, however, satisfied that the privilege given the bankrupt in section 5106 should have the effect of overturning the general rule, that a judgment obtained as those of Rice were is released, if the debt would have been.

It was at one time thought that, upon the bankruptcy of the owner of the equity of redemption pending a foreclosure suit, no decree could be entered until the assignee was made a party. The supreme court have declared the law to be otherwise. If the assignee chooses to let the suit proceed, he stands as any purchaser pendente lite would. Eyster v. Gaff [91 U. S.] 521. The fact that the title was cast upon him by operation of law is unimportant.

Whenever it is apparent that the value of the mortgaged property is less than the just claim against it, the assignee will have no interest to intervene, and will let the suit proceed. Since the decree will be valid without him, the plaintiff will have no motive for making the assignee a party. The decree will be valid to establish the amount due the creditors and give a good title to the purchaser thereunder.

In the suit of Rice, to foreclose his mortgage, it is not likely the bankruptcy court would have stayed proceedings, on the application of the bankrupt, in the absence of any action by the assignee, except to stay the execution for the balance remaining unpaid after the sale of the mortgaged premises.

Under section 5075 the value of the mortgaged property must be ascertained, either by agreement between the creditor and the assignee or by sale under the direction of the court.

When the assignee permits a pending foreclosure suit to go to final decree, without intervening, he must, in my judgment, be held to have agreed to that mode of ascertaining the value of the property subject to the lien of the mortgage, and the amount of the debt the creditor may prove. After a sale under the decree and the application of the proceeds to the payment of the creditor's secured debt, the balance, whether docketed as the statute of Nevada permits or not, is a provable debt.

In reference to the other judgment in the action of assumpsit, it appears to me that, although the bankrupt might have had a stay of proceedings by applying to the proper court therefor, yet his failure to do so does not invest the judgment rendered with any other qualities than it would have had if the suit had proceeded by leave of the bankruptcy court; that is, to fix the amount upon which the judgment creditor should receive dividends. The right to a stay is a qualified one. If the amount of the debt is in dispute leave may be given to proceed to judgment. If the amount is not in dispute there is no need of proceeding with the suit to fix it; but if, nevertheless, the suit is permitted by the court, the assignee and the bankrupt to go on to judgment without objection, the only effect of it is to fix the amount of the provable debt.

That appears to be the view taken by the supreme court in Norton v. Switzer [93 U. S.] 355. The suit was assumpsit, brought by Switzer at first against John and Mary Hein. Pending the suit, upon the suggestion of Switzer that the defendants had taken the benefit of the bankrupt law, and that Norton was their assignee, the district court of Louisiana ordered Norton to be made defendant, in his capacity of assignee, in the place and stead of the Heins.

Process was personally served on Norton, but he failed to appear, and judgment was rendered against him. This judgment was affirmed by the supreme court of the state, and taken by Norton to the supreme court of the United States.

Upon these facts it was held that the state court had jurisdiction to pronounce the judgment, but that the only effect of it was to establish the amount due Switzer as a basis for dividends. Speaking of the provisions of the bankrupt act in this connection, and specially of section 5106, the court uses this language: "Actions pending in favor of a creditor * * * at the time the debtor is adjudged bankrupt under the present bankrupt act, if no objection is made by the assignee or the bankrupt court, may, due notice being first given to the assignee, be prosecuted to final judgment to ascertain the amount due to the creditors; but the judgment will be effectual and operative only to establish the validity and amount of the claim. Notice in due form having been given to the assignee, the judgment may be filed with him as an ascertainment of the amount due to the creditor and as a basis of dividends, but it is effectual and operative only for that purpose." So far as appears in the case, the bankrupts did not apply for any stay of proceedings, nor did the creditor get leave of the bankruptcy court to proceed for the purpose stated in section 5106. And I understand the court to hold that a judgment in favor of a creditor, pending the bankruptcy proceedings in a suit begun before, has only the limited operation stated, although the bankrupt may have failed to apply for a stay, and no express leave of the bankruptcy court was given to proceed in the suit to judgment. In other words, the fact that the judgment is rendered under such circumstances, of itself, makes such judgment special in its character under section 5106.

The failure of the assignee or the bankruptcy court to object amounts to leave to go on with the suit to judgment. Qui tacet consentire videtur.

Following what I conceive to be the law

as declared in Norton v. Switzer [supra], I must hold the only effect and operation of the judgment rendered in the action of assumpsit in favor of Rice to be to establish the amount of his claim as a basis for dividends. As a consequence the judgment is a provable debt, will be released by a discharge duly granted to Stansfield, and Rice is a creditor having such interest in the question of discharge as entitles him to be heard thereon. Motion overruled.

Case No. 13,295.

In re STANTON.

[14 Hunt, Mer. Mag. 73.]

Circuit Court, S. D. Mississippi. May 19, 1845.

BANKRUPTCY — PROVABLE ACCOUNTS — ACCOUNTS CURRENT—PARTNERSHIP DEMANDS.

[1. A claim founded upon accounts current between the bankrupt and his creditors, and upon a comparison of those accounts current and the correspondence and books of the bankrupt, by the agent of the latter who kept those books, is provable in bankruptcy; accounts current having always been regarded as evidence between merchants.]

[2. Three firms bearing different names were composed of the same three partners. One firm was located in Louisiana, and two in Mississippi. The Mississippi firms became largely indebted to the Louisiana firm, and large balances were struck on the books of the latter. The Louisiana partner having gone into bankruptcy, the Louisiana firm was declared bankrupt, and these claims were sold by the assignee as assets belonging to its social creditors. One of the Mississippi partners also went into bankruptcy. The Mississippi firm was declared bankrupt, and the purchaser of these claims presented them for allowance. *Held*, that the fact of the identity of the partners did not operate to give the claims the character of an individual as distinguished from a social demand, and that they should be allowed as of the latter character.]

There were three firms, each composed of the same three partners,—Buckner, Stanton & Co., of New Orleans, of which Henry S. Buckner was the resident partner; Stanton, Buckner & Co., at Natchez, of which Frederick Stanton was the resident partner; and M. B. Hamer & Co., at Manchester, of which M. B. Hamer was the resident partner. In the course of many years of operation, the Mississippi firm fell in arrear to the New Orleans house, large balances respectively, which were struck on the books of the latter firm prior to the bankruptcy of Buckner, or of F. Stanton, or the death of Hamer. Buckner's bankruptcy was conducted in Louisiana. The balances due the New Orleans house were reported as assets of that firm, and were sold by the assignee there, for the satisfaction of the creditors of that firm, and Oakley purchased. The claims thus originating were presented as entitled to pro rata distribution, out of the products of the Mississippi firm, raised on Stanton's bankruptcy here. The main question was whether the claims were provable.

DANIEL, Circuit Justice. On consideration of the claim presented by this petition, I can perceive no valid objection to it arising either from generality, indefiniteness or uncertainty in its character, or from defectiveness in the proofs on which it is rested. The claim is founded upon accounts current between the bankrupt and his creditor, and upon a comparison between those accounts current and the correspondence and books of the bankrupt, by the agent of the latter, who kept those books. Accounts current have always been regarded as evidences between merchants, and as admitted proofs of the amounts they purport, upon their face, if not objected to within the usual lapse of mercantile correspondence. They are deemed in law a proper foundation on which to sustain the action of an indebitatus assumpsit, and it has been settled that claims upon which indebitatus assumpsit will lie, are provable in bankruptcy. It seems to me, therefore, that the claim in question for anything connected with its form, was provable under the bankruptcy; and I might add, if necessary, that it appears to me to have been sufficiently established by proof.

Let us now inquire whether there be anything relative to the nature of this claim, as being in reality a separate and individual or a social demand; or any consequence deducible from the identity of the individuals constituting these several firms which should lead to its rejection. Without instituting a comparison between the rule approved by Lord Hardwicke, and that adopted by Lord Thurlow and the latter decisions, we will take the modern rule in its most ample and unqualified extent; viz: that social creditors must be satisfied to the entire exhaustion of the social effects, and that the individual partner who may have advanced to the firm his separate and private means to any amount, cannot prove against the firm in opposition to the social creditors. This is putting the principle as broadly as any person can desire. Still it may be asked whether, even within this wide scope, the case before us be comprised? Is this the case of an individual partner attempting to prove his separate claim against the social effects, and in opposition to the social creditors? It is true, according to the proof adduced, there existed three firms, which were all composed of the same individuals. But although this natural identity as to the component members of these firms existed, still each was a distinct and separate mercantile body; and, as to its separate, corporate transactions, which it had an unquestionable power to conduct, and as to its separate and peculiar creditors, each was as distinct and entire as if no other whatever existed. The social creditors of each of those separate bodies had the right to claim whatever was due to it as a firm—had a right to claim first, and if necessary, to the full extent of its rights and effects. They had a right to claim whatever

was due to this firm, as a firm, from any other person or persons, natural or artificial. It matters not whether such artificial body or firm was or was not composed of the same persons, or of others; the debts due to the firm, as such, and all its property and credits, as a firm, belonged to its creditors, under the bankruptcy. This seems to be the natural and inevitable conclusion laid down by Lord Thurlow; and, to say that the individual identity of the persons composing the separate firms should have any effect, would amount to a total overthrow of that principle, and would be allowing the individual and not the social character of the party to give the rule. In the case before us, the New Orléans house is declared bankrupt; before the commissioner, its social claim against the Mississippi house is exhibited and proved; by order of the court, sitting in bankruptcy, it is ordered to be sold for the benefit of the social creditors of the New Orleans house, and the proceeds of the sale applied for the benefit of those creditors. Can there exist any reason why the transferee of this claim should not be permitted to prove it, in the same manner and to the same effect, which the creditor of the New Orleans firm or the assignee of that firm might have done? To my mind, no such reason is apparent. It is, in legal effect, a claim by the assignee of the bankrupt firm of New Orleans, in behalf of the creditors of that firm against the bankrupt firm of Mississippi, and should be allowed against the latter, pro rata, with other claims against them. The converse of this proceeding would be an appropriation to the creditors of the Mississippi firm of that which did not belong to it, or to its creditors, but which belonged rightly to the creditors of the New Orleans firm; for, with respect to those several firms, their respective creditors who dealt with them, and them alone, must attach upon those firms, respectively, and be regarded, a priori, as if they were solitary and unconnected with any other houses.

Case No. 13,296.

STANTON et al. v. ALABAMA & C. R. CO. et al.

[2 Woods, 506.][1]

Circuit Court, S. D. Alabama. Dec. Term, 1875.

RAILROAD COMPANIES—RECEIVERS—AUTHORIZED TO BORROW MONEY—CERTIFICATES—COMMERCIAL PAPER—LIABILITY OF RECEIVERS FOR MALFEASANCE—EXCEPTIONS TO MASTER'S REPORT.

1. Where a decayed and dilapidated railroad and its appurtenances are in the possession of receivers by authority of a decr.. of court, made in a cause brought by trustees of a first mortgage to foreclose the same, and it is necessary to borrow money in order to preserve the road and complete some inconsiderable portions thereof, and to put it in condition for the transaction of its business, the court may authorize the receivers to borrow money for such purposes, and make the sums so borrowed a lien on the railroad property superior to that of the first mortgage.

[Cited in Atkins v. Petersburg R. Co., Case No. 604; Credit Co. v. Arkansas Cent. R. Co., 15 Fed. 49, 50; Kneeland v. Luce, 141 U. S. 491, 12 Sup. Ct. 38.]

[Cited in Hale v. Nashua & L. R. Co., 60 N. H. 341; Hoover v. Montclair & G. L. Ry. Co., 29 N. J. Eq. 4; McLane v. Placerville & S. V. R. Co., 66 Cal. 624–628, 6 Pac. 759, 762; Vermont & C. R. Co. v. Vermont Cent. R. Co., 50 Vt. 578.]

2. The order of the court authorizing the receivers to borrow money prescribed that they should issue for the money borrowed, certificates payable in ten years, bearing eight per cent. interest, payable semi-annually, and that the same should not be sold or disposed of for less than ninety cents on the dollar. The receivers issued certificates payable to bearer, and which referred to the order of the court by authority of which they were issued. *Held*, that such certificates were not commercial paper, good in the hands of bona fide holder, no matter what vice or infirmity might attend their original issue.

[Cited in Union Trust Co. v. Chicago & L. H. R. Co., 7 Fed. 515; Central Nat. Bank v. Hazard, 30 Fed. 486; Stanton v. Alabama & C. R. Co., 31 Fed. 587.]

[Cited in brief in Humphreys v. Allen, 101 Ill. 497. Cited in McCurdy v. Bowes, 88 Ind. 585.]

3. They were good for the amount of money actually paid for or advanced on them to the receivers in accordance with the terms of the order of court.

[Cited in Stanton v. Alabama & C. R. Co., 31 Fed. 587.]

4. Persons who bought said certificates, or advanced money on them to the receivers, were not bound to see that the money was applied to the purposes of the trust.

[Cited in Union Trust Co. v. Illinois Midland Ry. Co., 117 U. S. 461, 6 Sup. Ct. 824.]

[Cited in brief in Turner v. Peoria & S. R. Co., 95 Ill. 136.]

5. When such certificates were hypothecated by the receivers to secure moneys advanced to them, and their face value greatly exceeded the sums borrowed, the court ordered that the certificates not necessary at ninety cents on the dollar to secure the sums so advanced should be returned to the receivers.

6. Receivers who willfully and corruptly exceed their powers are liable for the actual damage sustained by reason of their misconduct, but for nothing more.

7. Exceptions to the report of a master should be precise, and raise well defined issues. When they are vague and general, and require of the court the performance of duties which properly belong to the master and counsel, they will be overruled.

[Cited in Jones v. Lamar, 39 Fed. 586; Sheffield & B. Coal, Iron & Railway Co. v. Gordon, 151 U. S. 285, 14 Sup. Ct. 344.]

[8. Cited in Taylor v. Life Ass'n of America, 3 Fed. 470, as an instance in which a nonresident has been appointed to a receivership.]

In equity. The bill in this case was filed by the trustees of a first mortgage deed executed by the defendant railroad company to

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

secure its first mortgage bonds for the purpose, among other things, of bringing to sale the property conveyed by the mortgage, and to the end that the proceeds of the sale might be applied to the payment of the liens upon said property according to their priority. Before this time, trains had been running upon the road from one terminus to the other, but a portion of the road had been built in a hasty and temporary manner, and needed to be completed in a substantial and permanent way, in order to insure the safety of the trains. Such proceedings were had in the cause, that on the 26th day of August, 1873, a decretal order was made by Mr. Circuit Justice Bradley, whereby Lewis Rice of Massachusetts and Wm. J. Haralson of Alabama were appointed receivers to take possession and control of the mortgaged property, with authority "to put said railroad and other property in repair, and to complete any incompleted portions thereof; to procure rolling stock, machinery and other necessary things for operating the same, and to operate the same to the best advantage," and save and preserve the same for the benefit of the first mortgage bondholders, and others having liens thereon.

These receivers were, by the same decretal order, authorized to borrow or advance moneys, not exceeding $1,200,000, which were to be a first lien on said mortgaged property prior to all others, and to be paid before the said first mortgage bonds. For the money so raised, for the purposes aforesaid, the receivers were authorized to issue certificates, the principal payable in ten years from the first day of September, 1873, with interest payable semi-annually, at a rate not exceeding eight per cent. per annum. These certificates were not to be sold or disposed of for less than ninety cents on the dollar of their face value, and were not to be issued until countersigned by a majority of the trustees for the first mortgage bondholders, without which countersigning they were not to be entitled to the lien and priority aforesaid. Under this order, the receivers went into possession of the road, and managed the same, and issued and disposed of nearly all the certificates authorized to be issued by them. On the 23d of January, 1874, this court ordered, adjudged and decreed that the entire line of said defendant company's road, as the same was described in the mortgage deed, extending from Chattanooga, Tenn., through Georgia and Alabama to Meridian, Miss., with all accessories thereto at the time of sale, should be sold at public vendue by the commissioners named in the decree of the court.

The decree of the court further directed, that in case of a sale the proceeds should be applied—First. To the payment of the expenses of the trust, and the costs of suit, etc. Second. To the payment of all taxes, assessments, charges and liens prior in law to the lien of the said mortgage deed, and Third. To the payment of the first mortgage bonds, with their unpaid interest coupons. Fourth. The residue, if any, to be applied in such order and priority of distribution as the court should thereafter establish.

This decree also directed a reference to Joseph W. Burke, Esq., to report in detail all the amounts necessary and proper to be paid out of the proceeds of the sale under the four heads above specified; and the sale of the road was postponed to await the coming in of the report. On the 24th day of August, 1874, by a decretal order of Mr. Circuit Justice Bradley, which recited that the operation of the railroad, which was the subject of the litigation in this case, had nearly ceased in consequence of disasters from the elements and want of necessary repairs, and that said road and its equipments were fast deteriorating in value, the possession of the said railroad and its appurtenances was turned over to the trustees of the said first mortgage deed, namely, Daniel N. Stanton, John C. Stanton and Francis B. Loomis, the complainants in this cause. This order declared that the trustees "are authorized, for the purposes before mentioned, to raise any moneys which may be advanced to them (beyond the advances which have already been made thereon) upon any of the certificates issued or authorized to be issued under the decree of August 26, 1872, which certificates, for all amounts justly due thereon, according to the final decree in this cause made on the 23d of January, 1874, or which may become due thereon by such further advancements, are hereby declared to be entitled to priority over the said first mortgage bonds, and all other claims against said railroad and other property, as declared in said final decree, and the sale to be made by the masters named in said decree shall be subject to the lien of said certificates," etc.

On the 18th of June, 1874, Mr. Burke, the master, filed his general report, and on the 31st of May, 1875, his supplemental report, under the decree of reference heretofore recited. Afterwards, and before any exceptions to these reports were heard, on the 11th of June, 1875, the persons representing the first mortgage bondholders, the trustees of said mortgage and the holders of receivers' certificates, issued by the receivers appointed in this cause, entered into an agreement which, on the day last named, was made by Mr. Circuit Justice Bradley an order of the court. This order recited that there was some dissatisfaction with the reports of Master Burke, and provided for the appointment of Mr. Philip Phillips, of Washington City, as master, to enquire into, and with power to settle the various matters of reference involved in the case and ordered by the decrees of the court, which settlement, it was declared, should be final between the parties to the said agreement when confirmed by the court. It was further agreed and decreed that if any of the receivers' certificates were objected to by either party, the master should inquire and report whether the same were issued in accordance with the orders in the cause, what dis-

position was made of the same, whether said disposition was in conformity to the said orders, and which in his opinion should be allowed and which rejected. On the 8th of September, 1875, Mr. Phillips filed his report, to which a large number of exceptions were taken by counsel for various persons interested; and on these, the case was submitted to the court. Most of the exceptions raised questions of fact, and they are not noticed in that part of the opinion of the court which follows.

John A. Elmore, for trustees as complainants.

E. H. Grandin, also for trustees, and for J. C. Stanton individually and as receiver.

J. Q. Smith, for complainants in the bill.

Wm. Boyles, for F. S. Gwyer, a holder of receivers' certificates.

S. F. Rice, for Rice and Haralson, receivers.

V. A. Gaskill, for trustees D. N. Stanton and J. C. Stanton, and J. C. Stanton as receiver.

Robert H. Smith, R. I. Smith, and Thomas W. Snagge, of London, England, for the council of foreign bondholders, a corporation of London, in the kingdom of Great Britain; for certain persons known as the Frankfort committee of the Alabama & Chattanooga Railroad Company and other persons, holders to the amount of $3,200,000 of the first mortgage bonds issued by the railroad company.

WOODS, Circuit Judge. The most important exceptions to the report of Master Phillips have been filed by the solicitors of the contesting first mortgage bondholders, and these will be first considered and disposed of in their order.

The first of these relates to what are designated the hypothecated receivers' certificates. In order to understand the exception, it is necessary to set out briefly the facts as stated by Master Phillips, and his conclusions of law thereon: "The complainants in the bill," says the master's report, "were the trustees of the first mortgage bondholders. The bill prayed that the court would determine the various matters in dispute; that they would appoint receivers with full power to borrow money, and with such other powers as might be necessary to cause the property to be protected, improved and administered until the further order of the court; and that in the meantime the said road should be operated, and the business of the company be prosecuted, to the greatest advantage for the benefit of all interested. The solicitors for the second mortgage bondholders, who were defendants in the cause, united in the application for the appointment of receivers as prayed for. There were also annexed to the bill numerous affidavits showing the dilapidated condition of the road, and the absolute necessity for the preservation of the property that the order should be made. Under these circumstances, Mr. Circuit Justice Bradley made the decretal order of August 26, 1872, appointing Rice and Haralson receivers with powers as prayed for. The order provides, 'that all moneys which may be raised by the receivers by loan, or which may be advanced by them for the purposes aforesaid, not exceeding the sum of $1,200,000, shall be a first lien, to be paid out of the proceeds of said property.' Having thus designated the amount that might be raised, the order proceeds to provide the ways and means: 'The receivers shall issue certificates for the money which they may thus raise by loan, and the loans shall be made on such terms as the receivers may deem expedient, provided that the said certificates shall not be disposed of for less than ninety cents on the dollar; and provided, also, that the interest shall not be allowed at a greater rate than eight per cent.' This is followed with further direction, 'that the principal of any moneys so to be loaned to the said receivers shall be payable at the expiration of ten years from the 1st of September next, at some convenient place to be named therein.' The power of the court to make this decree is not now open to inquiry, but the master is very confident in the opinion that if any case could ever justify the exercise of such a jurisdiction, the one before him imperiously called for its exercise. Under this order, the receivers issued 1,200 certificates, numbered from one to twelve hundred inclusive, for one thousand dollars each. They are made payable to bearer, but on their face they recite that they are made 'under and in pursuance of an order of Judge Bradley, of the 26th of August, 1872, in a suit in equity, in the circuit court of the United States, at Mobile, for the district of Alabama, Fifth judicial circuit, in which said Seth Adams et al., trustees, are complainants, and the Alabama & Chattanooga Railroad company et al., are defendants.' These certificates thus conclude: 'In witness whereof, the said receivers in pursuance of the order aforesaid, and not otherwise, have signed these presents on this fifth day of September, 1872.' They are thus indorsed: 'We do hereby certify that this is one of the series of certificates of indebtedness of $1,000 each, and numbered consecutively from No. 1 to 1,200, both numbers inclusive, amounting in the whole to $1,200,000, and the same is now countersigned by us in pursuance of the order of court, in the cause pending in the United States circuit court for the district of Alabama, as mentioned herein.'" This was signed by the trustees.

It was argued that these certificates, being payable to bearer, were negotiable instruments by the law merchant, and that the parties who had in good faith purchased them in open market, held a title which could not be invalidated by any illegality in their disposition by the receivers. To

sustain this proposition, the following cases were relied on: Woods v. Lawrence Co., 1 Black. [66 U. S.] 386; City of Lexington v. Butler, 14 Wall. [81 U. S.] 512; Mercer Co. v. Hackett, 1 Wall. [68 U. S.] 83; Grand Chute v. Winegar, 15 Wall. [82 U. S.] 356; Gelpcke v. Dubuque, 1 Wall. [68 U. S.] 203; Lynde v. The County, 16 Wall. [83 U. S.] 7; Meyer v. Muscatine, 1 Wall. [68 U. S.] 385; Lee Co. v. Rogers, 7 Wall. [74 U. S.] 181. This view the master refused to adopt, but held that the title of every holder was dependent on the fact whether the certificate was disposed of by the receivers in conformity with the order of the court, and that it was not to be regarded as falling under the law of ordinary negotiable paper. His report declares: "These securities until within a few years were unknown; they are all directed to be issued by special appointees of the court, clothed with special and limited authority, and in relation to a particular case. On their face they refer to the particular power thus conferred, and to the particular case then pending in the court. This is a sufficient notice to put a prudent dealer on inquiry. The order imperatively declares that the certificate should not be disposed of at less than ninety cents on the dollar. Any act by the receivers which disposes of these at less than ninety cents is ultra vires. The first taker would derive no title from such a transaction and a subsequent holder would occupy no better position. These certificates may be likened to the English debentures of a business corporation, as to which it has been well settled that, when issued by the directors without due authority under the seal of the company, they cannot be enforced by members of the company who accepted them after being present at the meeting when the irregular issue was sanctioned, and a bona fide transferee of such debentures from such shareholders will stand in no better position, nor can strangers or their assignees enforce them where they were accepted by the first holders, with knowledge that the condition on which they were issued had not been fulfilled. In re Magdalena Steam Nav. Co., Johns. Eng. Ch. 690. In very many instances, as shown by the evidence, money was advanced in New York to the receivers, for which they executed their notes, dating them at Boston to avoid the usury laws, and stipulating to pay, exclusive of 8 per cent. interest, 2½ per cent. per month, with a pledge of certificates often exceeding double, and sometimes treble the amount loaned, with authority to sell the certificates at public or private sale without notice. The commissioner is of the opinion that such a pledge was wholly unauthorized. The proviso that the certificates shall not be disposed of at less than ninety cents is certainly violated by pledging twenty certificates for a loan of $10,000. Such a hypothecation deprives the receivers of their control over the certificates; it is a disposition which defeats the object of the order, which is to enable the receivers to obtain for the use of the road $1,000,000, if so much were needed, by the use of $1,200,000 in certificates. To hold such a disposition to be legal would confer a valid title upon all who claim under the first taker, and thus the lien of the first mortgage bondholders would be displaced in charging the trust estate with double or treble the amount of money actually advanced for its betterment. While entertaining these views, the commissioner is of opinion, that to the extent of moneys actually advanced to the receivers, and applied to the benefit of the trust estates, they are entitled on equitable principles to be allowed. It has been decided in England in accordance with the views here expressed that when money has been advanced on irregular securities and has been applied for the benefit of the company by the directors, and the shareholders have acquiesced in the transaction, the company and the shareholders are precluded from disputing their liability to pay the advance. And when a payment of six per cent. interest had been made upon the debentures without objection, it was held that although the holders could not recover upon the debentures, they were entitled to six per cent. interest on their advances. De Winton v. Mayor, etc., of Brecon, 26 Beav. 533. Each claimant is therefore allowed the amount of money actually advanced by him upon his delivery of the note or other evidence of indebtedness held by him on this account, and also all the remaining certificates which had been given to him in pledge after retaining as many of them at ninety cents as will extinguish the amount found due to him, the coupons belonging to said certificates being exscinded therefrom, so as to conform to the computation of interest made on such indebtedness. If the views herein expressed meet with the approbation of the court, then to give full effect to them and bring this litigation, so injurious to all interested, to a speedy conclusion, it is recommended that an order be made fixing a day for the completion of these settlements, and in default of settlement on that day, the trust estate shall be declared freed from all liability thereon."

The bondholders have excepted "to the allowance of each and every certificate hypothecated, and to every allowance as a lien prior to the first mortgage debt of any sum raised by the hypothecation of said certificates, and to the allowance and payment of any of said several sums on receivers' certificates at 90 cents, on the dollar." The grounds of this exception are that the transactions of the receivers in hypothecating certificates were unlawful, beyond the powers of the receivers, and in violation of the orders of the court, were usurious and in fraud of the trust, and that it is not shown that the moneys raised by the several transactions were applied to

the purposes specified in the orders of the court or to the benefit of the trust; were without proper consideration, and that the master by his report has attempted to make a new contract between the parties and the effect of his ruling is improperly to charge the trust fund with liens prior to the first mortgage.

I do not think that any of these objections to the conclusions of the master on this subject are well taken. I entirely agree with the master that these certificates have not the quality of negotiable instruments by the law merchant. In my judgment, power conferred upon receivers to issue certificates does not authorize the issue of a bond or other negotiable instrument which shall be good in the hands of a bona fide holder for value, no matter what vice or infirmity may attend its original creation. The paper issued must be governed by the authority under which it is issued and not by the form the receivers may choose to give it. In order to get a correct view of the subject, we must recur to the order of the court authorizing the receivers to borrow money and issue certificates. It will be seen by the decree already quoted that the receivers were authorized to raise by loan or to advance themselves a sum not exceeding $1,200,000, which should be a first lien, prior to all others on the trust property; that they were to issue certificates for the money thus raised by loan, and that the loan should be made on such terms as the receivers might deem expedient, "provided that the certificates should not be sold at less than 90 cents on the dollar of their face, and should not bear a greater interest than eight per cent. per annum, payable half yearly, and that the certificates should not be issued until countersigned by a majority of the trustees for the first mortgage bondholders, without which countersigning they should not be entitled to the lien and priority aforesaid." If the report of the master is adopted, the loan of money made on these certificates will be secured for the benefit of the trust, in full compliance with the terms of the decretal order of the court, namely, at 8 per cent. per annum, payable half yearly on certificates having ten years to run, and if the fund already raised does not reach the amount authorized by the court to be borrowed, a sufficient number of certificates will be released to raise the amount ordered. Unquestionably the receivers had no right to hypothecate the certificates, or to agree to pay more for money borrowed than eight per cent., payable semiannually. They had no authority to borrow money to be paid before the expiration of ten years from the first of September, 1872, the date when the certificates were to fall due. But there was no period fixed during which the money must of necessity be borrowed; they could borrow it as needed, at any time within the ten years. If the receivers were now in office they might, under the order of the court already referred to, borrow money on any certificates in their hands, to be repaid according to the terms of the certificates, on the first of September, 1882. In fact, under the decretal order of August 24, 1874, made by Mr. Circuit Justice Bradley, the trustees of the first mortgage to whom the railroad was ordered to be delivered, as quasi receivers, were authorized to raise money on any certificates remaining in their hands. The result therefore of the ruling of Master Phillips is to effect a loan of money for the benefit of this trust estate on the precise terms authorized by the order of the court, and to put in the hands of the trustees as receivers, certificates on which the residue of the loan authorized by the court can be raised. This cannot be said to be the making of a contract by the master. The terms of the loan have long since been fixed by the court, and if the holders of hypothecated certificates choose now to come in and assent to these terms, the bargain is of their and not of the master's making.

I do not think that the lenders of money on hypothecated certificates were bound to look after the application of the money loaned to the receivers. They can be compelled to allow their money to go on the terms prescribed by the orders of the court; that is, to consent to a loan payable September 1, 1882, at eight per cent. per annum, payable semiannually, and to take certificates as evidence thereof, at not less than ninety cents on the dollar. But their money cannot be confiscated, because receivers, appointed by the court at the instance of the trustees, for the bondholders, may have been unfaithful to their trust. But in my judgment, the question raised by this exception has been already settled by this court. The decretal order of Mr. Circuit Justice Bradley, made August 24, 1874, already referred to, by which the trust property was turned over to the trustees as quasi receivers, among other things, declared: "And it is further ordered that said trustees, having filed said bond and taken possession as aforesaid, shall be authorized for the purposes before mentioned to raise any moneys which may be advanced to them, beyond the advances which have already been made thereon, upon any of the certificates issued or authorized to be issued by the receivers in this cause, under the decree of August 26, 1872, which certificates for all amounts justly due thereon, according to the final decree in this cause, made on the 23d day of January last, or which may become due thereon by such further advances, are hereby declared to be entitled to priority over the said first mortgage and all other claims against said railroad and other property as declared in said final decrees, and the sale to be made by the masters named in said decree, shall be subject to the lien of said certificates," etc. The purpose of this order is unmistakable to recognize "advances" made on certificates already issued, or which were authorized to be, but had not yet been issued. The amounts

of the advances were not fixed. They might be ninety cents on the dollar, or a smaller sum. Whatever they were they were declared to be the first lien upon the trust property. This question therefore, having been passed upon by one of the judges of this court, will be considered as settled until reversed in an appellate tribunal. The exception under consideration must be overruled.

The next exception to be noticed is to so much of the report as refers to the account of Rice and Haralson, receivers. The grounds of exception are (1) the refusal of the master to charge Rice and Haralson with the face value of 726 certificates hypothecated by them; (2) his refusal to charge said certificates at ninety cents on the dollar; and (3) the allowance to the auditor, treasurer, and general superintendent and other officers and agents of extravagant salaries and compensation, the same being included in the items allowed the receivers. The overruling of the exception just passed upon, in effect disposes of the first two grounds on which this exception is based. If the trust property is charged only with the amounts actually advanced on the hypothecated certificates, and the certificates not necessary to secure the amounts thus advanced are ordered to be returned to the trustees, there is no rule of law or equity by which the receivers should be charged, either with the face value or ninety cents upon the face value of the hypothecated certificates. The damage, if any, sustained by the conduct of the receivers, is not to be measured in the manner suggested by this exception. If they acted in good faith, but under a mistaken view of their powers, they would perhaps not be liable at all. If they willfuly and corruptly exceeded their powers, they should only be held liable for the actual damage sustained by their conduct, and they are not chargeable by an arbitrary rule like that suggested by the exception. In re Skerrett, 2 Hogan, 192. The other ground upon which this exception is based is, that extravagant salaries were allowed the auditor, treasurer, and general superintendent, and other officers and agents employed by the receivers. This branch of the exception is too vague and general, and requires of the court the performance of duties which properly belong to the master and counsel. Exceptions should be precise, and raise well defined issues. The exceptor in this instance should have stated what officers were referred to, and what salaries were allowed them. Instead of this, the exception is launched at the compensation generally of the auditor, treasurer, general superintendent and all other officers and agents of the receivers, without stating what salary or compensation was allowed to any one of them. It is impossible for the court to pass intelligently on such an exception, and no rule of equity practice requires the court to make the effort to do so. The entire exception is therefore overruled.

[See Case No. 13,297 and 31 Fed. 585.]

Case No. 13,297.

STANTON et al. v. ALABAMA & C. R. CO. et al.

[2 Woods, 523.] [1]

Circuit Court, S. D. Alabama. Dec. Term, 1875.

RAILROAD COMPANIES — PURCHASER OF BONDS — RIGHTS—NOTICE—NUMBERING BONDS.

1. A purchaser of railroad bonds is bound to take notice of what appears upon the face of his bonds, and of the mortgage made to secure them.

2. But if the bonds and mortgage, which put the purchaser on inquiry, lull and satisfy inquiry, he is bound to look no further.

3. A railroad company executed a mortgage to secure a series of numbered bonds, all bearing the same date and payable at the same time, not to exceed sixteen bonds of one thousand dollars each to the mile of its road. Five hundred bonds, in excess of this limit, purporting to be secured by this mortgage, were issued by the company and sold for value to bona fide holders. *Held*, (a) That bonds of this kind are numbered, not for the purpose of giving one number any advantage over another, but simply for convenience in registration and identification. (b) In such a case, the five hundred bonds bearing the higher numbers stand on the same footing as those bearing the lower numbers; and when the mortgaged property is inadequate to pay, all are entitled to share pro rata with the others in its proceeds.

[This was a bill in equity by John C. Stanton and others, trustees, against the Alabama & Chattanooga Railroad Company and others.] Heard upon petition of certain bondholders.

The case was this: The defendant company was a corporation of the state of Alabama, whose existence and franchises had been recognized by legislation in the states of Tennessee, Georgia and Mississippi. The company was authorized to construct and use a railroad running from Chattanooga in the state of Tennessee, across the states of Georgia and Alabama to Meridian in the state of Mississippi. An act of the legislature of Alabama, approved September 22, 1868, required the governor of the state, whenever any railroad company of the state should have finished, equipped and completed twenty continuous miles of railroad, to indorse on the part of the state, the first mortgage bonds of the railroad company to the amount of sixteen thousand dollars per mile, for the portion thus finished and completed, and to indorse the same bonds at the rate of sixteen thousand dollars per mile for each section of five miles subsequently completed and equipped. The act also applied to railroads constructed beyond the limits of the state of Alabama by any railroad company organized under the laws of the state. The act further provided: "Nor shall such bonds be indorsed by the governor until the president and chief engineer of such company, upon oath, show that the conditions of this article have been complied with in all respects."

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

Sections 1417, 1422, Rev. Code Ala. On the 19th day of December, 1868, the above mentioned acts being in force, the Alabama & Chattanooga Railroad Company conveyed to trustees, to secure its first mortgage bonds, its entire railroad; extending from Chattanooga, Tennessee, to Meridian, Mississippi, together with all its other property, equipments and franchises. This mortgage recited, that the bonds to be secured by it were to be issued at the rate of sixteen thousand dollars per mile of said railroad. Bonds of $1,000 each, to the number of 5,220, purporting to be secured by this mortgage, were issued for value and put in circulation by the railroad company, all bearing the same date and payable at the same time. Each one of these bonds recited on its face, that it was one of a series of numbered bonds issued in accordance with and upon the conditions prescribed by the acts of the legislature above cited, and secured by an indorsement of the state of Alabama, and by a first lien upon the entire road and property of the railroad company. Each bond also bore the indorsement of the governor of Alabama, which recited, that the railroad company had complied with the conditions prescribed by law, upon the performance of which the governor was required to make such indorsement. Upon each bond was also indorsed a certificate signed by the trustees named in the mortgage, that the bond was one of the series of first mortgage bonds described in and secured by said mortgage deed. The railroad company having made several defaults in the payment of interest, the trustees of the first mortgage deed filed the bill in this case to foreclose the mortgage and bring the railroad property therein described to sale to pay the principal and interest on the bonds, the principal having become due by the default in the payment of interest. On the 23d of January, 1874, a decree of sale was made by the court, and on the first Monday of May, 1875, the property was sold by the master appointed for that purpose. and bid off and purchased by the trustees of said mortgage deed for the benefit and in behalf of all holders of the first mortgage bonds secured thereby. It appears by evidence on file in the case, and is not disputed, that the railroad of the defendant company, between Chattanooga and Meridian, is only 295 miles long. At the rate of sixteen thousand dollars per mile, the terms of the mortgage only authorized the issue of 4,720 bonds of $1,000 each, and the governor was only authorized to indorse that number. Five hundred bonds more than this number were indorsed by the governor and issued and negotiated by the railroad company. The holders of the bonds which bear numbers higher than 4,720 have applied to the court for leave to file their bonds and become sharers in the title to the property bought by the trustees. This petition is resisted by the holders of bonds numbered from 1 to 1,720 inclusive, and upon this issue thus presented this branch of the case was heard.

Samuel Dixon, of Philadelphia, and Thomas H. Herndon and John Little Smith, for petitioners:

1. The petitioners are bona fide holders of bonds which are negotiable instruments before maturity, and their title cannot be impeached except by affirmative proof of bad faith on their part in the acquisition of them. Goodman v. Harvey, 4 Adol. & E. 870; Swift v. Tyson, 16 Pet. [41 U. S.] 19; Peacock v. Pursell, 14 C. B. (N. S.) 728; Pettee v. Prout, 3 Gray, 502; Woodman v. Churchill, 52 Me. 58; Stotts v. Byers, 17 Iowa, 303; Lyon v. Ewings, 17 Wis. 61; Baker v. Walker, 14 Mees. & W. 465; Belshaw v. Bush, 11 C. B. 191, 200; Housum v. Rogers, 40 Pa. St. 190; Palmer v. Richards, 1 Eng. Law & Eq. 529; Ford v. Beech, 11 Q. B. 873; Bank of New York v. Vanderhorst, 32 N. Y. 553.

2. As against these holders, there is no infirmity in the bonds. The corporation is estopped and therefore liable to pay the bonds and the bonds are entitled to share in the security provided by the trust deed, equally with other bonds secured thereby. In re Athenæum Life Assurance Soc.; Ex parte Eagle Ins. Co., 4 Kay & J. 549, cited in Green's Brice's Ultra Vires, 433; Monument Nat. Bank v. Globe Works, 101 Mass. 57; Akin v. Blanchard, 32 Barb. 527; Royal British Bank v. Turquand, 6 El. & Bl. 327; Knox v. Aspinwall, 21 How. [62 U. S.] 544; Woods v. Lawrence County, 1 Black [66 U. S.] 386; Moran v. Miami Co., 2 Black [67 U. S.] 724; Mercer County v. Hackett, 1 Wall. [68 U. S.] 83; Supervisors v. Schenck, 5 Wall. [72 U. S.] 772; Railroad Co. v. Howard, 7 Wall. [74 U. S.] 413.

P. Hamilton, with whom appeared Thomas W. Snagge, of London, England, and T. A. Hamilton, contra:

1. The evidence before the petitioners when they purchased, to authenticate the bonds, does not tend to establish the right asserted against the bona fide holders of other bonds to participate with them in an inadequate security. It may very well be that the bonds held by petitioners are perfectly irreproachable and beyond attack, and yet the bonds not be secured by the mortgage in this case. Philadelphia & S. R. Co. v. Lewis, 33 Pa. St. 33.

2. The face of the bonds put the holders on inquiry as to the extent of the security which had been provided for their payment and the amount of the debt for which that security was pledged, and the mortgage shows that it was executed to secure bonds to an amount not exceeding sixteen thousand dollars per mile. The length of the road is 295 miles; the debt secured by the mortgage can therefore only be $4,720,000 or 4,720 bonds of $1,000 each. When, therefore, parties present bonds of higher numbers, their bonds show on their face that they are not secured by the mortgage.

[See Case No. 13,296.]

WOODS, Circuit Judge. It is conceded that the petitioners are holders of the high numbered bonds for value and without actual notice of any infirmity attaching to them. These bonds are commercial paper, and as such are binding upon the railroad company when in the hands of a bona fide holder for value. Commissioners of Knox County v. Aspinwall, 21 How. [62 U. S.] 539; Woods v. Lawrence Co., 1 Black [66 U. S.] 386; Mercer Co. v. Hackett, 1 Wall. [68 U. S.] 95; Gelpcke v. Dubuque, Id. 175; Van Hostrop v. Madison City, Id. 291; Meyer v. Muscatine, Id. 384; Murray v. Lardner, 2 Wall. [69 U. S.] 110. By the same authorities they are equitably binding upon the state by reason of its indorsement. Neither the railroad company nor the state enters into this controversy. The contention is between bondholders; the parties who hold bonds bearing numbers less than 4,721 insisting that their bonds only are secured by the mortgage, and what they style the overissue or high numbered bonds are not secured. The claim of the holders of bonds bearing numbers below 4,721 is based on two grounds: first, because the petitioners holding the high numbered bonds were put on notice of the fact that their bonds were not secured by the mortgage; and second, because by the very terms of the mortgage these bonds are not secured by it; that mortgage declares what bonds it is intended to secure, and these bonds are not among them.

1. Were the holders of the overissue or high numbered bonds put on notice of the fact that the bonds they held were in excess of what the terms of the mortgage deed authorized? The power of the railroad company to issue bonds was unlimited. It could issue as many as it chose. The bonds are therefore binding upon the railroad company. Were the holders of the bonds put upon sufficient notice of the facts that bonds held by them were not secured by the mortgage? The holders of the bonds were bound to take notice of what was contained in or indorsed upon their bonds; they were bound to take notice of what was contained in their deed of mortgage, and of the laws of the state referred to in the deed of mortgage. Royal British Bank v. Turquand, 6 El. & Bl. 327. Upon a reference to this mortgage deed, the purchaser of bonds would have learned that the mortgage was only intended to secure bonds at the rate of $16,000 per mile. He was, therefore, bound to reasonable diligence to find out whether his bonds were secured by the mortgage deed or not.

By a perusal of the laws of the state referred to in the mortgage, and also upon the face of the bond, he would have learned that the governor of the state of Alabama was authorized to indorse the bonds of the railroad to the amount of $16,000 per mile of completed railroad; that the oath of the president and chief engineer of the railroad company as to the number of miles of completed railroad was required to be filed with the governor as the evidence of the fact that so many miles had been completed, and that he was authorized to act on that evidence in making his indorsement. By a reference to the bonds, they would have seen that the governor had indorsed them and recited in his indorsement that he had done so in pursuance of law; they would have seen that the face of the bond recited that it was one of a series of numbered bonds, issued in accordance with the laws of the state above recited, secured by the indorsement of the governor, made in pursuance of the same laws, and was a first lien upon the railroad and other property of the railroad company, and they would have seen that the bonds bore the indorsement of the trustees named in the mortgage deed, to the effect that they were the bonds described in, and secured by the said mortgage. So it would seem that the very bonds and mortgage which put the purchasers upon inquiry lulled and satisfied inquiry. They had the right to presume that the governor had not violated his duty: that before he indorsed the bonds, he had on file the oath of the president and chief engineer of the railroad company, that a sufficient number of miles of railroad had been completed to authorize the indorsement. Besides this, they had the statement of the president and treasurer of the railroad company on the face of the bond, and of the trustees for all the bondholders upon the back of the bond, that the bonds were secured by the mortgage. To require the purchaser to go behind the indorsement of the governor, sustained, as they had the right to presume, by the oath of the president and chief engineer of the railroad company, and the statement of the railroad company itself, made by its president and treasurer, and of the trustees who were appointed to act for all the bondholders, would be to require every purchaser of a bond actually to measure the road for himself to ascertain its length. While, therefore, the mortgage put the purchaser upon inquiry as to the length of the road, the mortgage itself, and the bonds, with their statements and indorsements, answered the inquiry in such a way as to satisfy the most cautious and wary. But suppose the purchaser of bonds had ascertained the length of the road for himself by actual measurement, how would that help him to know whether his bonds were outside or inside the terms of the mortgage? The bonds all bear the same date, and fall due on the same day. Bond number one has, therefore, no advantage over any other bond, and no presumptions are to be indulged in its favor. There is no presumption of law that it was issued first or sold first. On the contrary, the presumption is that all were sold at the same time. Practically, we know that where a large number of bonds are put upon the market, the high numbered bonds are just as likely to be sold first as the low numbered bonds. So that if the purchaser should, before purchasing, ascertain for himself the precise length of the road, he would have no

means of ascertaining whether his bonds were over issue bonds or not. The holders of the five hundred bonds highest in number would have precisely the same ground to say that the first five hundred are over issues as the holders of the first five hundred have to say this of the last five hundred.

I conclude, therefore, that while it is true that the mortgage limits the number of bonds to be secured thereby, and the holder of bonds might be required to take notice of that limitation, there was nothing to put him upon notice that the limit thus fixed had been exceeded; on the contrary, that all the presumptions and all the evidence was that it had not; nor if he had ascertained that the limit had been exceeded, was he bound to conclude from the fact that his bonds bore the higher numbers, that they were the over-issue bonds, rather than others.

2. But it is claimed that the mortgage was executed to secure sixteen bonds of $1,000 each to the mile, and no more, and that no larger number of bonds can be secured by it than its terms authorize; that when the officers of the railroad company had issued sixteen bonds to the mile, they had no power to issue a greater number to be secured by that mortgage, and the overissue is not secured. But the difficulty recurs that there is no way of ascertaining which are the over issue bonds. The law presumes they were all issued at one and the same time, and the purchaser has the right to act on that presumption. The bonds are numbered, not for the purpose of giving one number any advantage over another, but as a matter of convenience in their registration and identification. The case is this: A mortgage is made to trustees to secure a given number of bonds, and as a matter of security to the bondholders, the trustees are required to place their certificate upon the bond to the effect that it is described in and secured by the mortgage. The common trustees of all the bondholders are unfaithful, and certify to a larger number of bonds than were intended to be secured by the mortgage. The result is that all must suffer from the unfaithfulness of the trustees. But no part of the bondholders can say that the loss shall fall exclusively on others. It is a case for the application of the rule that equality is equity. A second mortgage bondholder would have the right to insist that the first mortgage should only secure bonds to the extent of $16,000 per mile. But no first mortgage bondholder has the right to say that he shall be paid in full to the exclusion of others whose bonds purport to be secured by the same mortgage, and whose equities are equal to his.

The views expressed are illustrated by a fact in this case. The length of the railroad constructed is, in fact, only 290 miles; five miles of the line between Chattanooga and Meridian is not the property of this road, but is leased from the Nashville and Chattanooga railroad. So that according to the mortgage, the company should have issued and the governor indorsed only 4,640 bonds; yet it issued 4,720 as for the entire line between Chattanooga and Meridian. There is, therefore, among the 4,720 bonds an over issue of 80 bonds. Now I ask what 80 bonds of the 4,720 are to be excluded from the benefit of the mortgage? There is no rule by which any can be excluded. They must all share pro rata in the proceeds of the mortgage property. As the proceeds of the property sold are not sufficient to pay more than one-fourth of the first mortgage bonds, no second mortgage bondholder is injured by allowing the over issue bonds to share in the proceeds, and no first mortgage bondholder can exclude any other from sharing in the proceeds.

The result is that the prayer of petitioners must be granted.

[See 31 Fed. 585.]

STANTON (CHAMBERLAIN v.). See Case No. 2,579.

STANTON (MITTLEBURGER v.). See Case No. 9,676.

Case No. 13,298.

STANTON v. SEYMOUR et al.

[5 McLean, 267.][1]

Circuit Court, D. Michigan. June Term, 1851.

False Imprisonment—Color of Process—Matters of Aggravation—Pleading.

1. An action for false imprisonment is trespass.

2. And this is the case whether the imprisonment be charged under color of process or without.

[Cited in brief in Benham v. Vernon, 5 Mackey, 19.]

3. In this action, matters of aggravation may be proved without being stated in the declaration.

4. A plea must be single.

5. It must rest the defense on a single point.

[This was an action for false imprisonment by Elijah Stanton against James Seymour and others.]

Barstow & Lockwood, for plaintiff.

Davidson & Holbrook, for defendants.

OPINION OF THE COURT. This action is brought against the defendants for false imprisonment. The declaration contains four counts. To the three first counts the defendants pleaded the general issue, not guilty. All the defendants, except Hopkins, pleaded specially as to the first three counts, and by separate special pleas sets up substantially the same defense, set up by the others. They state in their special plea, "that a warrant was regularly sued out by the defendant, James Seymour, against the plaintiff, that it was delivered to the plaintiff, and that he voluntarily gave bail with-

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

out any arrest or imprisonment." To the fourth count all the defendants demurred. The plaintiff demurs to the special pleas, and joined in demurrer to the fourth count.

In support of the demurrer to the fourth count it is contended that, from the facts set forth in the declaration, the action should have been case, and not trespass. That the party, if at all arrested by the warrant, could not charge the defendants with force. That they are not liable to trespass while the warrant remains unsuperseded. 2 N. H. 491; 9 Bac. Abr. 463; 3 Hen. & M. 265; 5 Wend. 170-172.

The 4th count in trespass is good. It is in the proper form in an action for false imprisonment. 2 Leigh, N. P. 1431, 1437. The complaint is, for injuries done under color of legal process. This is an elementary principle, and can require no citation of authority to sustain it. In the fourth count matter is set up in aggravation; this was unnecessary, as it might have been proved without an averment of it in the declaration. The form is different from that of an action for a malicious prosecution.

The special pleas set up legal process as a justification for the imprisonment charged, and then aver, that the defendants did not arrest the plaintiff, but that he voluntarily gave bail. Here are two defenses. Justification by legal process is one; that the defendants did not arrest and imprison is another. The allegation of bail having been given by the plaintiff voluntarily, is immaterial. It is argumentative, by denying the false imprisonment which had been before denied. The plea is double. Issue could not be taken on one allegation without admitting the other. A plea in bar should confess and avoid, or else traverse the declaration. There is some uncertainty in regard to these pleas. A plea is bad, that embraces a traverse with a confession or avoidance.

The demurrer to the fourth count is overruled, and the demurrers to the special pleas are sustained.

Case No. 13,299.

STANTON v. WILKESON.

[8 Ben. 357; 2 Nat. Bank Cas. (Browne) 162; 2 N. Y. Wkly. Dig. 91.] [1]

District Court, S. D. New York. Feb., 1876.

NATIONAL BANK—RECEIVER—ASSESSMENT TO PAY DEBTS—OFFICER OF THE UNITED STATES—STATE LAWS AS RULES OF DECISION—DEBTS AND LIABILITIES—CONSTRUCTION OF STATUTE.

1. Section 721 of the Revised Statutes of the United States makes state laws applicable as rules of decision in trials at common law, in the federal courts, only where it is not otherwise provided by federal enactment.

2. The right of a receiver of a national bank to bring a suit in his own name to recover an assessment laid on stockholders, for the purpose of paying debts, grows out of the provisions of section 5234 of the Revised Statutes; and, therefore, sections 111 and 123 of the New York Code of Procedure do not apply to the case, as rules of decision. But if they did, such an action would be properly brought by the receiver in his own name.

[Cited in Price v. Abbott, 17 Fed. 508; Young v. Wempe, 46 Fed. 355; Fisher v. Yoder, 53 Fed. 565.]

3. A receiver of a national bank is an officer of the United States.

[Cited in Frelinghuysen v. Baldwin, 12 Fed. 397; Price v. Abbott, 17 Fed. 508; Hendee v. Connecticut & P. R. Co., 26 Fed. 678; Stephens v. Bernays, 41 Fed. 402; Fisher v. Yoder, 53 Fed. 565.]

4. A receiver of a national bank is not compelled to proceed by bill in equity against all the stockholders, to collect an assessment which the comptroller of the currency has directed to be levied upon them, but may proceed by separate actions at law, against the separate stockholders, to recover the amount due from each.

[Cited in Stephens v. Bernays, 41 Fed. 402; Young v. Wempe, 46 Fed. 355.]

5. The word "debts," in section 5234 of the Revised Statutes, includes the "contracts, debts and engagements" mentioned in section 5151, and the word "liabilities" imports no broader obligation.

[This is a suit to recover an assessment, by Edwin L. Stanton, receiver of the First National Bank of Washington, D. C., against Catherine C. Wilkeson. Heard on demurrer.]

Man & Parsons, for plaintiff.

George Gray and Henry Stanton, for respondent.

BLATCHFORD, District Judge. The plaintiff is the receiver of a national bank, which was organized under the act of February 25, 1863 (12 Stat. 665). The defendant, at the time the bank suspended, was the holder of 100 shares of its capital stock, of the par value of $10,000. This suit is brought to recover an assessment of 60 per cent., or $6,000, thereon. The complaint is demurred to.

The first ground of demurrer is, that the plaintiff has no capacity to sue. It is contended that, as section 721 of the Revised Statutes provides that "the laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply," the Code of Procedure of New York forbids the bringing of this suit by the plaintiff. The sections of the Code which are referred to are section 111, which provides that every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 113; and section 113, which provides that a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. The plaintiff was appointed receiver by the comptroller of the currency on the 19th of September, 1873, under the provisions of sec-

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission. 2 N. Y. Wkly. Dig. 91, contains only a partial report.]

tion 50 of the act of June 3, 1864 (13 Stat. 114). It is contended that the receiver is not the real party in interest, and is not a trustee of an express trust, and is not expressly authorized by the statute to sue. The 50th section of the act of 1864 (now section 5234 of the Revised Statutes), provides that the receiver shall take possession of all the assets of the bank and collect all debts, dues and claims belonging to it, and may sell all the property of the bank, and may, if necessary to pay the debts of the bank, "enforce the individual liability of the stockholders." The receiver is required to "pay over all money so made to the treasurer of the United States," subject to the order of the comptroller, and to make report to the comptroller of all his acts and proceedings. It is quite plain, from these provisions, that the receiver and he alone is authorized to sue, either in his own name or in the name of the bank for his use, to collect the assets of the bank and to enforce the individual liability of the stockholders. No such authority is given to the comptroller. No money can be made by any collection of assets, or by any enforcement of the individual liability of stockholders, unless it is made by the receiver, and the statute contemplates that he shall make it and does not contemplate that any one else shall make it. No one else is required to pay over to the treasurer any money so made, and no provision is made for the paying over to the receiver, by any other person, of any money so made. Hence it follows, that the money which the receiver is to pay over, so far as it is made by collections by suit and enforcement by suit of the individual liability of stockholders, can come into the receiver's hands only through suits brought by himself in his own name or in the name of the association for his use. He is, therefore, authorized to sue in his own name. His right to sue to collect debts due to the bank, and his right to sue to enforce the individual liability of stockholders, rest upon the same provisions of law, and both of those rights have been sustained by abundant judicial authority. Kennedy v. Gibson, 8 Wall. [75 U. S.] 498; Bank of Bethel v. Pahquioque Bank, 14 Wall. [81 U. S.] 383, 401; Bank v. Kennedy, 17 Wall. [84 U. S.] 19.

I do not intend to intimate that the law of the state applies to this case, in respect to the capacity of the plaintiff to sue, because section 721 of the Revised Statutes makes the state laws applicable as rules of decision, in trials at common law, in the federal courts, only where it is not otherwise provided by federal enactment. In the present case, the power of the plaintiff to sue is conferred by, and grows out of, the provisions of section 5234 of the Revised Statutes.

It is also objected that this court has no jurisdiction of this suit. It is provided, by section 563 of the Revised Statutes, that the district courts shall have jurisdiction "of all suits at common law brought by the United States, or by any officer thereof, authorized by law to sue." This is a suit at common law, as distinguished from a suit in equity, and the receiver is, as we have seen, authorized by law to sue. The remaining question is, whether the receiver is an officer of the United States.

It has been held by the supreme court, in U. S. v. Hartwell, 6 Wall. [73 U. S.] 385, that a clerk appointed by an assistant treasurer of the United States, pursuant to a statute authorizing such appointment, with a prescribed salary, and whose tenure of place would not be affected by the vacation of office by the assistant treasurer, and whose duties, although such as his superior should prescribe, were continuing and permanent, is an officer within the meaning of the subtreasury act, and subject to the penalties prescribed by it for the misconduct of officers. He was appointed by the assistant treasurer with the approbation of the secretary of the treasury, under a statute which authorized the appointment of clerks in such manner. The court say, in that case, that the clerk was a public officer; that an office is a public station or employment, conferred by the appointment of government; and that the term embraces the ideas of tenure, duration, employment and duties. A receiver of a national bank is in the public service of the United States. He is appointed pursuant to law. Vacation of office by the comptroller does not vacate the receivership. His duties are continuing and permanent. The secretary of the treasury is declared by section 233 of the Revised Statutes to be the head of the department of the treasury. By section 324 the comptroller of the currency is made the chief officer of a bureau in the department of the treasury, charged with the execution of all laws passed by congress relating to the issue and regulation of a national currency secured by United States bonds, and it is enacted that he shall perform his duties under the general direction of the secretary of the treasury. Receivers of national banks are authorized to be appointed by sections 5141, 5191, 5195, 5201, 5205, and 5234, under the circumstances prescribed in those several sections, which correspond to sections 15, 31, 32, 35 and 50 of the act of 1864, and section 1 of the act of March 3, 1873 (17 Stat. 603). In only one of these sections is it enacted that the appointment of the receiver shall be made by the comptroller with the concurrence of the secretary of the treasury. But this is implied; and, where the comptroller appoints a receiver, the concurrence or approval or approbation of the secretary of the treasury is to be presumed, till the contrary appears, for the comptroller is required to perform his duties under the general direction of the secretary of the treasury. See Cadle v. Baker, 20 Wall. [87 U. S.] 650. In U. S. v. Hartwell, it was held that the appointment of

the assistant treasure's clerk by that officer, with the approbation of the secretary of the treasury, constituted an appointment by the head of a department, within the meaning of the provision of the constitution (article 2, § 2), that congress may by law vest the appointment of such inferior officers as they think proper in the heads of departments. This point has been decided in the same way by the district judge for the Eastern district of New York, in Platt v. Beach [Case No. 11,215], and I entirely concur in his views.

It is further objected, that the proper remedy of the plaintiff is not by separate suits at law against individual stockholders, but by a suit in equity. The view urged is, that, if the 60 per cent. assessed in this case shall turn out, if it be all collected, to be more than is necessary, there is no provision of law for refunding it; and that, if there are insolvent stockholders who cannot pay the 60 per cent., another assessment may be sought to be made on stockholders who can pay, and thus they be compelled, perhaps, to pay more than their proper proportion of the debts.

The individual liability sought to be enforced in this suit, is that imposed by section 12 of the act of 1864, now section 5151 of the Revised Statutes, as well as that imposed by the act of 1863, under which the bank in question was organized. The liability imposed by section 12 of the act of 1863 was in these words: "For all debts contracted by such association for circulation, deposits or otherwise, each shareholder shall be liable to the amount, at their par value, of the shares held by him, in addition to the amount invested in such shares." The act of 1864 and the Revised Statutes enact that the shareholders "shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." The provisions of the acts of 1863 and 1864 in this respect do not differ in substance. The stockholder is to be individually liable, to the extent of the amount of his stock, at its par value, in addition to amount of the stock. The limit in amount or extent is the par value of his stock. Within this limit each stockholder is to be liable equally and ratably; that is, no one is to be assessed a larger percentage than any other one on the par value of his stock, and, when one is assessed a given percentage, every other one shall be assessed a like percentage. Each is to be liable in respect only of his own stock, and because he is a stockholder, and up to the full par value of his stock; but he is not to be liable in respect of the stock of any other stockholder, or because any other person is a stockholder, or beyond the full par value of his stock. This is a several liability. The stockholders are not jointly liable. There is no contribution among them provided for, whereby one of them has any right to call any other one directly to account, in contribution, in respect of any sum paid in discharge of the statutory liability. The proceedings are not taken by first ascertaining how much is necessary to be collected, and then apportioning that amount among the stockholders, and then collecting, by suit or otherwise, the sum so apportioned. The comptroller is to make an assessment, by determining how much each stockholder must be liable for, in a percentage on the par value of his stock. These views of the statute are those determined by the supreme court in Kennedy v. Gibson, 8 Wall. [75 U. S.] 498, which case is approved in Sanger v. Upton, 91 U. S. 56. There is nothing in the case of Pollard v. Bailey, 20 Wall. [87 U. S.] 520, that is in conflict with these views. That was an action at law by a creditor against a stockholder in a state bank, to recover the amount of the creditor's debt, under a statute which declared that individual stockholders in the bank should be "bound respectively for all the debts of the bank, in proportion to their stock holden therein." In delivering the opinion of the court in that case, Chief Justice Waite points out, that, by the provisions of the statute in that case, each stockholder is bound for the debts in proportion to his stock; that his liability is not limited to the par value of his stock, and he is not bound absolutely for the payment of the full amount of that; that he must pay a sum which shall bear the same proportion to the whole indebtedness that his stock bears to the whole capital, and is not required to pay more; that no stockholder is liable for more than his proportion of the debts; that such proportion can be ascertained only upon an account of the debts and stock, and a pro rata distribution of the indebtedness among the several stockholders; that the proper action in such case is one in equity, to state an account and make distribution; and that the case is different from one where the statute provides generally that all stockholders shall be individually liable for the payment of the debts. The latter is the liability prescribed by the statutes in relation to national banks, the liability being limited, however, to the par value of the stock. The court manifestly did not intend that the decision in Pollard v. Bailey, should apply to the liability of stockholders in national banks.

The suggestion that, where there is an enforced contribution of too much, from stockholders, there is no provision for refunding it, is not a sound one. In addition to the fact that, in such a case, the stockholders would have a right to enforce the refunding by suit, the provision of section 50 of the act of 1864, now section 5236 of the Revised Statutes, is not open to the criticism made upon it, that it only directs that the surplus of the proceeds of the assets of the bank

shall be paid to the stockholders, and does not provide for the payment back to them of surplus money collected in enforcement of their individual liability. If it were necessary, the money collected from stockholders might fairly be considered as the proceeds of assets of the bank, for the purposes of the statute; but, at all events, as the statute provides that the money to be made by enforcing the liability of stockholders is to be paid to the treasurer, subject to the order of the comptroller, and that the comptroller is to make dividends of such money and other money, and that the remainder of the proceeds, after paying the debts, shall be paid to the shareholders, it is entirely clear that such proceeds include surplus money collected from stockholders.

It is not necessary now to anticipate or decide any question in regard to a second assessment. No considerations growing out of the same properly affect any question arising on this demurrer.

The cases of Kennedy v. Gibson and Sanger v. Upton decide that the comptroller is vested with authority to determine the extent to which the individual liability of stockholders is to be enforced. This decision was followed by the district court for the Eastern district of New York, in Strong v. Southworth [Case No. 13,545].

The complaint alleges, that the assets of the bank are insufficient to pay "its debts and liabilities," and that, in order to provide for paying the same, it is necessary to enforce the personal liability of the stockholders; and that the comptroller has determined that such assets are insufficient to pay such "debts and liabilities," and that it is necessary, in order to pay "the same," to enforce to the extent named in the complaint the individual liability of the stockholders. The criticism is made, that the liability imposed by the statute is for all "contracts, debts and engagements" of the bank, and that the statute (section 5234) provides that such individual liability may be enforced only where is it "necessary to pay the debts" of the bank, and not for the purpose of paying "liabilities of the bank." It is a sufficient answer to this criticism to say, that the complaint, after the foregoing averments, goes on to set out in hæc verba the determination or assessment made by the comptroller, and that, in that, it is stated that he determines that the assessment is necessary to pay the duly proven debts of the bank. Moreover, there could have been no intention, by the language of section 5234, "to pay the debts," to narrow the individual liability imposed by section 5151, which is for all "contracts, debts and engagements," and the word "liabilities" imports no broader meaning that the word "debts" in section 5234, when the word "debts" in that section must necessarily be held to include the "contracts, debts and engagements" mentioned in section 5151.

The demurrer is overruled, with costs, with leave to the defendant to answer in 20 days, on payment of costs.

Case No. 13,300.

STANWOOD v. FORDYCE.

[See Case No. 15,130.]

Case No. 13,301.

STANWOOD v. GREEN.

[2 Abb. (U. S.) 184;[1] 11 Int. Rev. Rec. 134; 3 Am. Law T. Rep. U. S. Cts. 133; 17 Pittsb. Leg. J. 153; 2 Leg. Gaz. 302.]

District Court, S. D. Mississippi. June, 1870.

INTERNAL REVENUE—POWERS OF SUPERVISORS.

1. A supervisor of internal revenue is entitled, under the provisions of the internal revenue act of July 20, 1868, § 49 (15 Stat. 144), to examine the books and papers belonging to banks, bankers, brokers, and banking associations, and is not bound to inform the owners of his purpose in making such examination.

2. Where a summons for the production of books has been issued by the supervisor of internal revenue, and such summons has been duly executed, but not complied with, a United States district judge may, upon application, and proof of these facts, issue a writ of attachment.

3. Section 49 of the act of July 20, 1868 (15 Stat. 144), which gives supervisors of internal revenue the right to examine such books and papers as show the operation of banks, &c., with the public, and are connected with the internal revenue of the United States,—is not unconstitutional, either as purporting to authorize an unreasonable seizure and search, or as compelling a party to testify against himself.

[Cited in Re Platt, Case No. 11,212; U. S. v. Three Tons of Coal, Id. 16,515.]

Motion to quash an attachment.

HILL, District Judge. The questions now presented arise upon the following proceedings:

The applicant being the supervisor of internal revenue for the states of Alabama and Mississippi, called at the banking house of Messrs. J. & T. Green, and requested to see the checks received by them as such bankers on the previous day, which the Messrs. Green refused to exhibit; insisting that the supervisor, under the acts of congress, possesses no such right; and that, were such the provision of the act, it would be in violation of the constitution of the United States, and of no effect; whereupon the supervisor issued his summons directed to the Messrs. Green, requiring them to produce before him, at his office in Jackson, all books of accounts and papers containing entries of accounts between the banking house of said J. & T. Green and all other persons; which summons was duly executed, but which was not complied with. Whereupon application was made to me for a writ of attachment to com-

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

pel said bankers to produce said books and papers; and upon proof of the execution of said summons, and the non-compliance therewith, the attachment was issued, and the said bankers appeared at the return thereof; and, by counsel, moved to quash the proceedings for the following reasons:

1. That the application showed no facts under the acts of congress giving to the district judge jurisdiction to entertain this proceeding.

2. That if the facts as stated were sufficient under the acts of congress to authorize this proceeding upon the part of the supervisor and judge, such legislative act would be repugnant to the constitution of the United States, and void.

The first question for consideration is, what power and authority does the act approved July 20, 1868, confer upon the supervisor in relation to the examination of books and papers of a private banker? The act approved June 30, 1864 [13 Stat. 223], provides that banks chartered or organized under a general law, with a capital not exceeding the sum of fifty thousand dollars, and bankers using or employing a capital not exceeding fifty thousand dollars, shall pay a tax of one hundred dollars: when using or employing a capital exceeding fifty thousand dollars, for every one thousand dollars in excess of fifty thousand dollars, the sum of two dollars. Every incorporated or other bank, and every person, firm, or company having a place of business where credits are opened by the deposit or collection of money or currency subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, shall be regarded as a bank or a banker.

Section 110 of the same act provides that there shall be levied, collected, and paid a tax of one-twenty-fourth of one per cent. each month upon the average amount of deposits of money subject to payment by check or draft, or represented by certificates of deposit, whether payable on demand or at a future day, with any person, bank, association, company, or corporation engaged in the business of banking; and a tax of one-twenty-fourth of one per cent. per month, as aforesaid, upon the capital of any bank, association, company, or corporation, and on the capital employed by any person in the business of banking, beyond the average amount invested in United States bonds; and further provides for making monthly returns, and the payment of such taxes, imposts, penalties, &c.

Section 99 of the same act further provides that there shall be paid on all sales made by brokers, banks, or bankers, whether for the benefit of others, or on their own account, the following taxes, that is to say: Upon all sales, or contracts for the sale of stocks, bonds, gold and silver bullion and coin, promissory notes or other securities, a tax of one cent for every hundred dollars of the amount of such sales or contracts, &c. The act further provides that, in all such sales, or contracts of sales, there shall be made and delivered by the seller to the buyer, a bill or memorandum of such sale or contract, on which there shall be affixed a lawful stamp or stamps, in value equal to the amount of tax on such sale, to be determined by the rates of tax before mentioned; and other provisions in relation to such tax, stamps, and penalties for non-compliance and violation, which need not be here stated.

From the above provisions of the internal revenue laws it will be seen that a very considerable revenue is imposed upon these banking associations, and persons engaged in banking, and various duties are imposed thereon. And to determine what taxes should be paid, the books and papers belonging to such banks and banking associations should be shown.

By reference to the act approved July 20, 1868, imposing taxes on spirituous liquors and tobacco, and for other purposes, it will be found that by section 49 of the act, after providing for the appointment of a supervisor of internal revenue, it is further provided that it shall be the duty of the supervisor, under the direction of the commissioner, to see that all laws and regulations relating to the collection of internal taxes are faithfully executed and complied with; to aid in the prevention, detection, and punishment of any frauds in relation thereto; and to examine into the efficiency and conduct of all officers of internal revenue within his district; and for such purposes he shall have the power to examine all persons, books, papers, accounts, and premises, and to administer oaths, and to summon any person to produce books and papers and to appear and testify before him, and compel a compliance with such summons in the same manner as assessors may do, &c.

That there exists a necessity for taxation, and to a very large amount, is not denied. That the amount, the subjects of taxation, and the mode of assessing and collecting the same, are questions alone to be determined by congress, the law-making power, and with which the courts have nothing to do, it being their duty to expound and enforce the laws, is also admitted. It was competent for congress to provide for the appointment of such officers as might be deemed necessary for the collection of the revenue, and to prescribe their duty. The act stated has provided for the appointment of a supervisor, and has prescribed his duties: (1) To see that the laws for the collection of internal revenue are faithfully executed and complied with. (2) To aid in the prevention and punishment of frauds in relation thereto. (3) To examine into the efficiency and conduct of the revenue officers of his district. And to enable him to perform any one or all of these duties he is invested with these extraordinary powers, as they are

termed, without which he would be unable to perform the duty assigned him.

It is contended by the counsel of the Messrs. Green that this power is only to be executed in the same cases, and in the same way that assessors may do under the act of 1866 [14 Stat. 98]. This is a mistake; the powers are of a different character altogether; it is only when the summons is not complied with that obedience thereto is to be enforced as provided for in the case of non-compliance with the summons issued by assessors, which is to apply for an attachment to the district judge of the district, or to a commissioner of the circuit court of the United States.

It is contended that before the Messrs. Green were under any obligation to produce their books and papers the supervisor was bound to inform them of his purpose in the inspection. This he was not bound to do; for such a disclosure might have defeated the very object of the examination. It might have been to reach a defaulting or fraudulent officer, or other person committing frauds on the revenue, who might thereby have been notified of such proceedings against him, and made his escape, or covered up his fraud.

Without further comment. I am satisfied that the supervisor is entitled under the law to the examination sought, and to this mode of procuring it; which brings us to the last proposition, and that is, the repugnance of these acts of congress to the constitution.

It is said that this is an attempt at an unreasonable seizure and search into the private affairs of the citizens, against which they are protected by the constitution. There is no attempt to investigate any of the private affairs of the Messrs. Green, only an examination into so much of their business as relates to the operations of their banking house and is connected with the subjects of taxation; beyond this, he has no right to institute an inquiry. Although the Messrs. Green are not operating under a charter, they are nevertheless doing business with the public as bankers. If doing a business legitimately,—and there is no charge that they are not, nor is it necessary, as we have seen, that there should be, to support this inquiry,—no injury can result to them from an inspection of their books and papers connected with this public business, in which the United States has an interest in the collection of the revenue imposed. I am satisfied that it is not an invasion of any of the rights secured under the constitution.

But it is contended that it is in violation of that portion of the constitution which protects parties against being compelled to testify against themselves. If the provision of the constitution protecting parties against being compelled to produce such papers and documents as may tend to subject them to a criminal prosecution applies in this case, they are relieved from such liability by the provisions of the act of congress approved February 25, 1868 (15 Stat. 37), which was intended to enable the government, through its officers, to detect and punish frauds by obtaining evidence from those otherwise protected under this provision of the constitution.

The unconstitutionality of the act conferring the power has been pressed by counsel with unusual ability and zeal, but he has failed to convince my mind of its correctness. It was competent for congress to provide the mode by which compliance with the demand for an inspection of such books or documents, as well as the testimony of witnesses, might be enforced, and it has adopted the measures stated in the act; referring it to the judge of the district, in whom judicial power is vested, to determine the rights of the parties and to enforce obedience to the laws; and has not left it to the supervisor to be the judge of the extent of his powers in such cases. If the Messrs. Green were of the opinion, as they, I am satisfied, were, that this demand upon them was not authorized by law, it was their right to refuse compliance until the question should be determined by the proper tribunal, and in the mode prescribed by law, and their non-production of their books and papers, under the circumstances, is by no means to be taken as a suspicion of their having been guilty of any omission, or any violation of law; for no man, however correct in his business, would be willing to have his affairs pried into by those having no legal authority to do so. And it is not to be presumed that the supervisor would desire to inquire into the private affairs of citizens for any other purpose than those connected with his official duties. To settle the legal rights of both parties without reflection on either, this case has been brought before me; and coming to the conclusion I have, I feel constrained to overrule the motion to quash the proceedings, and unless other proceedings are proposed, the Messrs. Green will be directed to produce such books and papers as the supervisor may desire to examine, connected with their banking operations; it being understood that this right upon the part of the supervisor extends only to such books and papers as relate to their banking operations, and are connected with the internal revenue of the United States.

Order accordingly.

STANWOOD (UNITED STATES v.). See Case No. 16,377.

STAPLES (ARCULARIUS v.). See Case No. 509b.

Case No. 13,302.

STAPLES v. HARTFORD CITY GAS-LIGHT CO.

[Nowhere reported; opinion not now accessible.]

STAPLES (TREAT v.). See Case No. 14,-162.

Case No. 13,303.

STAPLETON v. REYNOLDS et al.

[9 Chi. Leg. News, 33; 16 Am. Law Reg. (N. S.) 48; 22 Int. Rev. Rec. 345.]

District Court, S. D. Ohio. Oct. Term, 1876.

REMOVAL OF CAUSES—PETITION BY ONE DEFENDANT.

1. In a suit by a plaintiff of one state against several defendants of a different state, where the sum in dispute exceeds, exclusive of costs, the sum of five hundred dollars, where the matter in controversy is wholly between them, and which can be fully determined between the plaintiff and the defendants, either of the defendants actually interested in the controversy may remove such suit to the circuit court of the United States.

2. The removal of a suit by one of the defendants, under such circumstances, removes it as to all of the defendants.

3. To accomplish such removal, it is not necessary that all of the defendants should join in the petition for removal.

[This was a suit by Catherine Stapleton, administratrix, against E. P. Reynolds and others.] Motion to remand the cause to the superior court of Cincinnati.

Mr. Colston, for plaintiff.

Jordan & Saylor, for defendants.

SWING, District Judge. The following facts appear from the record in the cause: On the 18th day of November, A. D. 1875, the plaintiff filed her petition in the superior court of Cincinnati, against the defendants, E. P. Reynolds, Thomas Saulspaugh, W. B. Shute and John Creupaugh, partners, as Reynolds, Saulspaugh & Co. The petition states in substance, that Daniel Stapleton, whilst in the employ of the defendants, in the construction of the bridge across the Ohio river for the Southern Railroad, through their negligence was killed; that he left the plaintiff, his widow, and three children, and claims ten thousand dollars damages, for which she asked judgment. On the 18th day of November, 1875, a summons was issued, which was served personally upon the defendant, E. P. Reynolds, on the 19th of November, and as to the other defendants, returned "not found;" on the 29th of November, a second summons was issued, which was returned on the 13th day of December as to all the defendants "not found." On the 18th day of December, the defendant, E. P. Reynolds, filed his separate answer, stating in it "that it was in his personal capacity, and that he did not appear for his co-defendants, or for the firm," and denying the material allegations of the petition. On the 6th day of March, 1876, a third summons was issued, which was served personally upon the defendant, John Creupaugh, on the 9th of March, and returned "not found" as to the other defendants. On the 20th day of March a fourth summons was issued, which was returned on the 3d of April "not found;" on the 5th of April a fifth summons was issued, which was served personally upon the defendant, Thomas Saulspaugh, on the 15th of April, and on the 20th of April returned "not found" as to the defendant W. B. Shute. On the 7th day of April, John Creupaugh filed his answer, the same in reservation and denial as that of E. P. Reynolds. On the 19th day of April a sixth summons was issued, which was on the 23d day of April served upon the defendant W. B. Shute. On the 4th day of May the defendant Thomas Saulspaugh, filed his separate answer, the same in reservation and denial as that of the defendant E. P. Reynolds. On the 4th day of May E. P. Reynolds filed his motion for security for costs, which was granted by the court on the 8th day of May, and which was given on the same day. On the 6th of May, the defendant W. B. Shute, not entering his appearance for any other purpose than the motion, filed his motion to set aside the service of the summons upon him, which motion was overruled by the court on the 20th day of May, and a bill of exceptions was taken on the same day to the overruling thereof, and on the same day a default for answer was entered by the clerk against him, which default, on the 29th day of May, was set aside, and five days given him within which to answer. On the 2d day of June the defendants Thomas Saulspaugh and W. B. Shute filed their petition for removal of the cause into the circuit court of the United States. The petition alleges that all of the defendants are citizens of the state of Illinois, and that the plaintiff is a citizen of the state of Kentucky; that the controversy in suit is wholly between citizens of different states, which can be determined between them, and that the matter in dispute exceeds the sum of five hundred dollars exclusive of cost, that the cause has not been tried and the petition is filed at the term of the court at which it could first be tried. A good and sufficient bond was filed and, on the 14th day of June, the superior court, upon hearing of the petition for removal, found all the allegations of the petition to be true, and ordered the cause to be removed to the circuit court of the United States. On the 1st of July, the plaintiff filed in the superior court her motion to set aside the order of removal, and on the 3d day of October, 1876, being the 1st day of the October term, the defendant filed in the circuit court of the United States the transcript of the record in said cause, and on the same day the plaintiff filed her motion to remand the cause to the superior court, first as to all of the defendants; second as to the defendants, Reynolds, Saulspaugh and Creupaugh.

The plaintiff claims that the cause shall be remanded because the petition for removal was not filed by all of the defendants, at the first term at which it could have been tried. But if the court should be of the opinion that it should not be remanded as to all the defendants, then it should be remanded as to all,

except W. B. Shute, who it is admitted filed his petition for removal within the time prescribed by the law. The record shows, that as to all the defendants except W. B. Shute, the cause was at issue before the June term of the superior court, and if a separate trial could have been had as to each defendant, such trial could have been had at a term before the June term at which the removal was made, that no such trial was demanded or claimed by either party, until the defendants were all served with process and issue joined as to each of them; the record also shows that but two of the defendants joined in the petition for the removal of the suit.

That the suit was removable by the defendant, W. B. Shute, I think clear from the provisions of the act of March 3, 1875, regulating the removal of causes to the circuit court of the United States. The act, after providing that the amount in dispute shall exceed, exclusive of costs, the sum of five hundred dollars, and shall be between citizens of different states, says: "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined between them, then either one or more of the plaintiffs or defendants actually interested in such controversy, may remove said suit in the circuit court of the United States for the proper district." The record shows that the matter in dispute exceeds, exclusive of costs, the sum of five hundred dollars; that it is wholly between citizens of different states, and can be fully determined between them, and that W. B. Shute is actually interested in the controversy. Possessing all these requisites, the defendant W. B. Shute and this suit are clearly brought within the express language of the act.

The defendant W. B. Shute having removed the suit, what was the effect of such removal upon the other defendants? The language of the act is, "may remove said suit." The suit in this case is against the defendants jointly, and is an entirety, a single cause of action, and if the suit be removed, no part of it remains in the court from whence the removal was made; but a subsequent section of the act, after providing for the steps which must be taken by any one of the defendants entitled to remove the suit, to wit, the filing of the petition and the making and filing of the bond, says: "It shall be the duty of the state court to accept said petition and bond, and proceed no further in such suit," the suit having been removed to the circuit court. Such court obtains full jurisdiction of the subject-matter, and of all the parties thereto, and can fully determine the controversy between all the parties to the suit; to give the construction contended for by the plaintiff would divide the suit, placing a part of it to be tried in one court, subject to its rulings and decisions in the trial, and a part of it in another court, whose rulings and decisions might be entirely at variance with the first; and increasing greatly the costs and expenses of the litigation; this would be contrary to judicial policy, and such a construction as could not have been contemplated by the makers of the law. In the judgment of the court, therefore, the entire suit was upon the petition of defendant W. B. Shute removed into this court, and it was not necessary to such removal that the other defendants should have joined in the petition for removal. The motion to remand the cause is therefore overruled.

Case No. 13,304.

In re STAPLIN.

[9 N. B. R. 142;[1] 5 Chi. Leg. News, 528; 5 Leg. Op. 171.]

District Court, E. D. Missouri. 1873.

BANKRUPTCY—COMMERCIAL PAPER—USURY.

1. A petition was filed against a debtor alleging that he had committed acts of bankruptcy by suspending payment of his commercial paper. The defendant answered the petition, denying that he was insolvent, and alleged that the notes in question were usurious.

2. The petitioner filed a demurrer to the answer. The court overruled the demurrer, on the ground that the answer presented an issue of fact upon the suspension of payment of the alleged bankrupt's commercial paper. The court *held* further, that it was not the intention of the bankrupt act to force a debtor to pay the face of every piece of paper to which he has put his name, under penalty of being adjudged a bankrupt, regardless of any defense he might have against the same.

The creditor's petition charged that the defendant had committed an act of bankruptcy by suspending payment of his commercial paper, and specified the non-payment of the note held by the plaintiff, and of some twenty other notes. The defendant, in response to the rule to show cause, among other things set up in his answer, denied his insolvency, and alleged that he had a defense against the note held by the petitioner, as well as against all the notes outstanding, upon which he was liable as maker or endorser; the defense being that he had paid, and the creditors had received, usurious interest at the rate of twenty-four to thirty-six per cent. per annum, and that by the law of the state of Missouri the creditors could only recover, by suit, the actual amount lent, with ten per cent. interest, to be paid to the county for the use of schools, and the creditor to be adjudged to pay the costs, and consequently that as against all the unpaid paper he had a valid partial defense. The answer set up many other matters tending to show that the defendant had means to pay all his debts, etc. To this answer the petitioner filed a demurrer.

TREAT, District Judge, overruled the demurrer, stating that the answer presented an issue of fact upon the suspension of the al-

[1] [Reprinted from 9 N. B. R. 142, by permission.]

leged bankrupt's commercial paper; that if it were true that, as to all the unpaid notes, the bankrupt had the defense set up, or so believed in good faith, and for that reason refused to pay such notes, he could not be charged as having been guilty of an act of bankruptcy by suspending payment: that it was not the intention of the act to force a debtor to pay the face of every piece of paper to which he had put his name, under penalty of being adjudged bankrupt, regardless of any defenses he might have against the same.

Case No. 13,305.

STAPP et al. v. The SWALLOW.

[1 Bond, 189.] [1]

District Court, S. D. Ohio. June Term, 1858.

MARITIME LIEN — WAIVER — ADMIRALTY JURISDICTION—FOLLOWING STATE DECISIONS.

1. A person having a valid maritime lien on a steamboat, who proceeds to enforce it in a state court, and obtains judgment therefor, thereby waives his original lien, and occupies a footing of equality with other creditors having no maritime lien, who also proceeded under the state law.

[Distinguished in The Brothers Apap, 34 Fed. 352; The D. B. Steelman, 48 Fed. 582; The Cerro Gordo, 54 Fed. 393.]

2. In the construction of a state law, this court is bound to adopt the views of the supreme court of the state.

3. Claims not founded on maritime liens have no standing in this court in the exercise of its admiralty jurisdiction, and will be dismissed.

In admiralty.

Lincoln, Smith & Warnock, for libellants.

Dodd & Huston and Collins & Herron, for intervenors.

OPINION OF THE COURT. The original libel in this case was filed in the joint names of different persons, severally claiming for labor and services rendered the steamboat Swallow in various capacities. Others have intervened for wages due. There are also claims for supplies furnished and repairs to the boat. It is conceded that these are all claims importing maritime liens. By consent, a decree has been entered for the sale of the boat, and the application of the proceeds to the satisfaction of these liens. A sale has been made and the proceeds applied; and there is now a surplus in the registry applicable to a class of claimants having no maritime liens. The only question before the court relates to the distribution of the funds in the registry to these claimants. The aggregate amount of this class of claims exceeds the sum in the registry; and hence the duty of the court to decide how it shall be apportioned.

Among those now asserting claims to the surplus are some who had originally valid maritime liens for supplies and repairs. Instead of enforcing their claims in this court, and insisting on their privilege of lien, they proceeded in a state court, under the water-craft law of Ohio, and have obtained judgments, which are now filed as the evidence of their claims in this court. It is insisted in the argument that these claims still retain their original character as maritime liens, and have priority over those not importing such lien, in which seizures have been made under state process.

In the case of Dudley v. The Superior [Case No. 4115], decided in this court some years since, this question was presented, though not argued; and the court held, that a claimant having an original maritime lien who, instead of asserting and enforcing his claim in the admiralty court, proceeded under the state water-craft law, thereby waived such lien, and occupied in this court a position of equality with those claiming liens solely by virtue of seizures under the state statute. I have no reason to doubt the correctness of the views indicated in the case referred to. It is true I have found no reported case in which this question has been under consideration in any other court. It is, however, clearly consonant with reason and the analogies of law, that if a party, having an undisputed maritime lien, voluntarily waives it by seeking another remedy, he can not be reinstated in his original right. His claim against the boat has passed into a judgment, pursuant to the state statute, and before a state magistrate or court, thereby losing wholly its original character as a maritime claim. It results, from this view, that this class of claimants can have no preference or priorities, except such as belong in common to all those who have made seizures under the water-craft law.

It is a question in this case, whether there is any priority of privilege among those claimants who have caused seizures to be made, under the statute referred to, dependent on the date of the seizure. On the one hand, it is insisted in argument that no preference is gained by a priority of time in the seizure, and that all creditors, having a lien by seizure, are entitled to a pro rata distribution of the proceeds. On the other hand, it is contended that priority of seizure imports a priority of lien; and that distribution must be made to the creditors of the boat in the precise order of the date of the seizures. It is conceded that the Ohio courts, including the supreme court, have uniformly recognized the rule just stated, in the construction and enforcement of the water-craft law. They hold that seizures made on the same day have an equality of lien, and those made on subsequent days are subordinate to those made at a prior date. It is true this construction is not in conformity with the principles which usually prevail in admiralty in adjusting the priorities of maritime liens. But its application to proceed-

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

ings under the water-craft law seems to be a necessary result of the principle settled by the state courts, and recognized by this court, that the statute gives no lien until there is an actual seizure of the debtor boat or craft. If the seizure alone creates the lien, it follows that the priorities of the creditors of the boat or craft must be determined, with reference to the date of seizure, subject to the modification before stated, that all seizures made on the same day are to be regarded as importing an equality of lien. If I doubted the justness and expediency of this principle of construction, I should regard it as my duty to give it my sanction, for the reason that it has been uniformly adopted by the courts of the state, in carrying out the statute referred to. It has settled a rule of property, depending on the construction of a state law; and, in accordance with the numerous decisions of the supreme court of the United States, is obligatory on the judges and tribunals of the Union.

There is another question in this case, as to the effect of the attachment prosecuted in the superior court of Cincinnati by James Millinger against Albert Culbertson, the owner of an interest of one-fourth in the steamboat Swallow. The attachment was served on December 5, 1857, and prior to any seizures under the water-craft statute. The nature of the debt claimed by the plaintiff in the attachment does not appear, but the commissioner reports that a judgment was obtained against the defendant in attachment for $6,397. No sale was made under the judgment, and, being still unsatisfied, it is now set up in this court as a valid claim against the steamboat.

It is not controverted in argument, and I suppose there is no room to doubt, that the seizure by attachment of the interest of one-fourth in the boat, held by the defendant Culbertson, operated as an effected lien to the extent of that interest. I understand, that by the practice and decisions of the state courts, the seizure of a boat or other watercraft, by the process of attachment under the statute of Ohio, has the same effect as a seizure under the water-craft law; and when made on the same day, is held to have an equality of lien. If this proposition is maintainable—and I perceive no reason for doubting it—it follows that as the seizure, under the attachment by Millinger, was prior in date to any of the seizures under the water-craft law, he has priority of lien to the extent of the interest of Culbertson.

It is insisted, however, that granting such to have been the effect of the service of the attachment, the lien created was waived or relinquished by the plaintiff, and can not be set up by him. The facts relied on, in support of this position, as reported by the commissioner, are, that after the service of the attachment, an arrangement was made by the parties by which the boat was permitted to remain in the possession of the master, and to engage in its regular business, upon bond being given conditioned for the delivery of the boat, or the payment of the appraised value of the interest attached, to answer the judgment that might be obtained in favor of the plaintiff. Such a bond was given and accepted by the plaintiff; and the boat continued in the possession of the master, and was employed in its ordinary business until the 6th of February following the date of the service of the attachment, on which day it was delivered to the sheriff of Hamilton county to answer the claim of the plaintiff Millinger. This was before there was any seizure of the boat, either by process under the water-craft law or from this court. It also appears, though the fact is perhaps not material in the consideration of the point before the court, that nearly the whole of the indebtedness of the boat originated between the date of the service of the attachment and the delivery of the boat to the sheriff.

Do these facts warrant the legal conclusion that the plaintiff in the attachment waived or relinquished his rights accruing from the seizure of the boat, and that he can not now assert a priority of lien over those who subsequently proceeded under the water-craft law? I regret that this point was not more fully discussed in the argument. No authorities were referred to applicable to it; nor have I found any which throw any light on the question. My conviction is, however, strong that there is nothing in the facts stated, which can be viewed as equivalent to a waiver of the plaintiff's rights under the attachment. When the arrangement was made by which the master was allowed to run the boat, no proceedings had been instituted against it except the attachment by Millinger; nor could he be presumed to know there were other parties whose interests could be affected by the arrangement. In any view, it could not operate prejudicially to the interests of other creditors. On the contrary, as affording the means of earning something for the owners, it would increase their ability to pay the liabilities of the boat, and thus inure to the benefit of the creditors. In a word, it is impossible to conceive of any principle, in the facts referred to, impairing the lien of the plaintiff in attachment or any just ground of complaint by the other creditors.

The claim of Millinger, to the extent of Culbertson's interest of one-fourth, must be respected, and entitles him to a preference in the distribution of the fund in the registry over those whose seizures were subsequent, and for causes of action not implying a paramount admiralty lien.

If, however, it can be made to appear that the judgment obtained by the plaintiff in attachment was not for a bona fide debt, or if, on any satisfactory showing, the court can be satisfied there was fraud or unfair-

ness in the judgment or other proceedings in attachment, it would perhaps be competent to modify the final order of distribution. As the facts now appear to the court, the plaintiff in attachment, in a legal proceeding, obtained a judgment, which must be held to be valid until it shall be made clear that such is not its legal effect.

There is a class of libellants asserting claims not founded on maritime laws or on seizures under the state law, who clearly have no standing in this court in the exercise of its admiralty jurisdiction, and as to whom the libels will be dismissed at their costs.

Case No. 13,306.

STAR et al. v. The WHITE CLOUD.

[N. Y. Times, April 3, 1858.]

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

PLEADING IN ADMIRALTY—COLLISION.

This libel was filed by Jesse W. Star and others, the owners of the brig Topaz, to recover the damages sustained by her by a collision with the schooner off Barnegat, on the night of October 14, 1855. The evidence as to the facts was contradictory and irreconcilable.

Beebe, Dean & Donohue, for libelants.
Burrill, Davison & Burrill, for claimants.

HELD BY THE COURT (HALL, District Judge): That the pleadings on both sides are in violation of all sound principles of pleading in maritime cases, and of the positive rules of the supreme court, neither party stating the course or bearings of the vessels, the direction of the wind, the state of the weather, the position of the vessels in respect to each other, or the land or the mode of their navigation at the time. That it is not fit in a case which may pass through all the gradations of a hostile litigation to leave it open to be shaped and varied as it progresses according to its necessities or the election of those who conduct it. That the pleadings contain no allegation of the facts in controversy and none which can be made a legal ground of acquittal or condemnation of the vessel under arrest, and the cause is therefore temporarily placed on the calendar for hearing.

THE COURT allows the parties to put in proper pleadings now, and submit the case on them and the proofs already in, for decision without further argument. If this proposal is not agreed to, then the libel is dismissed, or if accepted by the libelant, and not by the claimants, decree for the libelants pro confesso.

STARBUCK, The G. H. See Case No. 5,378.

STARIN, The C. F. See Case No. 2,565.

STARIN, The J. H. See Case No. 7,320.

STARIN, The JOHN H. See Case No. 7,351.

STAR INS. CO. (CHARTER OAK FIRE INS. CO. v.). See Case No. 2,623.

STARK (BACON v.). See Case No. 715.

STARK (FAILING v.). See Case No. 13,317.

STARK (GRAHAM v.). See Case No. 5,676.

STARK (KAMM v.). See Case No. 7,604.

Case No. 13,307.

STARK v. STARR.

[1 Sawy. 15.] [1]

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

EJECTMENT — EQUITABLE DEFENSE — TOWN SITE ACT—COLOR OF TITLE—POSSESSION —IMPROVEMENTS.

1. An equitable title is no defense to an action for possession by the holder of the legal title.

2. The act of May 23, 1844 (5 Stat. 657), commonly called the "Town Site Act," was not in force in Oregon prior to July 17, 1854.

3. The Oregon Code (Gen. Laws 1845-64, p. 226) does not allow a defendant in ejectment to defeat the plaintiff, by giving in evidence any estate in himself or another in the property in controversy, unless the same be pleaded in his answer.

4. Color of title is only the appearance of title, and therefore it matters not whether the grantor in a deed had any title or not, if it appears from the face of such deed, when compared with the law regulating the subject, that he might have had title, his formal conveyance gives color of title to possession, taken or held under it.

[Cited in Re Ah Lee, 5 Fed. 913; McConnaughy v. Wiley, 33 Fed. 454.]

5. Possession is presumed to be rightful until the contrary appears, and therefore adverse to the title of any other claimant; and this rule extends to the case of a vendee as against his vendor after the performance of the conditions of purchase by the former.

6. A person in possession under color of title, who believes, and has good reason to believe that his title is good, is acting in good faith, so as to entitle him to set off the value of improvements made by him upon the property, against a claim for mesne profits.

[Cited in Hicklin v. Marco, 46 Fed. 425.]

7. A person in possession under color of title, who makes permanent improvements upon the property, is presumed to be acting in good faith until the contrary appears.

8. A permanent improvement is something done or put upon the land by the occupant which he cannot remove, either because it has become physically impossible to separate it from the land, or, in contemplation of law, it has been annexed to the soil and become a part of the freehold.

9. To entitle a defendant in an action for mesne profits to set off the value of the improvements made upon the land against such profits, they must not only be permanent, but they must add to the future value of the property for the ordinary purposes for which it is or may be used.

10. A street improvement is not an improvement made on the property, upon which the assessment was made for such improvement,

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

and therefore the value of it cannot be set off by the occupant against a claim for mesne profits.

11. It is the duty of a party in possession of property, claiming title or interest therein, to pay the taxes and charges imposed thereon, and therefore an assessment for street improvement paid by a defendant in an action for mesne profits, is a proper deduction from the gross value of the rents of the property, in estimating the actual damage which the plaintiff has sustained, by the defendant's withholding of the possession.

[Cited in Neff v. Pennoyer, Case No. 10,-085.]

On December 21, 1868, the plaintiff, Stark, commenced separate actions against six persons, then in possession of different portions of the premises in controversy. On May 3, 1869, the defendants in these several actions answered, disclaiming any interest in the property, and alleging that they were in possession simply as the tenants of the defendant, Starr. On the same day Starr appeared, and was made defendant in place of the tenants. Code Or. (Gen. Laws 1845-64, p. 226). Thereupon, in pursuance of the stipulation of the parties, an order was made consolidating the actions and allowing the parties to plead anew, and proceed as if the action had been originally commenced against Starr for the whole premises. On May 11, the defendant answered the complaint in the consolidated action, whereby he denied each material allegation thereof, except those in relation to the citizenship of the parties and the value of the premises; and also alleged that he had an "equitable title" to the premises, and was entitled to the possession thereof. On June 14, on motion of plaintiff, the last mentioned allegation was stricken from the answer as "immaterial and frivolous," for the reason that an equitable title or interest in land is no defense to an action for possession by the holder of the legal title. On August 4, and days following, in pursuance of the stipulation of the parties, the cause was tried by the court without the intervention of a jury.

William Strong and Lansing Stout, for plaintiff.

David Logan and W. W. Chapman, for defendant.

DEADY, District Judge. The complaint alleges that the plaintiff is a citizen of Connecticut, and the defendant a citizen of Oregon, and that the premises in controversy exceed in value the sum of five hundred dollars; that the plaintiff is and for more than six years has been the owner and entitled to the immediate possession of lots one and two and the north half of lot four in block eighty-one in the city of Portland; and that the defendant wrongfully withholds from the plaintiff the possession of said premises and has so withheld such possession for the period of six years, to his damage $30,000.

On the trial plaintiff gave in evidence a patent from the United States to himself, dated December 8, 1860, to a certain tract of land in the city of Portland, including the premises in controversy. The defendant offered evidence to show that the premises were a part of a tract of land called the town of Portland, which had been laid off in lots and blocks since 1850, and upon which trade and commerce had been carried on more or less ever since. This evidence was offered to show title to the premises in the defendant as an occupant thereof under the act of congress of May 23, 1844 (5 Stat. 657), commonly called the "Town Site Act." Being objected to, it was excluded, because the town site act was not in force in Oregon prior to its extension here by the act of July 17, 1854 (10 Stat. 305). And as it appeared from the patent to the plaintiff that he was a "settler" upon the land under the act of congress of Sept. 27, 1850 (9 Stat. 497), commonly called the "Donation Act," prior to the passage of the act of July 17, 1854, his right under the first act could not be divested by the second one. Lownsdale v. Portland [Case No. 8,578]; Stark v. Starr, 6 Wall. [73 U. S.] 413.

Again, this evidence was not admissible because no such defense or right was pleaded by the defendant. The Code does not allow a defendant in ejectment, to defeat the plaintiff by giving "in evidence any estate in himself or another in the property, * * unless the same be pleaded in his answer." Code Or. (Gen. Laws 1845-64, p. 226).

Except this, the defendant offered no evidence to show title in himself or to impeach or deny that of the plaintiff. The legal title, therefore, being in the plaintiff, he has a present right to the possession and must have judgment accordingly. Indeed, this conclusion was practically admitted on the trial by the counsel for the defendant.

The defendant then offered evidence to show that he had improved the property for the purpose of setting off the present value of such improvements against the claim of the plaintiff for damages for withholding the possession of the same.

The Code provides that in ejectment, the plaintiff may, in the same action, recover damages for withholding the possession for the term of six years prior to the commencement of the action and to the time of giving a verdict therein, exclusive of the use of permanent improvements made by defendant; and also, that, "when permanent improvements have been made upon the property by the defendant, or those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith, the value thereof at the time of trial shall be allowed as a set-off against such damages." Code Or. (Gen. Laws 1845-64, pp. 226, 227).

Objection was made to the evidence concerning improvements because the supposed set-off was not pleaded in the answer. The objection was sustained, but the defendant had leave to then file an amended answer, in which it is alleged, that he and "those under whom he claims have been and now are hold-

ing under color of title adversely to the plaintiff in good faith," and that while so holding they made permanent improvements upon the premises, of the present value of $12,312, which sum, or so much thereof as may be necessary, the defendant will set off against the damages to which the plaintiff may be entitled for the use and occupation of the premises. To this amended answer the plaintiff filed a replication, denying specifically each allegation thereof, except the one in relation to the present value of the improvements, and as to this, it alleged that the value of the improvements upon lots one and two was not more than $3,080, and that there were no permanent improvements of any present value on the north half of lot four.

The evidence offered by the defendant was then heard and received, and the case argued and submitted.

In the consideration of the case the following questions arise:

(1) What damages is the plaintiff entitled to for the wrongful withholding of the premises by the defendant?

(2) Did the defendant or those under whom he claims make permanent improvements upon the property, while holding under color of title adversely to the claim of the plaintiff, in good faith; and

(3) If so, what is the present value of such improvements?

The measure of damages for withholding the possession of the premises is the value of the use and occupation of the same, exclusive of the use of permanent improvements made by defendant.

There is no direct testimony as to whether or not all the improvements upon the premises were made by the defendant or those under whom he claims, but such is the reasonable inference. The possession of the defendant and his vendors extends back to 1850, except as to lot one, and that is shown to have commenced not later than 1857. It is also quite probable from the testimony that all the improvements which the defendant seeks to set off against the plaintiff's claim for damages were made by the defendant while sole occupant of the premises, or by him and his brother, A. M. Starr, while occupying them or some portion of them as tenants in common. Indeed, I did not understand that the contrary was asserted or claimed on the trial by counsel for the plaintiff. For the purpose of this inquiry, I think that these improvements, whether made by the defendant as sole occupant or by him and his co-tenant, ought to be considered as made by the defendant.

There is no material conflict or difference in the testimony as to the probable value of the use and occupation of the lots during the six years prior to the commencement of the action and since.

Upon this point, W. S. Ladd, called by the plaintiff, testified that from $22 to $25 per month was a reasonable ground rent for each lot of 50 by 100 feet. The defendant, being called as a witness, for himself, testified that such rent was from $24 to $30. The mean between these is $25¼. Omitting the fraction, this gives for the 2½ lots, the sum of $750 per annum, and $4,500 for the six years. Add to this the thirteen months which have elapsed since the commencement of the action—December 21, 1868—and we have the sum of $5,312½.

Has the defendant shown himself entitled to a set-off for improvements, as set up in his answer? The first inquiry upon this point is, was the defendant holding under color of title when he made these improvements? Color of title is not title but only the appearance of title. "Any instrument having a grantor and grantee and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands described." 3 Washb. Real Prop. 139; Moore v. Brown, 11 How. [52 U. S.] 414. It matters not whether the grantor had any title or not, if from the face of the deed compared with the law regulating the subject, he might have had title, his formal conveyance gives color of title to possession taken under it.

Judged by this rule, the possession of the premises has been held under color of title by the defendant and his vendors since the fall of 1850, except lot one, and that has been so held at least since 1857. The facts in regard to the conveyances of the premises appear from the evidence to be as follows:

(1) Lot one.—July 24, 1852, deed from sheriff of county to Barnhart, and made in pursuance of sale on execution to enforce judgment of Norton v. Winter [1 Or. 42, 97], but with this deed the defendant fails to connect himself. September 22, 1857, deed from Eastman to Hutchins and Hale. May 19, 1858, deed from Hutchins and Hale to A. M. and L. M. Starr, the defendant, for the north half. May 20, 1858, deed from Hale to Hutchins for the south half. July 15, 1859, deed from Hutchins to A. M. Starr and Ankeny for the south half. July 25, 1860, deed from Ankeny to L. M. Starr for interest in south half. September 18, 1865, deed from A. M. Starr to L. M. Starr for interest in whole lot. From this statement it appears that the defendant and those under whom he claims have had color of title to lot one since September 22, 1857, and that the defendant as the co-tenant of his brother, A. M. Starr, has had color of title to the north half of said lot since May 19, 1858, and to the south half since July 20, 1860, and to the whole lot as sole tenant since September 18. 1865.

(2) Lot two.—October 3, 1850, deed from Chapman to defendant for the south half. October 9, 1850, deed from Butler to McCay for the north half. September 16, 1851, deed from Marye to McCay for the north half. September 22, 1851, deed from McCay to A. M. Starr for the north half. Jan-

uary 4, 1864, deed from defendant to A. M. Starr for undivided half of south half. January 4, 1864, deed from A. M. Starr to defendant for undivided half of north half. September 18, 1865, deed from A. M. Starr to defendant for his interest in whole lot. This statement shows that the defendant has had color of title to the south half of lot two since October 3, 1850, and that he and those under whom he claims have had color of title to the north half since October 9, 1850, and that as the co-tenant of A. M. Starr, he had color of title to the whole lot from January 4, 1864, to September 18, 1865, and has had such color as sole tenant since the last mentioned date.

(3) Lot four.—November 11, 1850, deed from Chapman to Powell. August 12, 1856, deed from Powell to A. M. Starr and defendant. September 18, 1865, deed from A. M. Starr to defendant for the north half.

From this it appears that the defendant and those under whom he claims have had color of title to the north half of lot four since November 11, 1850, and that the defendant, as co-tenant with A. M. Starr, has had color of title to said north half since August 12, 1856, and as sole tenant since September 18, 1865.

As to the possession alleged to be held under this color of title, there is no direct proof except as to that of the defendant and A. M. Starr. As to their vendors it might be inferred that they had the actual occupation of the premises described in their several deeds, and certainly nothing appears to the contrary. But as the supposed improvements have been made since the premises are alleged to have been in the possession of the defendant and A. M. Starr, the inquiry as to the possession or good faith of their vendors or predecessors is not material.

The evidence satisfies my mind that the defendant has been in the possession of the premises, except the north half of lot two, either as tenant in common with A. M. Starr or as sole tenant, since July 25, 1860, and as tenant in common of north half of lot two with A. M. Starr since January, 1864, and that the latter had been in possession of the same prior to that time as far back as 1851.

The possession of the Starrs was taken in pursuance of their deeds. They did not enter under the plaintiff or hold under him. It was open and visible and actually with the knowledge of the plaintiff. They were aware of his patent, and also of his claim to be a settler upon a tract of land including the premises, under the donation act, but their deeds and possession were prior in point of time to the patent. After the issue of the patent, and probably before, they knew that the plaintiff had the legal title to a tract of land including the premises, but believed that he was bound to convey such title to them and would be estopped to assert it against them: and the evidence tends to show that about the date of the patent the plaintiff declared to them that he would convey them such legal title for a mere nominal consideration, but whether as a matter of favor or legal obligation does not appear. It also appears that since 1862 the Starrs expended $5,000 or $6,000 in improvements upon the property, and were in the regular receipt of the rents and profits of the same; and that about 1864 they brought a suit against the plaintiff concerning their title, in which they failed to obtain any relief. That in 1864 the plaintiff said to the defendant, that Chapman never paid him for the property, but that if he, Chapman, would pay him, he, the plaintiff, would make the defendant a deed.

For some reason, neither party has seen proper to show how property, apparently within the donation claim of the plaintiff, should have been sold and conveyed as far back as 1850, by persons having no apparent relations with the plaintiff or connection with the legal title.

The circumstances referred to in the remarks of the plaintiff to the defendant in 1864, indicate that at some time Chapman and himself had come to an understanding or agreement, by which the plaintiff was to make a deed to this property in favor of the defendant or those under whom he claimed, and that the plaintiff excused his failure to perform on the ground that Chapman had not paid him for the property. It also indicates that lots one and the north half of two were originally sold by Chapman, as well as lots four and the south half of two.

These are all the material circumstances proven in the case, which bear upon the character of the defendant's possession, and they are all drawn from the testimony of the defendant himself, and A. M. Starr. Was this a "holding under color of title adversely to the claim of the plaintiff," or in other words, was the possession of the Starrs adverse to the title or right of the plaintiff?

What constitutes adverse possession has been one of the vexed questions of the law. In some cases the practical effect of the ruling of the courts has been to require actual proof that the possession of the occupant was adverse, even when nothing appeared to the contrary, or to presume that his possession was in subservience to the legal owner because the contrary did not affirmatively appear.

But the just and reasonable rule seems to be, that every possession is presumed to be rightful and therefore adverse to the title of any other claimant. This presumption may be overcome by the proof of facts inconsistent with it, as by showing that the occupant received a lease; paid rent; or acknowledged the superiority of the title set up.

In Parker v. Proprietors, etc., 3 Metc. [Mass.] 99, the court say: "If a person enters on land, having no right or title, and maintains the exclusive possession, taking the rents and

profits, his possession would be considered adverse, and, if of sufficient notoriety, would amount to a disseizin." Here the unexplained fact of possession and receipt of rents and profits is held to constitute an adverse possession; and for the simple reason it must be that the law presumes every possession rightful until the contrary appears or is shown.

In La Frombois v. Jackson, 8 Cow. 618, Senator Viele says: "Every possession, then, is adverse, and entitled to the peaceful and benignant operation and protecting safeguard of the statute, which is not in subservience to the title of another, either by a direct acknowledgment of some kind, or an open or tacit disavowal of right on the part of the occupant; and it is in the latter case only, that the law adjudges the possession of one to the benefit of another."

In Smith v. Lorillard, 10 Johns. 356, Kent, C. J., says: "Possession is always presumption of right, and it stands good until other and stronger evidence destroys that presumption."

Tried by this rule the possession of the defendant and A. M. Starr, must be considered adverse to the title of the plaintiff. They were in the actual and exclusive possession and receipt of the rents and profits. They did not enter under the plaintiff, but so far as appears without any recognition of his title.

But it is also true, that in the course of their possession, the Starrs acknowledged the legal title to be in the plaintiff—the final confirmation of his right as a settler under the donation act, by the issue of a patent to him by the United States. But this acknowledgment was always coupled with the opinion and assertion upon their part, that the plaintiff had no beneficial interest in the property, and, in some way, was bound in equity, and good conscience to convey such title to them.

Upon this aspect of the case, the learned counsel for the plaintiff insist, that since 1860, and prior to the making of any of the supposed improvements, the possession of the Starrs must be considered as being held in subservience to the title of the plaintiff, because during this time they acknowledged it and claimed to be entitled to it, and therefore their possession could not be adverse to it. In support of this argument, counsel cited the well-known rule that the possession of the vendee under the contract of purchase is not deemed adverse to the title of the vendor.

But admitting for the sake of the argument, the proper conclusion from the facts in the case to be, that the relation of vendor and vendee existed between the plaintiff and the Starrs—that the latter entered under a mere purchase of the possession, acknowledging the title of the former as paramount, but claiming for any reason to be entitled to have such title conveyed to themselves, it would not follow that their possession was not adverse.

After performance by the vendee of the conditions of sale, as the payment of the purchase money, and when in equity he would be entitled to have a conveyance of the title, his possession may become adverse to the title of the vendor, and in the absence of any proof to the contrary, should be presumed to be so. La Frambois v. Jackson, supra.

In Briggs v. Prosser, 14 Wend. 228, Nelson J., it is stated, "There can be no doubt that a person entering upon land under a contract of purchase, unperformed on his part, does not hold possession adversely to the vendor. After performance, and an equitable title to a deed of the premises acquired, I perceive no reason why his possession may not become adverse, or, in other words, there is nothing in the character of it inconsistent with the idea of an adverse possession. Whether it were in fact adverse or not, would depend upon the circumstances of each particular case."

This leads to the consideration of the point as to whether the Starrs were acting in good faith or not. To entitle the occupant to set off the value of his supposed improvements against the plaintiff's claim for mesne profits (damages), they must have been made while the occupant was "holding under color of title, adversely to the claim of the plaintiff," and "in good faith." To enable the defendant to claim the benefit of the law giving the set-off, these three things must concur. He must have held possession under color of title; his possession must have been adverse to the title of the plaintiff; and he must have acted in good faith.

Good faith, in relation to the colorable title, must mean nothing more nor less than that the party honestly believed his title good, although, upon investigation, it proves otherwise. Of course, in determining whether a party did so believe or not, weight must be given to the particular circumstances of the case. For, although the occupant hold under color of title, yet, if at the same time he knows, or has good reason to believe that his title is merely colorable, and confers no right as against the legal owner, he is not acting in good faith. If, under such circumstances he makes improvements, he does so at his peril, and cannot compel the true owner to allow him for them. If, then, the occupant honestly believes his title valid, however defective or unreal it may prove to be, he is holding in good faith. The good faith required by the code, is an actual belief in the apparent title under which the occupant holds and improves.

Upon whom is the burden of proof in this matter? Good faith is the opposite to bad faith, and bad faith and fraud are synonymous. Fraud is never presumed, except when the law peremptorily so declares, but must be proven. It would seem, therefore, that the occupant in this particular as in general is presumed to have acted in good faith until the contrary appears.

No evidence has been produced by the plaintiff to show that the Starrs were acting in bad faith. Nothing in the circumstances of the case tends to support that conclusion. On the contrary, the very fact that they expended several thousand dollars in making improvements on the land is evidence of their good faith—a faith which manifested itself by its works. My conclusion upon this branch of the case is, that the Starrs were "holding under color of title adversely to the claim of plaintiff, in good faith."

Next, while so holding did they or either of them make permanent improvements upon the premises? At common law when the owner of an estate, who had been disseized, sought to recover damages for the loss of the profits during the ouster against the wrongful occupant thereof, the latter might recoup such damages to the extent of the value of permanently useful improvements put upon the land by himself. And this was so, whether the remedy pursued was assize of novel disseizin, trespass with continuando brought after entry or after recovery in ejectment. Gill v. Patten [Case No. 5,428]; Green v. Biddle, 8 Wheat. [21 U. S.] 81, 82. In Jackson v. Loomis, 4 Cow. 172, it was held in an action of trespass for mesne profits, that a bona fide occupant should be allowed the value of his improvements made in good faith to the extent of the rents and profits claimed. See, also, Bright v. Boyd [Case No. 1,875].

The provision in the Code concerning permanent improvements is a substantial affirmance of this common law rule, restricted in all cases to the case of a bona fide possessor holding under color of title. Interpreting the phrase "permanent improvements" by the common law, it must be construed to mean something done to or put upon the land which the occupant cannot remove or carry away with him, either because it has become physically impossible to separate it from the land, or because in contemplation of law it has been annexed to the soil and is therefore to be considered a part of the freehold. Such an improvement, if it exist at the time of trial, is a permanent one. The term is a relative one and does not import any particular length of time. The degree of permanency or probable duration of the improvement is only material in estimating its value. Whatever the occupant may remove when ejected from the premises, is not a permanent improvement, and, therefore, there is no reason that he should be allowed for it out of the claim for rents and profits.

But the thing done to or upon the land must also as the word imports be an improvement to it—it must meliorate—better the condition of the property. It must make it more valuable in the future for the ordinary purposes for which such property is owned and used. Therefore a structure or labor may be as permanent in every sense of the word as the pyramid of Cheops, and yet add nothing to the usefulness or value of the land for ordinary purposes. It does not make the land more beneficial to the true owner, and is not an improvement. Bright v. Boyd [supra].

With this understanding of the phrase "permanent improvements," let us see what is the character and value of the alleged improvements in this case.

Burton and Goodenough, two master mechanics, called by the plaintiff, testified that they had examined the property during the trial. Their testimony substantially agrees, and is to the effect—that there are on lots one and two, three new wooden buildings, and an old shop connected with a marble yard, and on the north half of lot four there is an old wooden house, and that the present value of the new buildings is $350 each, of the shop $100, and the old wooden house $400. That there is a stone wall built across lots one and two on the east end, fronting on the Wallamet river, which would now cost $3,025, and that in their judgment the buildings are not permanent improvements, but the wall is. The defendant testified that either he or he and A. M. Starr caused the wall and buildings to be put upon the premises—the former in 1863 and the latter since. He also testified that the three new buildings were worth $1,200, and that the buildings on north half of lot four were worth $1,800 or $2,000. On cross-examination stated he could not say that the three buildings were worth $1,200 now. The defendant also testified that the stone wall was built as a part foundation of a house and to protect the bank from the river, but that he had abandoned the building of the house on account of the litigation concerning the premises with the plaintiff in 1864–5; and that in 1865 he had paid the municipal authorities of Portland the sum of $1,200 or $1,500, which was assessed upon said premises, for the purpose of paving and improving the street in front of them. It appears from the testimony of W. S. Ladd that these buildings, situated as they are, will rent for an average of $20 each per month exclusive of ground rent or the value of the land.

This is the substance of the testimony concerning the nature and value of the supposed improvements. The burden of proof is upon the defendants to show that they are beneficial to the property and to what extent.

This testimony shows beyond a doubt that the buildings—all five of them—are "permanent improvements" within the legal sense of that phrase. The opinion of the witnesses as to their permanency cannot control the judgment of the court upon the facts. As Mr. Burton said himself on cross-examination, "they are permanent as long as they stay there." They are permanent because they are fixtures—things annexed to the soil—and the defendant, being a wrongful occupant of the premises, has no right to take them away if he would. Upon this point the plaintiff's witnesses evidently testified under a misapprehension of the meaning of the term "perma-

nent." If they were not permanent in some degree, they would have no value, and yet both these witnesses give them a present value of between $1,400 and $1,600. They also improve the property. They will rent for a certain sum per month and they enhance the present value of the property by that amount. Town lots are ordinarily used for building houses upon, to be rented. These buildings are improvements of that character. Their actual value depends upon how long they will probably endure and be fit for use.

Upon this point the evidence is not uniform. The testimony of the defendant puts the value of the buildings at not less than $3,000; that of Burton at $1,400; that of Goodenough at $1,550, while Mr. Ladd gives them a present rental value of $1,200 per annum. While it is apparent that these buildings enhance the present value of the property, it is difficult in the nature of things, and particularly upon this evidence, to say precisely by how much.

This depends upon the probable durability of the buildings, the cost of keeping them up and the probable future demand for such houses—in other words, what is likely to be the annual net gain to the owner of the property from their future rental and for how long. The future rental of cheap, small wooden buildings is not capable of a very definite estimate. Under these circumstances and state of the proof, I have found the present value of the buildings to be $2,000.

The foundation wall is a permanent structure beyond a question, but I cannot satisfy my mind from the testimony, that it is of any benefit to the owner of property, or enhances its present value in any degree. If a house were built upon it, the result might be beneficial to the property, but to require the owner to build the house to make the wall available, would be in effect controlling him in the future use and enjoyment of his property for the benefit of the occupant. Practically the house would be the improvement and not the wall alone. But it may be said that the wall alone is a present benefit to the property as a means of protecting the bank from the wash of the river—and I do not overlook the fact that the defendant testified that it was partly built for that purpose. Yet, judging from the indefinite and hesitating manner in which the defendant made that statement, and his definite and positive testimony that the wall was intended as the foundation for a house, which was not built on account of his litigation with the plaintiff, and the further fact, that the defendant has failed to produce any evidence to show that a wall is in any degree or manner necessary to protect the bank from the action of the river, I conclude that it is not. The burden of proof is upon the defendant to show the value or benefit of this wall to the property, and if it was in fact useful as a protection against the water, it was very easy to have shown it by the testimony of persons conversant with the subject.

The amount paid the city of Portland by the occupant as an assessment for the improvement of the street adjoining the premises, is objected to as a set-off by the plaintiff as not being an improvement "made upon the property."

This may be called a technical distinction, but nevertheless, it is a substantial one. The assessment upon the property for the purpose of improving the street was a tax upon it—nothing more nor less. The payment of taxes upon property is not an improvement made upon it, however much such payment may indirectly enhance its value. This item of the alleged set-off is not within either the letter or reason of the provision of the Code concerning "permanent improvements."

But it is a proper deduction to be made from the gross rents of the property in estimating the actual damage which the plaintiff has sustained by the defendant's wrongful withholding of the possession. The expenditure was not made voluntarily by the defendant, but in obedience to the law and for the benefit of the property, and consequently its owner. It is the duty of a party in possession of property, claiming title or interest therein, to pay all lawful taxes and charges imposed thereon by public authority. If he neglect to do this, and purchase the property at a sale for these taxes, he acquires no right thereby, because his conduct is deemed fraudulent as against the true owner. As it turns out, these taxes were paid by the defendant for the benefit of the plaintiff. If the former had not paid them the latter must, or allowed the property to have been sold as delinquent. Therefore in estimating the damages to which the plaintiff is entitled for being kept out of possession, the amount of the assessment must be deducted from the gross rents, and the remainder is the true profits or damages. Bright v. Boyd [supra].

On the contrary, if the payment of a tax by an occupant without title could only be allowed him against a claim for mesne profits, by way of set-off, as for a permanent improvement, it would often happen that it could not be allowed at all. For instance, if the pavement put upon the street by this assessment were now worn out or if from serious defects in plan, materials or workmanship, it had proved worthless, it would not be of any present value to the property and could not be the subject of a set-off. But as the tax was paid and expended in obedience to public authority, the occupant is not responsible for such consequences or results, and therefore his right to be re-imbursed ought not to depend upon them.

In conclusion the plaintiff is entitled to a judgment for the recovery of the possession of the premises.

As has been shown, the use and occupation of the premises, exclusive of defendant's improvements, was worth $5,312.50. Deduct from this the amount—$1,350—of the tax paid for street improvements, and the remainder—$3,962.50—is the mesne profits, or damages, to which the plaintiff is entitled. Against this

amount set off the present value—$2,000—of the permanent improvements, and the remainder—$1,962.50—is the sum which the plaintiff is entitled to recover of the defendant, together with costs and expenses.

[NOTE. Upon the entry of the judgment in this case, Starr filed a bill in equity against Stark, setting up his equitable title to the premises, and praying that Stark be decreed to convey the legal title, and perpetually enjoined from executing his judgment in the above case. The case was first heard before Judge Deady, upon motion for preliminary injunction. The motion was denied, with costs. Case No. 13,316. Upon the final hearing of the case, a decree was entered in favor of the complainant. The opinion in this case was delivered by Circuit Judge Sawyer, Judge Deady dissenting. Id. 13,317. Upon appeal to the supreme court by Stark, this decree was affirmed. Mr. Justice Field delivered the opinion of the court. 94 U. S. 477.]

STARK (STARR v.). See Cases Nos. 13,316 and 13,317.

STARK (UNITED STATES v.). See Case No. 16,378.

STARKE (HEAD v.). See Case No. 6,293.

STARKE v. The NAPOLEON. See Cases Nos. 10,011–10,015.

STARKS (RICHMOND MANUF'G CO. v.). See Case No. 11,802.

Case No. 13,308.

STARKWEATHER v. CLEVELAND INS. CO.

[2 Abb. (U. S.) 67; 4 N. B. R. 341 (Quarto, 110); 3 Chi. Leg. News. 77; 28 Leg. Int. 36; 10 Am. Law Reg. (N. S.) 333; 5 Am. Law Rev. 568.] [1]

District Court, N. D. Ohio. Nov., 1870.

INSURANCE—TRANSFER OF POLICY—RIGHTS OF ASSIGNEE IN BANKRUPTCY.

1. A clause in an insurance policy declaring that the policy shall be void if assigned without the consent of the company, does not apply to a transfer made under the bankrupt law, by a register in bankruptcy, to an assignee appointed for the insured.

[Cited in Union Ins. Co. v. Barwick, 36 Neb. 233, 54 N. W. 519; Hammel v. Queen's Ins. Co., 54 Wis. 77, 11 N. W. 349.]

2. An assignee in bankruptcy does not acquire the beneficial interest in the assets, but is merely clothed with the title and control as agent for the bankrupt and his creditors, and for the purpose of converting them into money and applying them towards the discharge of the debts. The statutory transfer to such assignee is not within the purpose or operation of a condition in a contract, restricting alienation of the beneficial interest.

Petition in proceedings in bankruptcy.

S. O. Griswold and S. Starkweather, for the petition.

Willey, Cary, & Terrell, opposed.

SHERMAN, District Judge. The petition states that on February 7, 1870, Newton Wells, on the petition of his creditors, was declared by default a bankrupt, and that the petitioner was thereupon duly appointed his assignee. That on July 25, 1868, the defendants issued to Newton Wells, the said bankrupt, a policy of insurance in the sum of fifteen hundred dollars on his house in Concord, Lake county, Ohio, for the period of three years from that date. That on May 8, 1870, and within the life of the policy, but after Wells was adjudicated a bankrupt and the assignee appointed, the premises were destroyed by fire.

The answer of the insurance company does not deny the loss, or the sufficiency of the proofs, but bases its defense on two clauses in the policy which read thus: "If the title to the property is transferred or changed, this policy shall be void." And secondly, "If, without the written consent of the company, this policy shall be assigned, it shall be void." The direct question presented the court for adjudication is this: Is the assignment of the register to the assignee both of the policy and of the property insured, a violation of these two covenants in the policy, and does it exonerate the company from liability? It is claimed by the petitioner that his assignment and transfer were not the voluntary acts of the bankrupt, but merely an assignment by operation of law, and that there is a broad distinction recognized by the authorities between the voluntary and the involuntary assignments and transfers of the policy and title. It is claimed by the defendants that a policy of insurance is a contract of personal indemnity, in no manner incident to the estate, nor running with it, and that the language of this policy is broader than the common and usual clauses against alienation, and includes in it any involuntary change or transfer of title.

It may be premised, that as the covenants in this policy are in restraint of alienation, and entail a forfeiture, they may be strictly construed. Though a contract voluntarily entered into by the parties, no other meaning should be given to the language used than a most rigid and literal interpretation permits. 15 Johns. 276; 2 Wils. 234. The clause against the assignment of the policy, and against the transfer and change of title, may be considered together. The rules that apply to either apply to both. These covenants are common to all insurance contracts. All policies have the same clause forbidding the assignment of the policy. The covenant against change or transfer of title in different policies varies somewhat in phraseology. In some policies the language used is, "sold or conveyed, in whole or in part;" in others, "shall not be alienated by sale or otherwise;" or, as in this, "the title shall not be changed or transferred." All these expressions are in substance the same. To sell and convey, to alienate, or transfer

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission. 5 Am. Law Rev. 568, contains only a partial report.]

the title, means an act whereby a thing is made another man's; an act whereby a change in the ownership of property is made from one person to another. And whether these words are used in the active or passive sense can make no difference in their construction. These covenants, therefore, on the part of the assured, are that he will not assign the policy, or in any manner change his title to, or the ownership of, the property insured. [I can find no decisions under the present bankrupt law bearing upon the case at bar. The question must, therefore, be decided upon principle and by the lights derived from decisions upon analogous questions.] [2]

It is not to be doubted that the petitioner, by virtue of the adjudication in bankruptcy, and his appointment as assignee, has the control of this policy and of the property therein insured. What rights and what title did he thereby acquire? Assignees, according to 1 Bouv. Law Dict. 132, are of two kinds: one in fact, and one in law. An assignee in fact is one to whom an assignment has been made in fact, by the party having the right to assign. An assignee in law is one in whom the law vests the right and control in the property. To the latter class an assignee in bankruptcy belongs. He is like an administrator, executor, or guardian, upon whom, when appointed by the proper authority, the law confers the right and power to control the property thus committed to his charge, paramount to all others. But it does not give to, or vest in him, the absolute ownership in his own right to the property. He is a mere trustee, accountable under the law to the cestui que trust. He holds the property assigned to him in trust—of all leases and policies, as well as other property. In leases with covenants against alienation without consent, &c., it has always been held that the leases pass to the assignee, and this is true of the bankrupt law. Nay, more; it has been held (2 Chit. 600), that in such case, the assent of the lessor to such assignment is to be presumed from the law itself. This doctrine is nothing but the simple enunciation of the principle laid down by Lord Ellenborough, in Copeland v. Stephens, 1 Barn. & Ald. 593. In substance, he declares that the assignee is a mere agent for the bankrupt and for his creditors. He says: "An assignment by the commissioners of bankruptcy is the execution of a statutory power given them for a particular purpose, namely, the payment of the bankrupt's debts. Nothing passes from them, for nothing ever vested in them. Whatever passes, passes by force of the statute, and for the purpose of effecting the object of the statute. * * * The object of the statute, and of the assignment, is the payment of the bankrupt's debts, and the assignee is trustee only for that purpose."

Again, in 9 Ves. 100, and 13 Ves. 186, the lord chancellor declares that assignees are not considered as having the same rights as purchasers for a valuable consideration, and that they are placed in the same class as personal representatives of intestates. Of course I need not quote authorities to show that Wells dying, this policy, notwithstanding its covenants, would pass to and vest in his administrator. From these cases the principle is clearly deduced, that an assignee in the case of involuntary bankruptcy is only a trustee, an agent, standing in the shoes of the bankrupt, with only power to do what the bankrupt ought to have done, namely, pay the debts out of his assets. By the provisions of the bankrupt law, the register makes the assignment, and not the bankrupt. The latter makes no paper and performs no act to divest him of the title. But the control of the property, merely and solely by the judgment of the court, is taken from him and vested in the assignee, who has merely the power to do what the general as well as the bankrupt law requires, namely, to appropriate the bankrupt's property to the payment of his debts. In other words, that the assignee is a mere agent of the debtor to use his property in the payment of his debts. It therefore follows from this, that the bankrupt remains as much interested in watching over and guarding the insured property after as before bankruptcy, and that the assignee does not acquire such an interest in the policy, nor in the insured property, as to work the forfeiture contemplated by the clauses in question. Phil. Ins. 107.

This conclusion will be further strengthened by a review of the cases upon the effect of an involuntary act of bankruptcy upon the breaches of covenant in insurance and other like contracts. Parsons, in his work on Contracts (volume 2, p. 451), says: "On general principles, that where property, insured against fire, is taken into the possession of the law, for the benefit of creditors, the insurance will remain valid, until the property is sold by the assignee." The case of Bragg v. New England Mut. Fire Ins. Co., 5 Fost. [N. H.] 289, was a suit brought on a policy which contained a clause that, "if the property shall in any way be alienated, the policy shall be void." The property was mortgaged at the time, and this fact communicated to the company. During the life of the policy, the mortgage was foreclosed, and the property sold. But the court said, "that the title that became vested in the mortgagee by the foreclosure, was brought about by the operation of the law. There was no act of conveyance or transfer, by the mortgagor or mortgagee. We cannot therefore regard the foreclosure and sale as an alienation."

In the case of Smith v. Putnam, 3 Pick. 220, there was a lease of a farm, with a covenant not to carry off any hay under a for-

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2 [From 4 N. B. R. 341 (Quarto, 110).]

feiture of ten dollars per ton. Hay was attached and carried off by the creditors of the lessee, and without his consent. In this suit for the forfeiture the court said "that the general principle to be deduced from all the cases was that covenants not to assign, transfer, &c., are broken only by a voluntary transfer by the lessee. That the removal of the hay, by sale or execution, was not a voluntary act of the lessee, and, therefore, no breach of the covenant." The leading case in England will be found in 8 Term R. 57. Suit was brought on a lease, which contained a covenant that the lessee "should not set over, assign, transfer, or in any way dispose of the lease, without the written consent of the lessor." The lessee confessed judgment, and upon execution issued thereon the lease was sold. Lord Kenyon said: "I adopt the distinction between these acts which the party does voluntarily, and those that pass in invitum. Judgment in contemplation of law, always passes in invitum, and, therefore, there is no breach." The same doctrine was held thirty years before, and will be found in 3 Wils. 234.

In the case of Wilkinson v. Wilkinson, 10 Eng. Ch. 258, a father by will gave his son the rents and profits of certain premises, with a proviso that if the son assigned or disposed of, or otherwise incumbered the property, he should forfeit the estate. The son afterwards became bankrupt. Sir W. Grant, in deciding the case, says: "Now courts of law have held that an assignment by operation of law, which bankruptcy is, is not an alienation within the meaning of a restraint against alienation."

Hilliard, in his work on Bankruptcy (page 141), sums up the law in these words: "Property may be limited or leased to be void or revert back in the event of bankruptcy, and if a lease to a trader contain such a proviso, the term does not pass to his assignee, but reverts back. But to prevent its passing, there must be an express proviso to that fact. The usual covenant or proviso not to let, assign, or transfer, without consent, &c., will not be sufficient. The commissioners may still assign the lease to the assignees, without such consent, and such consent is presumed by operation of law. The distinction, however, is taken in England, that unlike bankruptcy, which is an involuntary proceeding, insolvency, being a voluntary proceeding on the part of the debtor himself, is a breach of the covenant against assignment, and works a forfeiture."

On these authorities, it seems clear to me, that the clauses in this policy forbidding its assignment, and the change and transfer of the title to the property, have no more effect than similar words in leases. Both are contracts between two persons, with this difference, that leases are under seal, and therefore of a higher nature. The cases cited establish the doctrine that bankruptcy and judgments are involuntary, and do not avoid covenants against assignments and transfers, either in leases or policies of insurance.

In this case, the bankruptcy of Wells, the owner of the policy and the property, was involuntary. By operation of the law, the policy and the property were taken out of his custody and control, and placed in the hands of the assignee, as the agent of the law, to sell the same and pay his debts. The entire interest in the property is sold under the law by the assignee. The loss provided for in this policy accrued while the property was in this condition. It was still in law Wells' property, but by operation of law, in the hands of the assignee for the sole purpose of selling and applying the proceeds for Wells' benefit.

Decree for petitioner.

[See Case No. 13,309.]

Case No. 13,309.

STARKWEATHER v. CLEVELAND INS. CO.

[4 Chi. Leg. News, 175; 15 Int. Rev. Rec. 59.]

Circuit Court, W. D. Ohio. Jan., 1872.

INSURANCE — BANKRUPTCY OF PARTY INSURED — RIGHT OF ASSIGNEE TO RECOVER FOR LOSS.

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

This was a case where a policy of insurance had been issued by the defendant to the bankrupt several months before any proceedings in bankruptcy. Proceedings in bankruptcy were commenced, the insured was declared a bankrupt, and all his property transferred to and vested in said assignee, the property covered by said policy included. Some months after the transfer of the property to the assignee in bankruptcy, the building insured was destroyed by fire. Suit brought for amount of policy.

[See Case No. 13,308.]

Griswold & Buckingham, for assignee.

Willey, Cary & Terrell, for insurance company.

EMMONS, Circuit Judge, held: That at common law the termination of all interest of the insured in the property, defeated the policy; and that the transfer to the assignee in bankruptcy terminated all interest of the bankrupt in the property insured. That a transfer to an assignee in bankruptcy was within the terms of that provision of the policy which declared that the policy should be void in case of any change or transfer of the title to the property insured. That the fact that the bankruptcy was involuntary was immaterial, as was also the fact that the transfer was made by operation of law.

Judge EMMONS went into an elaborate analysis and review of all the English and American authorities bearing upon this and analogous questions.

Policy held void for the above reasons, and case remanded for further proceedings.

In pronouncing the opinion in this case, Judge EMMONS discussed the effect of the recent decision of the supreme court in reference to summary proceedings in bankruptcy, in cases properly cognizable in law or equity, according to their respective forms of procedure; concluding to remand such cases to the district court for re-formation of the pleadings, advising that the greatest liberality should be allowed in relation to amendments, especially where hearings had been had upon the merits, without objection as to form.

Case No. 13,310.

The STARLIGHT.

[1 Hask. 517.] [1]

District Court, D. Maine. Feb., 1874.

PLEADING IN ADMIRALTY—ALLEGATIONS OF LIBEL — EFFECT OF FAILURE TO DENY — EVIDENCE — COLLISION—SHORTENING SAIL—RIGHT OF WAY.

1. In causes of collision, the charge in a libel that one vessel was close-hauled on the starboard tack and the other on the port tack with the wind free, is to be taken as true, when the answer in general terms avers that the latter vessel was not in such a position as required her to avoid the former.

2. In admiralty, all allegations in the libel not specifically denied are admitted.

3. Such evidence only is admissible as pertains to the express allegations in the libel or answer.

4. A vessel at sea in the night, that comes into the wind for the purpose of shortening sail, and thereby becomes unmanageable, not having first made a careful survey of the sea to discover approaching vessels, is at fault, and in case of collision with a vessel having the right of way, is accountable for damages.

5. A vessel on the starboard tack, close-hauled, is bound to keep her course until danger is imminent, and then she has a right to presume that an approaching vessel on the port tack will avoid her.

6. Negligence, by a vessel having the right of way, in not seasonably discovering an approaching vessel, in case of collision between them, will not charge the former with fault, unless such negligence contributed to the collision.

In admiralty. Libel in rem by a vessel close-hauled upon the starboard tack for damages sustained by collision with a vessel on the port tack with the wind free. Cause heard on libel, claim, answer and proof.

A. A. Strout and John C. Dodge, for libellant.

William Henry Clifford, for claimants.

FOX, District Judge. This action is instituted in behalf of the owners and crew of the schooner Thomas Fitch of New London, Conn., to recover damages sustained by a collision with the schooner Starlight, on the morning of the fourteenth of Nov. last, between three and four o'clock, about twenty miles southerly from Cape Henlopen. The Thomas Fitch is of the burden of eighty-one tons, and was on her voyage from New London to Tangiers in ballast for oysters. The Starlight is three hundred and thirty tons, was loaded with coal and bound from Georgetown to Portland. The wind it is agreed, was about N. W. by W. blowing heavily, but not a gale; there were some clouds overhead, but it was generally clear and dark and without haze; the fore-rigging, bulkwarks and stanchions of the Thomas Fitch on her port side were carried away, and her crew at the time abandoned her, going on board the Starlight, and she was afterwards picked up, taken into Wilmington and there libelled for salvage. In the present case, the libel alleges that the Thomas Fitch was close-hauled on the starboard tack, heading about W. S. W. under close reefed mainsail and jib, making not more than one and one half knots per hour, with the proper regulation lights burning.

The answer states the course of the Thomas Fitch as being S. W. by W. and does not deny that her lights were in position and burning, nor the other allegations above recited from the libel. These must, therefore, be taken as conceded by the answer; and the evidence given by the crew of the Starlight also establishes the fact that the lights of the Thomas Fitch were in compliance with the requirements of the act of congress upon this subject. The answer gives the course of the Thomas Fitch as one point more free than that stated in the libel; but the testimony from those on board of her sustains the allegations of the libel, and the difference of one point only is so slight, that from the other admissions in the answer, and all the other testimony in the cause, the court is satisfied, that at the time alleged, the Thomas Fitch was sailing close-hauled on the starboard tack.

The averment in the fourth article in the libel is, "that when the Starlight was first seen from the Thomas Fitch, she was heading about N. E. by N. having the wind free, and was coming directly towards the Thomas Fitch, on the port bow. She had no lights set at the time, and was not, therefore, seen until quite near." The answer asserts that the lights of the Starlight were in their proper position and burning brightly; but as to the course of the Starlight the answer is not directly responsive to the fourth article in the libel, and does not deny that she had the wind free, and was coming directly towards the Thomas Fitch.

The answer avers "that the captain took the wheel and ordered the man forward to inspect the lights, and call the watch to furl the flying-jib and reef the mainsail, and that in all respects, said order was a proper and necessary one at the time; that immediately

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

after the men had completed the furling of the flying-jib, and before the reef had been taken in the mainsail of the Starlight, the Thomas Fitch, sailing on a S. W. by W. course, ran into the jib-boom of the Starlight. It charges that the collision was caused by the carelessness and negligence of the Thomas Fitch, and not by any want of management of the Starlight; that at the time and before the occurrence of said collision, the Starlight was not in such position as required her to avoid the Thomas Fitch, but on the contrary, it was the duty of the Fitch to have avoided and gone clear of the Starlight."

In these extracts from the answer, the court is unable to discover any denial of the charge in the fourth article of the libel "that the Starlight's course was about N. E. by N. with a free wind coming directly towards the Thomas Fitch on her port bow."

There is nothing whatever stated in the answer as to the Starlight's course, or whether she had a free wind or not. The court does find that it is alleged in the answer, that the flying-jib of the Starlight was furled, and that the men were called to reef the mainsail; but it is not anywhere averred that in order to accomplish these movements, her course had been changed a single point, or that she had been thrown up into the wind, or that she had not been pursuing a course N. E. by N. It is stated, near the close of the answer, "that the Starlight was not in such a position as required her to avoid the Thomas Fitch;" but as it is charged in the libel that the Thomas Fitch was close-hauled on her starboard tack, and the Starlight was on her port tack with the wind free, the general denial that her position was not such as required her to avoid the Thomas Fitch, without in any way or manner setting forth what position she was in, or what excuse she had for not avoiding a vessel close-hauled on the starboard tack, is not sufficient, and does not directly meet and answer the charges found in the libel.

By the twenty-seventh of the admiralty rules, it is required "that the answer of the defendant to the allegations in the libel shall be full, explicit, and distinct, to each separate article and separate allegation in the same order as numbered in the libel;" and the rule in admiralty is substantially as in equity, that what is alleged on the one side and not denied on the other, is to be taken as true; and evidence is not admissible in a cause, except such as relates to the express allegations on the one side or the other.

In the case of The William Harris [Case No. 17,695], Judge Ware states the practice of the court to be that if a party relies upon an objection, "he should put the question of fact in issue by a dilatory plea, * * * or by a distinct denial of the averment in the libel, by a counter allegation in his answer. As he has done neither one nor the other, the fact must be taken as admitted; no evidence can properly be received to contradict it, because the proof must be confined to the matters in issue. The court cannot travel out of the record to decide questions which the parties have not submitted to it, and nothing is submitted to its determination, but what is distinctly alleged on one side and contradicted on the other. It is true that courts of admiralty are not restrained by the strict technical rules of pleading, which prevail at common law; but it is not less true, in all courts, that the matters in controversy must be distinctly propounded, and each party must set forth by plain and precise allegations, the grounds on which he asks for the judgment of the court in his favor, as well to disclose to the adverse party the points to which he must direct his proof, as to enable the court to see what is in controversy between them."

In the opinion of the court, the answer of the claimants is not full, explicit, and distinct, to the allegations in the libel, and does not present a full defense to the case as made by the libel. When the cause was opened at the hearing, upon the reading of the answer by the proctor for the claimants, the court was impressed by these objections to it, and frankly stated them to the counsel, and also the legal effect resulting therefrom, as the answer then was. No request, however, was made for leave to change or amend the answer, and the cause was allowed to proceed to hearing and argument upon the pleadings as they were originally presented, and upon these pleadings the court is of opinion, that the allegations of the libel present a valid, legal cause of action against the Starlight, to which no satisfactory defense is found in the answer of the claimants.

The cause was not staid on this objection, but the hearing proceeded. Four of the crew of the Thomas Fitch and two from the Starlight were examined in court. The depositions of three of the Starlight's crew had been previously taken, and the case was fully heard upon its merits. The court has thus been fully advised of the defense intended to be made, and of the evidence in its support. The claimants insist, that previous to the collision, the Starlight was thrown into the wind for the purpose of taking in the flying-jib and reefing the mainsail, and at the time of the collision, was head to the wind without headway. To this pretension, two answers may be made, either of which is satisfactory.

First: Under the circumstances such a movement was imprudent and should not have taken place.

The libel avers, that the Thomas Fitch had her lights burning, and this is not denied in the answer. From the testimony of nearly all on board the Starlight, it is clearly proved that they saw the lights of the Thomas Fitch at a very considerable distance. No objection is made to the character of these

lights, or that they were not in compliance with the regulations prescribed by congress; and they require "that the lights shall be of such a character, as to be visible on a dark night with a clear atmosphere, at a distance of at least two miles." Such was the night in question, and the lights of the Thomas Fitch should have been seen at about that distance. Why were they not sooner seen from the Starlight? It is stated by a number of the witnesses from her, that before her flying-jib was hauled down and furled, they looked about to discover if any vessels were in sight, and none were visible. Are these statements as to their examination to be depended upon? The court cannot rely upon them, as it is not disputed that the Thomas Fitch was then within less than a mile of the Starlight, and it being conceded that her lights could be seen at the distance of two miles, a competent, attentive lookout must necessarily have perceived the lights of the Thomas Fitch at the distance she then was.

The lights were not seen by reason of an insufficient lookout. If they had been seen, and the vessel discovered coming towards the Starlight close-hauled on the starboard tack, it was the duty of the Starlight, for the time being, to hold her course, and not to throw herself into the wind and become unmanageable. Before such a proceeding is adopted, all proper precautions should be observed, and a careful survey had of the sea, to discover whether other vessels may be exposed to danger by such movements; and she is to be held accountable, if by want of proper precautions, a collision ensued with a vessel coming down upon her, entitled to the right of way.

Second: The burden is upon the claimant to establish the condition of the Starlight and satisfy the court that she was in the wind without motion or control, and this he fails to do. That the original course of the Starlight was N. E. by N. is charged in the libel and not denied in the answer, and is therefore to be taken as truly stated. This was within eight points of the wind, so that she was not then close-hauled, but had the wind two points free. If the master concluded to furl his flying-jib, it is probable that he would let her come up somewhat nearer the wind, so that the sail would shiver and be more easily furled; but it would not be necessary for that purpose to bring her head into the wind; and while some of the witnesses from the Starlight do swear that she was in that position, the master gives her course as more than four points off. The Thomas Fitch was first discovered by the man at the wheel, and not by the lookout or any one forward, and at that time the furling of the flying jib was not completed. The seamen afterwards came aft to assist in reefing the mainsail, but nothing was done to accomplish that purpose; the peak, even, had not been lowered, but everything aft was in proper position for resuming her course; the crew were watching the movements of the Thomas Fitch, and the court has no doubt, that the Starlight might with perfect ease have been put upon her original course. Most of her crew do testify that her sails at this time were all shivering in the wind, without headway on the vessel, and that she could not have resumed her course; but the court is not satisfied with this statement, for the following reasons: 1st. Preparations for reefing the mainsail had not progressed as far as was necessary to throw her into the wind; up to that time all that had been done, was to furl the flying jib. 2d. The court is of opinion, that the position of the two vessels at the time of collision demonstrates that the Starlight was then under some headway, though probably, not to the extent claimed by the libellant. The master and mate of the Starlight testified at the hearing, that the Thomas Fitch ran into the Starlight striking with her jib-boom the Starlight's jib-boom, so that it was broken off at the cap, it being a stick of fourteen inches diameter, and that at the same time her bobstays were carried away with it, and the Thomas Fitch swung alongside to the leeward of the Starlight. Neither of these officers were forward at the moment of the collision. Two of the crew of the Starlight in their depositions, which were taken before the hearing, give us a very different version of the way the two vessels came in contact. They were aft at the time, but they testify that when they got forward, they found the bow-sprit of the Starlight ranging diagonally across the bow of the Thomas Fitch, between her foremast and jib-stay, with the jib-boom of the Starlight broken and hanging down. Mulford, another of the Starlight's crew, states in his deposition, that "when the vessels came together the head rigging of the Thomas Fitch carried our jib-boom away." The testimony of all who were examined from the Thomas Fitch sustains the version of the two hands from the Starlight, that this vessel struck the Thomas Fitch forward, and the bowsprit of the Starlight was found just forward of the foremast of the Thomas Fitch, with the broken jib-boom attached thereto; that when the two vessels came together, the shock was so violent that two of the crew of the Thomas Fitch were thrown down; that the Starlight's jib-boom was probably broken by striking the foremast of the Thomas Fitch, and that neither the jib-boom or any of the head gear of the Thomas Fitch were broken or displaced. If the collision did thus occur, as claimed in behalf of the Thomas Fitch, and as the court is inclined to believe was the case, it is certain, that the Starlight was not dead in the water, but was under considerable headway at the time.

The answer also sustains this view, as it does not claim that the Starlight was at the time up in the wind, motionless and unman-

ageable, while it does assert, that the flying jib had been furled, and that they were intending to reef the mainsail; it does not contain the other averments so very important to be presented as grounds of defense. The omission cannot be deemed to have been accidental, but from the failure to make any amendment must be considered as having been designedly and intentionally so made, in order that the answer might be verified by the oath of the master. This answer was filed some time before the hearing, and must be taken as a correct statement of the condition of things as the master then understood them. The subsequent attempt to change it by testimony can only be ascribed to the necessities of the case as they were developed by the evidence for the libellant.

The court, therefore, cannot but conclude that the Starlight was in a condition to have avoided the collision with reasonable care and seamanship.

It is said there was negligence on the part of the Thomas Fitch in not discovering the lights of the Starlight; on this question there is a most serious and direct conflict of testimony; all the witnesses from the Thomas Fitch swearing, without qualification, that the Starlight had no lights either before the collision or after they went on board of her. This statement is as unqualifiedly denied by five witnesses from the Starlight, every one of them swearing that the Starlight, at the time, did have the proper lights burning brightly. Three of the Starlight's crew were not produced before the court, but their testimony was taken by deposition; the court therefore had no opportunity from their appearance, of forming an opinion as to their fairness, credibility, or integrity. The two seamen from the Thomas Fitch, who were examined in court, testified apparently with great fairness, impartiality, and intelligence, and there was nothing in the appearance of either of them, while upon the stand, to cause the court to distrust their statements. Notwithstanding the favorable impression produced upon the mind of the court by these two men, as the number from the Starlight exceeds by one that from the Thomas Fitch, and they are presumed to have better means of knowledge of what took place on board their own vessel, and they have frankly admitted seeing the lights of the Thomas Fitch, the court, though not without great hesitation, is inclined to the opinion, that the balance of the testimony rather preponderates in favor of the Starlight having at the time had the proper lights, and that through the negligence of the lookout of the Thomas Fitch, the Starlight was not sooner discovered by her.

Did this neglect to discover the lights of the Starlight contribute to the collision? What should the Thomas Fitch have done, if the Starlight had been seen by her in due season? The law required her to hold her course when meeting a vessel on the port tack. The language of the 18th article of the sailing rules being as follows: "Where by the above rules, one of the ships is to keep out of the way, the other shall keep her course subject to the qualifications contained in the following article." That article requires due regard to all dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a departure from the rules necessary in order to avoid immediate danger, and provides that nothing in the rules shall exonerate any ship from the consequence of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

The general rule being, that the Thomas Fitch must hold her course, by the subsequent regulations, was she required to change it? These regulations are verbatim the same as those of Great Britain; and in speaking of them Dr. Lushington in The Orinoco, Holt, Rule of Road, 101, said: "According to my view of that section, it is an exception of persons, who would otherwise be under obligations to obey the previous sections. In omitting so to do, viz: the effect of it would be this; though they were directed to keep their course, yet if there was imminent danger, they would be justified in not keeping their course, provided they had a chance thereby of avoiding the certainty of a collision. But it does not appear to me this is a directory section at all, that tells parties they are to do this or that, or anything else; but they are released from the severe obligation of complying with all the terms of the previous sections, and they are released from that obligation by circumstances which would render obedience to them conducive to peril, while by deviation, they might escape from that peril."

My impression is, that the admiralty courts in America have not generally adopted this view of the article, but have rather held that every vessel is bound to take reasonable precaution, if possible, to avoid a collision; be that as it may, it is certain that the Thomas Fitch was bound to hold her course till danger was imminent; and even then, she had a right to presume that the Starlight would keep out of her way.

It is of the highest importance, that the observance of these regulations should be obligatory as far as possible, and special circumstances requiring a departure can only be found in cases of imminent danger. A vessel close-hauled, on a starboard tack, has a right to hold her course with confidence that other vessels will not approach so near as to endanger her safety; and as is said in Lown. Col. 69: "It is not easy to see how under ordinary circumstances the want of a lookout on board of a vessel close-hauled can contribute to the collision."

The court is of opinion that if the Starlight had been sooner discovered by the Thomas Fitch, the latter vessel ought still to have held her course, and should not have made

any change, and that the negligence of her lookout did not contribute to the collision.

Decree for libellant.

Mr. Wm. L. Putnam, appointed assessor.

Case No. 13,311.

STARLING v. HAWKS.

[5 McLean, 318.] [1]

Circuit Court, D. Ohio. Oct. Term, 1851.

COURTS—FEDERAL JURISDICTION—REAL PARTIES.

1. Where from the facts of the case a conveyance of land appears to be only colorable, with the view to give jurisdiction to the courts of the United States, the writ will be dismissed, on motion or on a plea.

[Cited in Blackburn v. Selma, M. & M. R. Co., Case No. 1,467.]

2. If the suit is to be prosecuted under the direction of the grantor, and at his expense, and where he has the option within a stipulated time to take back the land, on returning the bond; and where a similar right is given to the grantee, it is sufficient to show that the object of the conveyance was, to give jurisdiction to the circuit court of the United States, and for the benefit of the grantor.

[This was an action by Lyne Starling against J. Hawks. Heard on motion to dismiss.]

Mr. Backus, for plaintiff.

Swan & Andrews, for defendants.

McLEAN, Circuit Justice. A motion is made to dismiss this cause for want of jurisdiction, on the ground that the land claimed, was conveyed to the lessor of the plaintiff by Sullivant, to give jurisdiction to this court to prosecute a suit for the benefit of the grantor.

Mr. Backus stated, as counsel, which was admitted by the other party, that there were many cases involving the title to land to a large amount, pending in Champaign county. That from the trial of one of them he, as counsel, became convinced, from the local interest felt, and consequent influence on the juries, a fair trial could not be had in that county; and that he advised the conveyance made by Mr. Starling to the lessor of the plaintiff, for the consideration of twenty thousand dollars, in order that suits might be prosecuted to settle the title at the expense of the grantor. And it was agreed that if, at the end of five years, the grantee should prefer, he had the privilege to re-convey the land; that if sales could be made, the proceeds should be paid over to the grantor, in payment for the lands. And that Sullivant executed deeds of general warranty for the lands sold.

The following correspondence took place in making the arrangement: In a letter dated 5th of August, 1848, after complaining of the influence brought to bear on the jury, on one of the trials, for a part of the land, which caused a verdict against Sullivant, Mr. Backus states: "Sullivant and myself now propose to sell the tracts to you. Our title you are acquainted with, and as to the value of the land you are as able to judge as we. It has been estimated at various amounts from ten to sixty thousand dollars. We will sell it to you for twenty thousand dollars, payable in five years, with interest, upon the condition, that is, if at the expiration of five years, you should make default in the payment of the purchase money, the land shall be re-conveyed, and your note given up. In other words, the condition shall not operate as a mortgage in favor of either party; and if at the end of the time, you should not choose, or it should be inconvenient to make the payment, and take the land, we cannot compel you to do so. But upon re-conveyance we shall be compelled to release you from the payment of the purchase money. We, on the other side, should you be allowed to force us to look to a sale of the land for the purchase money, or to yourself upon your note, being as you are a citizen of New York, you would be more favorably situated, so far as regards litigation, than we, because you can bring your suits in the United States courts, and be beyond the local prejudice and feelings of the people of the county where the land lies." Another letter was dated 22d Aug., 1848, in which Mr. Starling says: "I am pleased with your proposition to sell me the Lee lands in Champaign, and I accept your proposition without hesitation, and enclose you my note for the purchase money. The legal title is in William; let him execute the proper conveyances, and deliver them to you. Do you place them on record, and prosecute the suits for the recovery diligently in the manner you shall deem conducive to my interest." On the 3d September, 1851, Mr. Starling writes: "I promptly accepted your offer to purchase the Lee lands upon the terms you proposed. I intended to have enclosed you a note for the purchase money, but believe I neglected to do it, and I now enclose it, dated August 22d, which is about the time I wrote to you."

Under the above circumstances the conveyance was executed, and suits, for the recovery of the lands, were commenced. A conveyance of land may be made with the express view of giving jurisdiction to the courts to the United States, and if it be an absolute, bona fide conveyance, it is good. This is the right of every citizen. A person may change his citizenship for this purpose; and the motive with which the conveyance was executed, or the change of citizenship was made, though avowed, if both were done in good faith, it constitutes no objection to the exercise of jurisdiction. In a conveyance of land for this purpose, the only question is, is it an absolute conveyance without conditions, that it shall enure to the benefit of the grantor. If it be colorable only, it is a fraud on the law, and jurisdiction in the federal court is not sustainable. The deed is absolute on its face. The condition, whether expressed in the deed or out of it, if inoperative as to a transfer of

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

jurisdiction, would not destroy the validity of the deed, only for the purpose of giving jurisdiction to this court.

The contract stipulates that the agreement should not operate as a mortgage, but suppose a mortgage on the land had been given to secure the payment of the consideration. The conveyance would have been absolute, and the jurisdiction undoubted. But this is not the character of the conveyance. The grantor had the option to rescind the contract at the end of five years. He was not bound to do so, but it was a right secured to him. This shows the nature of the transaction, and the purpose for which it was entered into. In addition to this the suits were to be prosecuted at the expense of the grantor, which authorizes the inference that the suits were to be brought for his benefit. Starling was not obliged to take the land, but had the right to relinquish it, on which the grantor was bound to deliver up his obligation. This shows the conveyance was not intended to be absolute. There is no immorality in this. It was simply a device and a contrivance to change the jurisdiction, with a view of obtaining a trial free from local prejudices. This, indeed, is a laudable motive, and there can be no objection to it, except that the law, and the policy of the law, are against it. The case of McDonald v. Smally, 1 Pet. [26 U. S.] 623, was different from this, in several important particulars. The title was absolute upon its face, and an adequate consideration was expressed in the deed. There was no condition for a re-conveyance, no promise to aid in the prosecution of the suit, nor that the grantor would pay the expense. Upon the whole, we are satisfied, from the facts of this case, that the conveyance was colorable only, and with the view to give jurisdiction to this court; the suit is, therefore, dismissed.

Case No. 13,312.

The STAR OF HOPE.

[1 Hask. 36.] [1]

District Court, D. Maine. Dec., 1866.[2]

CHARTER PARTY — TENDERING VESSEL — DELAY — WHEN EXCUSABLE — EXPRESS AND IMPLIED WARRANTIES — SUSPENDED CONTRACT — SEAWORTHINESS.

1. A charter-party, to commence when vessel is ready to receive cargo at place of lading and notice thereof is given charterers, requires the ship-owner to use due diligence in dispatching the vessel and prosecuting the voyage to the port of lading.

2. Inevitable accident or perils of the sea, that delay the vessel in reaching the port of lading beyond the usual term of passage, do not relieve the charterers from their contract, if the vessel be tendered in a reasonable time.

3. An implied warranty, or condition precedent, that the vessel is sea-worthy at the date of the charter, does not attach to such contract.

4. Disability to perform implied covenants, without default on his part, will excuse a party. Not so where the covenants are express.

5. A contract may be suspended and not dissolved.

In admiralty. Libel by the owners of the Star of Hope in personam against the charterers of that vessel for freight due upon a charter-party, stipulating that the charter shall commence when the vessel is ready to receive cargo at the place of loading and notice thereof is given to the charterers. The respondents answer, that the delay of the vessel was so great in reporting for cargo, that they were relieved from the charter-party, and that the cargo was carried under a subsequent agreement at a stipulated freight that has been fully paid.

Nathan Cleaves and Joseph Howard, for libellants.

William L. Putnam and George Evans, for respondents.

FOX, District Judge. This charter-party was executed at Boston, on Thursday, the 27th of April, 1865, and recites that the vessel, then in Boston, was chartered for a voyage from Farmingdale, in Maine, to Fort Gaines, or Mobile, Ala., the owners covenanting that the brig should be kept tight, staunch and strong during said voyage, and the charterers, that they would furnish cargo sufficient for the loading,—lumber on deck, ice in the hold, and would pay the gross sum of $4,250 freight for the voyage as stipulated. Lay-days were agreed upon and demurrage provided for. The contract also stipulated that "this charter shall commence when the vessel is ready to receive cargo at the place of loading, and notice given to the party of the second part, the dangers of the seas and navigation of every nature and kind mutually excepted;" these two stipulations being contained in the printed portion of the charter. The vessel sailed from Boston on Tuesday, May 1, and did not arrive at Farmingdale until the 24th of May.

The respondents contend, that by reason of this delay they were exonerated from all liability under the charter-party, that the usual time for this vessel to have made the passage to Farmingdale would not have exceeded five or six days, and that it was in the nature of an implied warranty or condition precedent that the vessel should have sailed forthwith from Boston, and should be at Farmingdale ready for her cargo within the time such vessels usually make the voyage, and that as she did not sail forthwith from Boston, and did not arrive seasonably, they are thereby discharged from their obligation to receive and load the vessel when she did arrive and report herself in readiness.

The charter-party stipulates "that the charter shall commence when the vessel is ready to receive cargo and notice thereof given to the charterers." If this language is to be taken strictly and literally, I do not perceive

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

[2] [Affirmed in Case No. 4,710.]

that there was any contract in force between the parties until the vessel arrived and reported at Farmingdale; and yet it would hardly be contended, in case this vessel had been sent on a different voyage by her owners, and the voyage contemplated by the charter-party entirely defeated, never commenced, that the owners would not have been accountable to the charterers for the damages sustained by them, and that they would have been justified in saying, the contract did not have any force or effect until the brig arrived at Farmingdale, and if it was for our interest to send her elsewhere, we had a right so to do without our incurring any liability to the other party by so doing.

In Lowber v. Bangs, 2 Wall. [69 U. S.] 728, which was an action for breach of a charter-party, Judge Swayne in delivering the opinion of the majority of the supreme court lays down the following rules, viz.: "That the construction to be put upon contracts of this sort depends upon the intention of the parties, to be gathered from the language of the individual instrument. All mercantile contracts ought to be construed according to the plain meaning to men of sense and understanding, and not according to forced and refined constructions which are intelligible only to lawyers, and scarcely to them. Contracts, when their meaning is not clear, are to be construed in the light of the circumstances surrounding the parties when they are made, and the practical interpretation which they by their conduct have given to the provisions in controversy."

Guided by these rules, there can be no doubt, although there is no express agreement in this instrument that the vessel should proceed to Farmingdale, and although it is expressly stated "that the charter shall commence when the vessel is reported ready to receive cargo at place of lading," that the owners nevertheless were under an obligation, growing out of this charter-party, that their vessel should sail for Farmingdale, and that the respondents should furnish her a cargo, and that this stipulation, as to the commencement of the charter, must be limited in its application to the terms and provisions therein expressed, which would naturally take effect and operate after the vessel's arrival at Farmingdale, and she had commenced loading under her charter.

No particular time being fixed by the agreement, either for the vessel's sailing from Boston or her arrival at Farmingdale, the contract in reference to these points being implied from the residue of the charter-party, what is the contract that the law implies these parties entered into? Is it, that the vessel, at the moment of the signing of the charter, is ready for sea and will sail forthwith, and will arrive within the usual time for such a voyage? Or is it, that the owners will use all diligence on their part, and as far forth as is in their power will expedite the purposes of the voyage, making no unreasonable delay in its commencement or deviation after the voyage has once begun? Do the owners become insurers of the vessel's arrival within the usual time, and of her readiness to receive her cargo? Or are they excused, if by the perils of the sea the vessel is delayed and the voyage protracted, if she afterwards completes her passage and offers to receive and carry forward the cargo to the port of destination; is there an implied warranty or condition precedent, as to the time of the vessel's being ready to receive her cargo, when nothing of the kind is so expressed in the contract? If the owners had expressly stipulated that the vessel should be at Farmingdale on a day certain and report for cargo, no one will deny their power to have made such an agreement, or that the courts would hold them to its very letter, however unreasonable. But there is a clear distinction between express and implied obligations; as is well said, there is a distinction recognized by the courts between covenants implied by operation of law, and express covenants; the latter are taken more strictly, and for the reason, that when a party, by his own contract creates a duty or charge upon himself, he is bound to make it good, and is not excused, although prevented by inevitable necessity, because it is said he might have provided against it by his contract. On this ground it has been held, that if a ship be warranted to sail on or before a particular day, but is prevented from sailing on that day by an embargo, the warranty is not complied with. In the case of covenants implied by operation of law, if the party is disabled to perform without any default on his part, and has no remedy over, the law will excuse him. Fland. Shipp. 240, note. Upon general principles, in all contracts by charter-party, when there is no express agreement as to time, it is an implied stipulation that there should be no unreasonable or unusual delay in commencing the voyage. If the clause in this charter-party relating to the commencement of the charter had been omitted, if the vessel sailed seasonably on the voyage to Farmingdale, and was delayed by tempestuous weather, or driven out of her course to Bermuda, the authorities are very clear that the respondents would not thereby have been excused from loading the vessel on her arrival at Farmingdale, the owners being without fault. The owner must repair his vessel as soon as he reasonably can, and the charterers must await her readiness. "The carrier is not responsible for delay on the voyage on account of boisterous weather, adverse winds or low tides, or the like. These are dangers and accidents of navigation, over which he has no control, and against which his contract contains no warranty." Fland. Shipp. § 219.

In Clark v. Massachusetts, F. & M. Ins. Co., 2 Pick. 104, where a vessel, bound from Richmond, Va., to Nice, with a cargo of tobacco, was compelled to go into Kennebunk for repairs that detained her for two months,

it was decided that the merchant was bound to wait that time to enable the master to make his repairs; that the contract was only suspended by reason of the disaster which befell the ship, and that the master should have repaired and proceeded on his voyage; that neither party was at liberty to abandon the contract without the consent of the other, or without legal cause, which was not procured or caused by the fault of the party who relied upon it. It was in evidence in that case, that if the vessel had not met with the disaster, and had made her passage to Nice in the usual time, that the tobacco would have reached a market in season for the fall concours, there being two concours a year only for sale of tobacco for consumption in France, and that the object of the owners in the shipment was to get their tobacco to the French market at the time of the fall concours, and that this object would have been defeated by the delay which had been occasioned by the repair of the vessel, but the court held that disappointment of arrival could not control or affect the decision, that there was no stipulation that the voyage should be performed in any given time, and that the disaster was only a temporary suspension which did not discharge the parties from their contract.

This distinction between suspension and dissolution of the contract has been recognized and enforced in a great number of cases, some of them of very great hardship. In one case, where a ship was chartered and afterwards detained by an embargo for two years, it was decided that the contract remained in full force, and that the parties were bound to complete it, and the ship's owner was held responsible in damages for not going the voyage at the termination of the embargo. Hadley v. Clarke, 8 Term R. 259.

Lord Kenyon in his opinion there says: "If this contract were put an end to, it might equally be said, that interruptions to a voyage from other causes would also have put an end to it; e. g., a ship being driven out of her course, and yet that never was pretended. Instances of such interruption frequently occur in voyages from the northwest part of this kingdom to Ireland; sometimes ships are driven by the violence of the winds to ports in Denmark, where they have been obliged to winter. * * * I am of the opinion, however hard it may be to the defendants, the plaintiff is entitled to recover." So in The Nathl. Hooper [Case No. 10,032], Judge Story remarks: "Suppose a ship meets with a calamity in the course of her voyage, and is compelled to put into a port to repair, and there the cargo is required to be unlivered in order to make the repairs, or to insure its safety, or ascertain and repair the damage done to it. Would such an unlivery dissolve the contract for the voyage? Certainly not."

The reports abound with cases of this description, and no benefit can result from further citation from them. The principle is so well settled, that even when the vessel is chartered by the month, and is detained or delayed for repairs after the voyage commences, the charterer is obliged to pay for the time she is thus delayed. This principle is so well established, that I do not understand it as questioned by the learned counsel for respondent; but it is contended that, admitting such to be the law when the vessel meets with disasters in the prosecution of the voyage, it is not applicable to the present case, as the voyage stipulated for in the charter had not yet commenced. It is very certain that the vessel was bound to proceed from Boston to Farmingdale under implied conditions, as the charter party is silent on this subject; and it is difficult for me to find satisfactory reasons why any other conditions should arise or be implied, in relation to this portion of her undertaking, than the law would imply in case the charter had merely said, "vessel to proceed from Boston to Farmingdale," or the charter had commenced at Boston, and had provided for the vessel going in ballast from Boston to Farmingdale and load, and in these cases, if the vessel had been delayed by storms and needed repair, and so was compelled to refit, and delay was occasioned thereby, neither party would have been exonerated from the performance of the contract, if the vessel was seasonably repaired and arrived at place of loading.

In Touteng v. Hubbard, 3 Bos. & P. 291, the vessel was chartered for a voyage to St. Michaels for fruit from London, and being driven back to England by the weather, she was there detained by an embargo. Lord Alvanley says: "The construction of this charter is this, the captain agrees to go to St. Michaels, restraint of princes excepted, and the merchant engages to employ him and furnish the ship with a cargo. * * * The merchant would have been under the necessity of furnishing the ship with a cargo if she had arrived at St. Michaels as soon as she conveniently might after the embargo was taken off, although by arriving after the fruit season was over, the object of the voyage might be defeated. * * * The object of the voyage might equally have been defeated by the act of God as by the act of the state, as if the ship had been weather-bound until the fruit season was over, and yet in that case the merchant would have been compelled to fulfill his contract."

The counsel for respondents read the case of McAndrew v. Adams, 1 Bing. N. C., 29, and an examination of the case and of the opinions of the court I think will sustain my construction of the present contract.

Tindal, C. J., says: "The broad question is, whether upon the construction of the charter-party," which was to St. Michaels for fruit, "there has been unnecessary delay in commencing the voyage to St. Michaels.

Upon general principles in all contracts by charter-party, when there is no express agreement as to time, it is an implied stipulation that there shall be no unreasonable or unusual delay in commencing the voyage, and after it has been commenced no deviation; and the question here is, whether the defendant sailed within a reasonable time according to the terms of his charter-party. All the authorities concur in stating that the voyage must be commenced in a reasonable time. * * * Now inasmuch as the parties have stipulated that the lay-days shall commence on the first of December, it may be inferred that they contemplated the voyage to St. Michaels should terminate by that day. If indeed, by an accident or unforeseen cause which should excuse the master, the vessel should arrive later, the charterer would have no just cause of action." Thus clearly showing, that in the opinion of the court, when no time was fixed for the vessel's arrival at her post, if delayed by accident or perils of the sea, the charterer was not relieved from performance of his contract.

By an express contract for the vessel to proceed from Boston to Farmingdale, the risk of delay occasioned by perils of navigation must have been borne by the charterers. Why should there be any different rule, when the vessel is sailing under an implied instead of an express engagement. I cannot believe that the law will, under such circumstances, imply a liability which would not arise out of an express undertaking to perform the same services. Upon this part of the case, the remarks of Judge Ware, are quite appropriate. "It is usual," he says, "in charter-parties of affreightment, as well as in bills of lading, to insert a clause specially exempting the master and owners from losses occasioned by the dangers of the sea. This instrument contains no such exceptions, but this, as was justly contended in the argument for the respondents, is an exception which the law itself silently supplies, without its being formally expressed. It is a general rule of law, founded upon the plainest and most obvious principles of natural justice, that no man shall be held responsible for fortuitous events and accidents of major force, such as human sagacity cannot foresee, nor human providence provide against, unless he expressly agrees to take these risks upon himself. The liabilities of the owners in this case are precisely the same, and no more extensive than they would have been, if the usual exception of the dangers of the seas had been inserted in the charter-party." The Casco [Case No. 2,486.]

I am therefore of opinion, that the ship-owners in this case are under the same liabilities as to delays and risks from dangers of the sea, as they would have been under a charter commencing at Boston, and binding them to send their vessel to Farmingdale for a cargo. In that case, they would not assume the risks and delays from perils of the sea, and they did not under the present agreement.

The learned counsel for the respondents have called my attention to the case of Lowber v. Bangs, supra. In that case, a majority of the supreme court held that an express stipulation in a charter-party, that a vessel should proceed from one foreign port to another in a distant part of the globe "with all possible dispatch," was a warranty and condition precedent. The two judges from the great commercial circuits did not concur in this construction of the charter-party. I am bound to yield to the opinion of the majority, and whenever the precise question involved in Lowber v. Bangs is brought before me, it will be decided in accordance with that decision; but in the present case I do not perceive its applicability. I do not find any express stipulation in this charter-party touching the point in controversy, and sitting in admiralty, I am not disposed to interpolate any condition precedent into the obligations of the parties in this cause. If the party desired any such obligations, he should have incorporated them in the very words of his contract, and not have left it to me to find them there only by inference.

It is said, the vessel was not sea-worthy, either in Boston or on her passage from that place, on account of an auger hole in her bottom, and that there is always an implied warranty of the owners that the ship is sea-worthy. In this charter-party the owners expressly stipulate that on the voyage therein described, viz., from Farmingdale to Fort Gaines, the vessel shall be tight, staunch, &c., but nothing is said about her condition in Boston and during the intermediate voyage. Let us suppose that this vessel had sailed from Boston short-handed, or without a full supply of sails and provisions for the entire voyage, but that her crew and supplies were awaiting her at Farmingdale, and no delay whatever was caused by the want of them during the passage, and the vessel, properly manned and supplied, should seasonably report to the charterers for cargo, would they have been justified in refusing to load her, for the reason that she was short-manned, or short of supplies down from Boston? I think under such circumstances they would have been bound to comply with their contract. She is sea-worthy when she is in readiness to receive her cargo, and no delay has been occasioned by her want of sea-worthiness, and no injury has been sustained therefrom.

The conclusion to which I have arrived is, that the vessel being represented by the charter-party as being then in Boston, the respondents had a right to expect that she would proceed from that port to Farmingdale, without any unreasonable and unusual delay; that if by the perils of the sea the vessel on her passage was injured and not

unreasonably detained for the repairs, but the run was made with due diligence, and the vessel with proper dispatch proceeded to Farmingdale and offered to receive her cargo and complete the contract on her part, the respondents on their part were still under obligations to comply with it. I must then inquire whether there was any unreasonable delay at Boston.

The vessel arrived in April from a foreign voyage, and delivered her cargo in good order. She was taken on the railway for repairs and painting. She was metalled and left the ways on the 27th, the day of the execution of the charter-party. The precise time at which the charter was signed does not appear, but Friday was necessarily spent in procuring her crew and getting her stores on board, and on Saturday she was ready to sail. The wind was fair, the vessel laid with single fasts at the end of Long Wharf, and would have been off in twenty minutes, as one of the witnesses states, but she was then run into by a tug with another vessel in tow, and the jib boom of the Star of Hope was carried away in the collision. This of course detained her, and she was not ready until Tuesday of the next week, when she proceeded under tow to sea, the rigging of the jib boom being set up by the men as she went out of the harbor. I am of opinion that due diligence was used in repairing the jib boom, and that the damage occurred under such circumstances as constitute a disaster from the dangers of the sea, so that the owners are not chargeable for the delay.

The pilot, George Williams, had the general charge of the vessel, and the evidence is that he was an experienced and licensed pilot, qualified for his position. The vessel left the wharf about three o'clock Tuesday afternoon. Her pumps were tried that evening between Boston and Thatcher's Island, without the least indication of any leak. Her hatches had been off a considerable portion of the time after she left the ways. Witnesses say they were frequently in the hold, and all agree that the stores were perfectly dry. Nothing unusual occurred on Tuesday night, but on Wednesday morning the wind increased, being about N. N. E.; the pilot from time to time took in his light sails; about eleven the wind had so increased that it was a severe gale, and for five hours continued very violent, causing a heavy sea. Such was the force of the wind that the topmast-staysail was blown to pieces, although it had only been nine months in use, and was just out of the sail loft. In the afternoon of Wednesday, the pilot states "that the vessel then lying to was struck under the luff of the port bow by a very heavy sea, so violent that he was nearly thrown over, and he supposed at the moment that they must have run into a wreck; that previous to this time the vessel was perfectly tight, no water to be seen in the hold; but immediately afterwards they found from one to two feet of water in the hold." The leak increased, and all hands were put to the pumps and kept constantly at the brakes excepting when their assistance was necessary in working the vessel. The wind being ahead, the captain and pilot, after consulting, deemed it most prudent to bear away for Boston for repairs. This they attempted, but before reaching Thatcher's Island the wind came round, and finding they could reach the Kennebec river, they changed their course, and arrived at the river on Friday night and went up to Bath on Saturday.

On Thursday and Friday, the pumps were kept going a greater portion of the time. The wind abated and the sea fell on Thursday, and the leak decreased from 400 or 500 strokes per hour to about 200 which she was making when she got into the pier.

This vessel was fitted with a centre-board about twenty-four feet in length with a fall of about twelve feet. At the time she was struck by the heavy sea, the centre-board was down about four feet. The pilot says, "Previous to the sea striking us it had always worked well, but after that it was out of order and we could not make it work up or down."

A survey was held on the vessel at Bath, and she was ordered to Portland. There she was taken on the ways and a new survey called. On examination an auger hole 1⅛ inches in diameter was found in the bottom on the plank next to her garboard. The hole was bored through between the timbers, and was filled with chips and dirt wedged in quite tight, and apparently lodged there from the inside of the vessel; on the outside there was a thin shell of wood left by the auger. There was a little water weeping from this hole, and about the centre-board-box there were also some indications of leaking, but not to any great extent. This hole was stopped up, and the survey having recommended the centre-board-box to be closed, it was done and a shoe put on the keel. The vessel was put in good order at an expense of about $400, only $12 of which was for the calker's bill, and on the 17th of May she sailed for Farmingdale, where she arrived and claimed a cargo under the charter-party on the 24th.

I am satisfied the auger hole was in the vessel at the time she left Boston, and that the explanation of Thomas Knight well accounts for it. He gives it as his opinion, from its position and appearance, that it was made when the vessel was on the ways in Boston, to let out any water that might be in her, and that by the flood of water the chips and other substances were loaded and packed within the hole, being detained there by the external layer of the wood, not wholly cut away by the auger. It is clear from all the evidence that the vessel did not take the bottom from the time she left the railway in Boston till she was taken out in Portland. All the circumstances tend to show that the leak which occa-

sioned the delay was not owing to this hole, but that on the contrary it was filled and so stopped that but little if any water entered by it. If it had been clear, the vessel must have sunk before reaching Bath, as all the witnesses agree. The hole was tight in Boston. She laid there from Thursday till Tuesday, no water visible within her, and none indicated by the pumps there, or on the first day out. Soon after she was struck by the violent sea, she leaked very badly, so that she had from one to two feet of water in her hold, and for a time she continued thus to leak, the water diminishing as the sea went down; her centre-board was strained, so that it would not work, and as is well understood, vessels of this construction are liable to get out of order around the centre-board-box, and it is frequently difficult to reach and remedy the trouble. The board would act as a lever in a heavy sea, and might if struck violently strain open the seams of the box, which would remain open as long as the centre-board was out of place, but might afterwards come together when the strain was removed. I am therefore of opinion, that the necessity for repairs and the delay occasioned thereby must be ascribed to the perils of the sea, and under the circumstances that there was no lack of judgment on the part of the master in going to Bath in the first place instead of Portland. He was not aware of the nature of the injury, and did not know, so far as appears, whether the railway in Portland was in working order, it having been for a long time out of order, and at the time the vessel appeared to be strained in her upper works, which he may have supposed was the principal cause of her difficulty.

The vessel sailed from Portland the 18th, and reported at Farmingdale on the 24th. None of the crew have been examined, and no reason has been shown for this length of time being taken up by the voyage. It certainly was longer than I should have expected, but from all the testimony, I am satisfied the owners were desirous of completing the charter, and on some occasions made, I think, unusual exertions to expedite the purposes of the voyage. I feel justified, taking into consideration the season of the year and the state of the river at that time, together with the locality of Farmingdale, well up the river, in not charging them with unreasonable delay in reaching Farmingdale after the repairs were made.

The vessel reported for loading on the 24th, and the charterers refused to accept her, and so telegraphed to Boston, to which the owners replied insisting on a compliance with the charter-party, and on the 27th respondents telegraphed as follows. "We will load Hope, Fort Gaines and Mobile, at eight, measurement or weight, difference between old and new charter to be open for settlement by lawsuit or arbitration, without prejudicing rights of either party." To which on same day the owners replied, "We accept your proposition; load vessel as per dispatch." The vessel was loaded, and on the 22d of July discharged her cargo in good order at Fort Gaines, and the respondents paid freight thereon at rate of eight dollars per ton. The libel alleges that the cargo was carried under the charter-party. The answer claims it to have been under the new agreement, and that the libel should have been so framed, and that not being so, even if I am of opinion that the charter-party was in force and the respondents not exonerated from their liability, the libel in its present form cannot be sustained. I have felt the force of this objection, and have hesitated whether I should not yield to it. If I did, I should allow an amendment of the libel to meet the objection, as I think the merits are clearly with the libellants, and a court of admiralty is not inclined to discuss a meritorious cause upon mere technicalities, when they can be obviated by an amendment.

I consider the legal effect of the telegrams to amount to this. The respondents claimed they were discharged of their liability, which the owners denied. The vessel was ready for a cargo, and that the voyage might not be lost, she was to carry the cargo forward, the law or arbitration to determine whether the respondents were still bound by the charter; if so bound, the cargo was shipped under it, and they were bound to pay the charter money; if not so bound, the owners were to be entitled only to the eight dollars per ton as stipulated. It would have been more satisfactory if the libel had set forth this supplementary agreement.

It is claimed the purposes of the voyage were frustrated by this delay, and the respondents greatly damaged thereby; but on a careful examination of all the testimony, I am not satisfied that it was so. The cargo destined for the Hope was on government account, and was delivered at Fort Gaines and received by the government official, from the Star of Hope, without as appears, any claim for damages or delay. It is true, the respondents, about the 14th of May, chartered the M. C. Rosevelt and loaded her with ice, intending to send her to Fort Gaines instead of the Hope, but on the arrival of the latter vessel, the destination of the Rosevelt was changed to Pensacola, and it is in evidence from the letter of the respondents that they were in want of a vessel for that port. I think it was no disappointment to them that the destination was changed, but rather in accordance with their wishes. It is said, if the Star of Hope had delivered her cargo in the usual time at Fort Gaines, the respondents would have been able to have shipped another cargo that season to Mobile on which a profit would have been made, but by the delay they were prevented from doing so. This, as a claim for damages, is of so conjectural and remote a character, so dependent on so many contingencies, that I do not think any court would adopt it for an instant. There was nothing to prevent their sending the second cargo if they wished so to do, and there is no proof that they intended

so to do, or that any profit would have arisen therefrom.

On the whole, I am of opinion that the libellants have earned and are entitled to recover the balance due under the charter, $1,258, and interest from August 25, 1865.

Decree for libellants.

[On appeal to the circuit court the above decree was affirmed, with costs. Case No. 4,710.]

Case No. 13,313.

The STAR OF HOPE.

[2 Sawy. 15.][1]

District Court, D. California. May 8, 1871.[2]

SHIPPING—PLACE OF STORAGE—BILL OF LADING—SUPPLEMENTAL AGREEMENT—EVIDENCE.

1. Where goods were received on board a vessel marked "in cabin state-room," and an extra freight was paid in consideration of their being so carried; and the receipts given for the goods specified that they were to be carried in the cabin, but the bill of lading, by an evident mistake, was in the usual form; and the goods were not stowed in the cabin, and sustained damage in consequence; *held*, that the libellant was entitled to recover.

2. That though parol evidence of an agreement that goods shipped under a clean bill of lading should be carried on deck is inadmissible, yet such evidence may be received to show a supplemental agreement for a particular mode of stowage under deck.

3. When such evidence has been taken on commission, the interrogatories of which were settled before the judge without objection, and the testimony was directly responsive to such interrogatories, whether it is not too late, at the hearing, and after publication of the depositions, to object that such evidence is inadmissible. Quere?

In admiralty.

H. & C. McAllisters, for libellants.

H. H. Patterson and H. J. Howe, for claimants.

HOFFMAN, District Judge. The libel in this case is filed to recover damages for injuries to certain bags of nuts and boxes of almonds shipped on board the above vessel, to be delivered at this port. The injury to the goods is admitted, and it is not denied that it was caused by heat and sweat.

The claim of the libellants is founded on an alleged breach of a special contract by which the goods were to be placed in the cabin or cabin state-rooms. The bill of lading is in the usual form. As the goods were stowed under deck, and all proper diligence to prevent sweat by ventilators, removing of hatches in fair weather, etc., etc., was shown to have been exercised on the part of the ship, the libellants, to sustain this action, must show either a notorious and well-established usage of trade, which requires goods of this description to be stowed in the cabin, or a special contract by which the carrier agreed so to stow them. Several witnesses were called to prove the usage contended for, but they failed, in my opinion, to show such an established, well-understood and generally recognized usage, as would justify a court in accepting it as a tacit element of the contract, modifying and controlling what would otherwise be its legal interpretation. It undoubtedly appears to have been the practice for several years, of the few houses in this city which import these goods, to require them to be carried in the cabin. But this is in all cases effected by entering into a special contract; the bills of lading invariably containing a note or memorandum expressing the agreement. This fact alone not merely accounts for the practice, but is inconsistent with the idea of any usage of trade which would bind the ship so to carry the goods in the absence of a special contract, or which would permit her so to do, if that mode of stowage were disadvantageous to the goods. That such a special contract was made, with respect to the goods in question in this case, is established, in my opinion, beyond a doubt.

All the packages were distinctly marked "in cabin state-room," and being so marked were received on board. The freight per foot paid on these goods was forty-five cents, while on goods which were to be stowed under hatches only forty cents were charged.

The agent of the ship-owners, the shipping clerk, and the receiving clerk, all testify that the receipts given for the goods when just delivered, specified that they were to be stowed in the cabin. Those receipts which were delivered up by the shippers on receiving their bills of lading have not been produced. They appear to have been lost or returned to New York since the commission to take testimony at that city has been executed. The secondary evidence of their contents, and the direct testimony of the ship's agents as to the agreement, and understanding of the parties leave no room for doubt as to its nature.

It is objected that this testimony is inadmissible to contradict, or modify, the effect of the bill of lading.

In the case of The Delaware [unreported], it was held by this court, that evidence of a parol agreement, that certain goods shipped under a "clean bill of lading" might be carried on deck, was inadmissible.

The authorities on the point are conflicting, and it is not certain that the judgment of this court will be affirmed.

But, assuming that decision to be correct, it does not necessarily follow that it would be decisive of the question presented by this case at bar.

The duty of the carrier to safely stow under deck goods confided to his care is of paramount obligation. By article 12, lib. 2,

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

[2] [Affirmed by circuit court; case unreported. Decree of circuit court affirmed by supreme court in 17 Wall. (84 U. S.) 651.]

tit. 1, of the Ordonnance de la Marine, masters were expressly forbidden to stow any merchandise on deck, without the consent or order of the shippers. The bill of lading in the usual form has universally been held to import an obligation to carry the goods in the usual manner—that is, under deck. Undoubtedly a well established usage to carry goods on deck, growing out of necessity, as in the case of acids, inflammable oils, and the like, or suggested by convenience, as in the case of lumber vessels, or those engaged in navigation, au petit cabotage (1 Valin, Comm. p. 397), will justify a departure from the rule. But the evidence of such usage does not contradict the bill of lading, nor modify the contract. No mode of stowage is usually specified in the bill. It is, therefore, held to import an obligation to carry in the usual manner, that is, in the manner in which goods of the kind received are usually carried on voyages similar to that contemplated in the contract. Evidence to show what that usage is, merely interprets and fixes the meaning of the bill of lading; it does not contradict or alter its terms.

But it does not necessarily follow that, if the parties have agreed to a special mode of stowage under deck, as that the goods shall be stowed in the hold, on the between decks, in the run, or directly underneath the hatches or the like, that such a supplemental agreement may not be proved by parol. The parties are competent so to contract; nor need their contract be in writing. It does not contradict the terms of the bill of lading. It is a new and independent condition. In the case at bar, the agreement was that the goods were to be carried under deck, but in a particular part of the ship, to wit: in the captain's cabin. It is not like an agreement that the goods shall be carried on deck, where they are necessarily exposed to vastly increased risks, both of direct damage, and of liability to jettison; and where written evidence of the shipper's consent may reasonably be exacted before a forbidden mode of stowage can be deemed to have been agreed on; but it is an additional stipulation, not inconsistent with the terms of the written contract, and intended to secure greater safety to the goods. I am inclined, therefore, to think that parol evidence of a contract, such as that set up in this case, ought to be received. It may moreover be doubted, whether the claimants are now at liberty to raise the objection.

The evidence was obtained under a commission, the interrogatories to which were settled by the judge without objection. The testimony is directly responsive to the interrogatories, and it establishes, beyond controversy, what were the terms of the written receipts given for the goods, when delivered to the ship. If it had been proposed to object that these written receipts, or secondary evidence of their contracts, were not admissible, on the ground that the preliminary writings were merged in the bill of lading, which contains the final contract between the parties, and that no parol evidence could be given of any other contract than that contained in the bill of lading, the objection to interrogatories, designed to elicit such proof, should have been taken before the commission was sent.

But if the conclusions already arrived at be erroneous, the right of the libellants to recover may perhaps be maintained on another ground. It is, I think, evident from all the circumstances of the case, that the words "in captain's cabin," were omitted in the bill of lading by mistake. Independently of the evidence afforded by the marks on the packages, the rate of freight charged, and the testimony of the agents of the ship, as to the shipping receipts, the libellants have shown it to have been their invariable practice for a series of years, to exact bills of lading for goods of this description, containing the words "in cabin," or "in cabin state-room." They produce seventy-one such bills for various shipments received by them since 1858; twenty of which were for goods shipped to them by the consignors of the goods in this case. They have been unable to find a single bill in which those words were omitted. The evidence of mistake is therefore conclusive. That such evidence is admissible was held in Chouteaux v. Leeck, 18 Pa. St. 224

In that case the judge at nisi prius, left it to the jury to say whether certain printed words in the bill of lading had not been left unerased by mistake. And if they so found, they were instructed to treat the instrument as if those words were omitted. This instruction was affirmed by the supreme court on error.

If, in a common law court, it was admissible to reform and correct an instrument, so as to make it conform to the real intention of the parties, a fortiori, it should be done in a court of admiralty, which is largely governed by equitable principles, and is called the "Chancery of the Seas." The Juliana, 2 Dod. 521. It is true that a court of admiralty cannot entertain a libel to reform a contract though clearly a maritime one, nor have they any jurisdiction to enforce contracts leading to maritime contracts, such as a contract to build a ship, to sign a shipping paper, to execute a bottomry bond. But if the contract be an executed maritime contract, the jurisdiction attaches, and the admiralty may then administer relief upon that contract according to equity and good conscience. Andrews v. Essex Fire & Marine Ins. Co. [Case No. 374]. On the whole, I am of opinion, that no technical obstacle exists to a decision of this case according to justice and its obvious merits.

The total value of the goods in this market at the time of delivery, if sound, would have been $2,695.50. They were sold at auction by the libellants after due notice to the

ship. The amount received from the auctioneer was $554. A decree for the difference between these amounts, viz., $2,141.50, must be entered.

[NOTE. On appeal to the circuit court, the above judgment was affirmed. Case unreported. Claimants then appealed to the supreme court, where the decree of the circuit court was affirmed. 17 Wall. (84 U. S.) 651.]

STAR OF HOPE, The (ANNAN v.). See Case No. 405.

STAR OF THE EAST, The. See Case No. 9,223.

Case No. 13,314.

STARR v. HAMILTON et ux.

[1 Deady, 268.][1]

Circuit Court, D. Oregon. June 25, 1867.

HUSBAND AND WIFE—CURTESY—OREGON CONSTITUTION—WIFE'S SEPARATE ESTATE—MARRIAGE—GIFT FROM HUSBAND—DEBTS OF HUSBAND.

1. Prior to February 14, 1859, while Oregon was a territory, the common law being in force therein, the husband by reason of the marriage became seized of a freehold estate in all the lands in which his wife had an estate of inheritance during the coverture, which could be taken in execution by his creditors.

[Cited in Wythe v. Smith, Case No. 18,122; Elliott v. Teal, Id. 4,396; Manning v. Hayden, Id. 9,043; Stubblefield v. Menzies, 11 Fed. 271.]

[Cited in Lemon v. Waterman, 2 Wash. T. 485, 7 Pac. 900.]

2. The constitution of Oregon, which went into effect February 14, 1859, provides (article 15, § 5) that certain property of every married woman "shall not be subject to the debts or contracts of the husband:" *Held*, that this provision had the effect as to third persons at least, to make such property thereafter the wife's separate property.

3. The separate property of a married woman is that of which she has the exclusive control and benefit, and its character as such must be imparted to it by the instrument or power by which the wife acquires the property.

4. Property conveyed to a wife and her heirs by her then husband, by an ordinary deed which contains no terms, from which it appears that it was the intention of the grantor to exclude the husband, as such, from the benefit and control of it, is not, by operation of such deed, her separate property.

5. The constitutional provision aforesaid concerning certain property of married women was not intended to operate retroactively, so as to affect rights already vested in the husband; and by article 18, § 10, of the constitution is prevented from so doing, if it otherwise would.

6. Marriage is not a contract within the purview of the national constitution, but a civil institution or relation, to be regulated and controlled by law, so far as the rights of the parties thereto in the property of each other is concerned; and until these become vested interests the legislative power may regulate the subject from time to time, to suit the wants of society, or the interests of the parties to the relation—therefore the provision aforesaid in relation to the property of married women applies to marriages existing when it went into force, so far as after acquired property is concerned.

7. Money loaned by the wife to her husband in 1857, which came to her by the sale of real property inherited before that time, was, by virtue of the marriage, the property of the husband, and therefore where property was afterwards purchased by the husband and the conveyance therefor taken to the wife for the ostensible purpose of reimbursing the latter, it is a gift from the husband, and not a purchase by the wife.

[Overruled in Dick v. Hamilton, Case No. 3,890.]

8. A gift to the wife from the husband, he acting in good faith and being solvent at the time, is within the provision of the constitution of Oregon (article 15, § 5) concerning the property of married women, and is therefore not "subject to the debts and contracts of her husband."

This was an action [by Addison M. Starr against Alexander Hamilton and Christina E. Hamilton] for the recovery of the possession of real property in the city of Portland, and by the stipulation of the parties, was tried by the court without the intervention of a jury.

The facts of the case are stated in the findings of the court as follows:

I. That the defendants, Alexander Hamilton and Christina Hamilton, were intermarried in the year 1853, at Portland, Oregon, and that the relation of husband and wife has ever since subsisted between such defendants.

II. That on July 1, 1859, the defendant, A. Hamilton, together with certain other persons, made his promissory note to the plaintiff herein, for the sum of one thousand dollars with interest, at the rate of three per centum per month thereon; and that afterwards, on March 21, 1865, in the circuit court for the county of Clackamas, state of Oregon, the plaintiff herein, in a suit against the fendant, A. Hamilton, and the others aforesaid, upon said promissory note, duly recovered a judgment therein against the said defendant, A. Hamilton, for the sum of two thousand five hundred and ninety-nine dollars.

III. That on July 27, 1866, a writ of execution was duly issued out of the clerk's office of the court aforesaid, against the property of the defendant, A. Hamilton, and directed to the sheriff of Multnomah county, state of Oregon; and that in pursuance of the command of said writ, the sheriff aforesaid, did, on July 30, 1866, duly levy on the real property described in the complaint of the plaintiff herein; and that said sheriff did, on September 4, 1866, in pursuance of said levy, duly expose to sale at public auction, the real property aforesaid, at which sale the plaintiff herein became the purchaser thereof.

IV. That on March 26, 1867, the court aforesaid made an order confirming the sale aforesaid in all respects; and that afterwards on June 6, 1867, the sheriff aforesaid in pursuance of the aforesaid order and pro-

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

ceedings, duly executed and delivered to the plaintiff herein, a deed, whereby he conveyed to said plaintiff all the right, title and interest, which the defendant, A. Hamilton, had in and to the real property aforesaid, on September 4, 1865, or at any time afterwards.

V. That prior to the marriage of the defendants as aforesaid, Christina Hamilton, inherited from her mother a piece or parcel of real property, situate in the state of Missouri; and that in July, 1857, she sold and conveyed the same to her brother for the sum of one thousand dollars, receiving from her said brother at the same time the additional sum of two hundred dollars, in payment for the prior use and occupation, by her said brother, of said real property.

VI. That on February 13, 1858, in consideration of the sum of five hundred dollars paid by Christina Hamilton, Daniel H. Lownsdale did, by his deed duly executed and delivered, convey to said Christina Hamilton the real property, described in the complaint of the plaintiff herein as block two hundred and fifty, to have and to hold the same to her and the heirs of herself by the defendant, A. Hamilton forever; and that the said five hundred dollars paid to Daniel H. Lownsdale as the consideration for the conveyance of block two hundred and fifty as aforesaid, was a part of the twelve hundred dollars, paid by the brother of Christina Hamilton as aforesaid.

VII. That on September 5, 1865, in the consideration of the sum of seven hundred dollars paid by Christina Hamilton, Moses H. Young and Francis, his wife, did, by their deed duly executed and delivered, convey to Christina Hamilton, and to her heirs of her body, by her husband, A. Hamilton, the real property described in the complaint of the plaintiff herein as lots three, five and six, block two hundred and fifty-three, to have and to hold to her and her heirs by her then husband to her and their own proper use and benefit and behoof forever, free from all control of her said husband.

VIII. That on August 9, 1864, in consideration of the release to Thomas Robertson, by Christina Hamilton, of her right of dower in blocks two hundred and fifty-one and two hundred and fifty-two, in the town of Portland, state of Oregon, the said Thomas Robertson and Mary, his wife, did, by their deed duly executed and delivered, convey to said Christina Hamilton, and to her heirs of her body, by her said husband, A. Hamilton, the real property described in the complaint of the plaintiff herein, as lot four in block two hundred and fifty-three, to have and to hold to her said heirs as aforesaid, to her and their own separate use, benefit and behoof forever, free from all control of her said husband.

IX. That the defendant, Christina Hamilton, did not receive from any source or person other than her husband, during her marriage with the defendant, A. Hamilton, any money or property other than the sum of twelve hundred dollars as aforesaid, and that of said sum on or about the time of receiving the same, she loaned seven hundred dollars to the defendant, A. Hamilton, who invested the same in his own name in real property, namely, blocks two hundred and fifty-one and two hundred and fifty-two aforesaid, which property was subsequently and prior to the date of the deed aforesaid from Thomas Robertson and wife, taken on execution and sold to satisfy a debt of said defendant, A. Hamilton.

X. That on March 28, 1866, the defendant, Christina Hamilton, in pursuance of an act of the legislative assembly, approved June 4, 1859, did duly execute and cause to be recorded in the proper office in the county of Multnomah, state of Oregon, a declaration of her intention to hold, possess and enjoy in her own right and as her separate property, all the real property mentioned and described in the complaint of the plaintiff therein.

XI. That the defendants, A. Hamilton and Christina Hamilton, on September 4, 1866, were in the possession of the premises described in the complaint of the plaintiff herein, and have continued in the possession of the same up to the present time, and that the monthly value of the use and occupation of block two hundred and fifty, from September 4, 1866, was fifteen dollars, and of the lots in block two hundred and fifty-three, twenty dollars per month.

And as a conclusion of law from the premises aforesaid, the court finds that the plaintiff has no estate or interest in lots three, four, five and six in block two hundred and fifty-three described in the complaint herein, and is not entitled to the possession of the same or any part thereof, but that the same is the separate property of the defendant, Christina Hamilton, and was so since the date of the conveyance of the same to her as aforesaid, and further, that the plaintiff, since September 4, 1866, was seized of an estate for the life of the defendant, A. Hamilton, in block two hundred and fifty, described in the complaint herein, and that he is entitled to the possession of said block during the continuance of such estate, as against the defendant herein; and that said plaintiff is entitled to recover of the defendant, A. Hamilton, the sum of one hundred and forty-seven dollars for the use and occupation of said block since September 4, 1866, together with the costs and disbursements of this action to be taxed; and that he should have judgment accordingly.

W. W. Page, for plaintiff.

W. Lair Hill, for defendant.

DEADY, District Judge. By virtue of the sheriff's sale, on September 4, 1866, and the subsequent deed to the plaintiff, in pursuance

of the order confirming such sale, the plaintiff acquired all the estate or interest which the defendant, A. Hamilton, had in the real property described in the complaint at the time of such sale. What then was the interest, if any, of A. Hamilton in the property in question on September 4, 1866?

Block two hundred and fifty was conveyed to the wife, Christina Hamilton, on February 13, 1858. At that time the effect of marriage upon the property of the wife was regulated and prescribed in Oregon by the rules of the common law. By the common law, the husband, by reason of the marriage, became seized of a freehold estate in all the lands in which the wife had an estate of inheritance. White v. White, 5 Barb. 474, 481; Snyder v. Snyder, 3 Barb. 621; 2 Kent, Comm. 108; 2 Bac. Abr. 695, 705. This freehold estate, which the common law gave the husband in the lands of his wife, was his absolute property, as much as though it had been conveyed to him by his wife before marriage. It could be seized and sold on execution by the creditors of the husband. 2 Kent, Comm. 110.

But it is claimed on behalf of the defendant, Christina Hamilton, that the constitution of this state has worked a change in the law in this respect, which is applicable to this case. The constitution (article 15, § 5), provides: "The property and pecuniary rights of every married woman at the time of marriage, or afterwards acquired by gift, devise or inheritance, shall not be subject to the debts or contracts of the husband; and laws shall be passed for the registration of the wife's separate property." Independent of the constitutional provision, the property of the wife is not necessarily her separate property or estate. "The separate estate of a married woman is that alone of which she has the exclusive control and benefit, independent of the husband, and the proceeds of which she may dispose of as she pleases; and its character as such must be imparted to the property by the instrument (or power otherwise) by which she is invested with such right to it." Cord, Mar. Wom. § 225. The instrument by which block two hundred and fifty was conveyed to Christina Hamilton did not in any degree impart to it the character of separate property. It is but an ordinary deed, conveying the property to her and heirs by her husband, and contains no terms from which it can be inferred that it was the intention of the grantor to exclude the husband, as such, from the benefit and control of it. For aught that appears in the deed, the property was conveyed to the wife, subject to the general marital rights of the husband as then prescribed and defined by law. Looking then to the nature of the instrument by which block two hundred and fifty was conveyed to the wife, and the law as it stood at the time of such conveyance, there can be no doubt but that the husband then became seized of a freehold estate in the same, which could be taken on execution by his creditors. The fact that the purchase money was derived from the sale of the wife's real property in Missouri, which she inherited from her mother, does not affect the question. That was not her separate property. It was her general property and subject to the marital rights of her husband, at the time of the marriage in 1853. Moreover, by the sale of it in 1857, it was converted into personal property—money—and upon the receipt by him became the absolute and exclusive property of the husband.

The constitution went into force on February 14, 1859. What effect did it have upon the rights of the husband in this property? The constitution makes provision for the registration of the wife's separate property, but does not declare in express terms what shall be considered such separate property. The contemplated registration is not for the benefit of the wife, but for the protection of the public. Still it is evident that the constitution intended to change the law on the subject of the wife's property, and to change in favor of the wife. This being the case, it is the duty of the courts to give effect to such purpose so far as it can be ascertained with reasonable certainty. If the constitution had said, "The property and pecuniary rights of every married woman," etc., shall be deemed to be her separate property, or shall be held by her as her separate property, no doubt could arise as to the legal effect of the language employed. This would have imparted a particular character to her property, so far as enumerated in the constitution, however acquired; the effect of which would have been to have excluded her husband from all control over it or benefit in it. The language actually employed in the constitution is "shall not be subject to the debts or contracts of the husband." Taken in connection with the following clause, providing for the registration of the wife's separate property, I think these words ought to be construed, so far at least as third persons are concerned, as equivalent to a declaration that the property enumerated in section 5 shall be the separate property of the wife. If the wife's property is not to be "subject to the debts or contracts of the husband," he is thereby precluded from any control over it, and if he has any benefit or interest in it, it is beyond the reach of his creditors, for it is not "subject to his debts or contracts." This seems to be the conclusion of the supreme court of the state in Brummet v. Weaver, 2 Or. 168. Any narrower construction than this would defeat the evident intention of the constitution to change the law concerning the effect of marriage upon the wife's property in favor of the wife. If, notwithstanding the provision in the constitution, the husband, by reason of the marriage, is still invested with a freehold estate in his wife's lands, then it may be well said, as maintained by the plaintiff, that such estate—the property of the husband—may be taken on execution by the creditors of the husband, without conflicting with the provision in the

constitution concerning the property of the wife. Such a construction would leave the subject as it stood at common law, without giving any effect to the constitution whatever. For these reasons I think that the property of the wife, as enumerated or described in the constitution, ought to be considered her separate estate in the technical sense of that term —property over which the husband acquires none of the marital rights known to the common law.

At the time the constitution went into force and from the date of the conveyance to the wife, the husband had a freehold estate in block two hundred and fifty. This was a vested right. Could the constitution take it away from him and give it to the wife, or should it be so construed? The act of April 7, 1848, of the New York legislature, for the more effectual protection of the property of married women, so far as it related to existing rights of property, in married persons, was declared unconstitutional and void by the courts of that state. White v. White, 5 Barb. 474; Westervelt v. Gregg, 2 Kern. [12 N. Y.] 202. These decisions maintain, that the rights of the husband in the property of the wife at the time of the passage of the act were vested rights to property, of which he could not be deprived, except by due process of law—forensic trial and judgment. But this conclusion was put upon the ground of the prohibition contained in the constitution of the state of New York: "No person shall be deprived of life, liberty or property, without due process of law;" while in the case at bar, the enactment under consideration is a part of the constitution itself—the supreme law of the land.

Whether the people of a state in the formation and adoption of a constitution are omnipotent or not is an unsettled question. Probably they ought to be held so, in the same sense in which the English parliament is deemed omnipotent—as having power to "do everything that is not naturally impossible." 1 Bl. Comm. 161. They are for the time being the supreme sovereign power of the state, and the constitution is their direct, definite and permanent will, expressed in the form of a law. But I do not deem it necessary to pass upon this question, because I am satisfied that the provision in the state constitution was not intended and does not operate retroactively. It is a general and salutary rule of the common law, that "no statute is to have a retrospect beyond the time of its commencement" (6 Bac. Abr. 370); and this rule applies in the construction of a constitution as well as a statute. In the construction of statutes, courts are to take "as a leading guide, * * * the presumption that all laws are prospective and not retrospective," Dash v. Van Kleeck, 7 Johns. 486; and Kent, C. J. (Id. 502), says: "The very essence of a new law is a rule for future uses." The language of the constitution is in no sense retrospective. It declares a new and important rule of property, as to married persons, and this rule, at least in the absence of express words to the contrary, should be construed as only intended to be applied to "future cases." I understand that the learned justice of the supreme court of the state from the Fourth district, has, on the circuit, construed this provision of the constitution as being prospective. I am not aware of any decision of the supreme court of the state on the subject. But I think the last clause of section 10, art. 18, of the constitution, confines the operation of this provision to future cases. Section 10 is the saving clause of the new constitution. It declares that the property and right of the territory and political subdivisions thereof shall remain "as if the change of government had not been made; and private rights shall not be affected by such change." The freehold estate of the husband in block two hundred and fifty was vested in him before and at the time this change was made. The enjoyment and ownership of this estate was then a private right in the husband—a right of property—and as such is protected by this saving clause, even if there was any doubt as to the true construction of article 15, § 5.

The registration of this property, on March 28, 1866, so far as block two hundred and fifty is concerned, availed the wife nothing. In fact she had no separate property in that block to protect by registration. The plaintiff having succeeded by purchase to the estate or interest of the husband in block two hundred and fifty, is entitled to the possession of the same. The duration of this estate is for the life of the husband, for although at common law, this estate might terminate with the death of the wife, for want of issue born alive, yet by our statute the husband is tenant by the courtesy, "although such husband and wife may not have had issue born alive." Gen. Laws, 1845-64, p. 717. As the defendants wrongfully withhold the possession from the plaintiff, he must have judgment against them accordingly, and against the defendant, A. Hamilton, for damages for the use and occupation of the property since September 4, 1866, according to the findings of the court. As to the lots three, four, five and six in block two hundred and fifty-three, the facts are different. They were conveyed to the wife after the constitution went into force, and by force of the constitution and the registration of March 28, 1866, must be held to be the wife's separate property, unless the following objections of the plaintiff or some of them are sufficient to take the case out of the constitution.

(1) The constitution can only apply to future marriages, for by the obligations of the marriage contract entered into before the constitution the husband was entitled to a freehold estate in all estates of inheritance which the wife might acquire during coverture.

(2) The property in these lots was acquired by purchase, and property acquired by the wife after marriage is not declared to be sep-

arate property by the constitution, unless acquired by gift, devise or inheritance.

(3) If these lots can be said to be acquired by gift, it was the gift of the husband to the wife, and on grounds of public policy the constitution should be so construed as to exclude such gifts from the category of separate property.

The first of these objections raises the question, long mooted, as to whether marriage is a contract within the provision of the national constitution which forbids any state from passing a law impairing the obligation of a contract. I do not think this objection well founded. Marriage has its inception in contract—the assent of the parties—but when established it becomes a relation. This relation is in no sense a contract. It is rather a civil institution, beyond the control or caprice of the parties to it, to be governed and regulated by law. This law, and not contract, regulates and prescribes the rights of the parties in the property of each other, and until these become vested interests, the legislative power may modify them from time to time, to suit the convenience and wants of society, or to promote the relation or to protect the parties to it. In my judgment the constitution should be construed, as applicable to marriages in existence when the constitution went into force, so far as the after acquired property of the wife is concerned. See White v. White, 5 Barb. 477, and Snyder v. Snyder, 3 Barb. 623.

The second objection is not free from difficulty. Strictly speaking the real property can only be acquired by purchase or descent. "Descent is the title whereby a person, upon the death of his ancestor, acquired the estate of the latter as his heir at law." Bouv. Law Dict. 448. The title to real property acquired in any other manner than by descent is title by purchase. The phrase in the constitution "by inheritance," is in legal parlance the exact equivalent of "descent." Title, or acquisition by gift or devise, is in law a title by purchase. The constitution cannot be construed to prevent the wife in any case from holding as her separate property that which she acquires during marriage by purchase in the legal sense of that term. It expressly includes acquisitions by gift or devise, and in law these are both deemed titles by purchase. But I suppose the constitution could not be construed to include property acquired by the wife by purchase in the popular sense—that is when the title was obtained for a valuable consideration moving directly from herself, unless the purchase consist as a matter of fact in the exchange or investment of already acquired separate property for some other. However, upon the facts, in my opinion, the title to these lots was not acquired by the wife by purchase in the popular sense. It must be presumed that the consideration proceeded directly from the husband. The wife had no separate property out of which to make the purchase. The seven hundred dollars which she loaned (as she calls it) her husband in 1857, was already his property by virtue of the marriage. The consideration paid for these lots being just seven hundred dollars, it is evident that as between the husband and wife the purchase was made for the purpose of returning to the latter the remainder of the money that he had acquired by the sale of her Missouri property. In this view of the matter, the transaction is substantially a gift to the wife from the husband.

The third objection assumes that a gift from the husband to the wife is against public policy. The language of the constitution is unqualified—property acquired by gift. As the law stood before the constitution, the husband could give property to his wife, though for other reasons it was necessary to resort to the intervention of a trustee. It should be remembered also, that in this case, there is no question of fraud or rights of creditors. The plaintiff claims as the purchaser of the husband, and only acquired the rights of the latter as against the wife. Where a husband in solvent condition and in good faith makes a gift to his wife, I know of no rule of law or principle of public policy that can be invoked to declare the same void. Besides, whatever may have been the law or public policy, I do not see how any court can presume to limit or restrict the language of the constitution, and hold that the unqualified words—acquired by gift—shall have effect only in the diminished sense—by gift from some person other than her husband. This would be legislation and not construction—and legislation on mere grounds of public policy, a matter for the law maker to determine and not the courts.

I am of the opinion, that the lots in block two hundred and fifty-three are a gift from the husband to the wife, and that by force of the constitution and the registration of March 28, 1866, they became the separate property of the latter. This being the case, the plaintiff acquired nothing by his purchase of the husband's interest at the sheriff's sale, for the simple reason that the latter had no interest in the property—at least no interest which could be the subject of levy and sale on execution.

In the consideration of lots in block two hundred and fifty-three, I have omitted to make special mention of lot four. The consideration for the conveyance of this lot to the wife was her release of her right of dower in certain other property of the husband's which had been taken and sold on execution. This right of dower was a mere contingency, depending upon whether the wife survived the husband or not. The estate of the tenant in dower is neither acquired by gift, devise or inheritance. The contingent right to dower in the lands of the husband, which the wife has during the life of the latter is a mere expectancy and cannot be called her separate property—if it can be termed property at all.

Money derived from the sale of such right becomes the property of the husband. When the husband joined with the wife in the release of the right of dower to Robinson, in consideration that Robinson then conveyed to the wife lot 4, I think he appropriated the proceeds or value of the right of dower to the purchase of that lot, and made a gift of it to the wife. See Dick v. Hamilton [Case No. 3,890].

It may also be noticed, that by the terms of the conveyance, granting the lots in block two hundred and fifty-three to the wife, it is provided that she shall hold them to her own separate use and benefit, and free from the control of her husband. Whether this form of conveyance was not sufficient to make this the separate property of the wife, independent of the provision of the constitution. I do not decide. The question was pressed upon the court by the counsel for the defendants, but the conclusion to which I have arrived renders it unnecessary to consider it.

Judgment must be given for the plaintiff, in accordance with the conclusion of law in the findings of the court.

STARR (LAMB v.). See Cases Nos. 8,021 and 8,022.

Case No. 13,315.

STARR et al. v. MOORE et al.

[3 McLean, 354.] [1]

Circuit Court, D. Indiana. May Term, 1844.

SALE—ATTACHED PROPERTY—EXECUTION—OFFICER—LOSS OF PROPERTY—PLEA.

1. An attachment laid upon property, does not change the ownership of such property.

2. The defendant may sell it subject to the lien of the attachment.

3. The same may be said of property levied on by execution.

4. A levy is said to be a satisfaction of the debt, if the property be of sufficient amount. And this is said to be the case, though the property should be wasted by the negligence of the officer.

[Cited in Lustfield v. Ball (Mich.) 61 N. W. 341.]

5. The officer is the agent of both parties, and may be liable to either.

6. But, if the property be lost, without the neglect of the officer or the plaintiff, the loss must be sustained by the defendant, who has failed to pay the amount due.

7. A plea that property was attached and lost, is defective in not showing how the loss occurred.

[Cited in Stewart v. Nunemaker, 2 Ind. 51; McCullough v. Druly, 3 Ind. 434; Dorman v. Kane, 5 Allen, 40.]

[This was an action at law by Starr & Smith against Moore and others.]

Mr. Gregory, for plaintiff.

Judah, Mace & Baird, for defendant.

McLEAN, Circuit Justice. This action is brought on a promissory note given for goods purchased in New York. The defendants pleaded that under the law of New York, an attachment was issued, upon which goods sufficient to satisfy the debt in controversy were seized and detained, by means whereof the said goods were, and still are, wholly lost to the defendant. To this plea the plaintiffs demurred. It is objected that this plea is bad, because it does not set out the statute of New York, under which the attachment was issued. As the courts of the United States treat the statutes of the respective states as domestic and not as foreign laws, there is no necessity to plead or prove those laws, as laws of a foreign country. If attaching property to the amount of the debt demanded, be an absolute discharge of the debt, this plea is sustainable.

In the case of M'Intosh v. Chew, 1 Blackf. 290, the court say: "We take the law to be, that the plaintiffs, by levying their execution on the lands of the defendant, have elected to take the specific property as a pledge for the satisfaction of their whole debt; and while it is held by them for that purpose, it is, for the time, presumed to be a satisfaction." In Hoyt v. Hudson, 12 Johns. 207, the court held: "When an officer under an execution, has once levied upon the property of the defendant, sufficient to satisfy the execution, he cannot make a second levy." In the case of Clerk v. Withers, 2 Ld. Raym. 1072, it was ruled, that when a defendant's goods are seized on a fieri facias, the defendant is discharged. And in the case of Ladd v. Blount, 4 Mass. 403, it was expressly decided, that when goods sufficient to satisfy an execution are raised on a fieri facias, the debtor is discharged, even if the sheriff waste the goods or misapply the money. In Jenner v. Joliffe, 9 Johns. 384, it was said: "If an officer have an authority to attach a man's goods, keep them in an unsafe place, or expose them to destruction, he acts contrary to the duty of his office." And in the same case, 6 Johns. 16, the court say: "If the loss of the timber happened while it was held under the attachment, and without the negligence of the officer, the defendant (at whose instance the attachment was issued) ought not to be responsible for it." And Mr. Justice Story, in his work on Bailment, says (section 128): "The officer, who has laid the attachment upon goods is considered as having the custody thereof as long as the attachment continues; and if he delivers them over to the bailee or to the debtor, and a loss ensues, he will be liable to the creditor, and the loss of the property is at his peril."

The laying of an attachment does not change the title to the property attached. The right of property remains in the defendant, subject to the lien of the attachment. And it is supposed that the effect is the same on the levy of an execution. In both cases,

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

to change the right of property, there must be a sale under the process. But, in either case, if the marshal or sheriff shall be negligent, so that the property shall be destroyed, the officer is responsible. He is responsible to the plaintiff, and also to the defendant, the owner of the property. The officer is the agent of both parties, and may, therefore, be liable to either party. The sheriff or marshal is bound, at least, to ordinary diligence for the preservation of the property in the custody of the law, and, consequently, subject to his control. He has a right to incur any reasonable expense in keeping the property. If it be live stock, he may pay the expense of keeping it, and tax it as a part of his costs. And it would seem to be reasonable, if the property be lost by the negligence of the officer, that the defendant should set up such loss in his defence, as in this case, to a new action for the same consideration. But if the loss be the result of accident, in no way chargeable to the officer or the plaintiff, the officer is not responsible, nor is it clear that the plaintiff sustains the loss. In such a case, the officer would be considered the agent of the law, and by resorting to that agency for the obtainment of his debt, the plaintiff is not chargeable with any dereliction of duty, or act of injustice to the defendant. He is the delinquent party, in failing to discharge his obligation, and should a loss be incurred by an unforeseen casualty, which is not chargeable to the officer or the plaintiff, it would seem that the loss should be borne by the defendant. The plea is defective in not showing how the loss took place, and on this ground the demurrer is sustained.

On motion, leave given to amend the plea.

Case No. 13,316.

STARR v. STARK.

[1 Sawy. 270.] [1]

Circuit Court, D. Oregon. Aug. 16, 1870.

JUDGMENT—RES JUDICATA—SUIT TO QUIET TITLE—SPLITTING CAUSES OF ACTION.

1. Where, in a suit to quiet title, one of the grounds of the relief sought is abandoned by the complainant because adjudged to be inconsistent with another ground of relief alleged in his complaint, and such suit is finally determined adversely to the complainant, he is barred from maintaining another suit for the same relief upon such abandoned ground.

[Cited in Davis v. Lennen, 125 Ind. 188, 24 N. E. 885.]

2. A suit to ascertain and quiet title under section 500 of the Code, extends to, and includes all the grounds of controversy between the parties as to the title to the premises; and by the final decree therein all matters affecting such title are determined.

3. A plaintiff in such suit cannot, at his option, split it up into many suits, and if he omits to set forth and prove all the grounds of his right, or his adversary's want of it, he cannot afterward bring another suit upon the fragment or portion of the case omitted.

[Cited in Burton v. Huma, 37 Fed. 741.]

[Cited in Indiana, B. & W. Ry. v. Allen, 113 Ind. 588, 15 N. E. 446.]

[This was a bill in equity by Lewis Starr against Benjamin Stark.] Motion for a provisional injunction to stay the enforcement of a judgment at law for the recovery of the possession of real property.

David Logan, for the motion.

Wm. Strong, contra.

DEADY, District Judge. In January, 1864, the plaintiff herein and his brother, Addison M., commenced a suit in equity in the circuit court of the state for the county of Multnomah, against the defendant herein, alleging themselves to be the owners and in possession of lots 1, 2 and 4 in fractional block 81 in the city of Portland, and that the defendant claimed title thereto adverse to the plaintiffs and threatened them with an action to recover the possession thereof, with a prayer that the defendant be compelled to set out by what title he claims said property, and that the rights of the plaintiffs and defendant might be determined by the court. The complaint in said suit also set forth the grounds of the plaintiffs' right to the premises to be certain agreements, representations and doings of the defendant, whereby, as plaintiffs claimed, he was in equity bound to convey to them the legal title which he had acquired from the United States as a settler under the donation act of September 27, 1850 [9 Stat. 496].

On August 20, 1864, the plaintiffs in pursuance of previous proceedings in the cause, filed an amended complaint, setting forth the facts aforesaid, and also that the defendant claimed title to the premises by virtue of a patent therefor issued to him by the United States on December 8, 1860. The amended complaint also alleged that, in pursuance of certain proceedings in the proper land office, a patent was issued by the United States on December 7, 1860, to the corporate authorities of Portland for a certain tract of land, including the premises in controversy, in trust for the occupants thereof, and that plaintiffs had been the occupants of said premises since December 13, 1849, and are entitled to the benefit of said patent to said corporate authorities; and further, that the said defendant contriving and intending to defraud plaintiffs out of the premises falsely, procured it to be established and proved before the surveyor-general of Oregon that he had resided upon and cultivated the land described in his patent for four years prior to September 10, 1853; he, the said defendant, then well knowing that he had not then so resided upon and cultivated said land—wherefore the plaintiffs prayed that the defendant's patent might be set aside and held for naught, and that defend-

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

ant be compelled to release to plaintiffs all his right, title and interest in the premises, and be forever restrained from setting up any title to the same by means of the premises and for other relief.

Afterward, on August 23, defendant demurred to the amended complaint, and on October 15, the court made an order sustaining the demurrer to all that portion of such complaint concerning the patent to the corporate authorities of Portland, and the fraud in obtaining the defendant's patent and the claim of the plaintiffs by reason thereof, and on October 28 the court made an order vacating the last named order, and directing that the plaintiffs have leave to amend their complaint and requiring them to elect which cause of suit they would proceed upon, and to set forth the same in the amended complaint.

On November 1, the plaintiffs, in pursuance of the last named order, filed a second amended complaint alleging therein as above stated, except that they omitted therefrom the statement and claim set forth in the original complaint that the defendant by reason of certain agreements, representations and doings, was in equity bound to convey the legal title which he held to them and thereby elected to proceed against the defendant upon the ground of the patent to the corporate authorities of Portland, and the fraud and illegality of the patent to the defendant.

On November 25, the defendant answered the second amended complaint, and on December 3, the plaintiff replied thereto.

Afterwards such proceedings were had in the case that said circuit court, on June 12, 1865, gave a final decree therein, whereby it was found that the plaintiffs were entitled to the relief prayed for by them, and adjudged that the patent to the defendant of December 8, 1860, as against plaintiff, be declared void and taken for naught, and that the defendant be perpetually enjoined from suing for or ejecting the plaintiff from the possession of the premises in controversy.

Afterwards, on appeal to the supreme court of the state of Oregon, said decree was wholly affirmed, and thereafter said cause was taken to the supreme court of the United States by said defendant, upon a writ of error, and upon a hearing thereon at the term of December, 1867, it was adjudged and decreed that said decree be reversed, and that the supreme court of Oregon remand the cause to the said circuit court with directions to dismiss the suit, which was done accordingly. [6 Wall. (73 U. S.) 402.]

Subsequently the plaintiff succeeded to the undivided interest or claim of Addison M. in lots 1 and 2, and the north half of 4, aforesaid; and thereafter, on February 12, 1870, in an action at law commenced and prosecuted in this court by the defendant against the plaintiff, the former obtained judgment against the latter for the possession of the premises last aforesaid, and for the sum of —— for the use and occupation of the same, and for costs and disbursements of the action. [Case No. 13,307.]

On February 18, 1870, the plaintiff commenced this suit to have the defendant enjoined from enforcing that judgment or maintaining any action against the plaintiff for the possession of the premises, and to have the court adjudge and declare, as against the defendant, that the plaintiff is the owner of the premises, and to compel the defendant to release to plaintiff his title thereto, acquired by virtue of the donation act and the patent aforesaid, issued to him thereunder.

The bill in this suit sets forth, as in the former suit, that by reason of certain agreements, representations and doings of the defendant, which are stated in detail, he, the defendant, is in equity bound to release or convey to the plaintiff the legal title to the premises which he acquired as aforesaid, but makes no mention of the patent to the corporate authorities of Portland, or claim for the plaintiff thereunder, nor does it contain any charge against the validity of the patent to the defendant, but in terms admits that the latter has obtained the legal title to the premises as a settler under the donation act.

On February 19, a notice of motion for preliminary injunction was served on the defendant. The hearing of the motion was postponed from time to time by agreement of counsel until June 23, when the same was argued and submitted with a stipulation that the defendant would take no steps to enforce the judgment while the motion was held under advisement.

Counsel for the defendant makes two objections to the granting of the preliminary injunction:

(1) That there is no equity in the bill, or in other words, that it does not appear from the facts stated that the defendant is under any obligation or ought to be compelled to convey his title to the plaintiff; and,

(2) That the subject matter of this suit—the title to this property—was fully adjudicated between these same parties in the suit of Lewis M. and Addison M. Starr against this defendant, above stated, and that by the final decree of the supreme court of the United States, given in said suit, it was determined and adjudged that the legal title to the premises was in the defendant, and that neither the plaintiff nor said Addison M., had any interest, legal or equitable, therein.

Upon the question raised by the first objection, I do not propose to pass in the consideration of this motion. The title to other property is now in litigation before this court between other parties upon the construction and effect to be given to the same acts and circumstances out of which the plaintiff claims that his equity arises.

As to the question made by the second objection, it must be decided in favor of the defendant. After deliberate consideration, I am well

satisfied that the former adjudication between these parties is a bar to this suit, and that therefore the motion for injunction ought not to be allowed.

Counsel for the plaintiff seeks to avoid this conclusion by ingeniously attempting to liken this to a case, where a party has two distinct causes of action which he might have joined in one action, and did not; or having done so, abandons one of them on or before trial. Now this is a suit to determine the title to this property as between these parties, and so was the former one. True, the grounds of this suit, as stated in the bill, are not the same as those of the former suit were at the time it was decided. In that suit, the plaintiffs shifted their ground, so that it was commenced upon one ground and finally heard and determined upon another. At the beginning, they relied upon their right to a conveyance of the legal title from the defendant, the same as in this suit. Afterwards they amended their bill and added the other ground, wherein they claimed independently of the defendant, under what is called the city patent and town site law. Then followed the order of the court, requiring them to elect which of these two inconsistent grounds they would proceed upon, when they abandoned the first and prosecuted the suit to final determination upon the second.

It seems to me, that the order of the circuit court, requiring the plaintiffs to elect which cause of suit they would proceed upon, is an adjudication that one or the other of these causes of suit was insufficient, because, in the nature of things, it was impossible that both could be true in fact and law, and that the plaintiffs should determine which one was insufficient, by electing to proceed upon the other. This election is in the nature of a solemn admission of record, that the alleged cause of suit then abandoned and now sought to be re-adjudicated, was not well founded in fact or law, or both.

Again, when this cause was appealed to the supreme court of the state, it went there as an equity case, to be tried anew upon the transcript and evidence. If the plaintiffs conceived that the circuit court erred in requiring them to make this election, and thereby abandon one ground for the relief sought by them, and did not desire to acquiesce in such decision, they should have sought redress on the appeal. Having abandoned the cause of the present suit in the course of the former one, in obedience to an order which, in effect, determined the cause of suit was insufficient, and having thereafter submitted to that order, the plaintiff cannot have the same matter re-adjudicated in another suit.

But waiving this view of the subject, and assuming that the present cause of suit had never been stated or brought to the notice of the court in the former suit, still the adjudication in that suit would be a bar to this.

The suit of Lewis M. and Addison M. Starr against the defendant was brought by them as persons being in possession of the premises under section 500 of the Code: "Any person in possession by himself or his tenant, of real property, may maintain a suit in equity against another, who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate or interest." Code Or. (Gen. Laws 1845–64, p. 273).

The suit given by this section, is one to ascertain and quiet the title to the premises, as between the parties. The plaintiff cannot, at his option, split it up into many suits, with which to harass and weary the defendant. By the final decree in such a suit, the title to the premises, as between the parties, is determined, and all questions or matters affecting such title are concluded thereby. If either party omits to set forth and prove all the grounds of his right, or his adversary's want of it, he cannot correct his error by bringing another suit upon the portion or fragment of the case omitted. In the suit between the Starrs and the defendant, the latter claimed, adversely to the plaintiffs, the whole estate or interest in the premises, whether legal or equitable. The suit was brought to try and determine such claim, and might have resulted in a determination of the question either for or against the defendant. In either event, the controversy is ended and the matter at rest between the parties. Whatever matter of fact or law the plaintiffs could allege or maintain to show the falsity or illegality of the defendant's claim, they were at liberty to do in the former suit. If they failed to bring to the consideration of the court, by proper proof or allegation, anything material to a correct determination of the controversy for which such suit was given and brought to settle, it was their own fault, and they must abide by the consequences. Already the defendant has been in court once, at the call of the plaintiff concerning his claim to these premises, and successfully answered whatever was alleged against him. After years of litigation, the judgment of the court of last resort was given in his favor, and now the plaintiffs seek to compel him to submit to a re-adjudication of his claim upon a fragment of the former suit, which was lost and abandoned by the plaintiffs in the progress of the former trial.

I am clear, that the matter is res judicata. The motion is denied, with $20 costs.

[NOTE. Upon final hearing, before Circuit Judge Sawyer and District Judge Deady, a decree was entered in favor of complainant, in pursuance to the prayer of the bill. Judge Deady dissented, upon the grounds set out in the motion above. Case No. 13,317. Upon appeal to the supreme court by Stark, this last decree was affirmed. 94 U. S. 477.]

Case No. 13,317.

STARR v. STARK.

[2 Sawy. 603, 642; 1 Am. Law T. Rep. 444.] [1]

Circuit Court, D. Oregon. May 8, 1874.[2]

JUDGMENT—RES JUDICATA—ESTOPPEL—CONTRACT—POWER OF ATTORNEY—REVOCATION—RATIFICATION—OREGON DONATION ACT—TITLE UNDER—APPEAL—OBITER DICTA.

1. Starr being in possession of certain lots in Portland, Oregon, filed a bill in chancery against Stark, to determine an adverse claim of title by the latter, in which the complainant, as one ground of relief, alleged title derived to himself through a United States patent to the city of Portland, and that defendant claimed title adversely under a subsequent patent to himself. And, as another ground of relief, that the legal title was in defendant under his said subsequent patent; but, that through certain transactions set out, complainant had the equitable right, and was entitled to a conveyance of said legal title. The court, upon motion of defendant, held that the two grounds of action were inconsistent, and could not be litigated together in the same action, and required complainant to elect upon which he would proceed, and omit the other; whereupon complainant, after excepting to the ruling and order, elected to rely on the first, and withdraw the second. A decree having been rendered in favor of complainant, on the cause of action retained, which was affirmed by the supreme court of Oregon, it was finally reversed by the supreme court of the United States, on the ground that the patent to the city was void, and the bill subsequently dismissed in pursuance of the mandate of that court. Complainant then filed a second bill, alleging the equitable title before set up in the first, and withdrawn in obedience to said order of the court, and prayed a conveyance of the legal title: *Held*, that the proceedings and decree, in the former action, are not a bar to the second action.

2. An irregular conveyance, by one acting under a power of attorney, of a possessory claim to public land, asquiesced in and acted upon by the principal, the consideration having been enjoyed by him, will vest in the grantee the equitable title to the interest purported to be conveyed.

3. Written contracts should be construed in view of the circumstances and condition of things in which they originated.

4. Subsequent acts of the parties, tending to show the construction put upon the contract by the parties themselves, may, also, be considered where the meaning is doubtful.

5. Lowndsdale, Coffin and Chapman claimed to be owners of the Portland land claim, being a possessory claim on the public lands of six hundred and forty acres, upon which the city of Portland was laid out, Coffin and Chapman deriving their interest through conveyances from Lownsdale. Stark claimed to own an undivided half of said land claim. Lownsdale and Stark, at San Francisco, entered into an agreement, dated March 1, 1850, to settle their conflicting claims, by which Lownsdale, with specified exceptions of sales made before the first of January previous, which were confirmed, conveyed to Stark all his interest in the part lying north, and Stark to Lownsdale all his interest to the part lying south, of a certain line. The instrument executed contained a covenant, that in case "any person or persons," holding interests under Lownsdale, with certain exceptions, "shall refuse to ratify and confirm" this agreement, then the agreement might be canceled, at the option of Stark, within six months: *Held*, that Coffin and Chapman were embraced in the terms of this covenant, and that the object was, in this mode, to make them substantially parties to the agreement, and, as such, to secure their assent thereto.

6. The said indenture, between Lownsdale and Stark, dated March 1, 1850, ratified and confirmed certain sales made by each prior to January 1, 1850. Coffin, Chapman and Lownsdale (the latter acting by Chapman, his attorney in fact), had made other dispositions of property subsequent to January 1, and prior to April 13, 1850, at which latter date Coffin and Chapman first had notice of said compromise. Coffin and Chapman indorsed, on said compromise agreement, an instrument in writing, by which they "ratify and confirm" the same, with a modifying or further clause, "hereby placing the disposition of property, up to notice of said adjustment, upon the same footing with dispositions of property before the first of January last," under which instrument Couch, in the name of, and as attorney for, Stark, indorsed and executed an instrument as follows: "I ratify the above agreement, so far as my interest is concerned, in said property:" *Held*, that these last two instruments constituted a modification of the said original indenture between Lownsdale and Stark, so as to ratify and confirm, on the part of Stark, to the extent of his interest, all dispositions of lots made by Coffin, Chapman and Lownsdale, through Coffin and Chapman, during Lownsdale's absence in San Francisco, from January 1st to April 13, 1850, and to ratify and confirm said contract, as so modified by the parties in interest.

7. A power of attorney to Couch, authorizing him "to do any and all acts during my (Stark's) temporary absence, which I might myself do were I personally present," together with accompanying letter of instructions to settle the difficulty about his undivided half, are sufficient authority to Couch to make said modification, under the circumstances shown in the case.

8. A revocation of a power is not necessarily implied from a subsequent power to another party to do the same thing. When the second power is not absolutely inconsistent with the first, the question whether it was intended to revoke the other must be determined by the circumstances of the case.

9. After the modification of said contract each party occupied the part released to him without objection from the other, and without claim to the part released by himself, and performed many other acts consistent with a recognition of the validity of said modified agreement, and inconsistent with any other view: *Held*, that said subsequent acts of Stark constitute an adoption and ratification of the acts of Couch, as his attorney; and that the equitable title to his interest in the said lots, sold between January 1st and April 13th, by virtue of the said several transactions, passed to the grantees of Coffin, Chapman and Lownsdale.

10. A party can not adopt that part of an agreement made on his behalf, without authority, which is beneficial to himself, and repudiate the part which is beneficial to the other party.

11. Where a donee, under the "donation act" of September 27, 1850, subsequent to the initiation of the four years' possession required by the act to entitle him to a patent, which is afterward ripened into a legal title by the issue of the patent, and before the passage of the said act, has conveyed all his right, title and interest, together with the possession in and to a portion of the land so possessed and claimed by him, without covenants for further convey

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 1 Am. Law T. Rep. 444, contains only a partial report.]

[2] [Affirmed in 94 U. S. 477.]

ance, or by quit-claim deed, and said land is thereafter possessed and occupied by his grantee, such conveyance is recognized and protected by said donation act, and the equitable interest in the land so conveyed passes to his said grantee; and a court of equity will enforce the equity by compelling such donee to convey the legal title vested in him by the patent subsequently issued.

12. When the record fairly presents two points upon the merits in a case, upon either of which the appellate court might rest its decision, and the court actually decides both, without indicating that it is intended to rest the judgment upon one rather than on the other, the decision upon neither can be regarded as obiter.

[Followed in Hawes v. Contra Costa Water Co., Case No. 6,235. Cited in Huntington v. Palmer, 8 Fed. 450.]

The complainant and his grantors having been for many years in possession of lots one and two, and the north half of lot four, in block eighty-one, in the city of Portland, the premises in controversy, the defendant Benjamin Stark, on December 22, 1868, commenced an action on the law side of the court for their recovery, in which judgment for the possession thereof was rendered in favor of said Stark, February 15, 1870. [Case No. 13,307.] The complainant [Lewis M. Starr] then filed this bill in equity, setting up what he claims to be a good, equitable title to the premises as against defendant, Stark, and praying that defendant be decreed to convey the legal title, and be enjoined from executing his judgment at law for the possession, etc.

[A motion for a preliminary injunction against Stark to enjoin him from setting up his legal title was denied. Case No. 13,316.]

The following facts satisfactorily appear, either from the admissions of the pleadings or the evidence:

On September 22, 1848, Francis W. Pettygrove executed to Daniel H. Lownsdale a conveyance, which purported, in consideration of the sum of five thousand dollars, to convey to the latter all the "right, title, interest, claim and demand in law, and in equity, present and in expectancy," of said Pettygrove to a certain tract of land specifically described, containing about six hundred and forty acres, "together with all and singular the houses, out-houses, fences, wharves and other improvements," excepting certain designated lots. On March 22, 1849, Stephen Coffin, by conveyance from, and agreement with, said Lownsdale, became the owner of one half of the interest so acquired by said Lownsdale in said land claim. On December 13, 1849, by further conveyance from Lownsdale and Coffin, Wm. W. Chapman became the owner of one third interest in said land claim, the three, from that time, holding and dealing with the same as partnership property. The several conveyances and agreements between these parties; their acts under them in connection with the said Portland land claim; the general facts of the case, and condition of affairs at Portland at the time, are the same as fully set out in the case of Lamb v. Davenport [Case No. 8,015], and need not be repeated here. From said March 22, 1849, Lownsdale and Coffin, and, from said December 13, 1849, Lownsdale, Coffin and Chapman were in the possession of said land, except such town lots as had been from time to time sold by these parties, and their grantors, claiming the title thereto under said several conveyances and agreements against all the world except the United States, or, in other words, all the title that at that time it was possible for a private party to obtain under the laws of the United States—the real title being in the government, and there being yet no law authorizing a sale or conveyance of the government's title. They actually lived upon the land, cultivated portions of it, improved it, erected houses thereon, and occupied others already built; exercised acts of ownership over the land, which were generally recognized by the inhabitants of Portland, and laid off portions into blocks and lots, and sold them as town property. Although the tract does not appear to have been enclosed by a fence, yet these parties entered and claimed under deeds, with designated boundaries, and this, in connection with living upon it, and performing the acts indicated, upon well settled legal principles, constituted possession of all of said tract not actually adversely occupied by other parties. Hicks v. Coleman, 25 Cal. 122, and cases cited, including cases in the United States supreme court; Ayres v. Bensley, 32 Cal. 620. They continued so in possession of said land claim, disposing of town lots, till April 15, 1850, during which time certain transactions took place which will now be mentioned. About January 8, 1850, said Lownsdale departed from Portland for San Francisco, leaving Coffin and Chapman in charge of the said land claim. Before his departure, on January 7th, he executed a power of attorney to Chapman, being "Exhibit A," annexed to Chapman's deposition in evidence. It is brief, and, in general terms, authorizes Chapman "to superintend and transact my business in said territory during my absence;" "to do and perform anything pertaining to my interests in Oregon which he, in his judgment, may think advisable, particularly in signing deeds to Portland lots"—this last clause containing the only particular specification in it. Lownsdale met defendant, Stark, at San Francisco. Stark had before set up a claim to an undivided half of the Portland land claim, which he now insisted on. He claimed that the Portland land claim had been taken up and held by said Pettygrove, not alone, but in conjunction with one Lovejoy; and that Lovejoy had conveyed his half interest to him (Stark) and by virtue of said alleged right of Lovejoy and conveyance to himself, he claimed title to an undivided half.

Subsequently, Lownsdale and Stark came to a settlement of their controversy by fixing upon a certain designated east and west line, nearly coincident with the street in Portland, now known as Stark street, Lownsdale agreeing to relinquish to Stark, with certain speci-

fied exceptions, all his right, title, interest and claim in and to that part of the Portland land claim lying north of said line, and Stark to relinquish to Lownsdale, with certain exceptions, all his right, title and interest in and claim to that part lying south of said line. Lownsdale and Stark are the only ostensible parties to this agreement. In pursuance of this arrangement, Lownsdale and Stark, at San Francisco, on March 1, 1850, executed, under their hands and seals, an instrument in writing, bearing date on that day, a copy of which is annexed to the bill of complaint, as "Exhibit A." This instrument, among other things, contains the recital: "Whereas, it is deemed expedient by the parties hereto, to determine, settle and adjust the title and possession of certain lands hereinafter described, and to preclude all future controversy in the premises," etc. It, then, on the part of Stark, purports to "bargain, sell, remise, release and forever quit-claim to Lownsdale, his heirs and assigns," "all his right, title and interest in all that portion" of said "Portland land claim," "situate south" of the line agreed upon, "hereby ratifying and confirming, so far as his right, title and interest is concerned, all conveyances which" Lownsdale "has heretofore made, or may hereafter make, in the premises hereinbefore quit-claimed." And, on the part of Lownsdale, it purports to make a similar sale, conveyance, etc., to Stark, with similar ratifications with respect to all of said land situate north of said line. It also contains the following covenants, which it is important to consider in this case. Firstly, Stark covenants that he, "so far as his right, title and interests are concerned, hereby ratifies and confirms all conveyances made by the said party of the second part (Lownsdale) or his lawful attorney, previous to the first day of January, one thousand eight hundred and fifty," of certain lots specifically described "lying north of said line," that is to say, in the part conveyed to Stark. "And said Stark likewise ratifies and confirms all grants or conveyances made of said party of the second part (Lownsdale) or his lawful attorney, in good faith and for a valuable consideration, to this date (March 1st), subsequent to said first day of January, of said lots situate north of said line," that is to say, in the part released to Stark. "Provided always, and said party of the second part (Lownsdale) hereby covenants for himself, his heirs, etc., that he will pay over all sums of money which have, since the first day of January, been, or may hereafter be, paid unto the said party of the second part, etc., in consideration of the grants and conveyances aforesaid"—that is to say, made subsequent to January 1st. And, secondly, Lownsdale further covenants "that, in case any person, or persons, holding or claiming under him, except the holders of those lots, and under the conveyances especially hereinbefore confirmed by said party of the first part (Stark), shall refuse to ratify and confirm this indenture, he, the said party of the second part (Lownsdale), will, at the option of the said party of the first part (Stark), at any time within six months from this date, cancel and release all rights acquired under these presents by the parties hereto."

Either before Lownsdale left for San Francisco, by Lownsdale, Coffin and Chapman, or after he left, and prior to March 20, 1850, by Coffin and Chapman—and it does not appear which—blocks seventy-eight, seventy-nine, and fractional block eighty-one, of the town of Portland, were laid off on said land claim. On March 20, 1850, before Lownsdale's return, and before Coffin and Chapman had notice of the said agreement between Lownsdale and Stark, dated March 1, 1850, Coffin and Chapman, acting for themselves, and Chapman, assuming to act for Lownsdale as his attorney under said power of date January 7, 1850, fixed a price upon said three blocks, valuing lots seventy-eight and seventy-nine at $3,000 each, and fractional block eighty-one at $2,000, and agreed that each should take one of these blocks at those prices; Lownsdale to have block seventy-eight, Coffin seventy-nine, and Chapman fractional block eighty-one. Conveyances to the respective parties were accordingly made on that day, bearing date March 20, in pursuance of this arrangement. "Exhibit F." of the evidence is a copy of one of the said deeds, being the deed to Chapman. It purports to be a deed from Coffin, Lownsdale and Chapman, "proprietors of Portland," to Chapman, and in consideration of the sum of $2,000, the receipt of which is acknowledged, to release, confirm and quit-claim to Chapman "lots numbers one, two, three and four, in fractional block number eighty-one, being the warehouse fraction," etc. There was, at the time, a warehouse upon the block. The deed was signed Stephen Coffin, D. H. Lownsdale, by his attorney in fact, W. W. Chapman, and W. W. Chapman. The sums agreed upon were charged to each of these parties, respectively, in the accounts of their transactions between themselves in relation to the business of selling town lots; and, after Lownsdale's return, adjusted and allowed in the settlement of these matters between the parties, Lownsdale acquiescing in the arrangement made in his absence. Chapman, after said conveyance, went into the actual possession of the block, and thereafter possessed and claimed it under the said arrangement and conveyance till he sold the several lots to defendant and his grantors. Said fractional block includes the premises in controversy, and is situate north of said line designated in said instrument of March 1, 1850, executed by said Lownsdale and Stark, and within the tract thereby purporting to be conveyed by Lownsdale to Stark. Other sales had been made by Coffin and Chapman during Lownsdale's absence.

After March 20, 1850, and either on or within two or three days before April 13, 1850,

Lownsdale returned to Portland from San Francisco; and, after said return, Coffin and Chapman were informed, for the first time, of the said arrangement, and execution of the said indenture of March 1, 1850, between said Lownsdale and Stark; and, upon being so informed, refused to ratify or confirm said contract. At that time John H. Couch was a partner of said Stark in mercantile business, carried on at Portland in a store situate but a short distance from said block eighty-one. He professed to be the agent of Stark in respect to the interest claimed by him in the Portland land claim, and assumed to act as such. After some negotiations between Coffin and Chapman, and Couch, in reference to said claim, and the said indenture executed by Lownsdale and Stark, the said parties came to an understanding, and, in pursuance thereof, executed and appended to said indenture, by indorsement thereon, instruments, of which Exhibits B and C, annexed to the bill, are copies. The first is as follows, to-wit: "We, Stephen Coffin and W. W. Chapman, partners with Daniel H. Lownsdale in the town of Portland, hereby ratify and confirm a certain agreement between Benjamin Stark and D. H. Lownsdale, bearing date the first day of March A. D. 1850, respecting an adjustment of title, hereby placing the disposition of property up to notice of said adjustment upon the same footing with the disposition of property before the first day of January last. In testimony whereof, we have hereunto set our hands and seals this the 13th day of April, A. D. 1850. (Signed) S. Coffin, (L. S.) W. W. Chapman, (L. S.)" Under which is the following, to-wit: "Portland, O. T., April 15, 1850. I ratify the above agreement as far as my interest is concerned in said property. (Signed) John H. Couch, for Benj. Stark."

Before the execution of said last named instrument by said Couch, for said Stark, on September 26, 1849, said Stark had executed a power of attorney to said Couch, of the most general character, without any enumeration of specific acts to be performed. Its language is, "to do any and all acts, during my absence from this territory, which I might, myself, lawfully do were I personally present." The said indenture of March 1, 1850, and the two instruments of ratification indorsed thereon, the one executed by Coffin and Chapman, and the other by Couch for Stark, were all recorded together, in the proper recorder's office, on November 23, 1850, at the request of George Sherman, who, at the time, represented himself as acting as attorney for Stark and Couch. After the execution of said several instruments, Lownsdale, Coffin and Chapman relinquished all possession and all claim to the portion of the Portland land claim not embraced in said indenture, as modified by said instruments, situate north of said line agreed on, and Stark all claim to the lands south of said line—each party thereafter possessing and exercising acts of ownership over the part so relinquished to him. Stark returned to Portland in June, 1850, when he was furnished by Coffin and Chapman with a list of the lots sold before the date of said modification of contract. Couch and Sherman had, before the execution of said instruments of ratification, been furnished a list of all lots sold during Lownsdale's absence. Stark, also, after said return and notice, stated to Coffin that he would sanction or submit to the contract as modified, and carry out its provisions; and he never did, down to the date of his patent, make any claim to the lots so embraced within said modification, either upon Lownsdale, Coffin or Chapman, or upon any of the parties in possession as their grantees. September 27, 1850, the donation act was passed by congress, under which Stark, on September 10, 1853, obtained from the surveyor-general a donation certificate to the part of the Portland land claim so lying north of said agreed line, released to him as aforesaid, he having dated his possession in his notification from September 1, 1849. Upon this certificate a patent of the United States issued to Stark, dated December 8, 1860, being the patent which vests in him the legal title to the lands in controversy.

Lownsdale, Coffin and Chapman, also, in pursuance of an agreement between themselves, dated March 10, 1852, commonly called the "Escrow," set out in Lamb v. Davenport [Case No. 8,015], before referred to, divided that portion of the Portland land claim lying south of said line among themselves; and each, respectively, obtained a similar donation certificate and patent thereon to the part of said tract allotted to him, under said agreement.

On October 3, 1850, said Chapman, being then in possession of said block eighty-one, conveyed to complainant, Starr, the south half of said lot two; and on October 8, 1850, the north half to one Butler. On November 11, 1850, Chapman conveyed said lot four to one Powell, and on January 30, 1851, said lot one to Winter and Latimer. All the right, title and interest so derived from Chapman in and to said lots in controversy, so conveyed by Chapman to parties other than complainant, Starr, had, since said conveyances from Chapman, and before defendant's patent issued, by mesne conveyances, become vested in complainant, Starr. All of said conveyances were for a valuable consideration, and the said several grantees from Chapman, under said conveyances to them, entered into actual possession, and erected valuable improvements on said lots; and all the said premises have been in the actual possession and occupation of Starr, and his several grantors, for mercantile and other business purposes, ever since their said several entries under, and soon after their said several purchases from Chapman. The said premises have always been, from 1850 to the pres-

ent time, in the heart of the business part of Portland.

On December 7, 1860, one day prior to the issue of said patent to Stark, a patent of the United States in due form, issued to the corporate authorities of the city of Portland for the tract of land upon which said city is located, which patent includes the lots in controversy. It purports to have been issued under the act of congress of 1844, known as the "Town Site Act," and to grant the land "in trust for the several use and benefit of the occupants thereof according to their respective interest." It also reserves "any valid claims which may exist in virtue of the several donations of Benjamin Stark, certificate No. 69," and of Daniel H. Lownsdale, William W. Chapman and Stephen Coffin, under their several certificates. The patent to Stark, on said certificate 69, issued on the next day, contains a similar reservation of any rights that may exist in favor of the city of Portland. The complainant, Starr, and his brother, Addison M. Starr, at the date of said patents, were in the occupation of the premises in controversy, claiming the possessory title as hereinbefore set out, and were, therefore, as to these lots, the parties for whose benefit the legal title thereto, so far as any passed, vested in the city of Portland by virtue of said patent of December 7, 1860.

In January, 1864, said Addison M. Starr, and the present complainant, Lewis M. Starr, being at the time in possession of said premises in controversy, in conformity with the provisions of the statute of Oregon authorizing said proceedings, filed their bill on the equity side of the circuit court of Oregon, for the county of Multnomah, against said defendant Stark, to determine his adverse claim made under his patent. An amended bill was filed in August, 1864, in which the complainants alleged two separate grounds of relief. In the first they set up a title in themselves, relying on the title derived through the patent to the city of Portland; secondly, they set up the equitable title upon which they now rely, and claimed that Stark should be adjudged to hold the legal title derived under his patent in trust for them. They prayed that Stark's patent should "be set aside and held for naught, and that he be held to release to plaintiffs all his right, title and interest, claim and demand, to said lots, etc." On October 28, 1864, an order was entered in the cause by said court by which the complainants "are ordered to elect which cause of suit they will proceed upon, and to set forth the same in the amended bill to be filed, to which order, requiring the plaintiffs to elect, the plaintiffs except." In obedience to said order the complainants elected to rely upon the patent to the city, and accordingly, on November 1, filed a second amended bill or complaint, as it is designated in the Oregon Code of Practice, in which the cause of action now relied on was omitted, and the cause of action resting upon the title, derived through the patent to the city, and the fraudulent procuring of a patent by Stark, more fully set out. Issue having been taken on the complaint, and the case heard on the testimony introduced, the circuit court entered a decree in favor of the plaintiffs, in pursuance of the prayer of the complaint, which decree was affirmed on appeal by the supreme court of Oregon. An appeal having been taken thence to the supreme court of the United States, that court held the patent to the city to be void, and that to Stark valid, reversing the decree of the supreme court of Oregon, and remanding the case, with instructions to enter a decree directing the circuit court to dismiss the action [6 Wall. (73 U. S.) 402], which was accordingly done, and the action finally dismissed in pursuance of said mandate and directions. The defendant Stark now sets up these proceedings in his answer, and insists that, by reason thereof, the cause of action now relied on is res adjudicata, and the former decree a bar to further litigation.

J. N. Dolph and Wm. H. Effinger, for complainant.

Wm. Strong and Bronaugh & Catlin, for defendant.

Before SAWYER, Circuit Judge, and DEADY, District Judge.

SAWYER, Circuit Judge. The order of discussion pursued by counsel will be followed, and the question presented by the answer of a former adjudication first disposed of. It is not pretended by defendant's counsel that the cause of action now relied upon was, in fact, put in issue, litigated and determined in the former action; but it is insisted that it might, and therefore ought, to have been so presented, litigated and adjudged; and, this being the case, that the decree in that action is just as conclusive as if it had been so determined. It is conceded that the ground of relief now relied on was at first set up in the complaint as one ground of action in connection with the cause of action, which was actually tried and determined; that the court held the two causes set out to be inconsistent and incompatible, and required the plaintiffs to elect upon which cause they would rely, and omit the other; and that, in obedience to this order, plaintiffs did elect, and omitted the one now set up, relying upon the other; but it is insisted that the court erred in this ruling; and although there was error, it was incumbent on plaintiffs to have had it corrected on appeal; and that, failing to do that, they are barred by the ruling, and that the decree is as conclusive upon the whole title as if this ground of relief had been in fact litigated and adjudged. The complainants, on the other hand, insist that the two causes of action were inconsistent, and for that reason could not be properly relied on by plaintiffs and litigated in the same action; and that

the order compelling plaintiffs to elect was correct. If wrong in this view, it is still insisted that, since the title now set up was not in fact litigated, and not permitted to be litigated, the proceeding in the former case is not res adjudicata.

It is quite clear to my mind, that the order compelling plaintiffs to elect upon which cause of action they would rely, and omit the other, was erroneous. The facts constituting the grounds upon which the plaintiffs claimed equitable relief in both cases alleged are entirely consistent with each other. Only the legal conclusions that might be insisted on, could be inconsistent. It might be claimed, and was claimed, by the opposing counsel, that under one patent the legal title was in the city. If that had been true the patent to Stark would of course have been void, and a cloud on the title, derived through the patent to the city, and the plaintiffs' equity, in respect to the city, rested upon the grant to the city in trust for their use and benefit, under the act of congress, as occupants of the premises in question. On the other hand, the legal title having rested in Stark, under his patent, as decided by the United States supreme court, upon the same state of facts as that under which title in or through the city was claimed, the patent to the city was void, and the plaintiffs' equities as against Stark depended upon the additional, but consistent, acts of plaintiffs and Stark alleged in the omitted cause of action, as affecting their individual rights. There can be no good reasons, it seems to me, why the plaintiffs should not have been permitted to allege the real facts upon both theories as they existed, and have since been proved, and leave the court to draw the correct conclusion therefrom, and give such relief as the plaintiffs were entitled to receive, if found entitled to any, in accordance with the legal or equitable conclusion adopted. If the circuit court of Oregon was right in compelling plaintiffs to elect, then the judgment in the former case is not a bar to this action, because the complainant has never had an opportunity to be heard, and he is not to lose his rights for not litigating them in a case wherein the law will not permit them to be litigated. If the court was in error, it still prohibited them from litigating the claim in that action, and deprived the parties of a right by compelling them to elect one cause of action, and omit the other. In either case, without any fault of their own, they have in fact been afforded no opportunity to be heard at all on their present cause of action. They did elect, and the wisdom of that election was vindicated by the judgment of the highest court in Oregon, which sustained the title ultimately relied on in that action, and decreed the appropriate relief; but that court also turned out to be in error, and the decree was reversed by a still higher tribunal. Shall complainant now be cut off from procuring an adjudication of his rights because, under such circumstances, the court erroneously prevented him from having it adjudicated before? It is, undoubtedly, well settled, that wherever any matter is directly in issue, and actually determined, by a court of competent jurisdiction, the determination is conclusive between the same parties and their privies, whenever the same matters again arise, even though collaterally. It is said in La Guen v. Gouverneur, 1 Johns. Cas. 492: "The principle, however, extends farther. It is not only final, as to the matter actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided." And this general principle is repeated in similar language in many subsequent cases. But the language is general, and must be considered in connection with the facts of the cases wherein it is used. The case cited affords as good an illustration as any of the principle upon which the rule is founded. The principle is, that an end should be put to litigation; that parties should not litigate their rights by piecemeal; that they are bound to be diligent, and when called upon to litigate their claims, they ought to present all they have to say, and that it is negligence to omit anything within their knowledge which might be available; and, if an omission is made, the consequences must fall upon the negligent party. Negligence of the party himself is the main element of the principle upon which the rule is founded. Says Mr. Justice Radcliffe, in the case cited: "It is evidently proper to prescribe some period to controversies of this sort, and what period can be more fit and proper than that which affords a full and fair opportunity to examine and decide all those claims. This extent of the rule can impose no hardship. It requires no more than a reasonable degree of vigilance and attention." Again (page 495), after stating that if the rule as stated is established, he says: "The only inquiry is, whether respondents, under the circumstances of the case, would have been permitted to make a defense on the trial at law, on the ground of the fraud which they now allege?" So, in the same case, Mr. Justice Kent says: "Every person is bound to take care of his own rights, and to vindicate them in due season, and in proper order. This is a sound and salutary principle of law. Accordingly, if a defendant, having the means of defense in his power, neglects to use them, and suffers a recovery to be had against him in a competent tribunal, he is forever precluded." Id. 504. "All the testimony now produced was, for anything that appears to the contrary, equally within their power then as now, and yet no effort was made to produce it. * * * They were guilty of gross and palpable neglect in thus slumbering upon this ground of defense, and must now be precluded from setting it up as a cause of equitable relief against the verdict. It is crassa negligentia if a party does not seek after a thing of which he is apprised, and, in law, amounts to

notice. So, whatever is sufficient to put a party on inquiry, is good notice in equity. If I am not mistaken in the principles which I have laid down, their application to the case before us is direct and pointed, and they operate with irresistible and conclusive efficacy to produce the result." Id. 504, 505. Now, what is the great principle which the learned judge so earnestly insists upon as excluding the defense, but negligence of the parties to avail themselves of the opportunity before afforded to bring forward their defense and have its merits determined? There had been a judgment for money recovered at law for proceeds of the sale of certain goods. Defendants then filed a bill in equity to restrain the collection of the judgment on the ground of fraud in representations as to the kind and quality of the goods, which fraud was available as a defense to the action at law, and was known to the defendants at the time, but which they did not attempt to set up, and this neglect is the principle upon which the former judgment is held to be conclusive. In the case now in hand, this element of negligence is wholly wanting. The parties did set up this cause of action in connection with the one ultimately relied on, and sought to have it determined, but the court refused to permit them to be joined, and required the plaintiff to elect one and omit the other, and this ruling must be presumed to have been obtained at the instance of the defendant, Stark, as it was made against the protest and the exception of the plaintiffs, duly taken, and noted in the order itself. Does it lie in Stark's mouth now, after procuring such a ruling, and forcing plaintiffs against their protest, under the order of court, to omit one cause of action, to say that plaintiffs might have litigated the claim in that action, and, because they did not, must now be precluded? I think not. They sought to litigate it, but were not permitted to do so. The opportunity was refused them. They were not in fault. Suppose Stark had been in possession and brought suit against the Starrs to quiet his title, and they had set up both grounds of equitable relief in the answer, and evidence on both issues had been received, and a decree entered in favor of the Starrs upon the city title only, the court expressly declining to pass upon the other, on the ground that it was unnecessary to consider it under the view taken, and this decree had become final by affirmance, neglect to prosecute any appeal, or otherwise, would it be pretended in another litigation between the same parties, whose rights, under the claim of title not passed upon, are in question, that the former adjudication would be a bar because it was presented and evidence taken, and might have been determined if the judge had seen fit to consider and decide it? Such is, certainly, not the doctrine of the authorities, as will appear by a number of cases cited in Caperton v. Schmidt, 26 Cal. 479. If it were so, the conclusiveness of the judgment would rest upon the discretion, negligence or something else, of the judge, over which the parties have no control, and not upon the diligence, good judgment, or other acts of the parties themselves.

But it is earnestly argued, by defendant's counsel, that the ruling of the court, that plaintiffs could only be heard upon one of their causes of action, and compelling them to elect upon which they would proceed, cannot affect the operation of the decree as a bar to this action; that they had a right to be heard upon every ground they had upon which to demand the relief prayed; that the refusal of the court to allow them to be heard, was error, and should have been corrected in the same case on appeal; and, that it cannot be reached in a collateral proceeding in another suit to establish the same right or procure the same relief, and several authorities are cited as sustaining the proposition. There appears to me to be some confusion of ideas in this part of the argument, and a misapplication of the legal principles invoked.

The authorities cited, properly applied, seem to me to overthrow the main proposition sought to be established. The first authority cited is Cocke v. Halsey, 16 Pet. [41 U. S.] 71. In that case (page 87), the court say: "The correct legal principle applicable to such proceedings is this: That in every instance in which a tribunal has decided upon a matter within its regular jurisdiction, its decision must be presumed proper, and is binding until it shall be regularly reversed by a superior authority; and cannot be affected, nor the rights of persons dependent upon it be impaired by any collateral proceeding. This principle has been too long settled to admit of doubt at this day, as in the cases of Thompson v. Tolmie, 2 Pet. [27 U. S.] 157; U. S. v. Arredondo, 6 Pet. [31 U. S.] 720; Voorhees v. Bank of U. S., 10 Pet. [35 U. S.] 473; and Philadelphia & T. R. Co. v. Stimpson, 14 Pet. [39 U. S.] 458." Now, what was the adjudication in the case under consideration? Clearly, not that the cause of action omitted under order of the court was invalid, but that the plaintiffs could only be heard in that particular suit upon one of the causes of action alleged, and that they must elect upon which they would proceed, and withdraw the other. This was clearly an adjudication in the progress of the cause, which the court had jurisdiction to make, and the determination is as conclusive as any other made in the progress of the cause. It was an adjudication between the parties, at the instance and in favor of one, against the other. An adjudication, not that plaintiffs could not be heard at all on that cause of action, but that both causes, on both grounds, for equitable relief, could not be heard in the same action, and that they must elect upon which they would proceed and withdraw the other. Suppose, after making their election under the

order, and proceeding upon their last amended complaint, as they did do, the decree of the court had been for the defendant instead of the plaintiffs, as it was, and the plaintiffs had appealed upon the sole ground that they had been compelled to elect and withdraw their other ground of relief, and the supreme court had affirmed the decree, holding that the two grounds of relief could not be heard in that action, that decision, whether right or wrong, would have settled the question by a direct adjudication, that the law of Oregon would not permit litigation of the two grounds of relief in one action. The decree in that case, would clearly not have been res adjudicata as to the cause of action which plaintiffs were compelled to withdraw, for the very rule invoked is, that the judgment or decree is conclusive, not only upon all matters actually litigated and determined, but upon all that might be litigated in the action; and as, by the law thus settled, the omitted ground of relief could not be litigated in that action, the case would not be within the rule invoked at all. The adjudication by the circuit court is no less conclusive. It stands unreversed on that point. Right or wrong, it is finally determined, and is res adjudicata between these parties, and, if erroneous, connot be reviewed collaterally in this or any other action. The ruling has the same effect, and is as conclusive as if it had been rendered by the court of last resort. It settles the question between the parties and their privies; and so the authorities cited in principle hold. The adjudication is, that the cause now relied on could not have been litigated in the former action, with the ground of relief therein actually determined. It goes no further, and this is conclusive on that point. There has, then, been no negligence on the part of the plaintiffs—no laches—no opportunity presented of which they were bound to avail themselves, conceding the determination to be erroneous. So long as the ruling did not shut the plaintiffs off from any hearing whatever, but only adjudged that they must pursue their remedy on that ground of relief in another action, they were under no obligation to have the error corrected. It left the road to another action open. It did not purport to cut them off from a hearing, and did not determine that there was no cause of action. And, so long as it did not do this, it did not matter to them whether they presented that ground of relief in this or in another action. To the plaintiffs it was only a matter of convenience. It would doubtless be less trouble to pursue the remedy in another action, than to attempt to correct the error in the one pending. Besides the plaintiffs were not in a position in which they could appeal. That determination was not a final decree from which an appeal could be prosecuted. It was an interlocutory adjudication. The appealable decree was in their favor on the other ground of relief, and plaintiffs could not appeal from a decree in their favor, nor could they have errors committed against them in the progress of the cause occurring before the trial corrected on Stark's appeal. On such appeal the question would not be presented. They, therefore, had no opportunity to correct the error, had it devolved upon them to do so, in order to procure a hearing upon the cause of action which they were compelled to withdraw. It is urged by complainant's counsel, that the two grounds of relief sought by the Starrs in the former suit, present causes of action so wholly distinct and independent, that they were not bound to litigate them in one action, even if it was admissible to do so. One cause went upon the theory that the legal title vested in the city of Portland by virtue of its patent for the use and benefit of the actual occupants, who as to these lots, were the Starrs, and that Stark had no title at all. The relief sought on this theory was in fact to remove a cloud upon a title already good. The other cause of action goes upon the theory that the legal title is in Stark by virtue of his patent, but that, by reason of equities arising between the parties themselves, the plaintiffs had the equitable right, and were entitled to a conveyance of the legal title. The case of Morris' Adm'rs v. Stuart's Adm'rs, 1 Iowa, 375, seems to be directly in point in favor of complainants on this question. But whether this case is correctly decided, I need not consider, for my conclusion is, that the former proceedings are not a bar to this action, on the grounds already indicated.

As to the equities disclosed by the bill and the evidence, the first objection in logical order arises on the conveyance to Chapman. It is said, firstly, that the power of attorney to Chapman was insufficient; and, secondly, if sufficient, that it was incompetent for Chapman, as attorney for Lownsdale, to execute a deed for Lownsdale to himself. The power is "to transact and superintend my business in said territory during my absence; to do anything pertaining to my interests in Oregon which he in his judgment may think advisable, particularly in signing deeds to Portland lots." The only business in Oregon which Lownsdale appears to have been engaged in at the time was selling town lots in Portland. And this power seems broad enough to cover it. The language, it is true, is by no means technical, and is liable to criticism; but considered in relaton to the known situation of the parties, and the condition of things existing at the time, the intention of Lownsdale can hardly be doubtful. The act of the attorney in executing a conveyance for, and in the name of the principal to himself, may well be regarded as extraordinary. But whatever view might be taken upon these points, if there was nothing more, other facts must be considered. Chapman himself had already the title to one third of all the interest ever

claimed by Lownsdale from Pettygrove, and Coffin owned another third, and it is not even suggested that Coffin's interest did not pass to Chapman by his conveyance. This vested in Chapman at least two undivided thirds of the lots conveyed in block eighty-one, if Lownsdale derived the title to the whole from Pettygrove, or two thirds of one half if Stark really owned one half as claimed by him. In fact the legal title to Lownsdale's entire interest purports to have been conveyed to Coffin by the deed under which Coffin became an owner. The deed is absolute on its face, and purports to convey the whole, and it is only by the accompanying agreement, executed between Coffin and Lownsdale at the same time by which it appeared, that it was to be held partly in trust for the benefit of Lownsdale, that the latter retained any interest at all. See Lamb v. Davenport [Case No. 8,015; 18 Wall. (85 U. S.) 307]. In this aspect the legal title to the two thirds of the possessory title passed to Chapman by Coffin's agreement, vesting in him the legal title to the whole, irrespective of Lownsdale's joining in the deed. But however this may be, Lownsdale was the only party entitled to complain, and he does not appear to have ever made any objection. He acquiesced in the transaction, accepted the lot conveyed to him at the price fixed and charged in the accounts of the parties at the time of the conveyance, and these accounts on Lownsdale's return were settled between Lownsdale, Coffin and Chapman on that basis. Chapman went into actual, several possession, and held till he conveyed to his vendees, who improved and have ever since occupied the lots without any claim on the part of Lownsdale. As between Lownsdale and Chapman, this certainly vested in Chapman all the right which could at that time be transmitted by Lownsdale, and Chapman acquired at least the equitable title to the whole. He already had the legal title to the possessory claim to the greater part.

The next question arises out of the deed of March 1, 1850, executed at San Francisco, by Lownsdale and Stark, by which they attempted to adjust and settle the conflicting claim of Stark to one half interest in the Portland land claim, and the subsequent modification and ratification as modified of this contract. It is claimed that there is no privity between complainant and defendant; that this deed is a contract between Lownsdale and Stark alone; that in the subsequent modifications Lownsdale is no party, and that Coffin and Chapman assume to modify Lownsdale's contract without authority; and that the language of the modifying agreements is insufficient, in various particulars, to accomplish the object claimed. Like other contracts of that time relating to lands in Portland, the language of these various instruments is doubtless open to much criticism. But in construing such instruments we must consider them in the light of the situation of the parties, and condition of things which gave them birth. We must place ourselves, so far as it is possible to do so by the use of extrinsic evidence now available, in the seats of the parties themselves at the time of the execution of the contracts, and examine them in view of the surrounding circumstances. Kimball v. Semple, 25 Cal. 449. And we may also consider subsequent acts of recognition tending to show the construction put upon them by the parties themselves to the instruments. Mulford v. Le Franc, 26 Cal. 110, 112; Steinbach v. Stewart, 11 Wall. [78 U. S.] 576; Le Roy v. Beard, 8 How. [49 U. S.] 468, 469; French v. Carhart, 1 Comst. [1 N. Y.] 102; U. S. v. Appleton [Case No. 14,463.]

Examining the transaction, and construing these instruments by the aid of these well settled rules, I think there will be little difficulty in arriving at the true intent of the parties executing them. It is true, that the ostensible parties to the instrument are Lownsdale and Stark, and for reasons sufficiently obvious, when the circumstances are considered. They were both in San Francisco, and Lownsdale, so far as anything to the contrary appears, without any power of attorney to act for his associates in the setttlement of the controversy. He could not, therefore, make the compromise for them. It was manifestly contemplated that there were other parties whose assent it was necessary to obtain; and their assent was provided for in the only way practicable at the time, by a covenant on the part of Lownsdale inserted in the said indenture of March 1st: "That in case any person or persons holding or claiming under him (Lownsdale), except the holders of those lots and under the conveyances especially hereinbefore confirmed by the said party of the first part (Stark), shall refuse to ratify and confirm this indenture, he, the said party of the second part (Lownsdale) will, at the option of the said party of the first part (Stark), at any time within six months from this date cancel this indenture, and release all rights acquired under these presents by the parties hereto." There can be no doubt to whom this covenant referred, because Stark knew before of, at least, Lownsdale's conveyance to Coffin. Coffin and Stark had before this time had a full discussion of their respective claims to the Portland land claim, as Coffin distinctly testifies, and there is nothing to the contrary, except the unsatisfactory general allegations of the answer, although Stark was himself a competent witness, and could have testified to the contrary had Coffin's testimony been incorrect. Besides, on September 26, 1849, at the same time when Stark executed the power of attorney to Couch, mentioned in the statement of facts, it was also accompanied by a letter of instructions to Couch, bearing the same date relating to the subject matter of the power,

in which he says: "With this you have from me a power of attorney of the fullest character, under which, during my absence from the territory, you can look out for all my interests, particularly with reference to my interest in the Portland town claim. As regards my claim, I wish you to notify Mr. Coffin as soon as he returns, of the true position of things, and, if possible, have the difficulty concerning my undivided half settled." And again gave directions how to proceed if, "after the return of Mr. Coffin, the matter can be brought no nearer to a settlement upon just and equitable principles." In this letter of instructions he does not mention Lownsdale at all, but treats Coffin as the man with whom his controversy existed. Lownsdale's deed to Coffin had been made in March previous, and being a deed absolute on its face, he may have supposed at that time the whole title to be in Coffin. Indeed, prior to the conveyance to Chapman, Coffin and Lownsdale acted themselves as though the entire legal title was in Coffin, for Lownsdale when he sold a lot did it as attorney for Coffin, as will be seen by reference to Lamb v. Davenport, already cited. But however that may be, it is clear that Stark knew of Coffin's interest. Although there is no direct evidence of the fact, it is altogether probable that he was also aware of Chapman's interest; for it is highly improbable that Lownsdale would have entered into the arrangement without disclosing it, and there is nothing in the testimony to justify the inference that he did not know of it. There can be no doubt, I think, that Coffin and Chapman were the parties had especially in mind in making this covenant, although not mentioned by name. Perhaps these general terms were used in order to embrace any others who might have held such conveyances unknown to Stark. But whether Coffin and Chapman are, or are not, the parties specially referred to, they are clearly embraced in the terms of covenant. The assent of Coffin and Chapman to this settlement, and the ratification of the indenture by them was regarded as essential, and provided for in this way. It was, therefore, contemplated that they were in fact, though not named as such, parties to said transaction and indenture, as well as Lownsdale and Stark.

Lownsdale returned to Portland on or about April 13, and brought to Coffin and Chapman the first information of the execution of the said indenture by Lownsdale and Stark. They promptly declined to ratify it. After some negotiation between Coffin and Chapman on one side, and Couch on the other, who acted for Stark, claiming to have authority for that purpose, the two instruments, one dated April 13, 1850, signed by Coffin and Chapman, and the other April 15, 1850, signed "John H. Couch, for Benj. Stark," set out in the statement of facts, were indorsed on the said indenture of March 1, and executed by the parties, and from that time forward the several parties and their grantees were in possession and exercising acts of ownership in accordance with said agreements and modifications without let, hindrance, objection or adverse claim from the other till after the patent to Stark issued.

Some questions have been made upon the construction of these modifying and ratifying instruments. It is claimed that they are not ratifications, but modifications if anything; but are not the latter, because they are not the agreement of Lownsdale at all, who is claimed to be the only party, and that Chapman and Coffin had no authority to act for Lownsdale in modifying his agreement; that it only purported to ratify sales of lots made by Lownsdale either in person or by his lawful attorney, etc.

In view of the rules of construction cited; the relation of the parties to each other, and to the lots; and of the condition of things already stated, the language, however inartificial, appears to me to be susceptible of but one reasonable construction. Chapman and Coffin were deemed to be the parties in interest, whose assent to the indenture of March 1, it was considered necessary to obtain, and which was sought to be secured by the covenant already considered. In the modifying instruments they were acting for themselves with respect to their own interests and not for Lownsdale merely. They were unwilling to accept all the terms of the compromise made by Lownsdale and Stark; but were willing to accept them in part. They insisted that all the property disposed of since January 1, up to the time of receiving notice of the compromise, should be placed on the same footing with the property sold prior to January 1; and this being acceded to by Couch on behalf of Stark, they indorsed upon the indenture of March 1; a supplementary agreement, whereby they "ratify and confirm" that agreement between Lownsdale and Stark "respecting an adjustment of title, hereby placing the disposition of property up to notice of said adjustment upon the same footing with the disposition of property before the first day of January last." The plain meaning of which is, that the contract made between Lownsdale and Stark shall be modified to this extent, and the contract as so modified, ratified and confirmed. This modifying clause does not limit the enlargement to lots sold by Lownsdale individually since January 1. Its terms are general—"the disposition of property up to notice of said adjustment"—that is to say, all property sold or otherwise disposed of. It is perfectly obvious that the object was to take out of the conveyance to Stark, all the property which Coffin and Chapman in prosecuting the busines of what they call in their own agreements, "the partnership in selling town property," all those lots disposed of during Lownsdale's absence from about the first of January

till his return on or about April 13. Lownsdale having been absent during all that time had in person disposed of none. But Coffin and Chapman had remained at home and continued to dispose of the common property, and these are clearly the dispositions intended by the modification insisted on. It is equally obvious that the instrument signed by Couch for Stark and appended to that executed by Coffin and Chapman, to-wit:—"I ratify the above agreement as far as my interest is concerned in said property," was intended to ratify the indenture between Lownsdale and Stark, as so modified and agreed to by that of Coffin and Chapman. If Couch had authority to sign the latter, or it having been signed by him for Stark, the latter, after being informed of the facts, acquiesced in and adopted it, then the contract so modified finally became the real and only contract between the parties, and all property disposed of subsequent to January 1, and before April 13, stood upon the same footing as that disposed of before January 1. That is to say, Stark by the terms of the first covenant in the said indenture, thus extended in its scope by these modifications thus adopted, in the language of the covenant, "so far as his right, title and interest are concerned, ratifies and confirms all conveyances of" lots disposed of by Coffin, Chapman and Lownsdale as owners of the Portland land claim through Coffin and Chapman, from January 1 to April 13, as well as those to the lots sold before January 1, particularly enumerated in the covenant; and this embraces the lots in controversy.

It is next insisted that Couch had no authority to make this modification, and it is, therefore, not binding on Stark. We have seen that a power of the most general character was given by Stark to Couch, his mercantile partner, September 26, 1849, in which the authority to Couch is in these words: "to do any and all acts during my temporary absence which I might myself do were I personally present," without more particular specification or limitation. So, also, in an accompanying letter upon the subject matter of the power, in which he directs Couch to notify Coffin, as soon as he should return, of the true position of things with reference to the interest claimed by Stark in the Portland land claim, "and, if possible, have the difficulty, concerning my undivided half, settled." This letter shows that the power of attorney was intended to cover this very matter, and that he expected Couch to settle his controversy with Coffin in relation to this claim. It shows that Stark intended the power to be broad enough to settle this controversy. If it is not, the letter is, and it does not matter whether the authority is conferred by a formal power or by letter. Lee v. Rogers [Case No. 8,201]. It is sufficient that the authority is given, and directions to do a specific thing embraces power to act. Now this is precisely what Couch did with Coffin and Chapman, the latter having in the meantime, through conveyance from Coffin in part, at least, become interested with Coffin and Lownsdale.

It is claimed that this power, whatever it authorized, had been revoked; but there is no evidence, other than by implication, that it had been revoked at the time. Another full power of attorney, given to George Sherman, dated January 17, 1850, was introduced, and claimed to be a revocation of Couch's power in the case of Failing v. Stark [Id. 4,606], but I do not find it in evidence in this and the other cases. But suppose it to be in evidence, that power does not purport to revoke Couch's power, and if it does revoke it, it is by implication only, and that implication arises only from the fact that a second power has been given, embracing the same subject matter. It is by no means clear that it does embrace the entire subject matter. While it is a very full power, authorizing Sherman to prosecute claims to land against individuals, and the government, and to lease and sell lands, it does not in express terms, or by reasonable construction, appear to me to authorize him to compromise or adjust this claim. It may well be that Stark would be willing to entrust his clerk, a young man, with power to prosecute or sell, while he would reserve to his more experienced partner's discretion and judgment the authority to settle or compromise by yielding a part to secure the remainder of his claim. But, if otherwise, I am not aware that giving a second power to another necessarily constitutes a revocation of the former power. I do not know any reason why two different persons may not be empowered to do the same thing. It has been held that they may. Davol v. Quimby, 11 Allen, 208. Where not absolutely inconsistent the construction must be determined by the circumstances, and from these I see no reason to suppose that Stark intended to revoke Couch's power in the particular under consideration. The circumstances indicate the contrary. At the time of the execution by Couch of this instrument ratifying the modification made by Coffin and Chapman, Couch had in his possession the said indenture of March 1, between Lownsdale and Stark, to which these modifications were appended. It must have been sent to him by Stark to be used in connection with the agency claimed under the power before given. Stark must have sent it up to him at about the same time Lownsdale returned. The fact that it was sent to him by Stark would indicate that his agency was intended to be still continued with reference to a settlement of this controversy. It was contemplated that something further was to be done by way of procuring the assent of Coffin and Chapman to the settlement, and somebody must attend to it. Besides, Sherman was himself a clerk in the employ of Couch and Stark. And it is quite clear from the evidence that he, too, was consulted, took part

in, and assented to, the arrangement, although Couch actually executed for Stark the assent to the modification of the agreement. So, also, Sherman himself acting for Stark put the agreement with the modifications appended by Coffin and Chapman, and by Couch on the records, and this, too, after Stark himself had been at Portland in June, and been informed of all these transactions, and it will be presumed under the circumstances by Stark's directions. This itself was an act of acceptance and adoption.

In addition to this, Stark himself, while at Portland in June, called upon Coffin and Chapman for, and was furnished by them with, a list of all property disposed of by them prior to the date of said modification. He stated to Coffin at that time, or on the steamer during his return voyage to San Francisco, that he would sanction the contract or submit to it, and carry out its provisions, and his subsequent acts, and the acts of all parties interested down to the issue of the patent—a period of ten years—are consistent with that idea, and totally inconsistent with any other. Stark was in possession and exercised acts of ownership over the part conveyed to him by the modified contract from that time, without setting up any claim to that released to Lownsdale, Coffin and Chapman, and the latter continued in possession, and exercised acts of ownership over the part released to them, without setting up any adverse claim to Stark's portion. Stark did not exercise his option to annul the contract within six months under the covenant in the indenture with Stark authorizing him so to do in case those having conveyances from Lownsdale should refuse to ratify the contract, and manifestly for the reason that he acquiesced in the contract as modified, and regarded that as a final settlement of the controversy. He availed himself of the right and undisputed possession thus acquired to procure his patent. Up to the date of his agreement with Lownsdale, Stark never claimed to have more than an undivided half of the Portland land claim, and the title to two thirds of the other undivided half of the entire tract north of the line agreed upon in the indenture of March 1, as well as to block 81, was in Coffin and Chapman at that date; and the only means by which Stark acquired his right to the possession of their share in any part of it, or any several possession by which he was enabled to obtain his patent at all to any part, was through this modified contract. He could not adopt that part which was beneficial to himself, and reject it so far as it was beneficial to Coffin and Chapman; and he manifestly did not attempt to do it, until he had fortified his position ten years afterward by a patent from the United States, conveying to him the title to the land.

I have only referred to the salient points of the evidence, without any attempt at a discussion of the particulars, and I content myself with indicating the result forced upon my mind, and saying, that in my judgment, no unprejudiced mind can examine the evidence and fail to reach the conclusion that Stark fully acquiesced in, adopted, and acted upon the modifications of the contract made by Coffin and Chapman on the one part, and Couch for Stark on the other, in the sense adopted in this opinion; and, that, as a result, he realized a fortune, or might have done so, if he did not, that might well have satisfied his ambition, without any encroachment upon the rights that ought to have been secured without let or hindrance on his part ten years afterward to the other parties and their privies to those transactions. And more, it is equally manifest from the evidence, that while there was no written covenant on the part of Stark to that effect, he held out by his acts and express declarations to the purchasers from Lownsdale, Coffin and Chapman, and in particular to complainant and his brother, one of complainant's grantors, and for a time a joint owner, unmistakable assurances upon which they were entitled to rely with confidence, that if he obtained his patent to his general claim he would convey to them the lots they had purchased. He expressly so told both the Starrs with reference to the lots held by them at the time, and to those other lots purchased by others from Chapman, and made similar declarations to some, if not all, of Starr's other grantors. The complainant himself purchased one half of lot two from Chapman as early as October 3, 1850, and in December of that year he erected a tin shop on it and occupied it. From that day till the filing of the bill in this case, he has occupied it for mercantile purposes. In October and November, 1850, and January, 1851, Chapman sold the other lots in controversy, and the purchasers soon after entered, improved and occupied in like manner, and their respective titles were acquired by Starr at various times before the issue of the patent to Stark—some before and some after Stark's said declaration to him—and the occupation continued, without adverse claim or hindrance on the part of Stark. A warehouse had been built upon one of the lots, even before Lownsdale acquired his interest from Pettygrove, and this Chapman occupied by himself, or tenants, while he claimed the lot under the conveyance before set out. The Starrs were joint owners and occupiers of parts of the lots during a portion of the time from 1850 to 1860, and while so occupying, Stark repeatedly told them, that the title to their lots, and the others in the same situation, was good; and that when he got his patent he would convey the legal title to the owners of the possessory right. He stated to complainant, that if lot owners would go in with him, and assist in getting title, he would make lot holders good titles. And Starr says, that he and his brother "rendered assistance by not opposing him in getting his patent," and "by talking to

others to get them to acquiesce in it, believing that he would make good their title, and in various other ways." One of these conversations was had at the very time when Stark was going to obtain his certificate of location, which was not obtained till the fall of 1853. Stark returned to Portland about October, 1850, and with brief temporary absences resided and did business in person within a short distance of this property, till he got his patent in 1860. During this time he had repeated conversations with the Starrs, and consultations and joint actions in litigating other matters affecting the value of this property, and of other property which Stark himself owned; and during all this time no claim was ever set up, or intimated by Stark adverse to Starr, or the other purchasers of the property from Chapman.

Such is the result of the testimony of the Starrs, confirmed by other testimony, with none of any importance to oppose it. There it nothing to impeach its credibility beyond the coloring which the interest of the parties, however honest, may be supposed to give. But Stark is a competent witness, also, and it is but fair to presume that if he could have truthfully denied, or qualified in any material degree, the accuracy of the testimony given, he would have offered himself as an opposing witness upon these specific points, and submitted himself to a cross-examination in the manner usual with other witnesses. He has not done so, other than by the loose and general allegations in his answer to the bill; and I see no good ground for doubting the substantial correctness of the facts as stated. They harmonize with the acts and uniform conduct of Stark in relation to the matter. These further considerations not only go to establish beyond all doubt the conclusion that Stark fully acquiesced in and adopted the modification of the contract with Lownsdale, assented to by Couch for him, but also show that the complainant and his grantors had every reason to believe, so far as acts and verbal promises can go, that Stark would obtain the title to the lots so embraced in the modified contract for the benefit of the purchasers from Chapman; and that the complainant, and those under whom he claimed, acted upon that idea, and permitted Stark to prove up his claim without any opposition from them. These are not mere loose general rumors—general expectations entertained by the public at large as to what the proprietors of this land claim would do in the event of procuring title from the government, but they are specific personal statements by Stark to Starr himself, and to those from whom he derives title, and in respect to these specific lots. And complainant derived title to some of them after these conversations, and to all of them after Stark, by his acts, had fully manifested his approval of the modifications of the contract in question. In these particulars the complainant appears to me to stand in a much stronger position than Davenport in the case of Lamb v. Davenport, and in an equally strong position in every other particular except one, which will be considered in its proper place.

It follows that, whatever interest in the lots in controversy had been acquired by Pettygrove and Lovejoy, under whom Stark claimed, by virtue of a settlement, improvement and occupation commenced in 1848, and continued in their grantees as stated, including Stark, became fully vested in Chapman, and were by him either conveyed directly to complainant Starr, or to others, who subsequently conveyed to Starr. As between complainant Starr and defendant Stark, the complainant has all the right, title and interest that it was possible for Stark to convey on March 15, 1850, the date of the modification of the indenture of March 1, 1850, by Couch for Stark, and subsequently acquiesced in by him in the manner indicated, and this included the initiation of the four years' possession dating from September previous, subsequently perfected into a full title by the patent issued in virtue of that possession. At that time the donation act had not been passed, consequently Starr acquired, through Chapman and the other parties before mentioned, all the title it was at that time possible to acquire, a title against all the world except the United States. The donation act having been passed in September, 1850, Stark afterwards filed his claim under that act, dating the possession upon which he relied, and which he afterwards proved up, and upon which the patent issued, from September 1, 1849—from which time his right subsequently perfected by his patent dates—some seven months prior to the final compromise between Stark and Lownsdale, Coffin and Chapman. By that compromise, the right to the very possession of these particular lots upon which the patent issued passed, as the actual possession had before passed to Chapman, and afterwards through him to Starr. Stark was not in fact in possession of these lots at the date from which he dates his settlement, nor at any time afterwards during the four years, while his possession was required to be continued to entitle him to a patent, as we have seen. During all that time it was in the occupation of Starr and his grantors. It follows that unless he obtained the title for the benefit of those who had purchased under the circumstances stated, he either committed a fraud upon them, or else upon the United States and the law, for the law did not grant, or intend to grant, to one party, land which he never possessed, but which at all times was actually in the occupation of another.

The only particular in which Davenport occupied a better position in respect to the title to the lots claimed by him in Lamb v. Davenport, than Starr does in this, is, the equity claimed by him under the fourth covenant in the instrument executed between

Lownsdale, Coffin and Chapman, commonly known as the escrow, which will be found set out in the report of that case. That covenant does not apply to this case. In other respects Starr's equity is equal to, and in some particulars, as we have seen, stronger than Davenport's. The supreme court has recently decided that case on appeal, and the bearing of its decision upon this case will now be considered. The circuit court rested its decision upon the fourth covenant of the escrow, as expressly obligating Lownsdale to convey the legal title, in case he should obtain it from the United States. While the supreme court affirmed that view, it is believed that an attentive consideration of the decision cannot fail to satisfy the inquirer that it is much broader in its scope. The supreme court say: "We are satisfied that by the true intent and meaning of these agreements, the equitable right to all the lots in controversy had been transferred by Lownsdale to Coffin before the passage of the donation act, and that, as between Lownsdale, Coffin and Chapman, the equitable interest, such as we have described it, of the lots in controversy, was in Coffin or his vendees. The record shows that this interest or claim, whatever it was at the commencement of this suit, was vested in Davenport, while the legal title was in the heirs of Lownsdale. According to well settled principles of equity often asserted by this court, Davenport is entitled to the conveyance of this title from those heirs, unless some exceptional reason is found to the contrary."

Now the agreements referred to by the supreme court by which "the equitable right to all the lots in controversy had been transferred by Lownsdale to Coffin before the passage of the donation act," and, "was in Coffin or his vendees," were the agreements prior to the escrow, for that was not executed till long after the passage of the donation act, and it did not purport to transfer any interest in these lots at all. It was simply an arrangement for their own future action. After discussing the validity of the escrow, notwithstanding its execution after the passage of the donation act, the court proceeds: "And if this latter agreement is rejected as altogether void, it is still apparent that by the contracts made prior to the donation act, the equitable right of Coffin to these lots is sufficiently established." Coffin's individual conveyances to Mills and Cheeny, under which Davenport claimed title, were not made till after the passage of the donation act, and to sustain these conveyances under the act, the court very properly distinguished Coffin's right as an individual lot holder through mesne conveyances from the town proprietors and donee, from Coffin's right as general claimant and holder of the Portland land claim and general town proprietor. The court say, in reply to the objection to the validity of the conveyances to Mills and Cheeny: "The answer is, that Coffin is not the donee, who takes title under the act of congress, but Lownsdale; and Lownsdale had made a valid agreement by which his interest in them was transferred to Coffin before that statute was passed." The conveyance by which the lots then in question passed from Lownsdale, donee, and Coffin as general claimants and town proprietors, to Coffin as as individual lot holder under the general claimant, is the conveyance made to Marshall, the substance of which is given in Lamb v. Davenport. Marshall having resold the lots to Coffin as an individual, the latter subsequently conveyed them to Mills and Cheeny. This conveyance to Marshall is a simple quit-claim deed, without any covenant at all as to a future procurement of title, or for conveyance of title should it be procured. Or, if we consider the conveyance from Lownsdale to Coffin, of March 30, 1850, Exhibit C of the evidence in the case now in hand, as the one referred to by the supreme court under which the title of Lownsdale, donee, passed to Coffin, as purchaser, it is also but a quit-claim deed, equally barren of covenants. The equity of Davenport in that case, then, as against Lownsdale, the patentee and donee under the donation act, rested entirely on a quit-claim deed made under the circumstances detailed in that case. The court, then, distinctly hold in that case, that a quit-claim deed made in view of the condition of things existing at Portland at the time the various transactions considered occurred, gives an equity against the grantor, who subsequently obtains the legal title under the donation act, under the circumstances disclosed in that case. In fact, this ground of decision is, if possible, more distinctly brought out than the other, and is suggested as a ground free from doubt, even if the other were doubtful. Both points were fairly and directly presented by the record, and the decision might as well have been put upon one as the other, and both are distinctly determined. We can, therefore, no more say that one was not directly adjudicated than the other. But if we can, the court manifestly rest more directly and confidently on the equities derived from the quit-claim deeds prior to the escrow, than upon the covenants in the escrow; for this is the point, particularly stated, and the only one mentioned in the close of the opinion, where the result is announced as follows: "But we hold, that as to the portion of the land which was allotted to him by the surveyor-general, and the title of which vests in his heirs by the act of 1836 (5 Stat. 31), without which the patent would be void, his contract of sale made before the donation act was passed, and while he was the owner of the possessory interest before described was a valid contract intentionally protected by the donation act itself, and binding on the title which comes to his heirs by reason of his death."

Thus, ex industria, this point seems to be repeated, as the one upon which the court designs principally to rest the decision. The conveyances referred to as made before the passage of the donation act do not embrace the escrow, for that was executed long after the passage of the act; and Davenport had no title whatever under any contract executed before the passage of the donation act, coming from Lownsdale, the donee, other than that by a quit-claim deed, without any further covenants for title. The claimant in the case now under consideration, substantially stands in the position upon the facts stated, of having a conveyance of all of Stark's right, title and interest, on the 15th of March, 1850, which is after the initiation of the possession upon which his title to a patent as donee rested, which was commenced in September before, and was all the title he, or any of the Portland land claimants, was capable of conveying at the time. It conveyed his right of possession and the rights incident to it. Complainant's title is, therefore, in every particular, equal to that of Davenport derived from Lownsdale, under the conveyances made before the passage of the donation act. The complainant, therefore, is strictly within the decision of the supreme court in that case. It is impossible to take the present case out of the rule there laid down. The decision is authoritative, and must control the decision of this case, and I am glad to be able to say that I am fully satisfied, as I think any reasonable mind must be, that the result in this case, and in the several others argued in conjunction with it upon the same, and substantially the same testimony, is in strict accordance with the intrinsic justice of the case. In my apprehension, any other result in these cases would work great hardship and gross injustice. This class of cases is sui generis, and I do not now perceive why the rule established by the supreme court in Lamb v. Davenport would not operate justly in all cases of the same class.

I have given these cases all that careful attention which ought to be bestowed when so large an amount of property, and principles so important, are involved, and have earnestly endeavored to reach a correct conclusion. If I have failed to correctly construe the decision of the supreme court, or have in any other particular misapprehended the law, I am glad to know that my error can and will be corrected by a higher tribunal, and justice ultimately done.

There must be a decree for the complainant in pursuance of the prayer of the bill with costs, and it is so ordered.

DEADY, District Judge, dissented upon the point as to the bar of the former proceedings; also, upon the point as to the effect of a conveyance of his interest without covenants, made by the donee under the donation act, after the initiation of his possession upon which the patent issues, and prior to the passage of that act.

[On appeal to the supreme court, the decree of this court was affirmed. 94 U. S. 477.]

[NOTE. The case of Failing v. Stark, involving the same general facts as the principal case, was decided May 8, 1874, and is here reprinted by permission from 2 Sawy. 642. The opinion of the court was as follows:]

SAWYER, Circuit Judge. This is a bill in equity to restrain the defendant from prosecuting an action to recover the north half of lot three, in block twenty-seven in the city of Portland, and to procure a conveyance of the legal title. The general facts are the same as those fully set out in Starr v. Stark [Case No. 13,317], except that the first conveyance by which the possessory title passed out of the general claimants of the Portland land claim was by Coffin, Lownsdale, Chapman, Hastings and Baker to J. T. Hobbs & Co., Hastings and Baker claiming some interest subordinate to Chapman. This deed bears date March 14, 1850, and is, therefore, one of the lots sold in Lownsdale's absence, and is embraced in the modified contract considered in Starr v. Stark. As to the question discussed in Starr v. Stark the equities in this case are, in all particulars, as strong as in that case, if not stronger. The testimony of Stark himself, given in another matter, was introduced in this case, and he nowhere in this testimony denies that he acquiesced in the modifications to the agreement of March 1, between himself and Lownsdale, made by Chapman and Coffin. He states that Coffin and Chapman ratified the agreement with the modifications; and that he went into the undisputed possession in accordance with that agreement. The plain inference from his own testimony is, that he acquiesced in it. He nowhere in his deposition denies Couch's authority. It is perfectly clear, from all the testimony, that he did accept the modifications made by Coffin and Chapman, and acted upon them as valid. If he expected any money consideration after this modification as to lots sold subsequent to January 1, 1850, he evidently looked to Lownsdale individually for it, and not to Coffin and Chapman. If he did not obtain it, it was a matter between him and Lownsdale personally. There is no defense of res adjudicata set up in this case.

The only other questions arise on defects in the mesne conveyances. Without discussing them in detail, suffice it to say, that a valuable consideration was always paid, and the actual possession passed and continued in the several purchasers with the acquiescence, and without any subsequent claim on the part of the vendors, and enough appears to show that the equitable title of the various, intermediate holders from Lownsdale, Coffin, Chapman, etc., became fully vested in complainant.

Let a decree be entered in favor of the complainant in pursuance of the prayer of the bill with costs.

DEADY, District Judge, dissented on the second point indicated in his dissent in the case of Starr v. Stark [supra].

E. D. Shattuck, for complainant.
W. W. Page, for defendant.

[The case of Bacon v. Stark also involving the same facts as the principal case, and also decided May 8, 1874, is here reprinted by permission from 2 Sawy. 644. The opinion of the court was as follows:]

SAWYER, Circuit Judge. This action embraces the south half of lot four, in block eighty-one, and is, in all essential respects, similar to the cases of Starr v. Stark [Case No. 13,-317], and was submitted on the same testimony, so far as the litigated points are concerned, ex-

cept that in this case it is not pretended that the former action is a bar to complainant Bacon's action. On the authority of Starr v. Stark [supra] a decree must be entered for complainant, with costs, and it is so ordered.

DEADY, District Judge, dissented on the second point indicated in his dissent in Starr v. Stark [supra].

J. N. Dolph and William H. Effinger, for complainant.

Wm. Strong and Bronaugh & Catlin, for defendant.

Case No. 13,318.

STARR v. STARK.

[2 Sawy. 641.] [1]

Circuit Court. D. Oregon. May 8, 1874.

JUDGMENT—RES JUDICATA—IDENTITY OF TITLE.

1. A had two lots, numbers 1 and 2, held under two distinct chains of title. In a suit between A and B, involving lot number 1, one of A's titles was directly put in issue and determined, but the other was not. In a subsequent suit between the same parties, embracing lot number 2, *held*, that A was not estopped by the judgment in the suit relating to lot number 1, from setting up in the suit embracing lot number 2, the title not actually put in issue or determined in the first suit relating to lot number 1, only.

2. He was estopped from setting up the identical title which was actually put in issue and determined in the first action.

3. A party is not bound in an action relating to one lot to litigate his title to another and different lot, even though the title to both be the same; but if he does put the title in issue and have it determined in an action relating to one, he will afterwards be bound by the determination in an action relating to the other, so far as the identical title litigated is concerned.

At law.

J. N. Dolph and Wm. H. Effinger, for complainant.

Wm. Strong and Bronaugh & Catlin, for defendant.

Before SAWYER, Circuit Judge and DEADY, District Judge.

SAWYER, Circuit Judge. This action embraces lot three, in block eighty-one, and is in all respects similar to, and as to the litigated points, was submitted on the same evidence as the case of Starr v. Stark [Case No. 13,317], except that the lot in this case was not embraced in the former action, the decree in which was claimed to be a bar in the other case. The proceedings in the former action, however, are set up and claimed to be a bar in this case, on the ground that the same questions might have been directly litigated in that action between the same parties; and that the decree is as conclusive in this case as in the other. There can be no doubt, I think, that the decree upon the title actually litigated and determined in that case—the title derived through the patent to the city—is conclusive in this action. But there can, certainly, be no ground for holding it conclusive upon those matters not in issue, and not litigated or determined, whatever may be the effect of that decree upon the title to the lots actually involved in the decision. The land in question here is a different subject matter, and the parties are certainly not bound to litigate all their claims to this lot in an action about another lot, although the various chains of title to that other are the same. If the parties do, in fact, put the entire title in issue, and it is determined, the determination will be conclusive. But I know of no authority which goes so far as to sustain the position taken by defendant's counsel in this case.

The other questions are precisely the same as those discussed in Starr v. Stark [supra], and upon the authority of that case there must be a decree for the complainant in pursuance of the prayer of the bill, with costs, and it is so ordered.

DEADY, District Judge, dissented on the second point indicated in his dissent in Starr v. Stark [supra].

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

STARR (STARK v.). See Case No. 13,307.

Case No. 13,319.

STARR et al. v. TAYLOR et al.

[3 McLean, 542.] [1]

Circuit Court. D. Indiana. May Term, 1845.

ATTACHMENT — LOSS OF ATTACHED GOODS — ON WHOM LOSS FALLS — LEVY AS SATISFACTION—AGENCY OF SHERIFF.

1. Where an attachment is laid upon goods, they are taken from the possession and control of the defendant, the same as where an execution is levied.

2. If under such circumstances, the goods are lost without fault in the sheriff, the loss must fall on the defendant. But if the sheriff fail to use ordinary vigilance to keep the goods safely, and they are lost through his negligence, he is liable. And the defendant may set up the levy as a satisfaction, if the value of the goods be equal to the amount of the judgment.

3. The sheriff is the agent of both parties, and is liable to either, but in such a case the defendant is not bound to sue him.

[This was an action on a promissory note by Starr & Smith against Taylor, Moore & M'Griff.]

O. H. Smith and Mr. Gregory, for plaintiffs.

Judah, Mace & Beard, for defendants.

McLEAN, Circuit Justice. This action is founded upon a promissory note given for goods purchased at New York. In their defence, the defendants set up that a large amount of goods, to wit, of the value of $2.-800, and for a part of which the above note

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

was given, was attached at Buffalo, in the state of New York, by Frost & Dickerson, on a claim against the defendants, for five hundred dollars. That the plaintiffs came in under the attachment law of New York as creditors, and filed the above note as the foundation of their claim; and that the warehouse in which the goods were deposited was burnt, and the goods destroyed by the negligence of the sheriff who laid the attachment, and who took the goods into his custody. The thirty-seventh section of the attachment law of New York (Rev. St. 8), provides, that "an affidavit may be filed with the officer who issued a warrant of attachment, specifying the sum due," &c. And the thirty-eighth section declares, "that upon the filing of such an affidavit and petition such creditor shall, in all respects, be deemed to be an attaching creditor, and entitled to the same benefits and advantages, and subject to the same responsibilities and obligations, as the creditor at whose instance such attachment was originally issued."

Various objections were made to the original attachment, and to the affidavit on which it was issued. But the court held, that as the plaintiffs became parties to the attachment by filing their claim, they cannot, under the pleadings in this case, object to the legality of that procedure. The property was held under the attachment, as much for the benefit of the plaintiffs, as for the benefit of the plaintiffs in the attachment.

The great question in the case is, on the facts proved, whether the loss of the goods may be charged to the negligence of the sheriff. The goods were taken out of the possession of the defendants by the attachment, and after this they were in the custody of the law. The seizure of goods on execution is a bar to any other execution against the defendant for the same debt. And on the same principle, such levy may be pleaded in bar to any other suit for the same demand. After a sale of the property, the satisfaction of the judgment could only be set up pro tanto. M'Intosh v. Chew, 1 Blackf. 290; 4 Mass. 403; 2 Ld. Raym. 1072. The same principle applies on the laying of an attachment. Until the sale of the property on an attachment or an execution, the plaintiff does not realise the fruits of the proceeding, and consequently, he is not responsible for the safe-keeping of the property. And if it shall become lost by one of those casualties which often occur, and which are in no respect chargeable to negligence, the loss must be that of the defendant. This risk every defendant incurs, when he suffers his property to be taken in execution. He is chargeable with neglect in failing to do what the law enjoins on him, and if a loss shall be the consequence, the fault is his own. But if the sheriff or other officer who serves the process, and who has the custody of the property shall, by his neglect, suffer it to be injured or destroyed, he is responsible. He is bound to use at least ordinary vigilance for its safe-keeping. Should live stock be levied on, the sheriff is bound to provide for its support at the expense of the defendant. This expense should be paid on a sale of the stock. Story, Bailm. §§ 46, 128–131; Phillips v. Bridge, 11 Mass. 242; Id. 211; Id. 163; Congdon v. Cooper, 15 Mass. 10; Knap v. Sprague, 9 Mass. 258; Jenner v. Jolliffe, 6 Johns. 9.

On the above considerations, the court instructed the jury that if they shall find, from the evidence, that the sheriff failed to exercise that degree of vigilance which a careful man would use in the protection of his own property, and it was consequently lost, they should find for the defendant. The sheriff is the agent of both parties. And if he be guilty of negligence, so that the property becomes lost, he is responsible to the plaintiff, at least to the amount of his judgment. The sheriff is also liable to the defendant in such a case, but the defendant is not bound to prosecute him. The plaintiff, through the instrumentality of the law, having taken the goods from the possession and control of the defendant, he may set up the levy in discharge of the judgment, and a loss of the goods, through the negligence of the sheriff, will not invalidate that plea.

The jury found for the defendant.

STARR (UNITED STATES v.). See Case No. 16,379.

STARR, The SARAH. See Cases Nos. 12,352–12,354.

STARR, The SARAH. See Cases Nos. 105 and 106.

STARRETT (PERRY v.). See Case No. 11,-012.

Case No. 13,320.

STAR SALT CASTER CO. et al. v. CROSSMAN et al.

[4 Ban. & A. 566.] [1]

Circuit Court, D. Massachusetts. Oct., 1879.

PATENTS—INFRINGEMENT—MEASURE OF DAMAGES—ROYALTY.

1. The rule, that the profits, which a plaintiff who has made and patented an improvement upon an existing machine or manufacture, is to recover, must be those only which can be proved to have resulted from his particular improvement upon the existing machine or manufacture, and that the burden of proof of such profits is upon him, stated and applied.

2. In the case of infringing articles made and sold, an established royalty is the proper measure of damages.

[Cited in Stutz v. Armstrong, 25 Fed. 147.]

[This was a bill in equity by the Star Salt Caster Company and others, against Charles P. Crossman and others, for the infringement

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

of letters patent No. 71,643, granted to G. B. Richardson, December 3, 1867.]

T. Weston, Jr., for complainants.
George A. Bruce, for defendants.

LOWELL, Circuit Judge. The provision of law which gives a complainant in equity, whose right is established and has been infringed, the right to recover damages in addition to profits, appears to intend that he may have either profits or damages as may be most for his advantage in the particular case. To this end, the profits may be assessed by the master, and, if they prove inadequate, that is to say, if they prove to be less than the damages, a sum may be added to make up the difference, which brings the decree simply to an assessment of damages. Several such decrees have been entered in this district and circuit. There is, however, a noticeable reluctance in the courts to add damages when the profits are a substantial sum, and very clear proof is required before the addition will be made. See Birdsall v. Coolidge, 93 U. S. 64; Marsh v. Seymour, 97 U. S. 348; Buerk v. Imhaeuser [Case No. 2,107]; Carew v. Boston Elastic Fabric Co. [Id. 2,397].

The profits were estimated by the master, in this case, and damages were added. The evidence is not reported, and I can; therefore, only say that, excepting for reasons presently to be mentioned, the master's theory appears to be entirely valid. Neither party, however, brought to the notice of the master two facts which appear upon the record, and which should have a vital influence on the decision. I consider myself bound to take notice of these facts, because the counsel were not very familiar with the mode of accounting in these suits, and ought not to be concluded, under the circumstances, by their omission to observe these facts.

The first point touches the profits. The improvement for which the plaintiffs hold a right under their two patents is in pulverizers for salt bottles; and the profits appear to have been estimated upon the manufacture and sale of the bottles themselves. The rule is now well settled, that the profits which a plaintiff is to recover must be those only which can be proved to have resulted from his particular improvement upon the existing machine or manufacture, and that the burden of proof is upon him to show what his profit was. The rule, though just, is at times harsh in its operation. There are several reported cases, in which patentees, who are proved and admitted to have made valuable improvements which have controlled the market for the whole machine, have recovered merely nominal damages, from their inability to make out what value was to be attached to their part of the new machine. See Blake v. Robertson, 94 U. S. 728; Goulds Manuf'g Co. v. Cowing [Cases Nos. 5,642, 5,643]; Ingersoll v. Musgrove [Case No. 7,040]; Garretson v. Clark [Id. 5,248]; Schillinger v. Gunther [Id. 12,457]. In this district, the very competent master, Mr. Stetson, who has, by consent of the parties, been called upon to audit most of these cases, has succeeded in some cases in dividing the profits. Such was the case of Holbrook v. Small (1877) [Id. 6,595], in which he attributed three parts out of ten in the profits of seed sowing machines to the patented devices; and both parties were satisfied with the finding.

In Child v. Boston & F. Iron Works (1877) [Case No. 2,674], the same master found, under the peculiar facts, that all the profits belonged to the invention. In this case, if I read the report correctly, the master was not asked to find how much of the profit on the bottles was due to the pulverizers contained in them, and he, therefore, very naturally reported the whole.

The other point relates to damages. It appears that for five successive years the defendants, Morey & Smith, were manufacturing under licenses from the plaintiffs, or from those with whom the plaintiffs are privies, and I should suppose that the royalties, then fixed by the parties, would be the true measure of damages. If this be so, there is no danger that the plaintiffs will be sent out of court with the barren victory of a nominal decree. I would, therefore, suggest to the parties, that they should assess the royalties without further reference. Of course there may be evidence, not before me, which will change the appearance of the case, and I cannot refuse to recommit the report, if either party asks for such action; but an established royalty is so clearly and properly the usual measure, in case of articles made and sold, that it would not be departed from without good cause shown.

Report to be recommitted, if either party requires it.

Case No. 13,321.

STAR SALT CASTER CO. et al v. CROSSMAN et al.

[4 Cliff. 568; 3 Ban. & A. 281] [1]

Circuit Court, D. Massachusetts. May Term. 1878.

PATENTS—CONTRACTS—IMPROVEMENTS—ROYALTY—SALT CASTER BOTTLES.

1. Contracts concerning the use and enjoyment of patented inventions are to be construed in the same way as contracts respecting other species of property; that is, so as to carry into effect the intention of the parties as collected from the language employed, the subject-matter, and the surrounding circumstances.

2. Two patents may both be valid where the second is an improvement on the first; and if the second includes the first, neither of the two owners can lawfully use the invention of the other without such other's consent.

[Cited in Cantrell v. Wallick, 117 U. S. 694, 6 Sup. Ct. 970.]

3. The patentee under a subsequent patent agreed to pay to the owner of the earlier patent

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

two cents upon each and every dozen of articles made in conformity to the specifications of the second patent, whether made by him as owner of the patent or by his licensees.. The owner of the earlier patent agreed that the articles (salt caster bottles) made by him in accordance with his patent should be provided with wooden pulverizers, and the pulverizers used in the bottles made by the owner of the second patent should be metallic ones. *Held*, that the agreement was valid, and was such as it was competent for the parties to make concerning the patents referred to.

4. The contract restricted the patentee of the first patent to the use of wooden pulverizers only, and was also a consent that the owner of the second patent might work under that patent, using metallic pulverizers.

5. The respondents knowing of the agreement between the patentees, at the time their licenses were acquired, are bound by it.

6. The making of the bottles by the owners of the first patent, with pulverizers such as were reserved to the owner of the second patent by the contract, and claimed in his patent, is infringement on the part of the owner of the first patent.

[7. Cited in Hammond v. Hunt, Case No. 6,-003, and in brief in Jarecki v. Hays, 161 Pa. 622, 29 Sup. Ct. 118, to the point that an exclusive licensee may maintain a patent suit even against the patentee.]

Bill in equity [by the Star Salt Caster Company and others against Charles P. Crossman and others] to restrain the respondents from making salt bottles, casters, &c., in conformity with the patent of the complainants [granted December 3, 1867, No. 71,643]. The respondents owned a patent earlier in date than that of the complainants. The patentees, however, had made a contract concerning their respective patents, in which each one was restricted, in his manufacture of the articles, to a particular kind of pulverizer. The owner of the first patent broke the agreement, and made pulverizers such as were reserved to the owner of the latter patent, and covered by his claim.

George A. Bruce, for complainants.

Thomas Weston, Jr., for respondents.

The use of a particular substance in the manufacture of a patented article cannot be restricted by any agreement which parties may make under a license to manufacture and sell under the patent, nor would such agreement affect a party not named in the agreement. The defendant's demurrer must be sustained. The complainants cannot have the relief prayed for, as they are not the owners of the patent, only licensees. A licensee cannot obtain an injunction restraining the defendants from manufacturing and selling. The owner of the patent can alone have the relief. The complainants' remedy, if any, is an action at law. Suydam v. Day [Case No. 13,654]; Potter v. Holland [Id. 11,329]. The complainants are not entitled to relief under their bill. The defendants have a legal right to manufacture and sell under the Crossman patent, using metallic pulverizers under this agreement. If there is any doubt as to the meaning of this contract, it arises on the meaning of the words "his said patent." Parol evidence may be received to explain the meaning of these words, and to show the circumstances under which they were used. Macdonald v. Longbottom, 1 El. & El. 977, 987; Stoops v. Smith, 100 Mass. 63. The attempt to restrict the material from which the pulverizers should be made, in the contract annexed to the complainants' bill, is not a valid restriction, and, as such, is null and void.

The agreement is under a certain patent, and relates to that patent. It can confer no other rights than those granted in the letters-patent. The letters-patent secured the invention to the inventor. It does not limit him to any particular material. The license gave to the party the right to manufacture and sell, and included whatever material they saw fit to use in their manufacture of it. It is not to be presumed that a grantor intends to grant more than he has a right to grant, or that a grantee intends to receive, by way of grant, that to which he has a full right without a grant. Goodyear v. Cary [Case No. 5,562]. It is not permitted for a patentee to carve several monopolies out of one. Sanford v. Messer [Id. 12,314]. But even if this was valid as to Crossman, it cannot be binding on Morey & Smith. It is a personal agreement with Crossman. The contract or agreement does not extend to his assignee, or to any party under him. He does not restrict others than himself to whom he might give a full and entire license to manufacture and sell. If it was not intended to make it a personal agreement with Crossman, it would have been so stated, as in the case of the other parties to the agreement.

CLIFFORD, Circuit Justice. Contracts touching the transfer, use, and enjoyment of patented inventions are to be construed in the same way as contracts respecting other species of property, so as to carry into effect the intention of the parties, as collected from the language employed, the subject-matter, and the surrounding circumstances. Add. Cont. (7th Ed.) 164. Two patents constitute the subject-matter of the present controversy, one of which, dated Sept. 15, 1863, was granted to the first-named respondent. It purports to be for a new and useful improvement in salt boxes, casters, &c., the object of which, as the patentee states, is to prevent the salt in a salt box from forming into lumps and clogging up the perforations in the cover of the box. As stated in the specification, it consists in the employment or use, in a salt box, of a stationary obstruction, formed by a series of arms extending across the box, or by wires or any other equivalent means, in such a manner that the salt will be pulverized by coming in contact with said obstruction whenever the box is shaken, for the purpose of giving a free discharge of the salt through the openings in the cover. Letters-patent were also

granted to George B. Richardson, dated Dec. 3, 1867, for an improved salt bottle or box, which, as described in the specification, consists in placing within a salt bottle or box a movable rod or pulverizer, made of cast metal or other suitable material, enlarged at each end, and provided with points or projections, so that, when the bottle is shaken, the pulverizer will move within it and effectually break up the salt so that it can escape freely through the perforated cap of the bottle. Glass bottles are usually employed, and, in constructing the same, the patentee states that he places a piece of cork or other suitable material at the bottom of the bottle, so as to deaden the blow of the pulverizer and prevent it from breaking the bottle when the latter is empty; and he states in his specification, in that connection, that his invention consists in the combination of that feature of the same with the bottle and the described pulverizer, but the claim is only for the pulverizer in combination with the bottle, called in the claim the receptacle.

Two patents of the kind may both be valid where the second is an improvement upon the first, in which event, if the second includes the first, neither can lawfully use that of the other without the other's consent. Plainly the second patent could not be used without the consent of the owner of the first, nor could the owner of the first patent use the second without the consent of the owner, as the patent contains an invention which the owner of the first patent never made. Woodworth v. Rogers [Case No. 18,018]. These explanations are sufficient to show that ground of controversy existed between the parties in the enjoyment of the several rights secured to them by the respective patents, and the record shows that difficulty in that regard did arise between the respective owners of these letters-patent, and that they entered into a compromise agreement in writing, which, for the sake of convenience and the purposes of this investigation, may be regarded as an agreement between the two patentees as the separate holders of the patents in question.

Two of the complainants, joined with the patentee of the second patent, have been stricken out of the pleadings by consent, and the others who remain, besides him, claim by virtue of his right under the agreement. Nor is there any difficulty in taking that view so far as respects the respondents, as the charge of the bill of complaint is, that those joined with the patentee of the first patent had knowledge of the agreement in question, which must be proved, to render them liable. By the terms of the agreement, the patentee of the second patent agreed to pay a royalty to the patentee of the first patent, of two cents upon each and every dozen of salt bottles made in accordance with the second patent, whether made by him, as patentee of the second patent, or by his licensees, and to make a full and true return of the same the first day of each month, during the continuance of the agreement. On the other hand, the patentee of the first patent agreed that the caster bottles made in accordance with his patent shall be provided with wooden pulverizers, and that the salt bottles he, the patentee of the second patent, manufactures or allows to be manufactured shall be provided, as at present, with metallic pulverizers. Based on that agreement, the bill of complaint alleges that by the contract it was agreed that all casters manufactured by the patentee of the first patent, under his patent, should contain wooden pulverizers only, and that all salt bottles or boxes manufactured by the patentee of the second patent, made under his patent, should contain only metallic pulverizers; and charges that the respondent and his licensees are manufacturing and selling casters or bottles furnished with metallic pulverizers in violation of the said written agreement.

Service was made, and the respondents appeared and filed two answers.

1. Crossman admits the patents, but denies that there was any controversy between him and the complainants.

2. He alleges that the patentee of the second patent wanted a license from him, the patentee in the first patent, to use his invention as described in the first, and that the agreement related solely to the second patent and none other; that no rights under the first patent were, or were intended to be, conveyed to the complainants.

3. He admits the license to the other two respondents, but alleges that he excepted from the license any right to manufacture salt boxes or casters under the second patent.

Answer in due form was also filed by the other two respondents to the effect following:

1. That they are ignorant that any controversy existed between the separate owners of the patents as to their respective rights under the same.

2. They allege that the second patent was void, and that the agreement gave no right to the complainants under the first patent.

3. That the patentee of the first patent has kept and performed all the conditions of the written agreement.

4. That the patentee of the first patent had no right to make such an agreement, nor had the complainants any right to receive it, because it could not be conferred by such an agreement.

5. They deny infringement, and insist that the salt boxes or casters which they manufacture are constructed in accordance with the patent set up in their answer.

Demurrer was also filed by the two respondents, assigning several causes for the same, of which one only will be mentioned, which is, that three of the complainants therein named are not interested to maintain the bill of complaint. Suppose there was such controversy between the parties to the

written agreement as that alleged in the bill of complaint, it would not impair the validity or operative character of the agreement; but it is not necessary to rest the decision upon that ground, as the evidence shows to the entire satisfaction of the court that the allegations of the bill of complaint in that regard are true, which is all that need be said in answer to the first defence.

Attempt is made by the second defence to give an interpretation to the written agreement, which the court cannot sustain. Instead of that, the court is of the opinion that, by the true construction of the agreement, the patentee of the first patent agreed that caster bottles made in accordance with the patent, whether manufactured by himself or his licensees, should be provided with wooden pulverizers, and that the salt bottles or casters constructed by the patentee of the second patent, or his licensees, should be provided with pulverizers such as the patentee of the second patent was constructing at the date of the written agreement. No reasons are assigned to support the proposition that the patentee of the first patent possessed no power to make such a contract, and it is believed that none can be which will be satisfactory. Inventions secured by letters-patent are property in the holder of the patent, and as such are as much entitled to protection as any other property consisting of a franchise, during the term for which the franchise or the exclusive right is granted. Such a holder may sell, assign, lease, or give away the property, or enter into any arrangement or agreement respecting the same, not enlarging the right granted, as the same might make with any other personal property. Authorities to support that proposition are not necessary, as the statement of it is quite sufficient to secure in its behalf universal assent. Parties are supposed to mean what they say. If so, it is clear that the patentee of the first patent contracted to use wooden pulverizers only, and consented that the owner of the second patent might work under the second patent, using only metallic pulverizers, which is a sufficient response to all the propositions that the contract gave the patentee of the second patent no right to practise the invention secured by the first patent. Grant that, and it follows that the patentee of the first patent has not kept his covenants, as the proofs are full to the point that he has made, and is making, salt boxes or casters with metallic puverizers, in direct violation of the agreement.

Two of the respondents claim that they are not liable, because, as they allege, they acquired the right to practise the invention secured by the first patent without any knowledge of the written agreement; but the proof is the other way, and shows not only that they knew what the terms of the agreement were, but that they had a copy of it in their possession when they acquired their right from the patentee of the first patent; nor is there any merit in the objection that some of the complainants have no interest to maintain the suit, as two of those mentioned have been stricken out by consent, and the record shows that the other acquired an interest in the second before the written agreement was executed.

Nothing remains to be considered but the charge of infringement. Sufficient has already been remarked to show that the first-named respondent has not kept and performed his covenants, and that the other two respondents, as his assignees, have manufactured and sold salt bottles in accordance with the patent mentioned in their answer, which the record shows has a pulverizer-rod with several series of radial points arranged in such a manner that the unscrewing of the cup from the neck of the bottle will produce a spiral motion of the points through the contents of the bottle. Crossman admits that his licensees have made salt boxes or casters with metallic pulverizers and sold the same, and that he has received payment for all they have sold. Taken as a whole, the evidence shows that the two respondents have made and sold salt boxes or casters provided with metallic pulverizers, in violation of the said written agreement, and with full knowledge of the existence of that agreement.

Decree for the complainants for an account, and for an injunction.

Case No. 13,322.

STATE v. BREWER.

[Nowhere reported; opinion not now accessible.]

Case No. 13,323.

STATE v. GRAHAM.

[See 41 N. J. Law, 15.]

Case No. 13,323a.

STATE v. MILLER et al.

[7 Cin. Law Bul. 219.]

Circuit Court, D. Indiana. April Term, 1882.

LAND GRANTS—BED OF LAKE—ACT OF CONGRESS—SWAMP LAND—ESTOPPEL.

[This was an action by the state of Indiana against Jane A. Miller and others.]

Before GRESHAM, District Judge. The United States ceded to the state, in 1850, all the lands known as swamp lands bordering on the lake. The state swamp land commissioner of Jasper county projected a ditch to the Kankakee river, the lake being forty feet higher than the river. Messrs. Dunn & Conduitt purchased the whole rim of land bordering on the lake. They subsequently conveyed the same to M. B. Bright, and aided

in carrying the ditch into the lake and constructing thirty miles of lateral ditches. Before that was done Bright platted the bed of the lake, by extending the government lines, and recorded the same in Jasper county. They went on perfecting the system of drainage, and, in 1859 Bright conveyed the odd-numbered lots to A. Jones, who reconveyed them to the state. In 1865 the state passed an act authorizing the sale, and the same were sold under Bright's title; the people getting farms by purchasing alternately from Bright and the state. In 1878 some squatters from Chicago pre-empted the old bed of the lake under the soldiers' bounty act, whereupon Milk went to congress and asked congress to quitclaim to the state. This was done. Two years ago the state began suit in Newton county to recover the even-numbered lots; and that was the real question in the present case.

Held, that the state swamp law of 1850 carried the title to the bed of the lake; further, that the state, by its contract under the Bright title, has stopped itself from claiming under the swamp land donation. Milk, the defendant, claims 2,688 acres, but there are several others equally interested.

STATE BANK OF INDIANA (SARGEANT v.). See Case No. 12,360.

STATE BANK OF OHIO, CHILLICOTHE BRANCH OF THE, v. FOX. See Case No. 2,683.

STATE BANK OF VIRGINIA (ALDERDICE v.). See Case No. 154.

STATE INV. INS. CO. (BRUGGER v.). See Case No. 2,051.

Case No. 13,324.

STATE NAT. BANK v. FREEDMEN'S SAVINGS & TRUST CO.

[2 Dill. 11; [1] 10 Am. Law Reg. (N. S.) 786.]

Circuit Court, D. Missouri. 1871.

BANKS — CERTIFICATE OF DEPOSIT — FORGED INDORSEMENT.

A certificate of deposit payable to the order of depositor on the return of the certificate was issued by bank A. to T. D., who could not write. The bank took his mark on its signature book, and wrote a description of him opposite. Shortly afterwards the certificate was stolen from T. D. and presented to bank B. by a stranger who gave his name as T. D., and said he could not write. Thereupon the cashier of bank B. endorsed the certificate to his own order with the name of T. D. to which the stranger made his mark, and an employé of bank B. added his signature as "witness to mark." The cashier then endorsed the certificate and sent it through a correspondent to bank A., which thereupon paid it, and the money was handed over to the stranger. Thereafter the real T. D. appeared at bank A., and on discovery of the forgery bank A. paid him the amount and brought suit against bank B. to recover the payment on the forged endorsement. *Held*, that bank A. had a right to rely on the identification of T. D. by bank B., and could recover.

On the 7th day of November, 1870, Tim Dunivan deposited in the State National Bank at Keokuk, Iowa, nine hundred dollars, and received therefor a certificate of deposit, of which the following is a copy: "$900. State National Bank, Keokuk, Nov. 7, 1870. Tim Dunivan has deposited in this bank nine hundred dollars, current funds, payable to the order of himself hereon in like funds on the return of this certificate. In currency, $900. (No. 4991.) G. W. Horton, for Teller." Tim Dunivan was unable to write, and therefore placed upon the signature book of the bank his mark, the officers of the bank at the same time writing his description opposite the mark on the book. Dunivan went off on the river, and on or about the 20th of November the certificate was stolen from him. About the 1st of December a man presented the certificate at the counter of the Freedmen's Savings & Trust Company, and asked the cashier to cash it. The cashier refused, on the ground that the person presenting it was a stranger to him, but offered to take it for collection. To this the stranger acceded. The cashier asked him if his name was Tim Dunivan. He replied, "Yes." He then asked him if he could write his name, and receiving an answer in the negative, the cashier himself wrote the following endorsement: "Pay to the order of W. N. Brant, cashier. Tim his X mark Dunivan,"—the party himself making the cross-mark. The mark was then witnessed by W. P. Brooks, a man who did odd jobs about the bank, as follows: "Witness to mark, W. P. Brooks, St. Louis, Mo." Neither Mr. Brant nor Mr. Brooks was acquainted with the man offering the certificate. The certificate was then endorsed by Mr. Brant, as follows: "Pay Bower, Barclay & Co., for collection, acct. of W. N. Brant, Cashier," and forwarded to Bower, Barclay & Co. for collection, by whom the certificate was collected and the proceeds remitted to Mr. Brant, and by him paid to the party who had left the certificate for collection. On the 22d of December, Tim Dunivan appeared at the bank in Keokuk, and claimed that the endorsement was a forgery, and that he had never received the money. Thereupon the Keokuk bank paid him the amount and brought this suit against the Freedmen's Savings & Trust Company to recover the amount paid through its correspondent. The evidence adduced at the trial disclosed the above facts. It further appeared that the cashier of the Keokuk bank, when the certificate was presented from Bower, Barclay & Co., simply looked at the back of it, and remarked that "he guessed it was all right—the endorsers were good." No information was given by plaintiff's officers to Bower, Barclay & Co., or to defendant, as to the description of Tim Dunivan which had

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

been placed upon its books; and there was no evidence as to when the plaintiff gave notice of the forgery, except that the cashier of defendant testified that notice was not given him until some time after the discovery.

Noble & Hunter, for plaintiff.

E. W. Pattison, for defendant.

[2] [Conceding that Brooks's attestation meant that he knew the man signing to be Tim Dunivan, it does not follow that he knew him to be the Tim Dunivan to whom the certificate was issued. All the cases we have been able to find with reference to the force of an attestation are cases where the question has arisen upon the effect of proof of the handwriting of a dead or absent subscribing witness. Many of these cases go to the length of holding that, where such subscribing witness's signature is proved, this is not only prima facie evidence that the name signed to the instrument as a party is genuine, but of the identity of the party sought to be charged if the name which is signed is his. On the contrary, there is a respectable number of cases which hold that the identity must be proved aliunde. Of these latter we cite Whitelocke v. Musgrove, 1 Cromp. & M. 511; Middleton v. Sandford, 4 Camp. 34; Parkins v. Hawkshaw, 2 Starkie, 239; Nelson v. Whittall, 1 Barn. & Ald. 19; and American cases, Robards v Wolfe, 1 Dana, 155. See, also, 2 Phil. Ev. 505-507. But all these were cases of actions on the instruments, and the utmost extent to which they go is that, when the attesting witness's signature is proved, identity of the party executing the instrument with the party sought to be charged will be presumed, subject, however, to be rebutted by showing that it was really executed by a different person. But it is claimed here that the mere fact that there is an attesting witness will authorize plaintiff to presume that the man signing the certificate is their customer, to whom they issued it, whose mark is on their books, and whose description is there too; so that they need trouble themselves no more about it. It may be remarked that actual identification here is impossible. The most that Mr. Brooks could say was that he knew the man writing to be a Tim Dunivan. See Graves v. American Exch. Bank, 17 N. Y. 205. Why should the fact that this depositor signed by a mark change the duty of the plaintiff, or relieve it of any exercise of care? It has been held that a mark is an endorsement. George v. Surrey, Moody & M. 516 (without attestation). So the initials, "P. W. S." Merchants' Bank v. Spicer, 6 Wend. 443. So the figures, "1, 2, 8." Brown v. Butchers' & Drovers' Bank, 6 Hill, 443. Now, if these are all signatures, and the bank is bound to know the signatures of its customers, as the authorities show (Smith v. Mercer, 6 Taunt. 76; Stout v. Benoist, 39 Mo. 277, and many other cases), why should it not be bound to know initials, or figures, or a mark, as well as a name? That the former are more easily counterfeited than the latter should increase the vigilance of the bank issuing the certificate, but does not change the law. Suppose the deposit had been made in the usual way and a passbook given, and somebody had drawn a check, signed it "Tim his X mark Dunivan," and it had been attested. Would not the bank have to bear the loss if it paid it? Could it recover it back from the holder of the check?

[(2) Conceding that Brooks's attestation meant that he knew the man, it does not follow that plaintiff had a right to presume that W. N. Brant, cashier, knew the man to be Tim Dunivan, or that he guarantied the endorsement in any way. He (Brant) had a right to depend on the fact that plaintiff would know its own customer. We insist that there was negligence on the part of plaintiff in this: (1) It should have taken some pains to ascertain whether its customer had really endorsed the certificate. (2) It should have notified defendant of the forgery promptly. This it did not do. Mr. Morse, in his work on Banks and Banking (page 300), expresses this very succinctly: "It is unquestionable that, if the payee has, upon the strength of the payment, released any security, or abandoned or lost any possible safeguard or protection from loss, it is too late for the bank to undo the error at his expense." And further he says: "Where the bank seeks to recover from the payee, it is held rigorously to make the discovery of the forgery, and to give notice of it to the holder with great promptitude." Indeed, in such a case as this the doctrine laid down in Cocks v. Masterson, 9 Barn. & C. 902, and other cases which have followed it (Wilkinson v. Johnson, 3 Barn. & C. 428; Price v. Neal, 3 Burrows, 1354, and other cases), does not seem too strong. The very mildest case involving this principle is that of Canal Bank v. Bank of Albany, 1 Hill, 292; yet there it is held that reasonable diligence in giving notice is necessary.] [2]

Before TREAT and KREKEL, District Judges.

TREAT, District Judge (charging jury). The case you are trying turns mainly on the question of negligence. The fact that defendant is a corporation is in proof. You have then the plaintiff a corporation and the defendant a corporation.

The rule of law usually is, that where a certificate of deposit is issued by a bank, and it comes back to the bank issuing it with the endorsement of the depositor through the hands of bona fide innocent parties, the endorsement being forged, the bank paying

[2] [From 10 Am. Law Reg. (N. S.) 786.]

[2] [From 10 Am. Law Reg. (N. S.) 786.]

the deposit certificate must lose it; for they are presumed to know the signatures of their customers, and the bank issuing the certificate has the means of verifying the signature.

This is a different case. Here was a person who could not write. The bank gave him the certificate and took his description. The ordinary mode, where a person signs by his mark, is to have him identified, so that a piece of paper coming back to the Keokuk bank through respectable institutions, with the depositor's mark on the back of it witnessed by another party, the bank issuing the certificate would have the right to suppose that the bank sending the certificate had so identified the man making his mark. The witness's signature is proven. Mr. Brooks himself says he signed it. The simple fact, then, that the paper comes back to the bank at Keokuk with a mark witnessed by Mr. Brooks, which means that he knew Mr. Dunivan to be the person who made that mark, is sufficient to justify the Keokuk bank in paying the draft. The jury found a verdict for the plaintiff.

Judgment accordingly.

STATE NAT. BANK OF BOSTON (MERCHANTS' NAT. BANK OF BOSTON v.). See Cases Nos. 9,448 and 9,449.

STATE NAT. BANK OF KEOKUK (PITTSBURGH LOCOMOTIVE & CAR WORKS v.). See Case No. 11,198.

STATE NAT. BANK OF MINNEAPOLIS (CANFIELD v.). See Case No. 2,382.

Case No. 13,325.

STATE NAT. BANK OF MINNEAPOLIS v. MORRISON.

[1 McCrary, 204.] 1

Circuit Court, D. Minnesota. Dec., 1874.

INTERNAL REVENUE—INCOME OF NATIONAL BANKS—DISTRESS.

The act of congress of July 14, 1870 (16 Stat. 260, 261, §§ 15, 17), imposes taxes upon the income and profits of national banks for 1870; and if the bank refuses to pay such taxes duly assessed upon notice and demand, the collector or deputy collector may, as authorized by act of congress (16 Stat. 101, 106), distrain therefor.

[This was an action by the State National Bank of Minneapolis against H. G. O. Morrison to recover the amount of taxes alleged to have been illegally exacted.]

Lochren, McNair & Gilfillan, for plaintiff.
W. B. Bellson, Dist. Atty., for defendant.

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

NELSON, District Judge. This is an action brought against the defendant, a deputy collector of internal revenue, in 1871, to recover the amount seized by him in satisfaction of taxes accrued upon the increase, earnings and profits of the plaintiff for the year 1870. The stipulation of facts submitted to the court trying the case without a jury by virtue of the consent of parties properly entered into, and filed of record, shows that the amount of income, earnings and profits of the plaintiff for the first and second six months of the year 1870, was obtained by an examination of the cashier of the plaintiff under a summons issued by the assessor, and that the tax, with fifty per cent. penalty, amounted to the principal sum claimed in the complaint. That the plaintiff refused to render any list or return of the amount of its earnings, income and profits, either as dividends due and payable, or undistributed sums in excess of dividends added to its surplus, or profits of any sort, for the year 1870; and that after the examination and disclosure of the cashier, the assessor returned to the collector the amount of the plaintiff's earnings for the year 1870, and the tax at the rate of five per cent. upon all earnings, income and profits for the time embraced between January 1, 1870, and June 30, 1870, and at the rate of two and one-half per cent. upon all income, earnings and profits for the time embraced between July 1, 1870, and December 31, 1870; that the collector demanded payment of the taxes assessed against the plaintiff, which was refused, and on March 18, 1872, a warrant was issued by the collector of internal revenue for the Second district of Minnesota, to the defendant, the deputy collector, commanding him to distrain upon the goods and chattels, and effects of the plaintiff, the amount of the tax and penalty. That the defendant was threatening to distrain, and was proceeding so to do, when the plaintiff by its cashier placed the amount of the tax and penalty claimed upon the counter of the plaintiff's bank, before the defendant, but protested against the defendant's taking it, claiming that the tax and penalties were illegal, and notified the defendant that suit would be brought against him for the amount. The defendant took the money, and this suit was commenced in the district court of the state for the county of Hennepin, and removed to the circuit court of the United States under the provisions of the act of congress.

The defendant is entitled to judgment upon the undisputed facts in the case. The fifteenth and seventeenth sections of the act of congress of July 14, 1870 (16 Stat. 260, 261), imposed taxes upon the earnings, income and profits of the plaintiff for the year 1870. These taxes the plaintiff refused to pay after due notice and demand, and the collector very properly, under the authority vested in him by the act of congress (14 Stat. 101, 106), proceeded to distrain for the same, when they were paid under protest. The defendant, as a deputy collector duly appointed, was authorized to execute the warrant addressed to him, and to receive the amount of the taxes.

Judgment will be entered in favor of the defendant, with costs. Judgment accordingly.

1 [Reported by Hon. Geo. W. McCrary, Circuit Judge, and here reprinted by permission.]

STATE NAT. BANK OF MINNEAPOLIS (UNITED STATES v.). See Cases Nos. 16,380 and 16,381.

Case No. 13,326.

STATEN ISLAND AND NEW YORK FERRY CO. v. The THOMAS HUNT.

[N. Y. Times, June 19, 1862.]

District Court, D. Connecticut.

SALVAGE—STEAMBOAT DISABLED IN NEW YORK BAY—CUSTOM—PRACTICE—LACHES.

[1. Rescuing and taking to a place of safety a steamer caught in the ice in New York Bay on a dark, foggy night, with a broken crank, which disables her for the time being, is a salvage service, but calls only for a small reward.]

[2. An alleged custom of boats running in New York Bay to assist each other in distress free of charge, *held* not to have been proved.]

[3. An objection to a claim for salvage by the owners of the salving vessel on the ground that their cosalvors, the officers and crew, were not joined in the libel, comes too late at the final hearing, especially when it appears that the claims of the cosalvors are barred by laches.]

[This was a libel for salvage, filed by the Staten Island & New York Ferry Company against the steamboat Thomas Hunt.]

Mr. Williams, for libelants.

Clark & Hale, for claimants.

BY THE COURT. This suit is instituted to recover salvage alleged to have been earned by the libelants' boat, the Southfield, in relieving from distress the Thomas Hunt in New-York Bay, and taking her to a place of safety. The service was rendered on January 19, 1861. The night was dark, somewhat foggy, and considerable quantities of ice were floating in the bay. I have had some doubt whether this was a case of salvage service at all; but I am inclined to the opinion, on the whole, that it was. Capt. Braisted, who was a passenger on the Southfield, testifies to the peril of the Hunt. He is familiar with the navigation of the bay, knew the character of the night, and the situation of the Hunt. She was in the ice, and had broken her crank, by which she was disabled for the time being. The claimants allege a custom among boats of this character running in the bay to assist each other, in case of need, free of charge, and insist that the custom proved covers this case. I think the evidence fails to establish the principle contended for in cases like the one before the court.

It was objected, on the argument for the claimants, that the libel should be dismissed because the cosalvors, the officers and crew of the Southfield, were not joined in the libel. This objection should have been taken at an earlier stage of the proceedings. No inconvenience can now arise to the claimants upon other claims for salvage for this service. All such claims, if any existed, are barred by delay.

It is a case calling for but a small allowance.

Decree for libelants for $100 and costs.

STATE OF.

[NOTE. Cases cited under this title will be found arranged in alphabetical order under the names of the states; e. g. "State of Georgia v. Atkins. See Georgia v. Atkins."]

STATE of MAINE, The (JARVIES v.). See Case No. 7,224.

Case No. 13,327

The STATE OF NEW YORK.

[3 Ben. 253.] [1]

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

COLLISION—AT PIERS—STEAMER COMING IN AND STEAMER GOING OUT—USAGE—RIGHT OF WAY.

1. Where two steamers used the same pier, the State of New York, a large steamer running through the Sound, whose berth was at the side of the pier, and whose hour of departure was 4 p. m., and the Sylvan Stream, a small steamer which made rapid trips up and down the East river, coming in at about 4 p. m., and leaving at 4.15; and it was the usage of the latter on that trip, if she came before the former had started, to stop off in the stream and whistle, and, if the former did not answer or start, to come to the end of the pier and land her passengers before the former started; and, on one occasion, coming according to this usage and whistling, and receiving no answer, she started to come to the pier, and had almost reached it, when the State of New York started to come out, and, though her engine was stopped and backed, it was not done soon enough to prevent a collision, her stem striking the smaller steamer a square blow on the end of her shaft, and being at the time about three feet outside of the end of the pier: *Held*, that the Sylvan Stream, having begun to make her landing before the State of New York had begun to move, was, under the circumstances, entitled to complete it without embarrassment from the latter.

2. She was not bound, under the circumstances, to deviate from her usual mode of making the landing.

3. The collision occurred from negligence on the part of the State of New York, in starting when she did, which happened because the pilot who started her, did so from aft, where he could not see ahead, and then walked forward to his post in the pilot-house, the vessel thus, for a short period, running right into danger, with no one to stop her.

This was a cause of collision instituted by the Harlem & New York Transportation Co., owners of the steamboat Sylvan Stream, against the steamboat State of New York, to recover the damages sustained by the former vessel, in a collision which occurred in the East river, on the afternoon of the 13th day of June, 1867. The Sylvan Stream was a fast steamboat, which made hourly trips between pier 24, in the East river, and Harlem; and the state of New York was a Sound steamer, whose berth was at the upper side of the same pier. The sailing hour of the State of New York was 4 p. m., at which time the Sylvan Stream usually arrived at pier 27, and, when the tide was flood, she, at that hour, landed at

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

the end of the pier, with her head down stream. To avoid embarrassing each other, it had been the practice between these two boats, that, when upon the 4 o'clock trip, the Harlem boat arrived near pier 24 before the State of New York had commenced to move out of her berth, she stopped in the river, a short distance above pier 24, to allow the State of New York to pass out ahead of her, if ready to move; if the State of New York was not ready, then the Harlem boat started again, and made her landing at the end of the pier before the State of New York left her berth. On the day of the collision, the Sylvan Stream arrived before the State of New York had started, and, in accordance with the usage, stopped off pier 27, and, as she claimed, blew her whistle to call the attention of the State of New York to her presence. The State of New York did not begin to move, and, accordingly, the Stream started again to make the landing. But soon after she had begun to move in towards pier 24, and while she was so crossing the bows of the State of New York, the State of New York started her engines. After she had begun to move out, it was, however, discovered by those in charge of the State of New York, that the Stream had already started, whereupon the engine of the State of New York was, at once, stopped and reversed, but, before her headway could be entirely stopped, she struck the Sylvan Stream a square blow upon the end of her starboard shaft—the Sylvan Stream having then arrived at the end of pier 24, and being just about to throw out her plank. The blow was not a heavy one, as the State of New York was barely moving, her stem not being over three feet outside of the end of the pier; but, being upon the shaft, it caused an injury to the engine, for which injury this suit was brought.

Benedict & Benedict, for libellants.

J. W. C. Leveridge and R. H. Huntley, for claimants.

BENEDICT, District Judge. The facts which are undisputed make a clear case in favor of the libellants, as it appears to me. It was a manifest error in the State of New York to commence to move after the Stream had started up, and was reaching in to make her landing, at the end of pier 24. She should have waited until the Stream had reached her landing-place at the pier. The Stream having commenced to make her landing before the State of New York had commenced to move, was, under the circumstances, entitled to complete it without embarrassment from the State of New York, and this she could have accomplished without causing a delay of more than a moment or two.

Much evidence was given upon the hearing, tending to show, on the one side, that the Stream stopped and backed her engine after the State of New York began to move, when she might have kept on, and thus avoided the collision; and, on the other side, to show that she was compelled to stop and back, to avoid running into the pier. But it is clearly shown that she made her landing in the usual way, and, if it be assumed that the evidence shows that, in case she had kept on by her pier, the collision would have been avoided, the fact is not material, in the aspect in which I view the case.

The operation of landing, at the end of the pier, was a single and well-known operation, to be executed with dispatch, in a rapid tide-way. It necessarily involved a crossing of the bows of the State of New York, and a stopping and backing, to bring up properly at the pier, and it required but a short period of time for its completion. Having properly undertaken this manœuvre before the State of New York began to move out, the Stream was fully justified in completing it, upon the assumption that the State of New York would not move out in such a way as to interfere with her.

The collision arose from negligence on the part of the State of New York, in beginning to move when she did; and this happened because the pilot who started her, and who, as I understand the evidence, had the sole control of the engine bells when he started her, stood aft, where he could not see out ahead, and then walked forward a considerable portion of the length of the boat, to his proper post at the pilot-house. The State of New York was thus, for a short period of time, moving directly into danger of collision, with no one to stop her. The period of time was very short, it is true, but it was sufficient to cause the collision, for the evidence shows that three feet would have avoided it.

It must be remembered, also, that this is not the case of two vessels meeting or crossing in their courses at sea, but of one vessel departing from the side of a pier, at the end of which the other was to land. The vessels were passenger boats, running by time-tables, and, certainly, so far as the Sylvan Stream was concerned, compelled to make landings rapidly, as the State of New York knew. The State of New York had the opportunity given her to make her departure first. Not being ready to do so, she was bound to wait quietly till the Sylvan Stream had made her landing; and, having failed to do so, she should be held solely responsible for the collision, even if it were true that the Stream, by abandoning her landing, could have escaped the danger which the fault of the State of New York had thrust upon her. She was not bound to abandon her landing, but had the right to keep on, and rely upon the State of New York's stopping in time to avoid her. The rule here laid down, as applicable to vessels situated as these two vessels were, seems to me necessary, to avoid constant danger and controversy, and one which will work injustice to no one.

The decree must, accordingly, be for the libellant, with a reference to ascertain the amount.

Case No. 13,328.

The STATE OF NEW YORK.

[7 Ben. 450.] [1]

District Court, S. D. New York. Sept., 1874.

PASSENGER'S BAGGAGE—MARRIED WOMAN—PARTIES.

1. A married woman shipped on board of a steamboat a trunk, containing wearing apparel, given her by her husband to be carried from New York to Essex, Conn. The steamboat was delayed, and reached Essex at Sunday noon, where the trunk was placed in a warehouse by the hands of the boat. It remained there till next day, when it was taken by a carman, who noticed and remarked upon its extreme lightness. Its condition was then the same as when landed from the boat, and the warehouse had been securely locked, and did not appear to have been disturbed. When the trunk was received by the owner, the contents had been abstracted, and she filed a libel against the steamboat to recover the damages. *Held*, that the action was properly brought in her name, instead of in that of her husband.

2. On the evidence, the articles were abstracted while the trunk was on the boat, and the libellant was entitled to a decree.

In admiralty.

H. T. Wing, for libellant.

R. H. Huntley, for claimant.

BENEDICT, District Judge. This is an action in rem, brought by Mrs. Hattie A. Gallagher a married woman, to recover the value of certain articles of her wearing apparel, which, as she avers, were abstracted from her trunk, while the same was being transported in the steamer State of New York from the port of New York to the port of Essex, Conn.

The main ground of defence is, as to the right of the libellant to maintain the action, the claimants contending that the property in question was paraphernalia of the wife, and as such belonged to her husband, who alone can maintain an action for its loss. I incline to the opinion that this ground of defence is not sufficient. The clothing in question was the wearing apparel of the libellant, given her by her husband, in her possession and shipped by her on board the vessel here proceeded against, to be transported for her from New York to Essex, and there to be delivered to her. In equity the paraphernalia of the wife is treated as the wife's separate estate, and a court of equity will protect the wife in its enjoyment and possession. See In re Grant [Case No. 5,693]; Rawson v. Pennsylvania R. Co., 48 N. Y. 212. A court of admiralty is a court of equity, and upon equitable grounds may sustain an action like the present. The objection to an action by a seaman, being a minor, was overruled by Judge Betts, it appearing that the minor was accustomed to receive his own earnings. Wicks v. Ellis [Case No. 17,614], Betts, J., Jan., 1849.

Furthermore the right of a married woman to maintain an action at law against a carrier for the loss of paraphernalia, has been maintained in the court of last resort of this state, upon the ground that by the statutes of this state, the estate of a married woman in property given her by her husband, is clothed with all the incidents of a legal estate. Rawson v. Pennsylvania R. Co., 48 N. Y. 216.

My determination therefore is that the action is rightly brought in the name of the libellant. Upon the merits, the evidence is clear to show that the articles sued for were in the trunk when it was delivered on board the steamer, and were abstracted therefrom. The steamer was delayed beyond her usual time, and did not reach Essex until about noon on a Sunday, when the trunk was placed in a storehouse on the wharf by the hands of the boat, whence it was taken by the carman of libellant on Monday morning. There is no positive evidence when the articles sued for were removed from the trunk. There is evidence, that the lightness of the trunk attracted the attention of the carman who received it from the storehouse, and was remarked on by him when he took it. There is also testimony to the effect that the condition of the trunk was then the same as when it was landed from the boat. The testimony is positive that the storehouse was securely locked, and its contents to all appearance undisturbed, while the trunk was there. These facts, the force of which is not materially weakened by the evidence for the steamboat, warrant the inference that the trunk was deprived of this part of its contents while on board the boat. There must accordingly be a decree for the libellant with an order of reference.

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

STATE RIGHTS, The (RALSTON v.). See Case No. 11,540.

STATON (UNITED STATES v.). See Case No. 16,382.

STEACY (ATKINS v.). See Case No. 605.

Case No. 13,329.

STEACY v. LITTLE ROCK & FT. S. R. CO. et al.

[5 Dill. 348.] [1]

Circuit Court, E. D. Arkansas. 1879.

RAILROAD COMPANIES—CHARTER—CONSTRUCTION CONTRACT—LIABILITY OF TRANSFEREE OF STOCK PURPORTING TO BE FULL-PAID WHEN NOT FULL-PAID—RELEASE OF SUBSCRIBER TO STOCK—DOUBLE LIABILITY OF STOCKHOLDER.

1. Where, under its charter, the directors of a railroad company issued shares of stock to a contractor for building its road as full-paid shares (which contract was never questioned by

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

shareholders or by creditors as being either fraudulent or ultra vires), and such shares were sold by the contractor, in the public market, as full-paid shares, to purchasers for value, without actual notice of the equities between the contractor and the company, the holders of such shares are not subject to such equities, or liable to have the shares thus issued and thus purchased treated as unpaid shares.

[Cited in Rood v. Whorton, 67 Fed. 437.]

[Cited in Hill v. Silvey, 81 Ga. 500, 8 S. E. 810; Young v. Erie Iron Co., 65 Mich. 126, 31 N. W. 822; Clayton v. Ore Knob Co., 109 N. C. 385, 14 S. E. 39.]

2. The agreement of the company, sanctioned by the stockholders, made when the company was solvent, and acquiesced in and acted on for seven years, to release certain counties from the payment of the balance of their stock subscriptions, was, under the circumstances, held valid.

3. The charter of the Little Rock and Fort Smith Railroad Company provided that no stockholder therein should be liable for losses to any greater amount than the whole amount of stock subscribed for or taken by him, and that the charter should not be altered or amended except by the consent of the majority of the stockholders. Subsequently the constitution of the state provided for a double liability on the part of all stockholders in corporation; but the provisions of the constitution were never accepted by the stockholders: *Held*, that the measure of liability of the stockholders, at whatever time they became such, is that fixed by the charter, and was not increased by any subsequent act of the state not assented to by the corporation.

4. Whether the constitutional provision was self-executing, quære?

The bill of complaint of John G. Steacy sets forth, among other matters, that Steacy, as the surviving partner of the firm of Peirce, Steacy & Yorston, on or about the 31st day of August, 1875, instituted a suit in the state circuit court of Pulaski county, against said railroad company, for the recovery of judgment for the sums due said firm and assumed by said company; and that the said Steacy, on or about the 8th day of December, 1875, recovered judgment against said company in said suit, for the sum of $1,041,181.70, which remains and is a valid and subsisting judgment, binding against said company and the stockholders therein. The bill of complaint of Steacy then sets forth that he, as such surviving partner of said firm of Peirce, Steacy & Yorston, on the 13th day of January, 1874, instituted another suit against said company, in which, by the consent of its attorney, he recovered judgment in said state court against said company, on the 19th day of March, 1874, for the sum of $5,510.02. Steacy avers that he has caused execution to issue on each of said judgments, and placed the same in the hands of the sheriff of Pulaski county, who has returned nulla bona on the same; that said company has ceased to do business, is utterly worthless and insolvent, and has no property or effects whatever upon which to levy said executions. That the defendants [Elisha Atkins, J. H. Converse, Conway, Pope, Johnson, and Crawford counties and others] are stockholders in said company, the said Atkins owning ten thousand shares, of $25 each, of unpaid stock, and the said Converse nine hundred and sixty shares of unpaid stock; that the stock held by said defendants was issued by said corporation subsequent to the adoption of the constitution of said state, which went into effect in April, 1868; that said constitution contained the following provision, viz.: "Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law; but, in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock." That the defendants respectively are liable to the said Steacy to the amount of stock owned by them, and each of them, in said corporation, and, in addition thereto, in an amount equal to the stock owned by each of said defendants respectively. The prayer for relief of said original bill of complaint is that the plaintiff may "have a decree against said defendants to the extent of their double liability upon the foregoing stock, if need be, or, if a less sum will be sufficient to satisfy his demands, that they, each of them, be required to pay such proportion thereof as they are respectively liable for," and for general relief.

The bill of complaint of the said Cornelius Hurley alleges, in substance, that on the 9th day of January, 1872, he recovered judgment in the said circuit court of Pulaski county, against said railroad company, for the sum of $7,981.05, which judgment is, in all respects, a valid and subsisting judgment against said company and its stockholders, and that the same has not, in whole or in part, been paid or satisfied. That on the 19th day of April, 1876, said Hurley caused execution to issue on said judgment, and placed the same, on said day, in the hands of the sheriff of said Pulaski county, who, on the 24th day of said April, made a return thereon of nulla bona. That said railroad company, regularly and in due form, executed two deeds of trust, the former December 22d, 1869, and the latter June 20th, 1870, conveying to certain trustees all its property, real and personal, and all the franchises which could be conveyed by said company, to secure its bonds, amounting, in the aggregate, to $8,500,000. That afterwards suits were instituted in this court for the purpose of foreclosing said deeds of trust, and such proceedings were had; that all the property of said company, and all its franchises which could be sold, were sold under and by virtue of decrees rendered in said suits, on the 6th day of November, 1874, in consequence of which said decrees and sales said company became and is hopelessly insolvent. That on January 1st, 1869, and at other times between said day and January 1st, 1872, said Atkins and Converse subscribed to the capital stock of said railroad company, viz., the said Atkins for ten thousand shares of $25 each, and the said Converse for nine hundred and sixty shares of $25 each, by virtue of which said

subscriptions the said Atkins became indebted to said company in the sum of $250,000, and the said Converse in the sum of $24,000. That neither the said Atkins nor the said Converse ever paid to said company the whole or any part of said sums of money owing from them respectively; that the same is still due and owing to said company, and that said company is taking no steps and making no efforts to collect said sums of money. That said sums of money due and owing from said several defendants are charged and subject in equity to the payment of the plaintiff's judgment, and that the defendants are liable to him for the amounts so due and owing by them respectively. Complainant prays that said amounts, or so much thereof as may be necessary, be subjected to the payment of his said judgment, and that he have judgment against the said Atkins and Converse for the said respective sums of money due and owing by them to said company. The bill of complaint of the said Hurley also sets forth allegations similar to those contained in the bill of complaint of the said Steacy, relating to the liability of the said Atkins and Converse under the aforesaid provision of the constitution of the state of Arkansas, which went into effect in April, 1868. The prayer for relief is that the said Hurley may "have a decree for the amount due by said defendants respectively for unpaid stock as aforesaid, and also, if the same be necessary, for the amounts for which said defendants are individually liable, respectively, as aforesaid, or so much thereof as may be sufficient to pay and satisfy complainant's said judgment," and for general relief.

These defendants demurred to the bill of the said Hurley, assigning as cause for demurrer multifariousness, or a misjoinder of causes of suit; but said demurrer was overruled. Before said suits were consolidated, each of said plaintiffs amended his bill of complaint by changing the same into a creditor's bill, and by alleging that the capital stock of said defendant corporation is $6,000,000, divided into shares of $25 each; that said stock is distributed among a very large number of stockholders, most of whom are non-residents of this state, and not within the jurisdiction of this court. Several persons, resident in said state, are made defendants to said bills of complaint, and reasons are given why certain other persons whose names are set forth in said amended bills are not joined as defendants.

The prayer for relief in each bill is "that the aforesaid stockholders may be ordered and decreed to pay to the plaintiff the amount due him as aforesaid, as fixed and determined by the judgments aforesaid, with interest from the date of each judgment respectively, and to pay such other creditors of said corporation as may become parties to this proceeding such sums as may be found due to said creditors, and that the amount of the debts due as aforesaid to the plaintiff from said Little Rock and Fort Smith Railroad Company, and such as may be found due to such other creditors as may become parties hereto, may be adjudged against said stockholders as law and equity may require; and that the plaintiff may have such orders, decrees, and process as may be necessary to enforce the payment of such sums as may be adjudged against said stockholders, either for unpaid stock or upon their individual liability as stockholders under the constitution of 1868 of the state of Arkansas," and for general relief.

The answers of Atkins and Converse deny the validity of the plaintiffs' judgments, and insist that the railroad company was dissolved December 19th, 1874, before the large judgment of Steacy was recovered. The answer of the defendant Atkins then proceeds to deny that he owns ten thousand shares, of $25 each, of the capital stock of said railroad company; but he admits that, as an individual, on July 30th, 1870, he owned two thousand shares of said stock; April 13th, 1871, three hundred and sixty additional shares; May 31st, 1871, two hundred and eighty additional shares; and October 12th, 1871, thirteen hundred and sixty additional shares, all of the par value of $25 each, and amounting, in the aggregate, to four thousand shares of said stock. The defendant Converse, in said answer, denies that he owns, or ever has owned, nine hundred and sixty shares, or any other shares, of the stock of said company; but says that on the 10th of October, 1870, he purchased, with moneys furnished him by other persons, and solely as agent for said persons, among other things, sixteen hundred shares of the stock of said company; that said shares were, by accident or mistake, transferred to him on the books of said company, instead of to said other persons, but that he had no interest whatever in said shares, and simply held the title to the same as the agent or trustee of the several persons for whom he bought the same, and that, within a few days thereafter, he transferred and conveyed to said several persons the aforesaid identical sixteen hundred shares to which they were severally entitled, and that he never owned any shares of the stock of said company, except as above stated. The answers of said defendants deny that they, or either of them, ever subscribed to the capital stock of said company, and deny that said shares of stock by them severally owned or held, as aforesad, were unpaid stock, and that any subscriptions are due and payable upon the same, or ever have been since said defendants severally became the holders or owners of said shares of stock. They aver that in and by section 17 of the act of incorporation of said company, among the powers specifically conferred upon the president and directors of said corporation, was the power "to contract specially for work, labor, or materials to be furnished to the company, and agree whether the whole or any part thereof shall be payable in the capital stock of said company;" and in and by

section 29 of said act of incorporation it was enacted as follows, viz.: "The president and directors may, if they consider it expedient, receive subscriptions for stock, payable in labor or materials in and for the road, to be done and furnished under the superintendence of the directors of said company, or officers appointed by them, bond being taken to the company, with security, for the faithful performance of the work and furnishing of the materials. No director, treasurer, engineer, clerk, servant, or other officer of the company shall be an undertaker or contractor of or for any work of said road." That, in pursuance of the aforesaid powers conferred by sections 17 and 29, the president and directors of said company, in the year 1869, entered into a written contract with the said Warren Fisher, Jr., the said Fisher, Jr., not being then or thereafter a director, treasurer, engineer, clerk, servant, or other officer of said company, in and by which said contract the said company, among other things, agreed to issue and deliver to the said Fisher, Jr., among other things, all the capital stock of said company, with certain exceptions specified in said contract, in payment for labor done and materials furnished in and upon the construction and equipments of the railroad of said company, the same to be done or furnished under the superintendence of an officer of said company, appointed by said directors; that the said several shares of the stock of said company which said defendants severally owned or held were originally issued and delivered by the said company to the said Fisher, Jr., under and in pursuance of the stipulations and agreements contained in said contract between said Fisher, Jr., and said company, and in payment for work done and materials furnished under said contract, and in and upon the construction and equipment of said railroad; and said several shares of stock were issued as, and were, and became thereby and by reason thereof, and are, full-paid shares of stock, and not subject or liable to any calls or assessments whatsoever, either by the directors or stockholders of said company, or any creditors thereof.

As a further defence to so much and such parts of said bills of complaint as seek to hold said defendants liable to pay the whole or any part of the said alleged judgments of the said Steacy and Hurley, by reason of alleged unpaid subscriptions due upon the several shares of stock by said defendants owned or held, said defendants, in their said answers, plead the laches of the said Steacy and Hurley and the statute of limitations of the state of Arkansas. The answers of said defendants deny that any liability was created or imposed upon stockholders in corporations, or upon these defendants, by the aforesaid provision of the constitution of 1868 of the state of Arkansas.

As a further defence to so much and such parts of said bills of complaint as seek to charge said defendants by reason of said constitutional provision of the state of Arkansas, defendants, in their answers, allege: (1) That, in and by section 25 of the act of incorporation of said company, all its stockholders are specially exempted from all responsibility for the debts of said company beyond the amount of their subscriptions, and that said provision of the constitution of said state is void, as impairing the obligation of contracts. (2) That the remedy supposed to have been created by said constitutional provision is barred by the statute of limitations of said state of Arkansas.

After the answers of said defendants had been filed, and after judgment had been rendered upon certain pleas in bar filed by another defendant, which set up the aforesaid special matters of defence, the said plaintiffs filed a second amended bill of complaint, in which they join other persons as defendants to said original and amended bills of complaint, and aver that they have made defendants all of the stockholders of said corporation who are known to said plaintiffs, and who are within the jurisdiction of this court, and solvent, and that the remaining stockholders are either insolvent or beyond the jurisdiction of this court.

The plaintiffs further allege, in said second amended bill of complaint, that these defendants, the said Atkins and Converse, "are setting up pretended payments to the Little Rock and Fort Smith Railroad Company for the stock they respectively own, and pretend that the same was paid for by Warren Fisher, Jr., in work, labor, and materials furnished to said company in the construction of the road; and said Atkins and Converse have, in their answers to the original and amended bills herein, and the said Huntington has, in his pleas to the same, set up such pretended payments, and claim that they were made under the 29th section of said company's charter. These alleged payments are the merest pretences, and have no foundation in fact. Complainants allege that it is true that the said company made a contract with Warren Fisher, Jr., by which said Fisher agreed to construct said company's railroad, and equip the same, from a point on the Arkansas river opposite the city of Little Rock to Fort Smith, in the state of Arkansas, the estimated length of which was one hundred and fifty-three miles; and on that basis, as regards length, the said company agreed to pay the said Fisher, for constructing and equipping its said road, the gross amount of all the first mortgage bonds of said company; second, all the land bonds of said company; third, all the state aid bonds to which said company should be entitled under the laws of the state of Arkansas; fourth, all the stock issued, and to be issued, by said company, with certain minor exceptions stated in said contract (which said contract was in writing, and duly executed); and in order to make the above agreement more specific,

said company further agreed with said Warren Fisher, Jr., that it would place a first mortgage upon said road and its appurtenances, and issue under the same six per cent gold bonds to the amount of $3,500,000, and no more, and that said company would put a mortgage upon all the lands, from whatsoever source derived, and issue seven per cent bonds thereunder to the extent of $5,000,000. and no more, and that said company would procure from the state, from the proper authorities, state aid bonds to the amount of $1,500,000. And the said company further agreed that the capital stock should be $6,000,000, of which one-half should be preferred and the other common stock. That in A. D. 1869 said Fisher entered upon the construction of said road, under his said contract, and performed some work and furnished some material; but before his said contract was one-third completed he abandoned the same, and said company, by an order on its books, in 1871, declared said contract forfeited and at an end, by reason of said Fisher's failure to perform the same, since which nothing further has been done in further execution of said contract by the said Warren Fisher, Jr. That while said Fisher, Jr., was working on said road under his said contract, the said company paid and delivered to him all the first mortgage bonds of said company, amounting, as aforesaid, to $3,500,000, less, perhaps, about $100,000 of said bonds which were not then issued and all the land bonds aforesaid amounting to $5,000,000, less a small number (amount not known to complainants); also, about $800,000 of state aid bonds, issued by the state of Arkansas and delivered to said company. And the said Warren Fisher, Jr., the defendants, Atkins, Converse, Huntington, and other persons, who are now stockholders in said company, subscribed for all, or nearly all, the stock of said company, as aforesaid, and certificates for the same were issued to said several stockholders; the exact amount of stock so issued, and precisely how it was subscribed, the complainants are unable to state, for at that time the stock-books of the said company were kept in the city of Boston, in the state of Massachusetts, and the subscriptions for and issuance of stock were made there, under the supervision of an executive committee, and the complainants have never had access to said books, and they pray that the defendants may be compelled to produce the said original stock-book of said corporation in court. The complainants further aver that the bonds which the said Fisher, Jr., received, as aforesaid, were, at their fair market value at that time, greatly more than sufficient to pay for all the work done and materials furnished by the said Fisher, Jr., under said contract, or in any other manner, upon said railroad. And these plaintiffs are advised and believe, and so aver, that the capital stock of said company was and is a trust fund, and that the bonds so paid to the said Fisher, Jr., or sufficient of them for that purpose, at their then fair and reasonable market value, should be applied to the payment of the work done for and materials furnished by said Fisher, Jr., to said company in the construction of its said road, whether under the contract or otherwise, and that no part of said work or materials should be applied as a payment or part payment of said stock, or as a payment or part payment of any portion thereof; and as said bonds were, at the time they were delivered to said Fisher, Jr., of value much more than sufficient to pay for said work and materials, and were a primary fund in the treasury of the said company, appropriated for that purpose, there has been no payment on said stock, or any portion of the same."

The plaintiffs then refer, for greater certainty, to the contract between said railroad company, and said Fisher, Jr., a copy of which they annexed to said amended bill of complaint, and pray that the same may be taken as a part thereof. The plaintiffs then allege "that the said contract between said railroad company and said Fisher, Jr., was not made under the said section 29 of the charter of said company, nor does said section authorize the making of any such contract. They aver that in the making of said contract there was no compliance with the provisions of said section, and there was no pretence or allegation in said contract, or in the rules of the said company in relation thereto, that said contract was intended to be made under said section. That the aforesaid stock was not subscribed under said section 29 of said charter, nor was the same subscribed payable in work or materials, nor was any bond taken by the said company to secure the faithful performance of any work or the furnishing of any materials, but, upon the contrary, said subscription, in whatever form the same was made, was a cash subscription, and the same has never been paid, in any manner, to said company by the said Fisher, Jr., or by the said defendants, or any of them, or by any other person or persons whomsoever. The complainants have not had access to the certificates of stock issued to the last-named defendants, and do not know whether they purport to be certificates for full-paid shares of stock, or of stock which is non-assessable: but, whatever may be the form of said certificates, the complainants aver that the stock they represent has never been paid for to said company, or for its benefit; and if the said certificates have been issued as full-paid stock, or as non-assessable stock, they have been so issued in fraud of the rights of creditors of said company, and so much of the said certificates as allege that the stock is full-paid, or not assessable, is void, and the certificates have no other or greater effect than if such void allegations had never been inserted therein." The counties of Conway,

Pope, Johnson, and Crawford are among the defendants who are alleged to be stockholders whose subscriptions have not been paid. The prayer in said second amended bill is for "process against said above-named defendants, requiring them to appear and answer the original and amended bills herein, and for the relief against them prayed for in said original and former amended bills, and for other proper relief."

The answers of said defendants, Atkins and Converse, to said second amended bill of complaint, deny that the allegations heretofore made by these defendants, that the stock which they, or either of them, owned or held in said company was issued as full-paid stock by said company, and in payment for work done and materials furnished, as alleged in their former answers, are mere pretences, and have no foundation in fact; and said defendants, in their said answers to said amended bill, reaffirm the allegations made by them in their said former answers upon this subject. Said defendants, in their said answers, admit that the copies of the contracts annexed to said second amended bill of complaint are substantially correct copies of said contracts between said railroad company and said Fisher, Jr.; that said Fisher, Jr., began work under said contract in the latter part of the year 1869 or in the early part of the year 1870; that all work under the same was suspended in the early part of the year 1871; that said company, in the latter part of the same year, declared said contract forfeited, and that no work has been done by the said Fisher, Jr., under said contracts since said contract was declared forfeited by said company. Said defendants, in their said answers, aver that, at the time when said work was suspended, as aforesaid, over fifty miles of said railroad had been completed by said Fisher, Jr., and accepted by said company; fifty additional miles had been graded and made ready for the iron, and a considerable amount of work had also been done upon the remaining line of said road; a large amount of iron rails had been purchased and delivered along the line of said road, to be laid thereon; a great number of ties had been cut, prepared, and delivered; a large number of locomotives, engines, cars, rolling stock, and equipments had been purchased and delivered, all under said contract between said railroad company and said Fisher, Jr., and in part compliance with the terms and conditions of said contract on his part to be performed; that a large amount of iron rails had also been purchased on account of said road and contract, but that the same were used by the aforementioned Josiah Caldwell in the construction of the Cairo and Fulton Railroad, for the building of which he at that time held the contract; and that after the contract between said Fisher, Jr., and said company had been terminated, as aforesaid, and before the aforesaid foreclosure proceedings were had, fifty additional miles of said road were fully completed by said defendants and other holders of the securities of said company. Said defendants, in their said answers, deny that said railroad company delivered to said Fisher, Jr., as many of the first mortgage and land grant bonds of said company as is alleged in said second amended bill of complaint, but admit that said company delivered to said Fisher, Jr., bonds of the state of Arkansas to the par or nominal value of $800,000. Said defendants deny, in their said answers, as they have denied in their former answers, that they, or either of them, ever subscribed to the capital stock of said company. They are informed and believe and aver that all the shares of stock of said company which they, or either of them, ever owned or held, were all issued in Boston, Massachusetts, to the said Fisher, Jr., by the orders and votes of the board of directors of said company, or of the executive committee of said board, residing in said state of Arkansas, under said contracts between said company and said Fisher, Jr., and upon estimates made by the chief engineer of said company, as provided in said contracts. They deny that any subscriptions to said stock were made in the said city of Boston, or elsewhere, outside of said state of Arkansas. Said defendants, in their said answers, aver that said company was duly authorized by the 17th and 29th sections of its said act of incorporation, and by the charter of said company and the laws of the state of Arkansas, to enter into said contracts, and to issue its capital stock in the manner provided in said contract, and that all the shares of capital stock which were issued to said Fisher, Jr., under said contracts, by the board of directors of said railroad company, or by the executive committee of said board, and that all the shares of stock of said company which these defendants, or either of them, now hold or ever held, were and are full-paid shares, and not liable or subject to assessment by said company, or upon the application of any creditor of said company, whether or not a bond was taken from said Fisher, Jr., to said company, with security, for the faithful performance of said work or furnishing said materials. Whether such bond was taken or not, said defendants are ignorant.

The Little Rock and Fort Smith Railroad Company was originally incorporated in 1853, under the general laws of the state of Arkansas; but by an act of the general assembly of said state approved January 22d, 1865, entitled "An act to incorporate the Little Rock and Fort Smith Railroad Company," the corporation theretofore existing under that name continued its existence under said act.

Abstract of charter:

The 1st section of said act provided "that the said corporation shall be composed of" certain persons whose names are mentioned,

"and such other persons, corporations, states, counties, and cities as may subscribe to stock in said company and comply with the provisions contained in this act, and also with the by-laws, rules, and regulations of said company, and the general law of the land respecting the same."

The 2d section fixes the termini of said road, and the 3d section contains the grant of powers, franchises, and privileges incident to corporations of that nature.

By section 4 of said act, "the capital stock of the company is fixed at $1,750,000, divided into seventy thousand shares of $25 each. A payment of five per cent on the amount of each share shall be made when the sum of $100,000 shall be subscribed. The subsequent payments shall be made in such sums and at such periods as shall be fixed by the board of directors: provided, that the call shall not be made for more than ten per cent at any one time, and that sixty days notice of each call shall be given by publications in one newspaper in the city of Little Rock, one in Fort Smith, and one in Van Buren, Arkansas, and not more than three calls shall be made in any one year."

By section 5, "the state of Arkansas and the several counties upon the line of this road, or elsewhere in this state, not only may become, but are solicited to become, stockholders in said company, by subscribing for stock therein; and in the event that any or either of them do so, they shall be represented in the directory in the manner hereinafter provided."

Section 6 provides that "the said corporation shall go into operation and be organized as soon as shares of stock to the amount of $100,000 shall have been subscribed."

The sections intervening between section 6 and section 15 have no bearing upon the issues in this cause, and relate principally to matters of detail in conducting the election of directors and in the appointment of commissioners to receive subscriptions to stock, which are required to be "returned to the domicile of the company, at Clarksville, and there recorded in the office of the recorder of deeds and mortgages of the county of Johnson, and otherwise disposed of as may be required by law."

Section 15 enacts that "in case of failure on the part of any subscriber to pay any installment on his stock when and as required, the amount due shall bear interest at the rate of ten per cent per annum from the time it falls due. The board of directors shall have the option, after thirty days written notice to the defaulter, to forfeit his stock and sell it at auction for the benefit and at the risk of said stockholder, and sue him for any deficit afterwards remaining, or to compel by suit the payment of such installment; and no stockholder shall be permitted to vote, personally or by proxy, for himself or as proxy for another, while in default."

Section 16 provides that "all meetings of stockholders shall be composed of persons or corporations, or the agents of corporations or persons, holding, in the aggregate, more than one-half of the stock of the company taken and subscribed for, in order to make valid and binding their action in the premises, except meetings called for the purpose of increasing or diminishing the capital stock of the company, at which three-fourths of the stock shall be represented. At elections more than one-half of the stock, exclusive of that taken by the state, shall be represented."

Section 17 enumerates at great length, and with much detail, the powers of the president and directors of said corporation, among which are the powers: "To do anything necessary for the construction, repair, and maintenance of the railroad hereinbefore mentioned, with as many tracks as they may deem necessary; to contract specially for work, labor, or materials to be furnished to the company, and agree whether the whole or any part thereof shall be payable in the capital stock of the company; to receive from the state or general government a grant of lands, or become the agent of either to dispose of lands granted, and with the same, or the aid of the same, to procure the road to be built; to make all contracts necessary thereto, and all contracts for the furnishing of iron, or other necessary equipment or supplies of the road, on such terms and credits as they think proper, including all locomotives, engines, cars, vehicles, teams, and other equipments, deemed by them necessary or useful to the purposes of the company; to borrow money for and on account of said road in any sums not to exceed $50,000, unless authorized by a vote of two-thirds of the stockholders, exclusive of the state, to exceed that sum, and to mortgage said road and its appurtenances to secure the same; to mortgage said road, or hypothecate its receipts, to pay persons who take contracts for building the same."

In and by said section 17, said directors are required to "make a report in full detail to the stockholders, upon the 1st days of June and December in each year, of the working of the road, and its expenses and profits, as also a detailed statement of all contracts during the process of constructing the road and its bridges, with an account of the progress made;" also, "to be kept a regular set of books, in which shall be entered, in the regular order of their several dates, all business or other transactions in the company, which books shall always be open to the inspection of any stockholder, at the office of the company, during the business hours of the day;" also, "to keep a stock-book, and certificates of stock shall be issued to the stockholders, and no transfer of stock shall be binding on the company until made on its stock-books."

By section 19: "The limitation as to the amount which the board of directors may borrow, does not apply to contracts upon credit for the furnishing of iron equipments, other

necessary supplies, or labor, or to a contract for the construction of the whole road, or a section thereof."

Section 21 provides that "no transfer of stock shall exempt the transferrer from the obligation of paying installments afterwards called for, until the whole fifty per cent on each of his shares shall have been paid."

"Sec. 24. The said company hereby reserves to itself the right either to accept or reject any act of the general assembly of this state, altering or amending this charter; which shall be decided by a vote of a majority of all the stock, exclusive of that taken by the state, at a meeting of the stockholders regularly convened for that purpose."

"Sec. 25. No stockholder in this company shall be, in any event, responsible for losses of the company to any greater amount or extent in the whole than the amount of stock subscribed for and taken by him."

"Sec. 29. The president and directors may, if they consider it expedient, receive subscriptions for stock, payable in labor or materials in and for the road, to be done and furnished under the superintendence of the directors of said company, or officers appointed by them, bond being taken to the company, with security, for the faithful performance of the work or furnishing of the materials. No director, treasurer, engineer, clerk, servant, or other officer of the company, shall be an undertaker or contractor of or for any work on said road."

"Sec. 31. This charter shall continue for the term of ninety-nine years; at the end whereof, the corporate privileges hereby granted shall cease and terminate."

Abstract of votes, also of the history of the corporation:

The counties of Conway, Pope, Johnson, and Crawford severally subscribed to the stock of said corporation to the aggregate amount of $52,000, and the state of Arkansas, under an act approved January 15th, 1861, invested the proceeds of the sales of certain swamp lands, amounting to $38,000, in the stock of the company, and full-paid certificates of stock for said amount were issued to said state. Prior to January 1st, 1868, the directors had made the following calls upon the stockholders on account of their subscriptions, viz.: November 9th, 1853, five per cent.; June 8th, 1854, one and one-half per cent.; December 23d, 1859, five per cent.; May 13th, 1860, five per cent. On the 2d of September, 1869, an additional call of ten per cent. was made, payable on or before December 15th, 1869. At a meeting of the stockholders held on the 2d day of December, 1869, it was voted that no further calls should be made upon the original stock subscriptions, but that certificates of stock should be issued to all those who had paid up the calls already made, and that the balance of their subscriptions should be cancelled. The directors were requested to carry this vote into effect. On January 25th, 1870, the directors instructed the secretary to cancel seventy-three per cent. of the original individual and county subscriptions, "and to issue, under the direction of the president, certificates of stock to all stockholders whose accounts shall, on the 15th day of March next, show credits to the amount of twenty-seven (27) per centum of the stock now standing in their names." The directors also voted, at the same meeting, "that all stock which shall not, on the 15th day of March next, be credited with payments amounting to twenty-seven (27) per centum in the aggregate, shall be forfeited to the company, and shall be sold so far as paid to the highest bidder, for the benefit of the delinquent, as provided by the charter; and the secretary of the company is hereby directed to give legal notice of the same, and to carry into execution this resolution." And in December, 1870, the directors voted that it was "inexpedient for the company to attempt the further collection of calls upon the original individual and county subscriptions, and that the secretary cancel on the stock-books of the company such per centum of the subscriptions as now remain unpaid, and issue certificates of stock to each stockholder for the amount respectively paid—that is, one share of stock for each sum of $25 paid, the stockholder to lose the fraction or excess paid over a full share."

The treasurer of said company delivered to said Fisher, Jr., or on his account under said contracts, and by order of the board of directors of said company, seventy-four thousand shares of common stock and seventy-four thousand shares of preferred stock, all of the par value of $25 per share. These shares were delivered as follows, viz.: July 28th, 1870, 60,000 shares common stock. July 25th, 1870, 60,000 shares preferred stock. September 28th, 1870, 6,000 shares common stock. September 28th, 1870, 6,000 shares preferred stock. December 5th, 1870, 6,000 shares common stock. December 5th, 1870, 6,000 shares preferred stock. February 3d, 1871, 2,000 shares common stock. February 3d, 1871, 2,000 shares preferred stock. The votes of the directors of said company authorizing the issue and delivery of the above shares of stock were passed at various times, as follows, viz.: September 2d, 1869, a meeting of the board of directors was held, at which were present Messrs. A. J. Ward, D. E. Jones, C. C. Reid, Jr., E. Wheeler, D. H. Barnes, U. M. Rose, and James A. Martin.

On motion of Mr. Martin, the following resolution was adopted, without dissent, to-wit: "Resolved, That the secretary of this company be directed to issue to Warren Fisher, Jr., the assignee of DeWitt C. Wheeler, trustee, common stock of this company to the amount of thirty-five thousand dollars ($35,000), at par, on account of work done and materials furnished under the contract for the construction of the road of this company, previous to the 1st day of September, 1869." February 8th, 1870, at a meeting of

the board of directors, at which were present Messrs. C. G. Scott, U. M. Rose, James A. Martin, J. H. Haney, and E. Wheeler—a quorum—Mr. Rose offered the following resolution, which was unanimously adopted, viz.: "Resolved, That the consulting engineer of this company proceed, with the assistance of the chief engineer of the contractors, to make a detailed estimate of all work done and materials furnished by the said contractors in the construction and equipment of the said road, and report the same at the next meeting of the board, or as soon thereafter as possible." July 11th, 1870, a meeting of the directors was held, at which five directors were present—a legal quorum. (The record does not give their names.) Mr. J. H. Haney, consulting engineer, presented and filed his report and estimate of the amounts due to the contractors by the terms of the contract, and thereupon Mr. Rose offered the following resolutions, which were unanimously adopted, to-wit: "Resolved, That the president, in his discretion, be, and he is hereby, authorized to deliver to Warren Fisher, Jr., the sum of $787,500 in the first mortgage bonds of the company, and the sum of $1,125,000 in the land bonds of the company, and the sum of $675,000 in preferred stock of the company, and the sum of $675,000 in the common stock of the company; such being the estimate of J. H. Haney, Esq., consulting engineer of the company, of the amount now due him on his contract." "Resolved, That the president may, in his discretion, advance to said Warren Fisher, Jr., any greater amount of bonds or stock, upon his giving good and sufficient security as provided in said contract: provided, that the said Warren Fisher, Jr., shall also include in said security the excess of first mortgage bonds already delivered to him by way of advances to him: provided, further, that said Warren Fisher, Jr., shall first execute his power of attorney to the secretary of this company for the transfer of stock, as required by said contract." "Resolved, That the president be, and he is hereby, authorized to take the seal of the company with him to Boston, Massachusetts, and there to execute, sign, and deliver said bonds and stock in accordance with the terms of these resolutions."

November 15th, 1870, a meeting of the directors was held, at which were present John C. Pratt, president, and Messrs. Scott, Rose, Wheeler, Lawson, and Martin. The following resolution was unanimously adopted, viz.: "Resolved, That the executive committee shall have full power to deliver to Warren Fisher, Jr., the contractor, or his assigns, the stock and bonds of this road in such amounts and at such times as they may deem expedient." At various times between February 15th, 1870, and June 9th, 1871, the treasurer of said company also issued and delivered to the said Fisher, Jr., or on h s account, by order of the board of directors, $3,340,000 first mortgage bonds, $4,441,000 land bonds, and $900,000 state aid bonds; of which $550,000 first mortgage bonds, and $950,000 land bonds, were issued as loans subsequently to December 22d, 1870. Of the bonds loaned, as aforesaid, only $55,000 first mortgage bonds, and $55,000 land bonds, were returned to said company.

The plaintiffs seek to hold the defendants, Atkins and Converse, liable to contribute to the satisfaction of their several judgments against the Little Rock and Fort Smith Railroad Company, upon two distinct and independent grounds, viz.: First. Because these defendants are the owners of certain unpaid shares of stock of said company. Second. Because, under the constitution of 1868 of the state of Arkansas, stockholders in corporations are not only liable for such amounts as remain unpaid upon the shares of stock by them owned, but "to a further sum equal in amount to such stock." The counties of Conway, Pope, Johnson, and Crawford, prior to 1869, had severally subscribed to the stock of the railroad company, paid twenty-seven per cent thereof, and rely upon the action of the stockholders of December 2d, 1869, and of the directors January 25th, 1870, heretofore mentioned, releasing them from further liability, and upon the statute of limitations of the state and the laches of the complainants. The other necessary facts are stated in the opinion.

W. H. Winfield, B. F. Rice, M. L. Rice, and Mr. Thoroughman, for plaintiffs.

C. W. Huntington, for Atkins and Converse.

U. M. Rose, for certain other defendants.

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

DILLON, Circuit Judge. It is not necessary to decide whether the company's contract with Warren Fisher, Jr., for the construction of the road, would have been held valid if it had been assailed by non-concurring shareholders or by the creditors of the company. A contract for the construction of the whole road seems, however, to have been contemplated as permissible by the 19th section of the company's charter; and the 17th and 29th sections contained express authority to receive subscriptions for stock, "payable in labor or materials in and for the road;" * * * "bond being taken to the company, with security, for the faithful performance of the work or furnishing of the materials." But it is not necessary to pass upon the validity of the Fisher contract, for the reason that the complainants' bills do not attack it either as being fraudulent or ultra vires. Nor has it been assailed in argument on either of these grounds, or on any ground, by the learned counsel for the complainants. In these causes the validity of that contract, so far as it authorized the issue of stock in payment for work done by Fisher, must, there-

fore, be assumed. Stock was thus issued, purporting to be full-paid stock.

On September 2d, 1869, the directors of the company ordered the secretary to issue $35,000 in the common stock of the company, at par, "on account of work done and materials furnished under the contract for the construction of the road, previous to September 1st, 1869."

On February 8th, 1870, the engineers of the company were instructed, by the unanimous vote of the directors, to make a detailed estimate of all work done and materials furnished by Fisher, and report; and in July, 1870, the report having been made, the directors unanimously authorized the delivery to Fisher of $787,500 first mortgage bonds, $1,125,000 land grant bonds, $675,000 in the preferred stock, and $675,000 in the common stock of the company; "such being the estimate of the consulting engineer of the company of the amount now due him on his contract." It was also resolved, at the same meeting, "that the president might, in his discretion, advance to Fisher any greater amount of bonds or stock, upon his giving good and sufficient security under his contract."

On November 15th, 1870, the directors authorized the executive committee to issue to Fisher "stock and bonds of this road in such amounts and at such times as they may deem expedient." Some stock was advanced, under authority thus conferred, without security being required; but this latter fact does not appear on the records of the company. The stock earned under the contract, and that issued in advance of being earned, was in the same form, and alike purported to be paid-up stock.

The defendants, Atkins and Converse, never made an original subscription to the stock of the company, and they became holders of its shares by the purchase of the same in Boston, through brokers in the market, without any actual knowledge of the facts connected with its issue. The shares thus purchased by the defendants, Atkins and Converse, were shares which had been issued to Fisher by the company, under the resolutions and circumstances hereinbefore set forth: but whether these shares were shares which had been fully earned by Fisher, or shares which had been advanced to him in anticipation of work to be done, does not appear, nor is it possible, as counsel concede, ever to ascertain.

The ground of liability on the part of the defendants, Atkins and Converse, is that, in point of fact, none of the shares issued to Fisher were ever paid for; that he had received in bonds more in value than the work he performed under his contract was worth; that, not having complied with his contract, his agreement, contained in his construction contract with the company, to take the shares, must now be regarded and treated as an agreement to pay for the shares in cash; and that shares, not being negotiable in the sense of the law merchant, are open, in the hands of every holder, to all the equities which attach to them in the hands of the original taker; and, therefore, since Fisher, if he held the shares, could be compelled to pay for them by the company, or, at all events, by its creditors, the present holders of such shares, although they are holders for value, and without actual notice of the equities in respect thereto as between Fisher and the company, are necessarily charged with the obligations which attach to the original subscriber or holder of the shares.

There is no allegation in the bills of complaint that the defendants, Atkins and Converse, were in any way interested in, or parties to, the contracts under which said shares of stock were issued, or that they had any knowledge of such contracts when they purchased their shares of stock. Neither is there any allegation in the bills of complaint that said defendants were parties or privies to any over-issue or over-payment of bonds or stock by said company to Fisher, Jr., or that the defendants had any knowledge or information that such alleged over-issues or over-payments had been made. Neither is there any allegation that the defendants had any knowledge or information that the shares of stock owned by them had not been paid for in full, or that they had any knowledge or information that their certificates of stock were issued in fraud of the rights of creditors.

Upon the allegations of the plaintiffs' bills, as well as upon the proofs, these defendants are to be treated as the bona fide purchasers and holders of the shares of stock by them severally owned.

The plaintiffs nowhere allege, indeed, that any shares of stock were issued to said Fisher, Jr., by said corporation, otherwise than in accordance with the terms of said contract, or that any shares were issued in excess of the stipulations of said contract.

It is our judgment, especially in view of the provisions of sections 17, 19, and 29 of the company's charter, before adverted to, that shares of stock issued as full-paid shares by authority of the board of directors, under the construction contract, which was never questioned by the company or its shareholders or creditors, and which is not assailed or impeached by the pleadings in the cause, and sold by the contractor as full-paid shares, to purchasers for value, without actual notice of the equities between the contractor and the company, if any there be, cannot be held subject to such equities, and to a liability to have shares thus issued and thus purchased treated as unpaid stock. No case holding such a doctrine was referred to by the learned counsel for the complainants, and it is confidently believed that no such judgment has ever been pronounced. It is difficult to perceive any principle of reason or law on which such a judgment could rest. The com-

pany have the power to issue its shares. It cannot, without special authority from the legislature, issue its shares as full-paid without actual payment in money, or, at least, in money's worth. A leading object of the creation of corporations and the issue of shares is that the shares may be transferred with all practicable facility. Bank v. Lanier, 11 Wall. [78 U. S.] 369; New York, etc., R. Co. v. Schuyler, 34 N. Y. 30, 82.

The company's directors and officers are the guardians of the company's rights. They ought not to issue shares in violation of their duty. They know whether the shares have been paid for or not. This the public have no means of knowing, and no effectual means for ascertaining. If the company's directors, or other authorized officers, commit a fraud upon the company in this respect, they are undoubtedly liable therefor. But can any one point out wherein the equities of the creditor of a company thus defrauded by its officers is superior to the equities of those who have acted upon the representations of such officers within the scope of their powers, accredited by resolutions of the directors and authenticated by the corporate seal, and upon such solemn assurances purchased the shares of the company? Grant that the capital stock is a trust fund for the benefit of creditors, yet this trust cannot be followed, any more than other trusts, into the hands of bona fide purchasers for value. Per Swayne, J., in Sanger v. Upton, 91 U. S. 56, 60.

What contract did the defendants Atkins and Converse make? They made a contract to buy, and did buy, what the company had issued and represented to be full-paid shares, without notice that this representation was untrue. If the representation thus made is true, they are under no liability again to pay for the shares. If the shares had been represented to have been unpaid, non constat that they would have purchased them. Clearly the company would be estopped to make the claim here advanced by its creditors.

Again, we ask, in what consists the superior equity of the creditor over the obvious equities which exist in favor of such a purchaser of the company's shares? The creditor trusted that the company's officers would not violate their duty; the purchaser trusted that they had not violated their duty.

The rights and obligations of a bona fide transferee of shares purporting to be full-paid shares are different from the rights and obligations of the transferee of shares which do not purport to be full-paid. In cases where the certificates show on their face that the shares have been paid in part only, the law implies a promise by the transferee to pay the balance due upon the shares upon calls when he has come into privity with the company. Webster v. Upton, 91 U. S. 65, 69; Upton v. Tribilcock, Id. 45. Such an implied promise rests upon the reasonable and obvious ground that the transferee has knowingly and voluntarily assumed the liability of the transferrer. But upon what ground can the law raise a promise to pay the balance due upon shares when the company has asserted, and the purchaser acts upon the assurance, that the shares have been fully paid?

The question here r ed by the complainants is settled by the universal practice of business men, as well as by the judgments of the courts. Millions of dollars of stocks are sold in this country every week, and there is no practice on the part of purchasers and no understanding that the law requires of them that they shall ascertain aliunde the representations of the company's authorized officers that certificates of full-paid stock have in fact been fully paid. How could a purchaser ascertain this fact? Must he go to the records of the particular corporation, in a remote and distant state it may be, and make an examination before he can safely buy? What more value is to be placed upon facts stated in the records than upon those stated under the corporate seal, by the authorized officers, as respects matters infra vires? Officers who would state a falsehood on the certificate of stock would state it on the corporate records, if this were necessary to make the intended fraud effectual. And, hence, the duty so much insisted on in argument, that a purchaser is bound to know the facts appearing on the corporate records, in addition to its being an impracticable duty, would, if discharged, be valueless as a guaranty against frauds upon creditors. Besides, on what principle is it that a purchaser of the company's shares is to be held to be the guardian of the rights of the company's creditors and bound to protect them? But the exigencies of this case do not require us to go so far, since, if we concede that a bona fide transferee for value of full-paid shares is charged with knowledge of all the facts concerning those shares appearing on the records of the corporation, there is nothing therein disclosed which shows that the shares purchased by Atkins and Converse had not been paid for by Fisher under his contract. The company's records show that a large amount of stock had been earned by Fisher and ordered to be issued, and under the 29th section of the charter other stock was ordered to be advanced to him, on his giving bond to the company to pay for the same under his construction contract, the validity of which was not questioned by the company or any of its shareholders.

But the question here presented does not rest alone upon general reasoning. The subject was somewhat considered by the circuit court for the Eastern district of Missouri, in Phelan v. Hazard [Case No. 11,068]. That was a suit brought by a single creditor of an insolvent corporation to enforce the liability of a stockholder for the unpaid balance of his stock. The shares had been issued in payment for a mining property which the corporation had purchased. The plaintiff did not undertake to impeach as fraudulent this

transaction between the corporation and the original shareholders, but simply claimed that the shares of stock had not been paid for, either by the person to whom they were originally issued or by the defendant, the transferee and present holder of the shares. The court, after stating that the proof showed that the shares in question had been paid for precisely as they were originally agreed to be paid for, viz., by a conveyance of the mining property of the corporation, and that the conveyance had been received and recorded by the corporation, says: "Unless this agreement is rescinded or set aside for fraud, how can it be said that the stock has not been paid for? The parties have agreed that it has been paid for, and that agreement is conclusive, unless it is rescinded or impeached for fraud, and this cannot be done unless the attack is directly made. Undoubtedly such an attack could be made while the stock was in the hands of the original takers of it; but it is not so clear that it could be made by a subsequent creditor of the corporation against a transferee of the stock for value, who purchased the same in good faith as full-paid stock, relying upon the records of the corporation, which showed the shares to have been fully paid for, and the manner in which the payment had been made."

Subsequently the similar case of Foreman v. Bigelow [Case No. 4,934] came before the circuit court for Massachusetts, and it was decided that a bona fide purchaser of full-paid shares was not liable to be assessed upon his shares. The opinion of Mr. Justice Clifford is very full, and we forbear going over ground so exhaustively covered in his judgment.

A long line of English cases under the companies acts, referred to in the opinions in the two American cases last cited, had established the principle that stock need not necessarily be paid for in cash—that it might be paid for in money's worth. This doctrine had led to such abuses as to cause parliament to insert in the companies act of 1867 the following provision:

"Sec. 25. Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the registrar of joint stock companies at or before the issue of such shares."

The construction and effect of this section came before the court in Nicolls' Case [In re British Farmers' Pure Linseed Cake Co.], 7 Ch. Div. 533. In that case a company issued certificates of shares as fully paid up, when in fact no payment had been made, nor contract registered, under the provisions of the companies act of 1867, (section 25). At the date of the winding up of the company, some of these shares were held by N., who had no notice that they were not fully paid up. It was held (reversing the decision of Hall, vice-chancellor) that by the issue of the certificates the company were estopped from alleging that the shares were not paid up, and that N. could not be placed on the list of contributors in respect of them as unpaid shares.

An appeal was taken by the liquidator, and the appeal was dismissed by the house of lords. 26 Wkly. Rep. 819. In giving judgment, Lord Cairns, after quoting the aforementioned section 25 of the act of 1867, said: "The effect of the section is very simple. Before the passing of the act it was open to any holder of shares to say, 'I have made a contract that I shall not be called on to pay up the value of these shares;' but the abuse of such contracts led to a statutory provision, making it a condition that no shares be treated as fully paid unless their value is paid in cash, or unless publicity is insured by a written contract duly filed in the manner provided for. If Goulton had been called upon to pay up the value of his shares, this section would have deprived him of any defence; but we have now to consider the case of a bona fide transfer for value, and I want to know how the section can affect such a transaction. It leaves untouched the question of payment, and says nothing as to evidence of payment; but if the company gives a receipt for the amount of the shares, and this receipt passes to a purchaser who does not know that no actual payment has been made, his title must not be prejudiced by the statute. He receives a representation to the effect that the law has been complied with, and it would paralyze the whole trade in companies' shares if a person taking shares with a representation that they are fully paid up must disregard this assertion and satisfy himself of the fact by personal inquiry, especially as he might have considerable difficulty in obtaining accurate information as to the fact of payment or non-payment. Much was said as to the burden of proof and as to the necessity for showing an absence of notice. If the shares come, in the regular course of business, into the hands of a purchaser for valuable consideration, those who challenge the transaction must prove that such purchaser had notice of the fact." Lords Hatherley, Selbourne, and Blackburn each gave opinions in concurrence, and Lord Gordon concurred without delivering a separate opinion.

As to other defendants, different questions are presented. Certain individuals and counties became original subscribers to the stock of the company. By the charter of the company it is provided that five per cent on each share shall be paid when subscribed, and subsequent payments shall be made upon calls by the board of directors, who are, however, required to give sixty days notice of each call, and are prohibited from making a call for more than ten per cent at any one time, and from making more than three calls in any one year. On December 2d, 1869, the stockholders voted that no further calls be made upon the original stock subscriptions, and that certifi-

cates issue for stock to the extent to which the payment had been made, and that the balance of the subscriptions be cancelled; and on January 25th, 1870, the directors, pursuant to the above-mentioned vote of the stockholders, instructed the secretary "to cancel seventy-three per cent of the original individual and county subscriptions, and to issue certificates of stock to all stockholders whose accounts shall, on March 15th, 1870, show credits to the amount of twenty-seven per centum of the stock now standing in their names." As respects certain individuals and counties made defendants, this was carried out.

The case as to the counties was submitted upon the bill and answers. The averments of the answers are to be taken as true. The counties had paid twenty-seven per cent of their subscriptions. The release was directed by the stockholders themselves. The company was then solvent. The release was made a matter of record in 1870. There was no secrecy and no fraud intended. It is averred in the answers that the original subscriptions had been made before there was any legislative authority for that purpose. The company decided in 1870 that it was "inexpedient to attempt the further collection of calls upon the original individual and county subscriptions to the capital stock," and ordered one share of $25 to issue for each $25 paid, "the stockholders to lose the fraction paid over a full share." This arrangement, it may fairly be inferred, was consented to by every person interested in the company. The amount of the old stock was thus ascertained, and the company had agreed to give the balance of its stock to the contractor for building its road, and undoubtedly the contractor knew of this arrangement and consented to it. The counties and the company acted on the faith of this release. The counties supposed they were out of the company, and subsequently had no voice and took no part in its affairs. No stockholder in the company ever complained of the action in releasing the counties. No creditors are in existence who were such at the time of the release of the counties, except those claiming under the Fisher contract; and no claim was made against the counties that they were liable as stockholders until 1877, nearly seven years after they were released, and long after the company was bankrupt and practically dissolved. Under the circumstances of the case as set forth in the answers of the counties, we are of opinion that the release was effectual; but if it is not, the counties ought to be protected by the creditors' laches from the liability which, at this late day, the creditors are now seeking to enforce against them.

In disposing of the case it may be well briefly to express our views concerning the claim of the creditor based upon the double liability clause of the constitution of 1868. The charter of the railroad company contained this provision:

"Sec. 25. No stockholder in this company shall be in any event responsible for losses of the company to any greater amount or extent in the whole than the amount of stock subscribed for and taken by him."

Section 24 of the charter of the company was as follows: "The said company hereby reserves to itself the right either to accept or reject any act of the general assembly of this state, altering or amending this charter; which shall be decided by a vote of a majority of all the stock, exclusive of that taken by the state, at a meeting of the stockholders regularly convened for that purpose."

Afterwards the constitution of 1868 was adopted, containing the following: "The general assembly shall pass no special act conferring corporate powers. Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed. Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law; but, in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock. The property of corporations now existing or hereafter created shall forever be subject to taxation, the same as the property of individuals. No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law."

The provisions of the constitution were never accepted by the stockholders.

As respects the claim in the bill based upon the double liability clause of the constitution of 1868, we remain of the opinion heretofore expressed, that the measure of liability of the stockholders, at whatever time they become such, is fixed by the 25th section of the charter, and was not increased by any act of the state not assented to by the corporation.

The purpose of the provision in section 25 of the charter was not to declare a double liability, but to limit the liability of the stockholder to the duty of paying for the stock subscribed or held by him. The state has passed no act, so far as relates to the liability here sought to be enforced, to carry the constitutional provision into effect.

The defendants contend that the constitutional convention of 1868 did not intend to legislate upon this subject of the personal liability of stockholders in corporations, but to leave the whole subject to future legislatures, with a limitation upon their powers, which limitation was fixed by the clause in question; and that the sole object and purpose of such clause is to declare the limita-

tion, and not to create the liability. It cannot be denied that there are strong arguments in favor of this view.

If the constitutional provision is not self-executing, the same result is reached as that based upon sections 24 and 25 of the charter. Bill dismissed.

[See Atkins v. Steacy, Case No. 605, published in 5 Dill. 387, as a note to this case.]

Case No. 13,330.

In re STEADMAN.

[8 N. B. R. 319.] [1]

District Court, N. D. Georgia. Sept. 10, 1873.

LANDLORD AND TENANT—BANKRUPTCY—POSSESSION OF BANKRUPT—CONTEMPT.

1. A lease to S. terminated by condition broken, after S. filed his petition in bankruptcy, and before the appointment of an assignee. The lessor, by summary proceedings in the state courts, evicted S. and took possession of the premises leased. On petition of S.'s assignee in bankruptcy, to require the lessor to restore possession or show cause why he should not be attached for contempt, *held*, the possession of the bankrupt, after petition filed, is the possession of the bankrupt court, and any interference therewith, except by leave of that court, is in contempt of its authority.

[Cited in Lockett v. Hill, Case No. 8,443; Lansing v. Manton, Id. 8,077; Re Jessup, 19 Fed. 95; Re Lyman, 55 Fed. 42.]

[Cited in brief in Weeks v. Prescott, 53 Vt. 69.]

2. Ordered, that lessor restore possession of the property leased within 20 days, or, in default, attachment absolute for contempt issue.

In bankruptcy.

ERSKINE, District Judge. March 22, 1873, Enoch Steadman, of Newtown county, in this district, filed in this court his petition and schedules, making oath that the schedules contained a statement of all his debts, etc., and an accurate inventory of all his estate and effects, assignable under the bankrupt act [of 1867 (14 Stat. 517)], whereupon he was adjudged a bankrupt by Register Murray, to whom the petition was referred. There being a failure to choose an assignee at the first meeting of creditors, the district judge selected and appointed Hon. Amos T. Akerman assignee of the estate, on the 26th of April last, and two days thereafter he conveyed and assigned to him all the estate, real and personal, including all property and effects of whatever kind of which the bankrupt was possessed, interested in, or entitled to, on the 22d of March. Mr. Akerman accepted the trust, and entered upon the duties of his office. On the 9th of May last, as assignee of said estate, he filed a petition in this court, against David W. Spence and Oliver S. Porter, residents of said Newtown county. The petition, after setting forth the filing of the petition in voluntary bankruptcy by said Steadman, his adjudication, the failure of the creditors to choose an assignee, the appointment of the assignee by the district judge, and the assignment of the estate to the appointee, goes on to state: That among the property possessed by said Steadman, on the 22d of March, 1873, and then claimed by him as his own, was a tract of land in said county, on Yellow river, containing about four thousand three hundred acres; comprising divers farms, a valuable water power on said river, at Cedar Shoal, and two yarn factories, a saw mill at said shoal, and the machinery appurtenant thereto, a dwelling house and out-buildings, occupied by the bankrupt as a residence and store house, and many other buildings, and all known as the Steadman factory property. The petitioner further states: That said property at one time unquestionably belonged to Steadman, but was the subject of certain instruments entered into between him of the one part, and David W. Spence and Oliver S. Porter, in the month of September, 1871, which, as contended by Steadman, constituted an equitable mortgage of said property to said Spence & Porter, to secure certain debts owed to them by him, and, as construed by them, constituted a conveyance of said property from him to them, in fee, with a right to re-purchase in him, and a right of possession in him, until the 1st of January, 1874, on his compliance with certain conditions. That said instruments came for construction before the supreme court of Georgia, at the January term, 1873, in a litigation between the parties; and the court held it was a question of fact for the determination of a jury whether the instruments constituted an absolute conveyance or a mortgage, and also held that Steadman was entitled to keep possession of said property until the 1st day of January, 1874, provided he keep the property insured and pay the other parties two thousand dollars on the 1st day of April, 1873, and the same sum every three months thereafter, until January 1, 1874. That immediately after Steadman was adjudged a bankrupt by the register he appointed him agent to take charge of said property until the appointment of an assignee; that while Steadman was so holding the property, and before the appointment of an assignee, to wit, on the 15th of April, 1873, he was dispossessed of a part of said property, to wit, of said factories, mills and machinery, and of most of said farms, by the sheriff of said county, at the instance of Spence & Porter, who had caused to be issued by some state magistrate a process against Steadman as their tenant of said premises, holding the same after the expiration of his tenancy, and caused the sheriff to execute said process and eject Steadman from said part of the property, and to place themselves in possession of the same, and which possession they now hold. The petition further alleges, that the petitioner, on the 3d of May last, demanded, as assignee as aforesaid, of

[1] [Reprinted by permission.]

Spence & Porter, the immediate possession of said property, and they refused to yield to him the possession of the same. The petitioner further charges, that Spence & Porter, by thus taking possession, have put a stop to farming operations thereon and to the running of the machinery, and thereby and otherwise have greatly lessened the value of the bankrupt's estate; and that they knew when they instituted the proceedings and obtained possession of the property that Steadman had been adjudged a bankrupt, and was holding it as the agent of the district court under the appointment of the register, and that said proceedings of Spence & Porter were taken without permission of the said district court of the United States. And in conclusion, the petitioner avers that said proceedings of Spence & Porter were unlawful, and injurious to his rights, as assignee, and in contempt of this court, and he prays that a rule may be issued requiring them to show cause why they should not be attached for contempt of the authority of this court, and why the petitioner should not be placed in possession of said property by this court.

The court, on reading the petition, granted a rule nisi in accordance with the prayer, and the defendants, Spence & Porter, were served by the marshal on the 12th of May, and on the 31st of May they put in their answer to the petition and rule, and on the 20th of August they filed an amendment to it. The answer disclaims and denies any purpose, design or intention of committing any contempt, and that they were under no writ of injunction, order, judgment, or decree not to remove their tenant (Steadman) from their premises by local process; they state that Steadman was, in fact, their tenant, and that his term had expired, and that he had not surrendered possession according to law; they deny that he was or could be rightfully in possession, as the agent of the register in bankruptcy, and that he (Steadman) could not divest himself of the character of tenant to the respondents, and hold against them as agent of another after the expiration of his term. And as to putting the assignee in possession, they set up the facts alleged in their answer to the bill of Steadman, referred to in the assignee's petition, as showing good and sufficient reasons to the contrary; and offer the answer and exhibits thereto annexed on the hearing of this matter; and that if the assignee has any right to the possession, he cannot enforce it in this summary method, but must resort to a regular action for that purpose. The amendment to the answer avers that the possession of which they deprived Steadman was, in fact, the same and identical one which he acquired from them as their tenant, he having held the same continuously without break or intermission from the time he continued as such tenant, and that he never did, in fact, vacate to go out of possession of said premises until put out by the sheriff, and never had, up to that time, divested himself of the character of tenant.

To remove tenants who are holding over after the expiration of their term or lease, is, under the provisions of the Code (sections 4005–4007), briefly as follows: When it is claimed that a party is thus holding over, and on demand, refuses or omits to surrender the possession, the owner may go before a judge or justice of the peace, describe the premises and make oath to the facts; upon which a warrant or process issues to the sheriff to remove the tenant and place the owner in possession, unless the tenant shall arrest the proceedings by a counter affidavit that the lease or term has not terminated, and give bond for the payment of such sum and costs as may be recovered against him at the trial before the superior court. Adopting this mode, Spence & Porter went before a state magistrate, described the lands, tenements, etc., alleged to be held over by Steadman—these lands, tenements, etc., being the same property which Steadman had, on the 22d of March, 1873, returned in his petition, and which he swore was then in his possession and under his control, but encumbered by a deed as security to Spence & Porter. They made their affidavits accordingly, stating that on the 19th of September, 1871, they made Steadman a lease of these premises, with all the machinery therein, and improvements thereon, for one year, to commence on the 1st of January, 1872, and to end on the 31st December, 1872; that they have demanded and desire possession of said property which he is holding over, and that he refuses and neglects to deliver possession. On this the magistrate issued a warrant, directed to the sheriff of Newtown county, who, on the 15th of April last,—the day of making the affidavits,—removed Steadman from the occupancy of the premises and placed Spence & Porter in possession of the same.

It is not questioned that Steadman once owned this very property in fee; but Spence & Porter have always insisted that in September, 1871, they became the absolute owners of it by purchase from Steadman; while he, on the other hand, contended before the state courts—and the assignee does the same here—that such is not the legal fact; that although he made a deed in fee to it, and received from them a lease of the property at a named rent, yet that this was a mere devise, mutually entered into between them and him to loan and borrow money at illegal interest, and to evade the usury laws. This controversy found its way into the superior court of Newtown county. The court granted Steadman an injunction, restraining Spence & Porter from ejecting him, or from levying any fi. fas. upon any of his other property. This ruling came before the state supreme court for review, and on the 25th of February, 1873, McCay, J., speaking for the court,

said: "We cannot act upon the demurrer to the bill nor on the merits of the case, as it may finally be made before the jury (the usual mode of trial in chancery causes in Georgia) or before us." It also held that the superior court erred in enjoining the fi. fas. In concluding the decision the court said: "We are of the opinion that the facts, as they appear by the bill and answers, and by the proposition, lease and bond, justify the court in considering the complainant to have made out such a prima facie case of compliance with the real intent of the lease, as to authorize an injunction against his eviction, for his failure to pay the ten thousand dollars instead of eight thousand dollars, for the rent of 1872, and that the injunction against his eviction should be continued until the 1st of January, 1874, provided he keep the property insured as agreed upon, and promptly pay eight thousand dollars rent for 1873, in quarterly payments, on the 1st of April, July, and October, and on the 31st of December, 1873, with the right to re-buy at the end of 1873, as provided in the bond, leaving the real truth of the amount of the rent (it being a point in dispute whether the true yearly rent was eight thousand dollars or ten thousand dollars) for 1872 and 1873, as well as whether the transaction of September, 1871, was a mortgage or sale—the question of usury and other questions made to be finally settled by the jury on the trial. Judgment reversed with instructions." Spence v. Steadman (1873) 49 Ga. 133.

As the legal effect of the lease from Spence & Porter to Steadman was discussed, it is, perhaps, due to the counsel on both sides that a synopsis of it be given, as a matter of illustration rather than a proof of fact: Steadman is to hold the described property for the term of one year, commencing from the 1st of January, 1872, and to continue to 1st of January, 1873, he to pay the annual rent of ten thousand dollars, payable at the expiration of every quarter, for which he gave his notes each for two thousand five hundred dollars; lessors bind themselves to continue and extend said lease to 1st of January, 1874, provided he comply with certain obligations "hereinbefore and hereinafter" set forth, and the full payment on the 1st of January, 1873, of the ten thousand dollars; and if he also then pay fifty thousand dollars he is to receive from the lessors a clear title to the property; and if this lease continue to the 1st of January, 1874, and he, on or before that day, pay ten thousand dollars rent, and an additional fifty thousand dollars, he is to receive from them a clear title to the whole property. And Steadman covenants to insure from fire in a responsible company, at his own expense, the machinery and buildings; and to do the necessary repairs at his own cost. But should he fail or refuse to comply with the terms of the lease, at the end of the first year, then he is to give immediate possession, without demand. And should the terms be complied with the first year and not the second—if lease extended—he binds himself, likewise, to yield immediate possession to the lessors.

The decision of the supreme court, reversing the ruling of the superior court and giving it instructions, was invoked by the assignee in his petition and in his argument to sustain his cause; while Spence & Porter, in their response, relied on the lease from them to Steadman; also on their answer to the bill filed by him against them in the state court, and inter alia, on the state law, as found in the Code (already cited), which confers on a lessor, or owner, the right to remove his tenant, who is holding over, and to re-enter the claimed premises. And they claimed that this local right was saved to them notwithstanding such tenant or lessee may have gone into bankruptcy (under the act of the congress of the United States, passed March 2, 1867), anterior to the termination of his lease, or the forfeiture of his term, and anterior, too, to the appointment of the assignee. Besides, that although they relied on the answer to the bill and the lease, yet they did not ask to go behind the opinion of the supreme court. Further, that the right to re-enter accrued to them by reason of the non-payment of the quarter's rent due and owing to them on the 1st of April, 1873, so they had a right to remove Steadman who—although he had become a bankrupt on the 22d of March—was nevertheless their tenant holding over, when they removed him by state process, on the 15th of April. Their learned counsel further insisted that no act which they had done could make them guilty of a contempt, for neither order or writ of injunction ever was issued from this court to restrain them; nor had any writ gone forth commanding them to answer an action at law. And if the assignee had any injury to complain of he had mistaken his remedy. While replying to the argument of Mr. Bleckley, Mr. Akerman expressed a willingness to rest his side of the case on the construction placed on the lease by the supreme court of Georgia; or to abide by such interpretation as might be given to it by the federal court,—submitting that should this court take the lease itself as a guide, whether, as Steadman had complied with the terms of the lease for the first year and entered on the second, there could be such a breach of the terms of the lease (for instance by the nonpayment of rent, on the 1st of April, 1873), as would work a forfeiture before the 1st of January, 1874. As to whether there really was a forfeiture of the lease, on the 1st of April last, or that there could be none until the 1st of January, 1874, is a matter which, from the view I entertain of the controversy between the assignee and the defendants, may be laid aside. But if it were essentially necessary for me to consider the question, and arrive at an opposite conclusion, I should do so with that distrust which I feel would

not be unbecoming in a single judge when differing from a court so eminent as the supreme court of Georgia.

Earnest discussion was had as to whether Steadman performed his covenant to insure. But this has not become a point for decision, as Spence & Porter based their right to re-enter because of the non-payment of rent. And I think the language of the supreme court of the state, when nicely weighed, indicates that this covenant was not broken when the decision was made on the 25th of February, 1873. The learned judge who pronounced the opinion said: "Provided he keep the property insured, as agreed upon and promptly pay," etc. From the hour Steadman filed his petition in bankruptcy he was divested of his estate, real and personal, in possession or in action; and the estate being assets for the payment of his debts it must, by operation of the bankrupt law, be considered in custodia legis, as fully, indeed, as if the court had the prehensory power over it. Intermediate, the filing of the petition and the appointment of and conveyance of the estate to the assignee, it is the duty of the bankrupt to protect and preserve the estate for the benefit of his creditors; and if he have warning that it is threatened with invasion by strong hand, or he has knowledge of impending danger from local process, he may apply to the bankrupt court for such apprehensive remedy as may avert the approaching wrong; so he may, I apprehend, institute actions for any trespass to, or eloinment of the estate, when committed before the assignee has qualified (if the estate remain in his care); and he may do so whether he be specially designated to collect, preserve and utilize the estate or not. It is a power incident to his trust, and the assignee may afterwards come in and be made plaintiff, for the rights of the creditors—so far as they affect the title or interest which the bankrupt had in the property at the time he filed his petition—are, by relation to that time, vested in the assignee.

I am not unaware of the doubts entertained by many, of his authority to bring actions at law in the bankrupt court, under the circumstances instanced. It has been held (Jones v. Leach [Case No. 7,475]; In re Bowie [Id. 1,728], and often by this court) that he may have an injunction to stay proceedings, which might prove injurious to the interests of parties concerned in the distribution of the estate. And I have heard no sound reason advanced why, when the claim or demand is a legal one, he cannot bring an action at law in the bankrupt court as well as file a petition or bill on the equity side of the same court, when the remedy he seeks is of an equitable nature. Before the appointment of the assignee, the bankrupt is the custodian of the estate (unless the court order it into other hands), and his fiduciary relation to the general creditors requires affirmative care on his part, to gather up, guard and preserve the estate until it is conveyed to the assignee. His trust resembles the office of a temporary administrator under the laws of this state, or of an administrator ad colligendum whose duty is to collect and keep the estate of the deceased until an administrator is appointed. Code, § 2456; Ventress v. Smith, 10 Pet. [35 U. S.] 167.

From the very act of bankruptcy the assignee has, by relation, the interest of the bankrupt in the estate; and the privity of contract between the bankrupt and his creditors being from that time transferred to the assignee, he has the same right, in my judgment, as an administrator who has a property from the death of the intestate, and may declare generally ut de bonis suis propriis. Mr. Justice Bradley, in Goddard v. Weaver [Case No. 5,495], so succinctly and clearly states what interests vest in the assignee, that I will quote his own words: "The assignee of a bankrupt is not the assignee of his creditors, nor of all the judgments, executions, liens and mortgages outstanding against his property. He takes only the bankrupt's interest in property, nor has he right, title, or interest which other parties have therein; nor any control over the same, further than is given expressly by the bankrupt act as auxiliary for the preservation of the bankrupt's interest for the benefit of his general creditors." Unwillingness to accumulate details, has compelled me to omit adverting to some of the views presented by each of the learned counsel. But as the arguments were, from the various matters which sprung up, in some degree discursive,—though pointing toward the main controversy,—I thought it due to them to dwell somewhat on the way before passing to the cardinal question in issue.

I will compress into a single sentence much of the scattered preceding data. Steadman was adjudged a bankrupt on the 22d of March, 1873; on the 27th he was appointed to superintend the running of the mills, etc., until the appointment of an assignee; on the 15th of April he was expelled from the premises, by the sheriff, and Spence & Porter put in possession; on the 26th of April the assignee was appointed by the judge, and on the 3d of May he demanded of Spence & Porter the possession of the lands, tenements, etc., described in his petition (of which I have given a summary), filed in this court on the 9th of May last. They refused to answer the demand, and still hold possession. At the unsuccessful meeting of the creditors, on the 12th of April, they were present and proved debts before the register. The court has no information whether the bankrupt had any knowledge, or notice whatever, of an intention to remove him. But, suppose he had notice,—timely notice,—and did not make application to this court for preventive process; or, if he was clothed with authority by the fair intendment of the bankrupt act, to institute proceedings at law against those who had dispossessed him, and he did not avail himself of a remedy, does either of these negative misprisions justify or excuse the conduct of Spence & Porter? I will endeavor to answer.

Woods, J., in McCan v. Norton [Case No. 8,677], decided in the United States circuit court, at New Orleans, November term, 1871, after quoting the first section of the bankrupt act, said: "The exercise of the powers thus broadly conferred upon the bankrupt court, is inconsistent with the exercise of the same powers in any degree by a state court." In Re Vogel [Case No. 16,983], Vogel filed his petition, and returned in the inventory a stock in trade at his store of about eight thousand five hundred dollars; he surrendered to the register, and was adjudged a bankrupt. Several mercantile firms brought actions of replevin for the goods, in state courts, each writ alleging that Vogel had fraudulently obtained the goods by color of purchase; that no title passed to him, and that they claimed the goods, as owners. The sheriff removed the goods from the store, and delivered them to the several plaintiffs in the replevin suits. Subsequently the assignee was appointed and demanded the goods of them; all refused to surrender the property. He then filed a petition in the bankrupt court, stating the facts, and praying that the parties be directed to deliver to him the property so taken and received by them, or that attachments for contempt issue against them severally, for taking the property from the possession and control of the court. They answered that they owned the goods, and that they never were the property of the bankrupt. Blatchford, J., pronounced an able opinion on the questions involved, and ordered that the goods be delivered to the assignee; or, if sold by them, then that they pay the several values of the goods to him, or, in default, attachments for contempt would issue. This case came before Mr. Justice Nelson for review, and the decision of Blatchford, J., was affirmed. In the case of Freeman v. Howe, 24 How. [65 U. S.] 450, the United States marshal had levied a process of attachment upon property belonging to a party not named in the writ. The owner brought an action of replevin in a state court, and the sheriff seized the property in the hands of the marshal, and delivered it to the owner. But the supreme court of the United States held that the rightful owner could not receive possession of it by state process. In the recent case of Buck v. Colbrath, 3 Wall. [70 U. S.] 334, —a case in almost every feature like Freeman v. Howe [supra],—the court said, that whenever property is in the custody of the court, and under its control for the time being, "no other court has a right to interfere with the possession, unless it be some court which may have a supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises."

To compel an equal distribution of the estate of the bankrupt among all his creditors is the policy and aim of the bankrupt law. Therefore, to permit one creditor to obtain an advantage over other creditors, would not only provoke unseemly contests, but would be a fraud upon the very law itself; and, doubtless, it was to prevent this very struggle for precedence, that the law gives the title of the assignee a relation back to the act of bankruptcy,—the filing of the petition. Steadman became a bankrupt on the 22d of March, and on the 15th of April, Spence & Porter caused the warrant of the state magistrate to be executed, by putting him out and themselves in. These acts were done ten or eleven days prior to the appointment of the assignee. With these facts, and the authorities cited before the mind, how can it be said that the execution of the process withdrew the property from the custody of this court, and gave a rightful possession to Spence & Porter? But it was urged, on their part, that the condition in the lease being broken by Steadman, on the 1st of April, 1873, the estate reverted to them on their re-entry on the 15th of April, under a state process; that notwithstanding he was a declared bankrupt at the time of the re-entry, he, nevertheless, continued their tenant—tenant at sufferance—until they removed him. The argument cannot be defended, for whatever estate he had in the premises on the 22d of March (and the lease was then current), passed absolutely into the custody of the law and under the control of the bankrupt court. Suppose there were a condition annexed to a lease that the terms shall be void on the bankruptcy of the lessee, and that the lessor may re-enter for the breach, and the lessee files his petition in the bankrupt court under the act of March 2, 1867, and avers, in his inventory or schedule, that the very premises so leased are in his possession and enjoyment; and, though he might be mistaken in his tenure, or believe that the condition was illegal or contrary to public policy, or he may contemplate a fraud, still the lessor could not evict him and regain the possession by state process; he must seek his remedy in the national court. It may be said to be a hardship to compel the lessor, in such a case, to pursue his right in a federal, instead of a state court, when the end might be obtained as well in the latter, as in the former tribunal. But congress must possess the choice of means and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution, for example, "to establish uniform laws on the subject of bankruptcies throughout the United States." Const. art. 1, § 5. At the time Steadman was dispossessed of the possession of the property it was in the custody of this court, and any interference with it, unless by the permission of this court, was a contempt of its authority, and I so decide. Therefore, the said David W. Spence and Oliver S. Porter, must, within twenty days

from the entry of an order on this decision, deliver to the assignee the identical lands and tenements, and all other property and effects of every kind and description so taken. In default thereof, attachments must issue as prayed for.

Case No. 13,330a.

STEADMAN v. CASWELL et al.

[2 Hask. 375.] [1]

District Court, D. Maine. Jan., 1880.

BANKRUPTCY—CONVEYANCE—VALIDITY—TITLE IN TRUST.

1. A conveyance by a bankrupt within one month of his bankruptcy proceedings, of real and personal property that he had previously sold, received pay for and surrendered to the purchaser, but had not conveyed, in the absence of fraud, is valid.

2. The title to such property is held in trust for the purchaser, and the bankrupt's conveyance of the same after he became insolvent, and knew it, is not fraud of the bankrupt act [of 1867 (14 Stat. 517)].

In equity. Bill by the assignee in bankruptcy of Samuel B. Scribner, against him and his mother and sister, seeking to annul a conveyance by the bankrupt to his mother and sister of his distributive share in his father's estate, made within one month of his bankruptcy proceedings as a fraudulent preference and a conveyance made in fraud of the bankrupt act. The defendants severally answered that, in 1873 and '74, the bankrupt having sold his distributive share in his father's estate, consisting of real and personal property, to his mother and sister, then received payment for the same, at which time they took and afterwards kept the possession thereof; and that his deed to them of the same made September 12, 1877, to perfect their equitable title, and within one month of the time when he filed his petition to be adjudged a bankrupt on October 2, 1877, was not void under the bankrupt law.

George F. Holmes and Almon A. Strout, for orators.

H. S. and H. C. B. Reade, for respondents.

FOX, District Judge. After perusing the entire testimony a second time, I have been brought to the conclusion that, in 1873 and 1874, the respondents, Abby M. Caswell and Betsey Scribner paid to Samuel B. Scribner the sum of $1100 in full for his interest in all the estate, real and personal, of his father at his decease.

From the time of such payment, Samuel B. Scribner held the title to the property in trust for the mother and sister; and, although he was insolvent at the time of the conveyance and was undoubtedly aware of his condition at that time, he was justified, under the bankrupt act, in perfecting his contract with his mother and sister, and conveying to them the legal title to the property that they had previously purchased.

The assignee is not in a condition to question such a conveyance, although made less than a month before proceedings in bankruptcy were instituted. The result therefore is, bill dismissed without costs.

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

STEAMBOAT.

[NOTE. Cases cited under this title will be found arranged in alphabetical order under the names of the vessels: e. g. "The Steamboat C. Vanderbilt. See C. Vanderbilt."]

Case No. 13,331.

STEAM CUTTER CO. v. SHELDON et al.

[10 Blatchf. 1; 5 Fish. Pat. Cas. 477.] [1]

Circuit Court, D. Vermont. March 25, 1872.

PATENTS—LICENSE—RIGHT TO MANUFACTURE AND USE — REPAIRS — TERM OF PATENT — INFRINGEMENT—DAMAGES—PROFITS —ABANDONMENT—INJUNCTION.

1. W., the patentee of a machine for quarrying stone, assigned his patent to C. Before that, W. had made a written agreement with S., transferring to S., and his assigns, "the right to use the patented invention, to the extent of one machine," in the quarry of S., "and in no other place," to the full end of the term of the patent, and further agreeing, that S. should have the privilege of using additional machines, in such quarry, and not elsewhere, on making certain specified gross payments to W. The agreement further provided, that W. should superintend the construction of at least one machine, and be compensated therefor by S., for days' labor, S. to pay for constructing the machine. One machine was built, and paid for by S., and put to work in the quarry of S. S. used it for a time and then ceased, for more than two years, to use it, but, during the interval, repaired it. During the same interval, it was used by R., in a different quarry, with the knowledge of S. Afterwards, S. put into use, in his quarry, five machines got up by one L. C. notified S. that the machines of L. infringed the patent of W. S. had taken from L. an agreement by L. to defend the machines of L. against claims under the patent of W. S., after this suit was brought, tendered to C. and to W. money, as and for the payment for the right to use five additional machines, under the agreement with W. *Held*, that S. acquired, by the agreement with W., the right to manufacture, as well as the right to use, the machines mentioned in it, subject to its conditions.

[Cited in Steam Stone Cutter Co. v. Shortsleeves, Case No. 13,334; Porter Needle Co. v. National Needle Co., 17 Fed. 538.]

2. S. acquired the right to repair and rebuild the one machine, so as to have and keep in use one machine, in his quarry, during the life of the patent.

[Cited in Wooster v. Sidenberg, Case No. 18,-039.]

3. S. was liable for the profits from the use of the one machine by R., and for the damages thereby sustained by C.

4. S. did not forfeit his rights in respect to the one machine, by allowing it to be used by R., in another quarry.

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

5. S. was a naked infringer in using the five machines of L., and could not defeat the right of C. to recover in this suit, in respect of such use, by the tender above mentioned.

6. S. had abandoned and forfeited all right, under the agreement with W., in respect of any additional machines, beyond the one machine.

7. S. must be enjoined from using any but the one machine first put into use, and be decreed to pay all profits made by him by the use of the five machines, or by the use of the one machine by R., and all damages sustained by C. from both of such users.

[This was a bill in equity by the Steam Stone Cutter Company against Charles Sheldon and others for the infringement of letters patent No. 40,584, granted to G. J. Wardwell, November 10, 1863; reissued October 10, 1865, Nos. 2,087 and 2,088.]

[Final hearing on pleadings and proofs.]

Chauncey Smith and John Prout, for plaintiffs.

Edward J. Phelps and James N. Edminster, for defendants.

WOODRUFF, Circuit Judge. This is a suit in equity brought to restrain the defendants from infringing certain patents, for a stone channelling machine, and machinery for cutting and quarrying stone and marble, issued to George J. Wardwell, patentee, and reissues granted to the complainants, his assignees, and praying for a discovery and an account of the gains and profits accrued to the defendants from alleged past infringements, and for damages. Although the answer of the defendants put in issue the novelty of the alleged inventions and the exclusive title of the complainants, and denied that the alleged infringing machines used by them (which were made by the Windsor Manufacturing Company, and were called Lamson machines) were a violation of the rights of the complainants, and some testimony was comprised in the proofs, bearing on those questions, neither of these denials was insisted upon when the cause was brought to a hearing. The decision of this court in Steam Cutter Co. v. Windsor Manuf'g Co. [Case No. 13,332], which affirmed the validity of the patents, and that the like machines were infringements, was accepted by the defendants' counsel, and the defence was rested solely on the agreement made by the defendants, on the 1st of June, 1864, with the patentee, Wardwell, to be presently mentioned, and the acts and rights of the defendants under that agreement.

This agreement was made before the assignment by Wardwell to the complainants, and it recited, that Wardwell had obtained letters patent for certain improvements in machines for cutting stone, and that Sheldons & Slason were desirous of obtaining an interest therein; and the agreement witnessed, that, in consideration of one thousand dollars paid by the defendants, the said Wardwell assigned, transferred, and set over to the said Sheldons & Slason, their heirs, executors and assigns, "the right to use the said patented invention, to the extent of one machine, in their quarries at West Rutland, and in no other place or places, * * * the same to be had and held by the said Sheldons & Slason, for their use and behoof and for the use and behoof of their heirs, executors and assigns, to the full end of the term for which said letters patent are or may be granted." Wardwell further agreed, that the said Sheldons & Slason, their heirs, &c., should have the privilege of using all improvements that he might add to said patented machine, the same to be applied and used on the said machine, in their quarries at West Rutland, and in no other place or places. The instrument then provided: "And I further agree to and with the said Sheldons & Slason, their heirs, executors and assigns, that they shall have the privilege of using additional machines, upon the conditions hereinafter mentioned, to wit, one additional machine upon the payment of two hundred and fifty dollars, a second additional machine upon the payment of two hundred dollars, a third additional machine upon the payment of one hundred and fifty dollars, a fourth additional machine upon the payment of one hundred dollars, a fifth additional machine upon the payment of fifty dollars, and, upon the further payment of fifty dollars, any number of machines more than six; all of the above machines to be used on the quarry property now owned by the said Sheldons & Slason, at said West Rutland, and in no other place or places. I further agree to and with the said Sheldons & Slason, their heirs, executors and assigns, that they shall have the privilege of using, on the above-named machines, all the improvements that I, George J. Wardwell, may add to said patented machine." Immediately before the execution of the foregoing, and in pursuance of the negotiation which followed the perusal thereof by the defendants, and at their instance and requirement, the following supplemental agreement was prepared, and the two were simultaneously delivered, that is to say: "Whereas, I have this day sold Sheldons & Slason the right to use machines for cutting stone upon their quarries, now opened or hereafter to be opened upon their quarry property in West Rutland—for full explanation, see sale of right, as executed this day—and it is further understood, that I am to superintend the construction of at least one of the machines, in the best manner and in the cheapest possible way, the said Sheldons & Slason to pay for construction of same. I further agree to attend to starting of the machine upon their north quarry, so called, superintending the same until fairly and successfully at work, S. & S. to pay my board while attending to the same, and, also, a fair compensation per day, for each day's labor." The one thousand dollars stipulated in the agreement was paid by

the defendants, and, immediately thereafter, Wardwell recommended the procurement of the first machine at a machine shop in St. Johnsbury, with the proprietors of which he had previously had some negotiations in relation to the construction of machines, and a stipulation as to the terms on which they would build them. A machine was there built, the bill therefor was rendered by the machinist to Wardwell, the bill was paid by the defendants, and the machine was put in operation at the defendants' quarry in the fall of 1864 or the spring of 1865, the defendants, through Wardwell, procuring from Boston an engine wherewith to operate the machine. It was used for a short time, in cutting one cut or channel of about forty feet in length, and was then removed by the defendants, under a conviction, that, in that quarry, it could not be used to advantage, and it was not again used by them until the summer or fall of 1867, but repairs were made, and some new parts were substituted for old. During the year 1866, or in that year and early in 1867, as appeared in evidence, this machine was used, in a neighboring quarry, by the Rutland Marble Company, but, except by the fact of such use, and that the firm was aware of that fact, it did not appear that it was by the consent of the defendants, nor did it appear that they received any compensation therefor. Meantime, Ebenezer G. Lamson, (claiming to be the inventor,) and the Windsor Manufacturing Company, had begun, and were carrying on, the manufacture of the infringing machines, called, in the litigation, the Lamson machines, and, in the summer or fall of 1867, and thereafter, the defendants purchased, and put in operation, in their quarries, five of such machines. They were, at or about the same time, notified, on behalf of the complainants, that such machines were infringements of the Wardwell patents. They were forbidden to use them, and were apprised that the complainants would institute legal proceedings, to restrain any wilful and persistent violation of their rights under the said patents, and to recover damages therefor. To meet the exigency thus suggested, the defendants had already fortified themselves, by taking from the said Lamson and the Windsor Manufacturing Company, contemporaneously with their purchase, a special agreement, by which the parties last named agreed to defend the machine and apparatus sold by them, and fully protect the said Sheldons & Slason in the use and enjoyment of all so by them purchased, and, in case of any litigation involving the said Sheldons & Slason for such use, to assume the litigation, and pay all damages and costs to which Sheldons & Slason might be subjected, and save them whole and harmless, and, in case of final adjudication against the right, then to take back the machines and rights granted, and repay the consideration, or so much thereof as should be just, equitable and sufficient to make them whole in the premises. Thus fortified, the defendants, disregarding the notice from the complainants, persisted in the use of the Lamson machines. The complainants prosecuted their suit against Lamson and the Windsor Manufacturing Company, and, in November, 1870, commenced this suit against the defendants. Before putting in their answer, the defendants, having heard of the decision in the suit against their vendors, on the 9th of December 1870, tendered, unconditionally, to the complainants, and also to the said Wardwell, the sum of nine hundred dollars, "on account of their contract with the said Wardwell," which tender is set up, in the answer, as covering the amount which, by the terms of the agreement above stated, the defendants were to pay to entitle them to the use of five additional machines, and, also, interest thereon from the time such use was begun.

Upon these facts, the claims of the parties arise, which were urged on the hearing. If there are any others which seem to us material, they will be adverted to in disposing of the case. The complainants insist, that the agreement between Wardwell and the defendants conferred upon the latter only the right to use the Wardwell machine and the improvements he might make thereon; that such right to use was separate and distinct from the right to construct the machine for the purpose of use, and the agreement did not include the latter; that the defendants, therefore, could not procure machines (even though they had paid the money mentioned in the agreement) except from the patentee, or his assigns, or from some person authorized by him or them to construct machines; that the payment of the sums specified was a condition precedent to the right of the defendants to use any other than the first machine, which was manufactured under the superintendence of Wardwell; that the defendants, having paid for that first machine, had the right to use that, but had no right themselves to repair it, or to rebuild it by substituting new parts thereof; that, hence, in respect of the five machines purchased from the Windsor Manufacturing Company, the defendants are liable as tort-feasors, infringing the rights of the complainants, on two grounds—first, that they had no right to make, or procure to be made, any machines, except by the complainants, or by their consent or license—and, second, that, they not having performed the condition precedent, by the payment of the sums stipulated, they had no right to use the additional machines, by whomsoever made; that, in respect of the first machine, they are now infringers, because, first, they have repaired and partially rebuilt it, and, second, they have suffered it to be used outside of their quarry, and have so forfeited the license conferred by the agreement; and, finally, that the conduct of the defendants, as shown by the evidence, establishes an abandonment of the agreement,

and a forfeiture of all rights under it, in such wise, that it constitutes no defence to this suit, and the defendants could not, by the tender which they made, reinstate themselves in the position they once held under the agreement. The defendants maintain the contrary of most of these propositions, and insist, that the agreement gave them the right to make, or cause to be made, any machines, when or where they saw fit; that it gave them the right to repair, and, if necessary, rebuild, the machine which was constructed under the superintendence of Wardwell, and first put in use; that, although the agreement imported that, before such making and use of the additional machines, they should pay the sums specified therefor, a court of equity should not regard them as having forfeited their right, and subject them to accountability as tort-feasors, but, on payment of the amount stipulated, as already tendered, with the interest from the time when it ought to have been paid, should regard them as having made the complainants whole in the matter, and as, therefore, exonerated from further liability; that the use of the one machine, by the Rutland Marble Company, though not warranted by the terms of the agreement, was not the act of the defendants; that, although the marble company may be liable therefor, the defendants are not; and, especially, that such use could not operate to destroy the right of the defendants to use that machine or the others.

Our conclusions upon the case are as follows:

1. We think it clear, that the right conferred upon the defendants, subject to the conditions of the agreement, was a right to construct and use the machines therein mentioned. True, the patent granted to an inventor confers upon him the right to make, to use, and to vend to others to be used; and it is possible for him, in granting to others a share in his exclusive right, to limit the privilege granted, as he may see fit, and it is, therefore, possible for him to keep these privileges distinct, if he can find persons willing to pay for one without the right to enjoy either of the others. Each case, however, must be judged of as well by the terms of the grant of privilege, as, also, by the situation of the parties or the circumstances under which they act. Wilson v. Stolley [Case No. 17,839]. If a party engaged exclusively in the construction of machines of various kinds, for sale to others, were to receive a license to manufacture a patented machine, for a consideration presently paid to the patentee, a construction which would deny him all opportunity to make the privilege of any value, forbidding his sale of the machines when manufactured, should be very clearly imported by the license, or the court would hold that the parties meant that he should derive some benefit from the license, and not be left thereafter wholly dependent on the will of the patentee. On the other hand, when the patentee, having made machines, sells one with the right to use the same, his grant may, with propriety, be limited to the particular machine sold; and it is, also, clear, that such a sale would (unless limited in terms, or by special circumstances) import the right to use, although not so expressed. So, a sale of a patented invention to a dealer, not for use, but for sale to others, would carry with it the right, in the ultimate purchaser, to use the machine sold. Limitations in respect to territorial limits, extent of use, and the like, may be, and, in general are, provided by express terms or stipulations.

In the present case, it appears, by the evidence, that Wardwell, the patentee, was struggling with a comparatively untried invention, anxious to bring it into use. The defendants were proprietors of quarries, engaged largely in business, and their example and their recommendation would be of great service in bringing his expensive machine before the public, and, if it proved valuable, into reputation. To secure this advantage, Wardwell, reciting that the defendants were desious of "obtaining an interest" in his letters patent, in consideration of one thousand dollars paid by them, assigned and sold to them, and their heirs, executors and assigns, the right to use "said patented invention," to the extent of one machine. Were there nothing more in the agreement or its contemporaneous supplement, we should say, that these terms imported a grant of the right to the whole benefit of what was secured to Wardwell by the patent, to the extent of one machine. Subsequent words limited the use to their quarries. But, within those quarries, they could, to that extent, use the invention, and, to be used within those quarries, they could sell and assign it, or vend it to others to be used. The defendants did not suppose —Wardwell could not have supposed—that he still retained a control over the interest which the defendants sought to acquire, which would render it necessary for the defendants to pay him further for one of the privileges secured to him by the letters patent, before they could make their purchase available for any purpose. They both supposed that this transaction was the direct and immediate means of bringing his invention into important use. The letter of the defendants, written shortly afterwards, at the request of Col. Nichols, who was in some manner interested in the patent, wherein they say: "We have had one machine made, and paid one thousand dollars for the right to use it, and intend to get other machines as fast as we can," indicates this construction of the agreement, most clearly. But, the supplemental agreement makes this quite plain. In that, Wardwell, at the instance of the defendants, as is obvious from the tenor of the agreement itself, and as is expressly proved, in order to enable Sheldons & Slason to procure the one machine, agreed to superintend its construction and attend to starting it, superintending

the same until fairly and successfully at work, they paying for its construction, paying his board, and a fair compensation, per day, for each day's labor. If it were otherwise doubtful, it is plain, that, under this agreement, the defendants could have required him to superintend that construction on their own premises, by their own machinist, or at any other machine-shop which they might designate. He was to be paid no further royalty or license fee, nothing for any supposed exclusive right to manufacture, but only for his days' labor, as a mechanic. His skill was put at their service, for the construction of the machine in the best manner, and at the smallest cost, and that alone the defendants were to pay. We think, therefore, the claim that the defendants did not acquire the right, (subject to the other conditions of the contract,) to make the machines themselves, or employ others to make them, is not well founded. All that has been said applies as well to the additional machines, except that the defendants did not bind Wardwell to superintend their construction. The gradually diminishing scale of prices for the privileges granted, adopted to induce the defendants to bring the machines into large use, tends in the same direction as other circumstances above adverted to.

If it were necessary, we might, on the authority of Woodworth v. Cook [Case No. 18,011], and cases therein cited, go further, and say, that it is established, by other proofs, to our satisfaction, that it was the intention of the parties that the defendants should have the right to make, or procure to be made, the machines which they obtained the right to use, and that, if this does not sufficiently appear by the language of the instruments, then the omission in this respect was a plain mistake. The instrument does not, in that case, express the actual agreement; and, although no cross bill has been filed, to reform the contract, such facts may be used as a defence to the suit; and, as it is shown that Wardwell is not only a stockholder, but one of the trustees of the complainants, and their superintendent of construction, it is not clear that the complainants can assert that they are bona fide purchasers, without notice of the agreement with the defendants, who were already in the possession and use of one of the machines, so as to deprive the defendants of such defence. But, our conclusion, founded upon the considerations before stated, renders it unnecessary to place the decision upon this ground.

2. We think it no less clear, that the agreement conferred the right to repair, and, if necessary, to rebuild, the first machine, made, paid for and put to use in the quarry. The grant was not a sale of a particular machine, or a license to use a particular machine, but, it was an assignment of the right to use the patented invention, to the extent of one machine; and this right was "to be held and enjoyed by the defendants, their heirs, executors and assigns, to the full end of the term of the patent." During all that time they might have and keep in use one machine. Number of machines in use was the subject of limitation, but it was to be permitted for the full term. Extent of use was the subject of declaration defined by the agreement, but that extent of use was to continue through the period. Whatever was necessary to the enjoyment of that use, to the extent or limit of one machine during the whole period, was involved in the grant. If repairs were necessary, that was included, if rebuilding was requisite, that might be done, so that the use stipulated for and granted might extend through the duration of the patent. See Bicknell v. Todd [Case No. 1,389]; Woodworth v. Curtis [Id. 18,013].

These views in regard to the construction and effect of the agreement are important in reference to the relief to be granted, notwithstanding our opinion upon other branches of the case. The defendants, by the agreement, and the payment to Wardwell of the one thousand dollars therein mentioned, did acquire the right to construct and use the machine which, under the superintendence of Wardwell, was made, and, also, the right to keep it in repair, and, if necessary to the enjoyment of the use of the patented invention, to the extent of one machine during the term of the patent, to rebuild it, maintaining it in suitable condition for use. We find no ground for saying that these rights have been forfeited. In so far as the use of this machine in another quarry was beyond the license, we think the defendants are liable for any profits they realized therefrom, and for any damages sustained by the complainants. The defendants are not shown, it is true, to have given an actual consent to such use, but they had the ownership and control of the machine, and there existed no right to use it outside of their quarry. They acquiesced in such use. Without their consent, or that of their agents, such use could not have happened. There is no pretence that the Rutland Marble Company took the machine by force or against the will of the defendants. In that infringement of the rights of the complainants, the defendants find no protection in the agreement. They are, with the Rutland Marble Company, joint infringers. But, the present grant cannot, in respect to such machine, be regarded as upon condition. It is enough, that, for such unlawful use, the agreement furnishes no protection. As to that, the defendants stand liable, as they would be if aiding, or co-operating with, the Rutland Marble Company, when no such agreement was in existence. In respect to that machine, the property is vested, the agreement is fully executed, and the right is not revocable. There was no condition annexed, upon the breach of which the complainants were remitted to their original rights, and could treat the agreement as at an end. They limited the privilege granted, and any use beyond

that leaves the defendants liable as infringers.

3. The much more important question relates to the effect of the agreement upon the right of the defendants to use the five machines purchased from the Windsor Manufacturing Company. The defendants were not entitled to any right or privilege beyond the use of one machine, except upon conditions expressly stated in the agreement. Without compliance with those conditions, they stood, in their relation to the patentee, in the same position as a third party having no agreement with him, and their use of his invention was as clear an infringement of his patent as like use by such third party. In respect to additional machines, they had, perhaps, secured an option, at a low rate of charge by the patentee, but, the condition that they should pay the sums named was none the less absolute. It was upon the payment, and only upon the payment, that they were entitled to use any additional machine. They, therefore, bought and used the Lamson machines without right, and as literally and truly so, as if they had never had an agreement with Wardwell. The right of the complainants to treat them as tort-feasors was perfect. They were liable to the complainants for damages, and the complainants' title, in equity, to treat the gains and profits realized by such tortious use, as held by the defendants as trustees for the complainants, was fixed and certain, and, on filing the bill of complaint herein, the right to recover could not, in any aspect of the case, be defeated by a tender of performance of the original conditions. This is not upon the ground of any forfeiture, not because any right once acquired was forfeited by the non-performance of a condition, but because the right to use the additional machines never existed. It was not acquired by the defendants in the only mode in which they could gain it. The complainants, therefore, could not, upon any principle of law or equity, be compelled to waive their right to gains and profits, and accept interest on the money, in lieu thereof.

But, this is not all. The defendants, by their conduct, placed themselves in such a position, as, we think, both at law and in equity, deprives them of any benefit whatever from the agreement, so far as relates to the additional machines. Quoad hoc, they defeated the very design and purpose which, upon their own showing, and as, in reference to the other branch of the subject, they here claim, constituted the inducement which moved the patentee to make the arrangement. They discontinued the use of the patented machine, which they had a right to do, but the doing of which points to their design and purpose to abandon the contract. They lay by for three years, doing nothing in the use of the invention, suffered the machine which they had to be used by the Rutland Marble Company, as a thing in which they had no concern, and then allied themselves to the infringers of the patent, and bargained for infringing machines. When notified, by the complainants, that such machines were a violation of their rights under the patent, and that prosecution would follow, they not only made no pretence that they were acting, or were willing to act, under the contract, but set the complainants at defiance, secured themselves against loss, by the covenants of the infringers, and persisted in the piracy. Instead of acting in subordination to the contract, with a view to preserve the rights or advantages stipulated therein in their favor, they lent themselves, so far as in their power, to the destruction of all value in the thing stipulated. Instead of exercising the option which, it may be conceded, they had, for a reasonable time, at least, to take and use the machines specified therein, they declared, by the most decided and unequivocal conduct, their intention to pay nothing more for machines or the right to use them, to Wardwell or to the complainants. Had they so declared in the strongest terms language can furnish, they could not more distinctly have expressed their determination to have, or pay for, no more Wardwell machines. In this view, the defendants must be deemed to have abandoned the contract, so far as it related to additional machines, and the complainants had a clear right, in equity not less than at law, to accept the abandonment and hold them to its consequences. This is no hardship. It partakes very little of the character of the enforcement of a forfeiture. The defendants chose, voluntarily, to attach themselves to the infringing party, and, when they did so, they chose to meet the just consequences. If they were advised that the machines which they used were not an infringement, that only establishes more firmly that they abandoned their contract with Wardwell and determined to have no more of his machines, and shows more fully, that, in the face of admonition and warning, they preferred to take their chance with the infringers. When, after about six years, their effort to defeat the purposes of the agreement had had its probable effect, to the prejudice of the complainants, and the decision of the question of infringement had shown that their conduct was unlawful, it was too late to retrace their steps. Their conduct had discharged the complainants and Wardwell from any obligation to treat them as licensees in respect to any machine but the one originally put into use. The conclusion is, that the complainants are entitled to a decree, that the defendants be enjoined from using the five machines purchased from the Windsor Manufacturing Company, or any machine but the one first put into use, but not against repairing and maintaining that machine during the term of the patent, for which the complainants or their assignor have received the full consideration. The defendants must, also, be decreed to account for, and pay to the complainants, all gains and profits made

by them, by the use of the said five machines, or by the use of the other one by the Rutland Marble Company, and must be decreed to pay, in addition thereto, all damages, (beyond such gains and profits,) if any, sustained by the complainants, from the defendants' unlawful use of the said five machines, or from such unwarranted use of the said first machine by the Rutland Marble Company, together with the costs of this suit.

[For other cases involving this patent, see Steam Stone Cutter Co. v. Shortsleeves, Case No. 13,334; Same v. Windsor Manuf'g Co., Id. 13,335; Same v. Windsor Manuf'g Co., Id. 13,336.]

Case No. 13,332.

STEAM CUTTER CO. v. WINDSOR MANUF'G CO.

[Cited in Steam Cutter Co. v. Sheldon, Case No. 13,331. Nowhere reported; opinion not now accessible.]

STEAM DERRICK BOAT (MALTBY v.). See Case No. 9,000.

STEAMER.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the vessels; e. g. "The Steamer New Orleans. See New Orleans."]

STEAM FERRYBOAT.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the vessels; e. g. "The Steam Ferryboat Roslyn. See Roslyn."]

Case No. 13,333.

STEAM PACKET CO. v. BRADLEY.

[5 Cranch, C. C. 393.][1]

Circuit Court, District of Columbia. March Term, 1838.[2]

ACTION — IDENTITY — CONTRACTS — PAROL EVIDENCE.

1. The criterion by which to decide whether two suits are for the same cause of action, is whether the evidence properly admissible in the one will support the other.

2. Parol evidence of the object and intention of a party in entering into a written agreement, and of the circumstances which induced him to make the contract, is not admissible, if there be no ambiguity in the written contract.

Assumpsit, upon the same cause of action as that in the case between the same parties in 9 Pet. [34 U. S.] 107, in which the judgment was reversed in January term, 1835, because it appeared by the record that the writ of capias ad respondendum was issued before the cause of action had accrued. The writ of error, upon which it was reversed, was issued in January, 1834. While it was depending in the supreme court unreversed, the plaintiffs sued out the capias ad respondendum in the present suit, on the 24th of December, 1834. In January, 1835, the supreme court reversed the first judgment, and sent the cause back with an order to issue a venire de novo, and thus it stood until the 22d of June, 1838, when the plaintiffs directed a non-pros. to be entered. On the 7th of March, 1836, the plaintiffs filed a declaration precisely like that in the former case; to which the defendant pleaded in abatement the pendency of the former suit. To this plea the plaintiffs replied, in effect, that the writ in the former case issued before the cause of action accrued, and therefore the evidence to support the present action was improperly admitted in the former suit, and that the judgment of this court in that suit was reversed by the supreme court upon that ground. To this replication the defendant demurred.

Mr. Marbury, for plaintiffs. The record in the former case shows that the plaintiffs had then no cause of action, and unless they could have recovered in that action, it is no ground of abatement of the present suit. But the former record is extinguished by the reversal before the plea pleaded, so that nul tiel record might have been pleaded. Knight's Case, 1 Salk. 329, 2 Ld. Raym. 1014; Marston v. Lawrence, 1 Johns. Cas. 397.

Mr. Jones, contrà. The plaintiffs in the former suit had a good cause of action for the hire of the boat from the 20th of November to the 2d of December, 1831, the date of the first writ; and the present suit covers the same time. To that extent, the cause of action is the same in both causes. The error of this court was, in instructing the jury that the plaintiffs could recover for the hire from the 2d of December to the 7th of February. The judgment of this court was reversed, but a venire de novo was ordered; so that the record remains, although the judgment is reversed. The first action is still pending.

Mr. Bradley, on the same side, cited 2 Chit. Pl. 469, for the form of the plea in abatement.

Mr. Coxe, in reply. There had been two suits brought by these plaintiffs, one against Mr. May, and one against Mr. Bradley, which had been settled or abandoned; and the parties agreed that a new suit should be docketed, to try the present question; but instead of docketing a new suit, the plaintiffs inadvertently filed their declaration in one of the former actions, in which the writ had issued prior to the present cause of action. The plea should have shown that the plaintiffs might have recovered in the former action, to the extent claimed in the present action. If they could have recovered in the

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

[2] [Reversed in 13 Pet. (38 U. S.) 89.]

former only a part of what they now claim, the abatement can only go to that partial extent; and, having been pleaded to the whole of the present cause of action, it is bad. If the contract was entire to pay in one sum for the whole detention of the boat from the 20th of November to the 7th of February, then the plaintiffs had no cause of action on the 2d of December, 1831, when the writ issued. But if the contract was to pay $35 a day, de die in diem, then the plaintiffs had only a cause of action for the hire of the boat up to that day; but his cause of action now is for the whole time of the detention of the boat, from November 20 to 7th February, so that the cause of action is not the same. As to the time from the 2d of December to the 7th of February, the first suit would not protect the plaintiff's cause of action from the statute of limitations.

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

CRANCH, Chief Judge. On the 2d of December, 1831, the writ in the first suit was issued, returnable to December term, 1831. The declaration contained two counts: (1) Indebitatus assumpsit for $2,765, for the use and hire of the steamboat Franklin. (2) Quantum meruit for the hire and use of the same boat; and that they deserved to have therefor the sum of $2,415. The jury found a verdict for the plaintiffs for $2,415, with interest from the 6th of February, 1832; and judgment was rendered accordingly. The bill of exceptions taken at the trial in November term, 1833, shows that the plaintiffs claimed, and the court instructed the jury, that if they believed certain facts therein stated, the plaintiffs were entitled to recover at the rate of $35 per diem from the 20th of November, 1831, to the 6th of February, 1832, both days inclusive. Upon a writ of error, the supreme court of the United States, at January term, 1835, reversed the judgment, and ordered a venire de novo, because it appeared by the record "that the jury was instructed to give damages to a time long posterior to the institution of the suit," the writ having issued on the 2d of December, 1831, and the defendant having appeared on the 1st Monday of December, 1831, and laid a rule on the plaintiffs to declare. This error was not noticed in the court below, or rather, as it seems, the record did not correspond with the facts, the parties having agreed, after the 7th of February, 1832, to docket a cause by consent; but as a writ had been issued on the 2d December, 1831, for a cause of action which was abandoned, the entries were made in the suit thus commenced on the 2d of December, instead of docketing a new suit according to the agreement of the parties. While the same cause was pending in the supreme court upon the writ of error, to wit, on the 24th of December, 1834, the plaintiffs sued out a new capias ad respondendum against the defendant William A. Bradley; and on the 8th of January, 1836, filed their declaration thereupon, precisely in the same words as those of the declaration in the former cause. To this new declaration, the defendant, on the 7th of March, 1836, pleaded, that before the issuing of the said writ in this cause, namely, at December term, 1831. the plaintiffs "impleaded the said defendant, and filed their declaration against him in a plea of trespass on the case of and upon the very same identical promises and undertakings in the said declaration in this present suit mentioned, as by the record and proceedings thereof remaining in the said court may more fully appear; in which said suit a trial was had and judgment therein by the said court rendered against the said defendant; from which said judgment the said defendant then and there prayed an appeal to the supreme court of the United States, in due form of law, which said prayer was granted, and the said cause was thereupon removed to the said supreme court, at the January term thereof, in January, in the year 1834; and the said defendant further says, that the parties in this and the said former action are the same, &c., and that the said suit so brought and prosecuted against him the said W. A. B. as aforesaid, was still pending in the said supreme court of the United States when the writ in this action was issued; and this the said W. A. B. is ready to verify, &c., and prays judgment of the writ and declaration, and that the same may be quashed." To this plea, the plaintiffs replied, in substance, that the writ in the former case "issued prior to the rising of the cause of action in this case mentioned," and although the declaration in that cause did set forth the same cause of action as is set forth in the declaration filed in this case; yet, by the final judgment entered in that case, and which still remains in full force, it was adjudged that the said cause of action, not having arisen until after the issuing of the said writ, the evidence given to the jury in that case was improperly admitted; and the judgment of the said circuit court was, on that ground, reversed, "wherefore the plaintiffs say, that they ought not to be precluded from recovering in this action, by any thing in the said plea contained." To this replication it is understood that the defendant demurs, and the plaintiffs join in demurrer.

The criterion by which to decide whether two suits are for the same cause of action. is, whether the evidence, properly admissible in the one, will support the other. The supreme court has decided that the evidence which is admissible, and will, as we suppose, support the present action, was not admissible in, and, therefore, could not support, the former action. And it is equally clear, that so much of the evidence as might have been admissible in the former action, (namely, for the hire of the boat from the 20th of

November up to the 2d of December, 1831,) and which might have supported so much of the plaintiff's claim, will not support the whole of the present claim.

I think, therefore, that the cause of action cannot in law be considered as the same. If the contract is to be considered as for an entire sum, comprehending the thirty-five dollars a day from the 20th of November, 1831, to the 7th of February, 1832, then no part of the evidence in the former suit was applicable to that case. So that, taken in either way, I think the pendency of the former action cannot abate the present action.

THRUSTON, Circuit Judge, did not sit in the cause.

Plea in abatement overruled.

Upon the trial of the general issue, the plaintiffs relied upon the same evidence which they produced on the former trial (see the case reported in 9 Pet. [34 U. S.] 107, and 13 Pet. [38 U. S.] 89), and the defendant offered, and the court again rejected, the same parol evidence to confine the contract to the time the navigation of the river should not be obstructed by the ice, which was offered and rejected at the former trial; and the court gave the same instruction, at the instance of the plaintiffs, which they had given before.

The verdict and judgment being for the plaintiff, as in the former suit, the defendant carried the cause again to the supreme court, where the judgment was again reversed, on the ground that the court ought to have permitted the defendant's parol evidence to be given to the jury. 13 Pet. [38 U. S.] 89.

STEAM PROPELLER.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the vessels; e. g. "The Steam Propeller Edgar Baxter. See Edgar Baxter."]

STEAMSHIP.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the vessels; e. g. "The Steamship Colon. See Colon."]

STEAMSHIP CO. (BARNES v.). See Case No. 1,021.

STEAMSHIP CO. (BAZIN v.). See Case No. 1,152.

Case No. 13,334.

STEAM STONE CUTTER CO. v. SHORTSLEEVES.

[16 Blatchf. 381; 4 Ban. & A. 364.] [1]

Circuit Court, D. Vermont. June 7, 1879.

PATENTS—LICENSE TO MAKE AND USE.

W., the patentee of inventions in steam stone cutting machines, granted to a corporation "the right to use said patented machine, or any number of said machines," in its quarry at S. C. succeeded to the rights of W., and another corporation to the rights of the corporation grantee in the quarry. D. was making a machine embodying the patented inventions, for the new corporation, for use in said quarry, and C. sought to enjoin D. from making such machine: *Held*, that the grant conveyed the right to make machines for said use, including the right to procure them to be made, and covered the making of them by the person procured to make them.

[Cited in Illingworth v. Spaulding, 43 Fed. 831.]

[Cited in Porter v. Standard Measuring Machine Co., 142 Mass. 194, 7 N. E. 927.]

[This was a bill in equity by the Steam Stone Cutter Company against David Shortsleeves for the infringement of letters patent No. 40,584, granted to J. G. Wardwell November 10, 1863; reissued October 10, 1865, Nos. 2,087 and 2,088.]

Aldace F. Walker, for plaintiff.

Wheelock G. Veazey, for defendant.

WHEELER, District Judge. This cause has been heard on the motion of the plaintiff for a preliminary injunction. The material facts appearing from the bill, answer and affidavits, on which the case is now presented, are, that George J. Wardwell, the patentee of inventions in steam stone cutting machines, granted to the Sutherland Falls Marble Co., a corporation, "the right to use said patented machine, or any number of said machines," "in their quarry at Sutherland Falls." The plaintiff has since succeeded to the rights of Wardwell, and another corporation, by the same name, to the rights of the Sutherland Falls Marble Co., in the quarry, and, for the purposes of this motion now, in the patents, although a doubt is suggested about how that may ultimately appear. The defendant is a machinist, and is making a machine embodying the patented inventions, for the new corporation, at his shop, for their use in that quarry. This making is what is sought to be restrained.

It is a maxim of the common law, that any one granting a thing impliedly grants that also without which the thing expressly granted cannot be had; or, as expressed more pertinently to the precise question here, by Twysden, J., in Pomfret v. Ricroft, 1 Saund. 321, "when the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use." Liford's Case, 11 Coke, 52a; Lord Darcy v. Askwith, Hob. 234; Howton v. Frearson, 8 Term R. 50; Nichols v. Luce, 24 Pick. 102; Coolidge v. Hager, 43 Vt. 9; 2 Washb. Real Prop. 622; Broom, Leg. Max. 362; Branch, Max. 32. The foundation of it is the presumed intention of the grantor to make the grant effectual. Howton v. Frearson, 8 Term R. 50; Nichols v. Luce, 24 Pick. 102; Tracy v. Atherton, 35 Vt. 52. And it is as applicable to grants of rights under patents, whether assignments or mere licenses, as to any other

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, reprinted in 4 Ban. & A. 364, and here republished by permission.]

subject, where the true intent is sought for. Curt. Pat. § 214. This grant by Wardwell would not pass anything at all, unless the grantee could, in some way, procure the machines. It is suggested, in argument, that the intention was that they should be procured of the patentee, or from a manufacturer under him. But no grant of any right to use such machine would be necessary. The sale of it would carry the right. And, as said by Lord Kenyon, in Howton v. Frearson, when he made the grant, it must be taken that he intended to confer some beneficial interest; and, if it carried no right but to use machines procured from or under the patentee, none would be conferred.

As this grant is now viewed, the right to make machines for the use expressly granted passed, and this would include the right to procure them to be made, and cover the making them by the one procured to make them. This is in accordance with the decision in Steam Cutter Co. v. Sheldon [Case No. 13,331]. The grant there was of the right to use the invention to the extent of one machine, and, under certain circumstances, to the extent of others, at the quarries specified. It is argued, that there is a material difference between the two expressions; but no such difference is apparent. The patented inventions are the subjects of the grants, and they would pass to the same extent, whether included in machines embodying them, without being otherwise mentioned, or mentioned to the extent of the machines, without otherwise mentioning the machines. The motion is denied.

[For other cases involving this patent, see Cases Nos. 13,335 and 13,336.]

Case No. 13,335.

STEAM STONE CUTTER CO. v. WINDSOR MANUF'G CO. et al.

[17 Blatchf. 24; 4 Ban. & A. 445.] [1]

Circuit Court, D. Vermont. Aug. 11, 1879.

PATENTS—INFRINGEMENT—GAINS AND PROFITS—COST OF MANUFACTURE—INSURANCE—SALARIES—LIABILITIES ON GUARANTIES—INTEREST—MASTER'S REPORT—POWER TO SET IT ASIDE.

1. A court has power to set aside a report of a master for any manifest error, either in law or fact, and to recommit it for further proceedings, or to correct it, if the means of correction are furnished.

2. The principle stated, upon which gains and profits are recovered from an infringer, in a suit in equity.

[Cited in Steam Stone-Cutter Co. v. Sheldons, 21 Fed. 878.]

3. Where infringing machines have been made and sold for profit by the infringer, the plaintiff is entitled to whatever of that profit arose from appropriating the patented inventions by making and selling those machines, although other infringing machines were disposed of by the infringer without profit, or are still on hand and cannot be disposed of, involving loss to the infringer.

[Cited in Porter v. Standard Measuring Mach. Co., 142 Mass. 195, 7 N. E. 928.]

4. The value of the use of real and personal estate belonging to the infringer, such as shops, fixtures and machinery, including repairs, employed in making the machines made and sold for profit, is to be allowed as part of their cost.

5. The amount paid for insurance on such property, the insurance being for the safety of the property, generally, and not for the benefit of the manufacture of those machines, is not to be allowed as part of their cost; nor is the amount paid for local taxes on such property.

6. The infringer being a corporation, salaries paid to stockholders in it employed in making those machines, such salaries having been paid in good faith, for services actually rendered, and not as a mode of dividing profits, or for the purpose of concealing profits, are to be allowed as part of the cost of those machines.

7. Where a portion of the prices at which those machines were sold was due to an arrangement of the boiler in the machine, different from the plaintiff's, but the defendant had no monopoly of such arrangement, such portion of the price being allowed to the plaintiff, the cost of the workmanship is to be allowed to the infringer.

8. Where $750 of the price at which each of those machines was sold was due to a patented improvement of the infringer, called a bow-string, attached to and sold with the machine, no part of the $750 is to be allowed to the plaintiff, and no part of the cost of making the bow-spring is to be allowed to the infringer.

9. The infringer had incurred liabilities on guaranties and warranty of title, as to those machines, but nothing is to be deducted on that account from the avails of their sales, because those liabilities will be extinguished by satisfying the plaintiffs' recovery as to those machines.

[Cited in Steam Stone-Cutter Co. v. Sheldons, 15 Fed. 608.]

10. Interest on the profits decreed was charged against the infringer from the time of the entry of the interlocutory decree.

[Cited in Burdett v. Estey, 3 Fed. 572; Bischoffsheim v. Baltzer, 21 Fed. 532.]

[11. If the avails of a sale are claimed and taken, the right to the thing sold must be parted with. It will be like taking judgment and satisfaction for the conversion of the property, which always operates so that the defendant hath now the same property therein as the original plaintiff had, and this against all the world.]

[Cited in Booth v. Seevers, Case No. 1,648a.]

[This was a bill in equity by the Steam Stone Cutter Company against the Windsor Manufacturing Company and Elbridge G. Lamson for the infringement of letters patent No. 40,584, granted to J. G. Wardwell, November 10, 1863, reissued October 10, 1865, Nos. 2,087 and 2,088.]

Aldace F. Walker and Chauncey Smith, for plaintiff.

Wheelock G. Veazey and Edward J. Phelps, for defendants.

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 4 Ban. & A. 445; and here republished by permission.]

WHEELER, District Judge. This cause has been heard upon the report of the master and exceptions by each party thereto. The exceptions of each raise some questions of fact as well as of law, and, in argument, it has been urged, on behalf of the orator, that these findings of fact should be revised by the court, and corrected in favor of the orator, and, on the part of the defendants, that they should not be revised, but, if revised, that there are errors which should be corrected in favor of them. There is no doubt but that the court has power to set aside the report of a master for any manifest error, either in law or fact, and to recommit it for further proceedings, or to correct it, if the means of correction are furnished. But, upon all that has been suggested or observed, in respect to this report, there is nothing that appears to warrant any interference with the findings of the master as to anything material to the rights of the parties, so far as his findings have extended.

There are various questions submitted by the master, and there is one point upon which he has reported no finding, that now seems to be material, which are to be considered. This bill was brought before the act of July 8, 1870 (16 Stat. 206, § 55), authorizing courts of equity to take an account of damages as well as of profits, in suits for the infringement of patents, and has proceeded, in this respect, for the recovery of profits only. The validity of the orator's patents and the infringement by the defendants have been established, so that the questions remaining here are solely as to the amount to which the orator is entitled. The defendant Lamson appears to have received nothing, otherwise than as a stockholder of the other defendant, on account of the infringement, and no decree for the payment of any money can be made against him.

The rights of the parties may be better understood, and a correct solution of several of the questions presented be more readily reached, by first considering the grounds upon which such recovery as may be had here rests. There was nothing in the statutes relating to patents, before the act of 1870, providing expressly for the recovery of the gains and profits of an infringement of a patent by suit in equity. The right must have been derived from the application of the general principles of justice, as administered in courts of equity, to the relations between the owners of patents and infringers, created by the patent laws. The patentee owns the monopoly of the patented invention. When an infringer converts any part of the monopoly into money, or into anything else, the owner has the right to follow his property in its new form. The person in whose hands it is becomes his trustee; not because he was ever a trustee of the invention or monopoly, or had any right whatever to dispose of it for the owner, but because he had the money or other thing in his hands, which the owner of the invention had the right to claim because the invention brought it. It is what is received for the invention that belongs to the owner of the patent, and, when that is not mixed with what is received for anything else, there can be no difficulty about how much the owner of the patent is entitled to; when it is, the difficulty lies wholly in making separation. Littlefield v. Perry, 21 Wall. [88 U. S.] 205. Here, the defendant, the Windsor Manufacturing Co., made sales of eleven infringing machines, for profit; and, whatever of that profit arose from the appropriation of these patented inventions by the making and selling those machines, the orator is entitled to here, and no more. Other machines were made by the defendant, embodying the invention, which have been disposed of without profit, or are still on hand and cannot be disposed of, and which, as they are left, involve serious loss to the defendant; but, these facts do not vary the amount received for those sold, on which profit was made. The defendant did not make nor sell any of them for the orator. The whole was done on its own account, as a part of its own business, exclusively. Each infringement was separate, and no claim accrued in favor of the defendant against the orator, on account of any of them. The losses of unfortunate attempts were the defendant's own losses, and there is nothing to set-off against the orator's right to the avails of the successful attempts. If the defendant had been acting for the orator, and the whole enterprise, in connection with making this kind of machines, had been the enterprise of the orator, the net result would have been what the orator would have to stand to; but, the enterprise was an enterprise of the defendant; none of the machines were made by the defendant for the orator; neither has the orator adopted the making or selling any machine, as having been done for itself. It had nothing to do with any of the machines, except as they included the patented invention, nor with the sale of any of the machines, except as the sale included so much of the invention, and, as to that, it only claims what the invention brought, which is the same as if anything else belonging to the orator had been put into and sold with the machines, and the orator claimed what that brought. The orator waives the tort, and proceeds for the money arising from the tort. The money arising here is what would be left, after deducting the cost of the machines which the defendant furnished, from the avails of the sales of the machines, including the invention that belonged to the orator.

The machines sold for $58,500; some of them with an express guaranty, in writing, of the right to use, and the rest with such war-

ranty as would be implied by law from the fact of sale. The master has found and allowed elements of cost of manufacture of these machines, about which there is no question of law, to the amount of $35,451.93. He has also allowed for local taxes $116, which the orator claims should be disallowed, and has reported that the use of real and personal estate, belonging to the defendant, including repairs, employed in making these machines, was worth $2,632.46; that there was paid for insurance on such property, $455.52; that there was paid for salaries to stockholders of the defendant, employed in the making, $1,490; that $8,250 of the prices at which the machines were sold was due to a patented improvement of the defendant, called a bow-spring, attached to and sold with the machines, and $1,100 to an arrangement of the boiler in the machine, different from the orator's, which the defendant insists should be added to the cost of manufacture; and that the defendant's liabilities upon their guaranties and warranty of title is $22,000, if they are responsible for a failure of the right to use, which the defendant claims should be deducted from the avails of the sales.

The machines cost the defendant the use of this real and personal estate, the shops, fixtures, and machinery. They could not have been made without such use, any more than they could be without iron. The whole cost of the machines belongs to the defendant, and no sound reason is apparent why this part should be left out. The personal efforts of a mere wrong-doer are not a proper subject for compensation to be allowed by a court, but this stands on different footing. The orator had no right to the use of shops and machinery, and has no right to the money brought by that use.

The insurance was no part of the cost of manufacture. It was not put upon the property because it was engaged in this business. Had it been consumed by the element insured against, no part of the insurance would belong to the orator. Harding v. Town of Townshend, 43 Vt. 536. That money would have come from the defendant's property, not from the plaintiff's invention. The insurance was not for the benefit of this manufacture, but for the safety of the defendant in respect to its own property, generally.

It is so, in some respects, as to the local taxes. In that locality such taxes are assessed upon property according to its value, and not on account of its employment. No property is taxed because it is engaged in any particular manufacture, or because engaged in any manufacture; although, sometimes, it is exempt for a while because it is so engaged. These taxes, if justly assessed, as is to be presumed, would have been precisely the same if the property had been engaged in other business, or had been otherwise invested, or had been lying idle and wholly unproductive. So, the payment of the taxes did not have, or, at most, is not shown to have had, any effect whatever upon the cost of the machines.

The salaries paid to stockholders appear to have been paid in good faith, for services actually rendered, and not at all as a mode of dividing profits, or for the purpose of concealing profits. They were the same to the defendant, in its corporate capacity, in which it is sued, as if they had been paid to others not stockholders. It does not appear that the part which these salaried officers took in the business was such as to make them personally liable as infringers. The corporation infringed and is sought to be charged for it in its corporate identity, and it should be held only according to its complete identity.

The defendant has not, so far as at all appears, any monopoly, by patent or otherwise, of the arrangement of the boiler in the machines. Placing it there was a mere matter of workmanship, for which the defendant should be allowed as a part of the cost of manufacture. That is allowed otherwise, and nothing should be allowed again on that account.

The defendant had a patent on the bow-spring improvement, and made use of it in disposing of so much of the orator's patents as was embodied in the machines. This improvement brought, according to the finding, $750 of the price which each machine brought. That part was not any product of the sale of the orator's invention. It is said, in argument, that the use of the bow-spring was intended and expected to make the use of the orator's invention more extensive and effective, which is, perhaps, true, and that, therefore, the orator should have the whole price due to both inventions, as belonging to that enhanced use. If this was an accounting for damages, there would be force in this suggestion, for, the more effective the machines sold were the greater the inroad upon the monopoly their sale would be, and the greater the damage. But, here, the sole question is as to how much was received from the appropriation and sale of the orator's invention, and not what damage resulted; and, what was received for the sale of something else, belonging to the defendant and not to the orator, should not be allowed to the orator. If, however, the defendant has $750 of the price of each machine, on account of the enhancement which the bow-spring furnished, no part of the cost of making the bow-spring should be treated as a part of the cost of what embraced the orator's invention. That cost should all be deducted from the total cost of the machines, and the remainder only be deducted from the remainder of the price of the whole, after the price belonging to the bow-spring has been deducted. The master has not reported what the total expense of the bow-spring is, but only that it brought $750 above the actual cost of making it and its attachments, leaving the part of other expenses allowed, belonging to it, unascertained. If, however, the proportion between what this part of the invention brought and its part of

this cost of the machines was the same as that between what the orator's invention brought and its part of this and the other parts of the cost of the machines, which is probable, the part of this cost of manufacture belonging to the bow-spring can readily be ascertained. It will bear the same proportion to the whole amount of these outside expenses as $8,250, the price of the bow-spring, bears to $58,500, the whole price. This part of the account is to be adjusted upon this basis, unless one party or the other moves for and obtains a further hearing in this respect.

As before stated, the only reason why the orator is entitled to any of the avails of the sales is, that, by the sales the defendant has converted the orator's property into money, which the orator is entitled to have in place of the property. The sale, to be an infringement, so as to entitle the orator to anything more than a mere nominal sum, must be a sale for use. Curt. Pat. § 294. Here, that part of the avails of the sale belonging to the patented invention is large and substantial, and not merely nominal. If the avails of the sales are claimed and taken, the right to the thing sold must be parted with; solutio pretii emptionis loco habetur. 2 Kent, Comm. 387. It will be like taking judgment and satisfaction for the conversion of property, which always operate "so that the defendant hath now the same property therein as the original plaintiff had, and this against all the world." Adams v. Broughton, And. 19, Strange, 1078. And this relates back to the time of conversion. Add. Torts (Wood's Ed.) 544; 6 Hen. VII. fols. 8, 9, pl. 4; Shep. Touch. 227; Barnett v. Brandao, 6 Man. & G., 640, note. The sales must be adopted by the orator upon the very terms upon which the defendant made them, and as much right to the inventions must follow as if the sales had been made by the orator instead of by the defendant. It may be that this right will not follow until satisfaction is made; but, whether it will or not is not now material. The question now is how much the orator is entitled to recover by way of satisfaction; and this is to be arrived at on the ground that satisfaction will be made. If not made, the defendant will not suffer unjustly by having it reckoned as if it would be. It follows, necessarily, that the defendant will be under no liability over to the purchasers after satisfaction, and that nothing should be deducted here on that account.

There are profits on repairs sold, to the amount of $1,732, and on cutting done by the defendant, to the amount of $810.03, about which there is now no question.

Upon these conclusions, there is to be added to	$35,451 93
for use of real and personal estate and repairs	2,632 46
and for salaries of stockholders	1,490 00
making total cost of machines sold	$39,574 39
the share of cost of bow-spring is	1,544 39
leaving for cost to be deducted	$38,030 00

From the amount of sales	$58,500 00
is to be deducted for bow-spring	8,250 00
leaving	$50,250 00
from which is to be deducted	38,030 00
which leaves	$12,220 00
to which is to be added	1,732 00
and	810 03
making	$14,762 03

received by the defendant for the plaintiff's invention.

The defendant sold one machine with special guaranty of the right to use, and received $1,000 in money and $3,000 in notes, on time, therefor. Upon demand of a machine by the purchaser, that might lawfully be used, which the defendant could not comply with, the contract was rescinded by agreement, leaving the money in the defendant's hands, against which the defendant has a claim of about the same amount, and the notes there, but not enforceable. The orator claims that the defendant should be charged with the profits of this machine, as upon a sale at $4,000. There is, however, no money, or the equivalent of money, arising from this transaction, belonging to the orator. The money received would not cover the actual cost of the machine. The notes were always subject to the defence of want of title, or, at least, to be extinguished by recoupment of damages, from failure of title to the invention and breach of the guaranty, while they were held as subsisting securities, and, since then, they have been wholly inoperative. There is nothing here to be reckoned, to vary the above statement.

The plaintiff claims interest upon the amount in the defendant's hands, and the defendant denies any liability to account or be charged for interest. In Silsby v. Foote, 20 How. [61 U. S.] 378, Mowry v. Whitney, 14 Wall. [81 U. S.] 620, and Littlefield v. Perry, 21 Wall. [88 U. S.] 205, interest upon profits of an infringement decreed to be paid was disallowed; in the first of the cases, without remark; in the second, with the remark that the profits were really damages unliquidated, upon which interest is not generally allowable, but that the court would not say that in no possible case could interest be allowed; and, in the latter, with the remark, that profits actually realized were usually, in cases like that, the measure of unliquidated damages, that circumstances might arise which would justify the addition of interest, in order to give complete indemnity for losses sustained by wilful infringement, and that it would be for the court to determine, upon the coming in of the new report in that case, accompanied by other evidence, whether the conduct of the defendants had been such as to subject them to liability in that particular. The tendency, in cases prior to the act of 1870, seems to have been toward confining the liability to account for gains and profits more strictly to those

actually received, and, at the same time, towards recognition of a liability for interest on the profits received. Still, no rule is laid down as to when it should or should not be allowed.

In this case, the defendant is made to account only for money or its equivalent actually received and held by the defendant, but belonging to the plaintiff. The master has found that the defendant began and continued the business in good faith, believing it was not infringing the orator's rights, but having knowledge, while making and selling the machines, of the orator's claims. It is argued, for the orator, that the duty of the master was merely to take and state the account, and that no question of good faith was before him. But, if the question of good faith was pertinent to any part of the accounting, it was as much before him as those things pertaining to any other part. There was no contract about any part of this liability, and none to pay interest more than to pay anything else; so, the defendant cannot be charged with interest, except for the wrongful detention of the plaintiff's money. If the defendant wilfully, without right, and knowing it was without right, took the plaintiff's patented invention and converted it into money, with the intention of keeping it, while it was kept the detention of it would be manifestly wrongful. Upon the finding, this taking was intentional and without right, but with belief of right. Knowledge of the orator's claims involved knowledge of the orator's patents, and the belief of right must have been founded in the expectation of defeating the patents. The defendant had a patent for the bowstring, as an improvement, but none for the machine covered by the orator's patents. It invaded the patents, taking the risk of its turning out to be rightful or wrongful. It has turned out to be wrongful, and, since the entry of the decree in the cause, October 7th, 1870, the money has been detained with full knowledge of the character of the detention. And the defendant was not ignorant of the amount, for its books showed the amount approaching toward accuracy.

In Ekins v. East India Co., 1 P. Wms. 395, on an accounting for a ship and cargo, bought by an agent of the defendant, of a person having no power to sell, the court charged the defendant with interest, and said: "If a man has my money by way of loan, he ought to answer interest; but, if he detains my money from me wrongfully, he ought, a fortiori, to answer interest. And it is still stronger where one by wrong takes from me either my money, or my goods which I am trading with, in order to turn them into money." This decree appears to have been affirmed, on appeal to the house of lords. 2 Brown, Parl. Cas. 382; 1 P. Wms. 397, note. It was said by Lord Mansfield and Mr. Justice Wilmot, in Fisher v. Prince, 3 Burrows, 1363, that interest might be allowed by a jury, in trover, for money numbered or in a bag. It was allowed on money obtained by fraud and imposition, in Wood v. Robbins, 11 Mass. 504, and on money detained by an officer, in People v. Gasherie, 9 Johns. 71. This seems to be well settled in Massachusetts. Hubbard v. Charlestown R. R., 11 Metc. [Mass.] 124. And, if the law of the state of Vermont, where the money was detained, should govern, as perhaps it ought to, the law is the same there. Crane v. Thayer, 18 Vt. 162; Vermont & C. R. Co. v. Vermont Cent. R. Co., 34 Vt. 2. It is quite usual to charge a party with interest from the commencement of a suit, on account of the effect of it, as a demand, upon the mind of a party. Hunt v. Nevers, 15 Pick. 500; Brewer v. Tyringham, 12 Pick. 547; Haven v. Foster, 9 Pick. 112. And it seems not to be improper here, to charge the party with interest from the entry of the decree, because ever after that the detention was known to be wrongful. This seems the more just, because all of the money was not received until about that time, October 1st, 1870, according to the master's report, although some of it was received considerably before. This interest amounts to $7,836.17, which, added to the principal sum, $14,762.03, makes $22,598.20 to be paid by the defendant, the Windsor Manufacturing Company, to the plaintiff, as of the 6th day of August, 1879.

The exceptions to the master's report are overruled accordingly, and the report is accepted and confirmed. Let a decree be thereupon entered, that the defendant, the Windsor Manufacturing Company, pay that sum, with costs, to the clerk, for the benefit of the plaintiff, and, in case the sum of $7,598.20, with the costs and interest thereon from said 6th day of August, is not paid within thirty days from that day, that special execution issue, for the whole sum to be paid, at the expiration of said thirty days; and, in case that sum is so paid, and the balance of $15,000 is not paid within sixty days from said 6th day of August, with interest from that day, that special execution issue for the amount so remaining unpaid, at the expiration of said 60 days.

[NOTE. This cause was again heard upon an additional report of the master, and the exceptions thereto. The exceptions were overruled. Case No. 13,336. For a motion for an attachment for contempt, see 3 Fed. 298. For other cases involving this patent, see Cases Nos. 13,331 and 13,334.]

Case No. 13,336.

STEAM STONE CUTTER CO. v. WINDSOR MANUF'G CO. et al.

[18 Blatchf. 47; 5 Ban. & A. 335.] [1]

Circuit Court, D. Vermont. April 15, 1880.

PATENTS—DAMAGES—PROFITS—INTEREST—INJUNCTION.

1. The master's former report as to profits in this case [Case No. 13,335] reviewed and confirmed.

2. Interest allowed on profits.

3. The question reserved as to an injunction beyond the term of the patent as to machines made during the term.

In equity.

Prout & Walker, for complainant.
Edward J. Phelps, for defendants.

WHEELER, District Judge. This cause [Case No. 13,335] has now been further heard upon the additional report of the master filed therein, and exceptions to that report. The report does not specifically answer what was submitted to the master in the order of recommitment, but what is reported covers the whole ground which before was wanting and in doubt. The former report showed the entire cost of the eleven machines sold, in specific expense for labor and materials actually employed upon the machines themselves, and in miscellaneous and general outlay, and showed what the bow-spring, on which the defendants have a patent, brought above its cost, but did not show what its cost was, so that the cost of making and selling the defendants' invention could be deducted from the cost of making and selling the whole, so as to show the distinct cost of making and selling the orator's. That want is now supplied, and it appears that, in the opinion of the master, the bow-spring cost, in actual labor and material, $135.19, and in general and miscellaneous expenses allowed, $114.81, making $250 for each machine.

In connection with the former report it now appears that the whole of the eleven machines cost.....	$39,575 81
That the bow-spring cost.........	2,750 00
Leaving the cost of parts embodying orator's invention..........	$36,825 81
That the whole eleven machines brought	$58,500 00
Of which the bow-spring brought..	11,000 00
Leaving due to the parts containing orator's invention	$47,500 00
Deducting the costs of these parts	36,825 81
And there remains net profit......	$10,674 19
To this is to be added profits on repairs	1,732 00
And profits on cutting done.......	810 03
Which make	$13,216 22

—Net profits in the hands of the defendant the Windsor Manufacturing Company, October 1st, 1870, received solely from the sale and use of the orator's patented invention. On that sum interest is to be cast to the date of this decree, April 6th, 1880, as has been before shown in this cause. This interest is $7,544.25, making $20,760.47, for which, according to the reports, the orator is entitled to a decree, as of this day.

The exceptions of the orator raise the question as to whether the master has allowed enough for the cost of the bow-spring, and whether a part of the cost of the boiler, and other things on which there is no patent, should be set to the bow-spring. The positions and argument of the defendants' counsel are mainly relied upon in support of these exceptions, and in some views more appears to be conceded than the master has allowed. But, after all, these are purely questions of fact and of inferences from facts. What part of the whole price the bow-spring brought can only be inferred; it cannot be exactly computed. The questions as to cost rest largely in the same way. In determining these questions, the same views should be held throughout as to similar subjects. If alterations should be made in one part it might be necessary to alter others to correspond. There is no good reason apparent for revising the whole report, nor for revising any part in view of the whole. The master has once heard and determined the case as a whole, and made a report harmonizing all its parts. He has now stated a part which he did not before state, but has not disturbed any of his former findings. It is, doubtless, more safe for the court not to undertake to disturb them.

The orator has moved that the final decree for an injunction be extended beyond the term of the patent, as to machines made during the term; and the parties have been heard upon that motion. The patent bears date November 10th, 1863, and will expire November 10th, 1880. The injunction is, in form, perpetual now, and there is nothing that can be added to that. There may not be any such machines at the expiration of the patent. If there are, and the defendants desire to raise this question, they can move to have the injunction discharged or limited. If the defendants undertake to use or sell them, and the orator desires to question their right, it can then be done by proper proceedings. Till then the question will not necessarily arise, and it is not now decided, but is denied without prejudice.

The exceptions are overruled, the reports are accepted and confirmed, and a decree is thereupon ordered, that the defendant the Windsor Manufacturing Company forthwith pay to the orator $20,760.47, with costs to be taxed, and for execution therefor.

[For a hearing on a motion for an attachment for contempt, in which the motion was denied, see 3 Fed. 298. For other cases involving this patent, see Cases Nos. 13,331 and 13,334.]

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, reprinted in 5 Ban. & A. 335; and here republished by permission.]

STEAM TUG.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the vessels; e. g. "The Steam Tug Titan. See Titan."]

Case No. 13,337.

STEARNS v. BARRETT.

[1 Mason, 153;[1] 1 Robb, Pat. Cas. 97.]

Circuit Court, D. Massachusetts. Oct. Term, 1816.

PATENT—PROCEEDINGS TO REPEAL—VERDICT—WRIT OF ERROR—BURDEN OF PROOF.

1. The proceedings under the 10th section of the patent act of 21st of February, 1793, c. 11 [1 Stat. 323], are in the nature of a scire facias at the common law, to repeal a patent.

[Cited in Wood v. Williams, Case No. 17,-968; Union Paper-Bag Mach. Co. v. Crane, Id. 14,388.]

2. Upon a judgment rendered on such a suit, error lies to the circuit court.

3. A verdict, which is repugnant or uncertain in a material point, is void.

[Cited in Delaware. L. & W. R. Co. v. Toffey. 38 N. J. Law, 528; Hewson v. Saffin, 7 Ohio, pt. 2, p. 234. Cited in brief in Baldwin v. Doubleday, 59 Vt. 10, 8 Atl. 576.]

4. The refusal of a court to amend a verdict is not matter, which can be assigned for error.

5. Upon a trial under the general issue, under the 10th section of the patent act, the burden of proof, that the patent was obtained surreptitously or upon false suggestion, lies on the plaintiff.

[Followed in Delano v. Scott, Case No. 3,753.]

6. If a patent has been obtained by the plaintiff, upon the defendant's refusal to submit to an arbitration, according to the provisions of the 9th section of the patent act, and the defendant subsequently obtain a patent for the same invention, this is not conclusive proof, that the latter was obtained surreptitiously or upon false suggestion.

[7. Cited in U. S. v. White. Case No. 16,675, to the point that if the jury find the point in issue, and also another matter out of the issue, the latter finding is void, and may be rejected as surplusage.]

[In error to the district court of the United States for the district of Massachusetts.]

This was a proceeding in the district court, under the 10th section of the act of the 21st of February, 1793 (chapter 11), to repeal a patent-right, granted to the defendant upon the allegation, that it was obtained surreptitiously and upon false suggestion. Upon a motion, supported by affidavit, a rule to show cause, why process should not issue to repeal the letters patent, was granted; upon the return of which the district court, after hearing the parties, made the rule absolute; and process was ordered by the court to issue against the defendant, to show cause why the letters patent should not be repealed; and it was further ordered, that the applicant should file his allegations with due specifications. A further allegation, with specifications, was accordingly filed, by way of amendment of the original complaint. and thereupon the said process duly issued. The original affidavit alleged, that the letters patent were obtained surreptitiously and upon false suggestion; and that the plaintiff was the true and original inventor of the machines in controversy. The amended complaint alleged, that the machines described in the letters patent to the defendant, "were not invented by him, but by another." And after specifying, under a videlicet, the particulars of the invention, and alleging, that they were not invented by the defendant, concluded by alleging, "that the same machines, in all respects, in which they are new. are and were of the invention of another; and were known, and secured by patent, previously, to the complainant, as in and by his specification or affidavit originally filed, to which this is an amendment and addition, is alleged." Upon the return of the process, the defendant duly appeared and filed the following plea and answer. "And now the said William Barrett comes and defends, &c. when, &c., and for cause, why the said letters patent should not be repealed, saith, that his letters patent were not upon false suggestion or surreptitiously obtained, in manner and form as set forth in the writ of said Abner Stearns; but that the said new and useful improvement, for which his said letters patent issued, as in said complaint is set forth, was invented by him, the said Barrett, in manner and form as he, in his former answer to the first complaint of said Stearns, hath alleged, and thereof he puts himself upon the country." And the plaintiff put himself, as to this issue, upon the country likewise.

The issue, so joined by the parties, was tried by a jury, who returned the following verdict: "The jury agree, that the plaintiff and defendant were both concerned in the invention of the reel, or machine, for dyeing all kinds of woven and silk goods, and a frame for finishing the same. They find, that the plaintiff has not supported his allegations, and therefore find a verdict for the defendant." Upon this verdict a judgment was rendered by the court, by consent of the parties, for the defendant. At the trial, a bill of exceptions was taken by the plaintiff to the charge of the court. The bill of exceptions stated, at large and in hæc verba, the testimony of all the witnesses on each side, and all the other evidence introduced by the parties. It then stated the points insisted upon by the counsel, and then the charge of the court upon these points as follows: "Whereupon the said counsel for the complainant insisted then and there before the said hon. judge, on the behalf of the said Stearns, that the said several matters, so produced and given in evidence on the part of the said complainant as aforesaid, were sufficient, and ought to be admitted and allowed as decisive evidence, that the said Barrett had surreptitiously obtained his said patent, and was not the inventor of all

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

the essential parts of the said machines. The said counsel particularly insisted, that the refusal of the said Barrett, in the manner disclosed in the evidence aforesaid, to appoint an arbitrator on his part, in compliance with the requirement of the law of the United States, in such case provided, and his, the said Barrett's obtaining his said patent afterwards, in the manner disclosed in the evidence aforesaid, was contrary to the statute in such case; and thereupon the said counsel for the complainant prayed of the said hon. judge to admit and allow the said matters so as aforesaid produced and given in evidence to be conclusive evidence, that the said patent of the said Barrett was obtained surreptitiously. The counsel for the complainant farther insisted, that, as to the invention of the said machines, it was incumbent on the complainant to produce only general evidence to show, that said Barrett was not the inventor; and that the burden of evidence thereupon devolved on the respondent; and it became incumbent on him to prove, that he, the said respondent, was the sole and exclusive inventor of all, and every essential part of the said machines respectively, as set out and described in his specification; and thereupon the said counsel prayed the hon. judge to admit and allow the evidence aforesaid to be conclusive, that the patent of the said Barrett was obtained upon false suggestion, and to instruct and direct the jury, that unless the said Barrett had proved, beyond a reasonable doubt, that he was the sole and exclusive inventor of all the essential parts of the machines aforesaid, described in his specification, and stated in his patent, that they, said jurors of the jury aforesaid, should return a verdict for the complainant. But to this the counsel for the respondent, on his behalf, did then and there insist before the said hon. judge, that the matters and evidence aforesaid, so produced and proved as aforesaid, did not amount to, nor ought to be held to be, conclusive evidence against the said Barrett to prove, that his patent aforesaid was obtained surreptitiously or upon false suggestion as aforesaid.

"And the said hon. judge did then and there declare and deliver his opinion to the jury aforesaid, as follows, namely: As to the first point the judge directed the jury, that though it should appear to them from the evidence, that there were conflicting claims for a patent by the respective parties, at the office of the secretary of state, and that a reference was recommended or directed, and that said Stearns did offer to refer such conflicting claims of himself and said Barrett to arbitrators, to be appointed according to the provisions of the law in such case, and named an arbitrator or referee on his behalf, and gave notice thereof to said Barrett; and though said Barrett should have refused, on his part, to appoint an arbitrator or referee, and afterwards a patent was issued to Stearns, and, subsequent to the date of said Stearns' patent, one was issued to said Barrett, as appears in evidence from their respective dates; yet that these circumstances alone would not constitute an obtainment of the patent surreptitiously, or on false suggestion, on the part of said Barrett, within the true intent and meaning of the statute; and that other evidence besides that, which should establish those facts and circumstances, would be necessary to support the charge of obtaining the patent surreptitiously or by false suggestion. And in regard to the second point, the said hon. judge directed the jury, that the burden of proof lay upon the complainant to support his allegations, in order to maintain the issue joined; and that as to the question, who was the true inventor of the machines, it was incumbent on the complainant to satisfy the jury, beyond a reasonable doubt, that said Barrett was not the true inventor of said machine or improvement, or of some essential part of it, to maintain that alleged ground for vacating the respondent's patent. That the objection, that this was requiring the complainant to prove a negative, was not applicable to this direction; for the complainant might prove the proposition contended for, by proving that another person, besides Barrett, was the inventor; and as there appeared no allegation nor evidence in the cause, nor was it contended by either party, that any other, besides Stearns and Barrett, was the inventor of said machine, it would follow, that unless Stearns should have satisfied the jury, that he was the inventor of the machine, or some material part of it, they must find a verdict for the respondent; and with this direction, the said hon. judge left the cause to the jury."

The following points were now made by G. Sullivan, for plaintiff in error: 1st. That by the finding of the jury, the fact was expressly established, that the respondent was not the sole inventor of any essential part of either of the machines, for which he obtained a patent; and the conclusion of the verdict in favor of the respondent was therefore repugnant to this finding, and contrary to law. 2dly. That the hon. judge ought to have amended and worked said verdict into form, and thereupon entered judgment for the complainant, or have rejected it, and awarded a venire de novo. 3dly. That the hon. judge directed and decided, that it was incumbent on the complainant to prove a negative proposition, viz. that the respondent was not the inventor of the essential parts of said machines, whereas the respondent ought to have been held to prove, that he was the inventor. 4thly. That the hon. judge directed and decided, that the obtainment. by the respondent, of his said patent, was not surreptitious, although obtained in the manner apparent on the record, viz. after a patent, for the same invention, had been is-

sued to another, upon the refusal of the respondent to submit to arbitration, as required by the ninth section of the patent law. 5thly. That the answer of said respondent, under oath, was read to the jury in evidence.

Under the first point it was contended, that whenever a patentee had obtained a patent upon a specification broader than his invention, the patent was void. As when a patent was obtained for the whole of a machine, and the patentee had invented only an improvement. Woodcock v. Parker [Case No. 17,971]. So where the specification imperfectly discloses the mode of producing the effect; or specifies an effect, which the means specified will not produce, the patent is void. Turner v. Winter, 1 Term R. 602; Rowntree's Case, Fessen. Pat. 151. And if the patent obtained really covers the invention of another, it is void. Tenant's Case, Fessen. Pat. 152.

Under the second point it was contended, that it was within the power of a court to amend a verdict. And that this might be done by the plea-roll, issue, notes of the judge, minutes of counsel, or affidavit of facts, proved at the trial. Goodtitle v. Otway, 8 East, 357; Doe v. Perkins, 3 Term R. 749; Petrie v. Hannay, Id. 659; President, etc., of Highland Turnpike Co. v. M'Kean, 11 Johns. 100, 101; Grant v. Astle, 2 Doug. 723. As where the jury find a fact, of which there was no evidence. Manners v. Postan, 3 Bos. & P. 343. Where the jury use technical terms, in an improper manner. Chester v. Willan, 2 Saund. 97. Where the jury undertake to collect the contents of a deed, and find the deed in hæc verba, the court will not regard the jury's finding of the contents, but will look to the deed. Rowe v. Huntington, Vaughan, 77. Where the jury undertake to find the costs for either party, of which the law disposes, the court will not regard the finding. Greene v. Cole, 2 Saund. 257. Where the jury find the plaintiff was disseised nisi the words contained in a will conveyed a good estate; the court held, that the verdict was perfect without the nisi, and so entered for the plaintiff. West v. Monson, Cro. Eliz. 480. Where the jury find, that the defendant did not promise, &c. nevertheless if two witnesses are to be believed, and they think they are, they find the verdict for the plaintiff; it was held a good verdict for the defendant. Sir Rowland Heyward's Case, 3 Dyer, 372. Where the jury find the facts at large, and further conclude against law, the conclusion is ill, and the verdict will be amended according to the facts found. Dyer, 106, 20; Plowd. 114; Priddle's Case, 11 Coke, 10. Where the jury bring in a verdict, and there is surplusage, the court will reject the surplusage. 11 Mod. 64. Where the jury find any thing out of the issue, such a verdict, for so much, is void, although it conclude in general for or against the plaintiff or defendant. And the rule, by which the court shall amend verdicts, is the true legal intent and meaning of the jury, if such may be collected from the verdict. Foster v. Jackson, Hob. 54; Hawks v. Crofton, 2 Burrows, 699; Doe v. Perkins, 3 Term R. 749; Rees v. Morgan, Id. 349; Walker v. Gibbs, 2 Dall. [2 U. S.] 211, 212. It was then contended, that the verdict in the case before the court, was, in substance, a sufficient and distinct answer to the issue, and defective only in form; and that the judge should, therefore, have amended it, or, since the verdict was no part of the record, have entered up judgment for the plaintiff, without amending it.

Under the third point, it was contended, that a scire facias was a summary remedy, in the nature of a quo warranto; and was sustained at common law, where the subjects were injured by a patent, in order to avoid a multiplicity of suits. That in a quo warranto, the respondent must set out his whole title at length, and that the affirmation necessarily devolved upon the respondent, by the whole course of the pleadings; that this process was in the nature of a quo warranto, and the whole course of proceedings was the same.

Under the fourth point, it was contended, that by the ninth section of the patent law, the legislature had prescribed a mode for the adjustment of interfering applications by a reference; and that if an applicant, refusing to submit to such reference, was permitted still to obtain a patent, all the advantages to be derived from a patent, which was that of an exclusive privilege, would be lost to the other patentee.

Under the fifth point it was contended, that to permit the answer of the respondent on oath to be read to the jury in evidence, was contrary to the course of proceedings in a quo warranto, and was not, therefore, allowable in this case.

Bigelow and Gorham, for defendants, contended that a writ of error would not lie in this case, because the process was not according to the course of the common law. Hunt v. Coffin, 2 Dyer, 197; Melvin v. Bridge, 3 Mass. 305; Pratt v. Hall, 4 Mass. 241; Edgar v. Dodge, 4 Mass. 671. That if it were according to the course of the common law, it would be necessary for the complainant to allege himself to be the first patentee, and to set out his right at length, which the complainant, in this case, had not done. That the burden of proof was on the complainant, and he must show, that the patent of the defendant was obtained surreptitiously and upon false suggestion; the patent obtained by the defendant being, in itself, primâ facie evidence of his right. That the writ of scire facias was a judicial writ founded upon a record; but that, in this case, there was no record to found the process upon, the district court not being the repository of the records of patents; and no process of this kind could have issued from that court, had not a special power been given to it by the patent law.

That the proper mode of procedure would have been by a certiorari, which being a writ of favor, the truth of the facts and the merits of the case would have been examined under it.

It was further contended, that the finding of the jury in this case was not, that this was a joint invention of the plaintiff and defendant, but only, that both of them were concerned in it; similar to the case of the invention of a machine by two men without either's knowing of the invention of the other; in which case it could not by any means be said, that the patent of the last inventor was obtained surreptitiously. If, therefore, the finding of the jury could by any means be made consistent, the court would make it so.

STORY, Circuit Justice. The first question is, whether this court has appellate jurisdiction from a judgment, rendered by the district court in proceedings under the tenth section of the patent act.

Before considering this question, it will be necessary to settle the true nature and character of the proceeding itself. It is not easy to give a construction to the tenth section of the act, that is entirely free from difficulties. It provides, in substance, that, upon oath or affirmation being made before the judge of the district court, that any patent was obtained surreptitiously, or upon false suggestion, and motion made to the said court within three years after issuing the patent, it shall be lawful for the said judge, if the matter alleged shall appear to him sufficient, to grant a rule, that the patentee, or the executor, &c., show cause, why process should not issue against him to repeal such patent; and if sufficient cause shall not be shown to the contrary, the rule shall be made absolute; and thereupon the said judge shall order process to be issued against such patentee, or his executors, &c., with costs of suit. And in case no sufficient cause shall be shown to the contrary; or if it shall appear, that the patentee was not the true inventor or discoverer; judgment shall be rendered by such court for the repeal of such patent. And if the party, at whose complaint the process issued, shall have judgment given against him, he shall pay all such costs as the defendant shall be put to in defending the suit, to be taxed against him by the court, and recovered in the due course of law.

The proceeding is evidently of a peculiar nature. It begins by a rule to show cause, which is commonly called a rule nisi, and if no sufficient cause be shown to the contrary, the rule is to be made absolute. For what purpose is it to be made absolute? Clearly, as the act declares, that process may issue against the patentee to repeal the patent; and the section proceeds to direct, that such process shall be issued against the patentee, with costs of suit. If the section had stopped here, there could have been little room for doubt; and it would, probably, have been judicially held, that the hearing upon the rule was decisive, and final between the parties; and that if the rule was made absolute, the patent would be in effect repealed; and the issuing of process would be in the nature of an execution to enforce, or make known, the judgment of the court. The proceedings would, in this view, bear a strong analogy to the summary proceedings under the statute of 17 Geo. III. c. 25, to set aside an annuity and cancel the bond, or other assurance, granting the same. 1 Tidd, Prac. (4th Ed.) 436. In aid of this construction of the tenth section of the patent act, it is material to observe, that, by its terms, the process is to be issued to repeal the patent, and not to show cause, why it should not be repealed; and the process is also to enforce a payment of the "costs of suit," which seems to suppose, that the suit is then concluded. But it has been supposed, that the subsequent clauses of the tenth section contemplate the process to be issued as merely interlocutory process, to bring the party into court to show cause, why the patent should not be repealed; and that, upon the pleadings upon such process, the merits of the application are to be discussed and decided. And the clause, that "in case no sufficient cause shall be shown to the contrary, or if it shall appear that the patentee was not the true inventor or discoverer, judgment shall be rendered by such court for the repeal of such patent," is supposed particularly to apply to those ulterior proceedings. In fact, the process is thus deemed, to all intents and purposes, a scire facias at the common law to repeal a patent.

There is certainly great force in the argument in support of this view of the process, although some differences must be admitted to exist between it and a scire facias at the common law to repeal a patent. In the first place, a scire facias is a judicial process, issuing upon some record already enrolled in the court. It either issues out of chancery, where the patent itself is recorded, or from some other court, where a forfeiture or other cause of repeal appears by office, or other matter upon record, in the same court. King v. Butler, 3 Lev. 220, 2 Vent. 344; 4 Inst. 72; 2 Saund. 72, p. 9, in note; 1 Tidd, Prac. (4th Ed.) 966. And the patent itself, or an inquisition, which finds a patent and a cause of forfeiture, is a sufficient record to authorize the issuing of the scire facias. Lev. 220; Com. Dig. "Patent," F 7; Dyer, 197, etc. In this respect, the process from the district court is different. That court is not the depository of the records of patents; but they are recorded in the office of the secretary of state; and, if the present argument be right, the process is not founded upon any judgment of the court, ascertaining a forfeiture or ground of repeal. In the next place, a scire facias is a process altogether confined to the crown, with the exception of the single case, where two patents have issued for

the same thing; in which case, the prior patentee may maintain a scire facias to repeal the second patent. Dyer, 198, 6; 2 Saund. 72, S, note; Com. Dig. "Patent," F 2, F 3. But see 6 Mod. 229. But, under our patent act, any person, whether a patentee or not, may apply for the repeal. There are other differences, which it is not now necessary to enumerate.

After considerable hesitation, I have come to the conclusion, that the proceedings upon the rule nisi are not conclusive; and that the process, to be awarded upon making the rule absolute, is not a final process, but a judicial writ in the nature of a scire facias at the common law. In this view, the preliminary proceedings are analogous to those on a rule for an information in the nature of a quo warranto under the English statutes. See Rex v. Dawes, 4 Burrows, 2022; Rex v. Dawes, Id. 2120; Rex v. Peacock, 4 Term R. 684. Upon this construction all the words of the statute have a natural connexion and distinct meaning, referring to the progressive order of the proceedings. The process is called in the statute a process to repeal the patent, merely as a description of its nature and use; and not because it necessarily and absolutely, per se, repeals the patent; in the same manner as a scire facias at common law, though, in fact, always a process to show cause, is generally denominated a scire facias to repeal a patent. Dyer, 179b, 198a; Lil. Ent. 411; 2 Saund. 72p, note. Nor does the addition of the words in the statute, "with the costs of suit," at all impugn this construction; for the process is then to show cause, why the patent should not be repealed, with costs of suit. In confirmation of this construction it may be remarked, that in the correspondent section of the patent act of 10th of April, 1790, c. 7 [1 Stat. 109], the clause as to the costs of suit is omitted; which clearly shows, that these words ought not to change the ordinary construction of the context. The subsequent language of the section, that "in case no sufficient cause shall be shown to the contrary, or if it shall appear, that the patentee was not the true inventor or discoverer, judgment shall be rendered by such court for the repeal of such patent," manifestly contemplates some proceedings after the process is issued, by which certain facts may be judicially determined, which are to be the proper foundation of a judgment. It is also of very considerable weight, that this has been, as far as we can obtain information, the practical exposition of the statute. It is consonant to the rules of the common law, which have generally been consulted and followed in all our laws and proceedings, to which they bear any relation; and it preserves the trial by jury, which the judicial act (Act Sept. 24, 1789, c. 20, § 9 [1 Stat. 76]) declares shall be the mode of trial of all issues of fact in the district court, in all causes except civil causes of admiralty and maritime jurisdiction. Whether a more convenient, as well as a more effectual remedy, might not have been obtained by a bill in equity, to set aside a patent for fraud or imposition, it is not the province of a judicial tribunal to consider or decide. See Attorney General v. Vernon, 1 Vern. 277, 280.

It being then ascertained, that this is a proceeding in the nature of a scire facias at the common law, the next inquiry is, whether this court has appellate jurisdiction from the judgment rendered therein by the district court. If this point were to be decided by a mere reference to the common law, no difficulty could arise; for, upon a judgment on a scire facias, it is very clear, that error lies. 2 Tidd, Prac. 966, 1028; Com. Dig. "Pleader," 3 B, 7. But the appellate jurisdiction of the circuit court depends altogether upon the positive provisions of our own statutes. It is not a court, originating in the common law, whose jurisdiction is to be ascertained by immemorial usage. The judicial act of 1789 (chapter 20, § 22) gives appellate jurisdiction to this court from all final decrees of the district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds 300 dollars; and from all final decrees and judgments, "in civil actions," where the matter in dispute exceeds 50 dollars. The act of 3d March, 1803, c. 93, § 2 [2 Story's Laws, 905; 2 Stat. 244], allows an appeal to this court from all final judgments or decrees of the district court, where the matter in dispute exceeds 50 dollars. Whether this last statute applies to any but causes of admiralty and maritime jurisdiction, is questionable (U. S. v. Wonson [Case No. 16,750]), and need not now be considered; for this process comes completely within the description of a "civil action." A scire facias is a judicial writ; and yet it is held to be an action, because the defendant may appear and plead thereto. Co. Litt. 290, 6, 291, a; Pulteney v. Townson, 2 W. Bl. 1227; Grey v. Jones, 2 Wils. 251; Fenner v. Evans, 1 Term R. 267; Winter v. Kretchman, 2 Term R. 45; 2 Tidd, Prac. (4th Ed.) 966. And for precisely the same reason this process must be deemed an action; and it is clearly a civil, as contradistinguished from a criminal, action. A writ of error, therefore, well lies, if the matter in dispute exceeds the stipulated value. It is conceded by the counsel on both sides, that the patent right is of a far greater value; and, as it judicially appears upon the record, that each of the parties claims the invention as his own, each has a matter in controversy sufficient in value to sustain the jurisdiction. It is not necessary to decide, whether, if the plaintiff had been a mere stranger, claiming no title to the invention, he could have brought a writ of error from the judgment of the district court. The difficulty in such a case would have been, how to estimate the value, which the plaintiff could have in the controversy. On this point no opinion is intended to be given.

The appellate jurisdiction in this court be-

ing established, we may now pass to the consideration of the other questions arising in the cause. It is deeply to be regretted, that the proceedings were from accidental causes conducted in so inartificial and irregular a manner by the parties in the court below. The scire facias does not express in the pointed and distinct terms of the statute the causes, for which the patent is sought to be repealed. It ought to have contained a direct allegation or suggestion, that the patent was obtained surreptitiously, or upon false suggestion, and have called upon the defendant for that cause, and for that cause only, to show cause, why the patent should not be repealed. Whereas the scire facias, after reciting (and, in my judgment, very unnecessarily) the whole proceedings prior to the making of the rule absolute, proceeds to state at large, in a new allegation, a specification of the particulars, in which the plaintiff denied the machine in controversy to be the invention of the defendant, and claimed it to be the invention of another (meaning, as the context shows, of the plaintiff himself); and then calls upon the defendant to show cause, why the letters patent, for the cause aforesaid, should not be repealed. From the manner, therefore, in which this new allegation is inserted in the scire facias, it is uncertain, whether the defendant is to answer to that only, (and it does not contain a syllable, as to the patent's having been obtained surreptitiously or upon false suggestion) or whether the statements in the original affidavit are now included in the charge. This specification was very properly ordered by the court; but it was in the nature of a bill of particulars, to assist the defendant at the trial, and by no means a regular part of the scire facias. It is very probable, that this informality occasioned the embarrassment of the subsequent pleadings, in which it is not very easy to discern at once, what was the precise point, which the parties meant to put in issue; whether, that the patent was obtained surreptitiously or upon false suggestion; or that the improvement, for which the patent issued, was the invention of the defendant. And this again, probably, misled the jury in shaping their verdict. In my judgment, the plea must be considered, substantially, as putting in issue the only point, that, on the scire facias, could be material, viz. whether the patent was obtained surreptitiously or upon false suggestion; and, of course, that the residue of the plea is mere surplusage. The material inquiry then is, whether the jury have, in direct terms, or by necessary legal intendment, returned a verdict upon this issue. Many authorities have been cited to show the power of courts of law to amend verdicts, which are defective, so as to conform to the real intentions of the jury. It is unnecessary to examine the nature or limits of this doctrine; for no amendment was made in this verdict by the district judge; and a refusal to amend a verdict is not the subject of a writ of error. It is a mere exercise of discretion by the court below; and it does not even appear upon this record, that any application was made to the court for that purpose.

The verdict is, therefore, to be taken as it stands upon the record, with all its imperfections on its head. It is clear, that, in terms, it does not find the issue joined by the parties; if, however, the court can collect the point in issue out of the verdict, it will be sufficient. Hob. 54. Com. Dig. "Pleader," S 18, S 26; Hawks v. Crofton, 2 Burrows, 698. The plaintiff contends, that the fact found by the jury, that the machine was the joint invention of the plaintiff and the defendant, is decisive in his favor; and, by inference, includes the point in issue; and that the subsequent finding for the defendant is repugnant to this fact, and therefore ought to be rejected. On the other hand, the defendant contends, that the general finding is for the defendant; and the special fact found is not repugnant to it, and may, therefore, be rejected as surplusage. If there be a material repugnancy in the verdict, it is not competent for the court to reject either part of the finding; for it is utterly impossible for the court to decide, which is the truth of the case. And if it were otherwise, there is no authority to substitute its own opinion for that of the jury. In such case, the repugnancy will be fatal. A verdict, which finds two inconsistent material facts, is void, and cannot be a foundation for a legal judgment. Com. Dig. "Pleader," S 23. On the other hand, a general verdict, (as this must be deemed to be,) which finds the point in issue by way of argument or inference, is void, even, as it is said, though the argument or inference be necessary. Rowe v. Huntington, Vaughan, 66, 75; Com. Dig. "Pleader," S 22. It follows, therefore, that in no event can the verdict be adjudged in favor of the plaintiff. It is either a verdict, which finds the substance of the issue for the defendant, or it is void for repugnancy, uncertainty, or insufficiency.

There are many authorities, in the books respecting this subject, some of which are not easily reconcilable with sound sense, or with legal principles. From the mass of cases, however, some rules may be extracted, which commend themselves to the judgment of all of us. If, for instance, the jury find the point in issue, and also another matter out of the issue, the latter finding is void, and may be rejected as surplusage. Com. Dig. "Pleader," S 18, S 28. But it is otherwise, if the matter so found be contained in the issue; for then, if it be material and contradictory, it cannot be rejected as surplusage. So if the point, on which the verdict is given, be so uncertain, that it cannot be clearly ascertained, whether the jury meant

to find the issue or not, it cannot be helped by intendment; and, à fortiori, if it be repugnant to other facts expressly found. Id., "Pleader," S 2, S 23.

Let us now apply these principles to the present verdict. From the terms, in which the verdict is expressed, it seems to be an argumentative finding for the defendant. The jury find, that the plaintiff has not supported his allegations, and therefore find for the defendant. What were those allegations? That the patent was obtained surreptitiously and upon false suggestion, as stated in the original affidavit? Or, that the machine in controversy was the sole invention of the plaintiff, as stated in his amended allegation? The terms of the verdict more correctly apply to the latter, than to the former; and there is this additional reason for this construction, that the fact specially found is, in this view, consistent with the general finding. For, as the jury find, that the plaintiff and defendant were both concerned in the invention, then the allegation of the plaintiff, that it was his sole invention, was not supported. In this view of the verdict, it is void, either because it is merely argumentative and uncertain, or, more properly, because it does not find the real point in issue between the parties.

On the other hand, if the verdict be supposed to refer to the real issue between the parties, it is to be considered if it be not necessarily repugnant. By the patent act, no person could entitle himself to a patent for any machine, unless he was the true inventor of it, and would make oath to that fact before some competent authority. By the expression in the statute, "true inventor," is undoubtedly meant the sole and exclusive inventor; for if the machine were the joint invention of several persons, neither of them could claim to be the true inventor, having an exclusive title to the patent; but the interest would be a joint or common interest in the whole. In such a case, therefore, if a party were to obtain a patent for the invention, having sworn, that he was the true inventor, he would, in the language of the act, obtain it "upon false suggestion"; and as such false suggestion would be a surprise and fraud upon the government, it might well also be declared to be obtained "surreptitiously." In the present case, the defendant obtained his patent, claiming it to be his own exclusive invention, and asserting the fact upon his oath. The jury have found, "that the plaintiff and defendant were both concerned in the invention." It is said by the defendant's counsel, that this is not a finding, that the plaintiff and defendant were jointly concerned in the invention. I confess, that this seems to me an over-refinement, and an exercise of legal astuteness too ingenious, and too subtle to be applied to the language of verdicts. When the jury declare, that both were concerned in the invention, the natural meaning of the words is, that the invention was the result of their joint, and not of their several and independent labors. However complicated the machine may be, the invention itself is not susceptible of division. If the plaintiff and defendant separately and independently invented several parts of the machine, capable of a distinct use, then those parts might be considered as separate inventions, for which each inventor might, perhaps, be entitled to a separate patent. But the present patent claims the invention, as a whole; and the jury find, that in this invention they were both concerned; which I cannot understand in any other sense, than as verifying the invention to be a joint, simultaneous production of the genius and labor of both parties. The special fact, so found, is necessarily repugnant to any general verdict in favor of the defendant, upon the real issue between the parties. It is a fact, consistently with which no such verdict could be given. It is also a direct contradiction of the allegation in the plea of the defendant, that the improvement was invented by him; and if that allegation be considered as part of the issue, the finding is so far against the defendant. In either view, the verdict is repugnant, in a material point, and consequently void.

In any way, therefore, of considering the verdict, it cannot, in my judgment, be supported. And I will add, that where a verdict is not expressed substantially in the terms of the issue, the case ought to be extremely clear, that should induce a court to make it the ground of a final judgment. For this defect in the verdict, the judgment of the district court must be reversed, and a new trial had at the bar of this court.

There are several points, however, made upon the bill of exceptions, which have been fully argued, and as they may be important in the future trial of this cause, I am willing to declare my present opinion respecting them. Before entering into the merits of them, I cannot forbear to remark upon the inaccuracy, with which the bill of exceptions has been framed. It contains, not a statement of the facts, but of the testimony introduced to prove the facts, on each side, in hæc verba; and the counsel for the plaintiff then insisted, that the matters so produced and given in evidence, on the part of the plaintiff, were sufficient, and ought to be admitted and allowed as decisive evidence, that the defendant surreptitiously obtained his patent, and that he was not the inventor of all the essential parts of the machine in controversy. There is no rule of law, which would have authorized the court to give such direction to the jury; for the matters so produced are not distinctly stated, but are mere questions of fact to be ascertained by the jury. Smith v. Carrington, 4 Cranch [8 U. S.] 62. The bill of exceptions should either have stated the facts, and not merely the evidence of the facts, and prayed the opinion of the court

thereon; or, if the evidence was doubtful, it might have stated, that evidence was given to prove certain facts, and then have prayed the opinion of the court thereon, if the jury should so find the facts. In England, when the facts are doubtful, I believe it is more usual in practice to insert those facts in the bill of exceptions, as settled by the jury, and then to allege the opinion of the court, as an absolute one, upon the trial.

Waiving, however, all objections to the terms and form of the bill of exceptions, let us now proced to examine the points, stated at the argument. The first objection, taken to the opinion of the court below, is, in substance, that the court ought to have directed the jury, that the refusal of the defendant to submit his claim to arbitration, under the circumstances detailed in the evidence, (which brought it within the 9th section of the patent act) and subsequently obtaining a patent after the plaintiff had obtained his, was conclusive evidence, that the patent of the defendant was obtained surreptitiously or upon false suggestion; whereas the court held, that these facts were not, per se, conclusive to establish this point. In my judgment, there was no error in this opinion of the court. If an arbitration had been actually perfected between the parties under the 9th section, the award or decision of the arbitrators would have been final between the parties only so far, as respected the granting of the patent. It would not have concluded the parties from showing in the present suit, that it was obtained upon false suggestions. It would not have concluded them, in an action for an infringement of the patent, from asserting any defence allowed by the 6th section of the patent act. The sole object of such an award is, to ascertain who is prima facie entitled to the patent. But when once obtained, the patent is liable to be repealed or destroyed by precisely the same process, as if it had issued without objection. If the award itself would not have been conclusive, a fortiori, a refusal to join in an arbitration under the statute cannot be so.

Another objection is, that the court held, that the burden of proof to maintain the issue lay upon the plaintiff; and that it was incumbent on him to prove, that the defendant was not the true inventor of the machine in controversy; whereas, it is contended, that the burden of proof lay on the defendant, and the plaintiff was not bound to prove a negative. In my judgment, there was no error in the opinion of the court upon this point. By the very form of the pleadings the affirmative rested on the plaintiff. He was bound to prove, that the patent was obtained surreptitiously or upon false suggestion. This is an affirmative proposition; and to have called upon the defendant to prove the contrary, would have thrown upon him the burden of the proof of a negative proposition. In respect to the point, who was the inventor, the possession of the patent was prima facie evidence for the defendant at least upon this process; and the proof, that another was the inventor, was not the proof of a negative proposition. And, at all events, the trial being in substance upon the general issue, the plaintiff could entitle himself to a verdict only by the strength of his own proof, and not by the weakness of that of his adversary.

Upon the whole, these exceptions must be overruled; but for the defect of the verdict a venire facias de novo must be awarded. Judgment reversed.

Case No. 13,338.

STEARNS v. DAVIS.

[1 MacA. Pat. Cas. 696.]

Circuit Court, District of Columbia. Aug., 1859.

PATENTS—WHO ARE INVENTORS.

[One who receives a "suggestion" of a machine from another, and promptly reduces it to practical use, is not an inventor, and will acquire no right by reason of any laches of the original inventor in perfecting his invention. If the latter forfeits his rights, the forfeiture will be to the public.]

[This was an appeal by Charles Stearns from a decision of the commissioner of patents, in an interference proceeding, awarding a patent to Asahel Davis, for an invention relating to the manufacture of lightning-rods.]

The patent issued to Stearns July 5th, 1859 (No. 25,534), with the following claim: "The twisting rollers, constructed as described, in combination with the corrugated roller, for producing the corrugated twisted lightning-rod."

E. W. Scott, for appellant.
Munn & Co., for appellee.

DUNLOP, Chief Judge. It is truly said by the commissioner of patents, in his reply of the 8th of August, 1859, to the reasons of appeal of Mr. Stearns, that the object of this appeal is not to decide who invented the lightning-rod, but the question of priority of invention in the rollers for twisting the rod. The whole evidence on both sides is directed to this issue. I have carefully examined the proofs, and it seems to me there can be no doubt that the appellant Stearns was the original, first inventor of the twisting rollers exhibited in the models and specifications of appellant and appellee. This appears not only in Stearns' testimony, but is fully made out by the witnesses examined by Davis himself. I refer to the depositions of Thomas Trask, Thomas Richardson, Henry H. Wilder, Moses C. Crocker and others. But it is said by the office that the "idea," the "suggestion" of Stearns was inchoate, and not reduced to practice; that it was first turned to practical use by the appellee Davis, and therefore the patent ought to be awarded to him. If this was a controversy

between two original inventors or discoverers of the same thing, and the second inventor—or the original inventor, posterior in point of time of the two—first reduced it to use, the first original inventor would not, and ought not, to lose the fruits of his genius unless the second inventor could show that the first had forfeited his right by failing to pursue and perfect his invention by the use of reasonable diligence in reducing it to practice and making it available to the public. But this is not the case of two original inventors, each conceiving the same idea, unaided and unassisted. Stearns' "suggestion," it is conceded on all hands, and is even admitted by Davis himself, was communicated to him (Davis) by Charles Stearns and Moses Marshall, who is unimpeached; and others declare that the suggestion was at once practically applied, and produced the desired result—the twisted, corrugated copper rod. In no sense, therefore, under the patent laws, can Davis be held to be an inventor of the twisting rollers. If Stearns, by want of diligence, has forfeited the fruit of his conception, he has forfeited it to the public and not to the appellee. But I see no reason to impute want of diligence either to Davis or Stearns. The invention was discovered in May or June, 1858, and the models and specifications of both parties presented to the patent office—Davis' on the 14th of December and Stearns' on the 18th of December, 1858. No want of diligence was imputed by the office to Davis, and his application was only four days earlier than the application of Stearns.

It is also assumed by the office that advertisements and sales of the machine with the twisting rollers by Davis in the year 1858, claiming it as his invention on several occasions with the knowledge of Stearns, and not denied by him, is evidence that Davis was the true inventor or owner; but this prima-facie presumption (even supposing it to exist) is rebutted by the positive proof of Davis' own witnesses that Stearns was the inventor, by the absence of all proof that Stearns ever assigned to Davis, and by the affidavit of Davis himself, which (although no evidence against Stearns, it does not lie in Davis' mouth to gainsay) admits that Stearns was entitled, on certain terms therein set forth, to half the patent right.

The last objection urged by the office to the claim of the appellant for a patent is that his improvement in the twisting rollers is substantially different from Davis', and that there is no conflict. Upon inspection of the models and specifications of the contending parties, the principle of the improvement appears to be the same; the difference is in mere mechanical detail and more elaborate finish in the model of Davis; both machines producing the same corrugated vertical or twisted rod. The contending parties and the witnesses on both sides treat the principle as the same, and the dispute was, and is, who invented it. The office has made the same affirmation in declaring the interference.

Upon the whole, I am of opinion that the honorable commissioner of patents erred in awarding a patent to Asahel Davis for the improvement in the twisting rollers referred to in his decision of the 16th of June, 1859, and that his judgment be, and the same is hereby, reversed. I am also of opinion that a patent ought to issue to Charles Stearns for said improvement, on a proper application made by him limiting his application to the improvement in the twisting rollers, in combination with the corrugating rollers, producing the corrugated twisted copper rod.

Case No. 13,339.

STEARNS v. PAGE.

[1 Story, 204.][1]

Circuit Court, D. Maine. May Term, 1840.

PLEADING IN EQUITY—PLEA AND ANSWER—STATUTE OF LIMITATIONS—LACHES.

1. Where a bill in equity was brought by an administrator de bonis non, for an account of the intestate's estate, after the lapse of from twenty to twenty-five years, and the defendant pleaded the statute of limitations, and filed a general answer to the whole bill; it was *held*, that the plea should, in itself, contain averments, negativing such special matters, stated in the bill, as would, if true, avoid the operation of the statute; and that it was not sufficient, that such matters were negatived in the answer.

[Cited in Lemoine v. Dunklin Co., 38 Fed. 570.]

2. When an answer contains more than is strictly applicable to the support of the plea, it overrules the plea.

[Cited in Dakin v. Union Pac. Ry. Co., 5 Fed. 667; Hayes v. Dayton, 8 Fed. 706.]

[See Steiger v. Heidelberger, 4 Fed. 455.]

3. Where a bill in equity is brought after a great lapse of time, it is incumbent on the plaintiff to state the reasons, why it was not brought before, in order to repel the presumption of laches or improper delay; and if fraud, mistake, &c. are charged, distinct and definite averments should be made in regard to the time, occasion, and subject matter of such fraud or mistake.

[Cited in Greene v. Bishop, Case No. 5,763. Quoted in Hardt v. Heidweyer, 152 U. S. 547, 14 Sup. Ct. 674.]

[Cited in Clark v. Potter, 32 Ohio St. 61; Ogden Paint, Oil & Glass Co. v. Child (Utah) 37 Pac. 737.]

Bill in equity, brought by George B. Stearns, of Boston, as administrator de bonis non of John O. Page, against Rufus K. Page.

The bill alleges, in substance, as follows: That John O. Page died in foreign parts, about the 28th of February, 1811, intestate, and possessed of real and personal estate to the amount of about $81,000; that he left a widow, who, on the 25th of June, 1811, was appointed his administratrix; that, during his absence, the management of most of his personal property was intrusted to Ru-

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

fus K. Page, and, after his death, his widow being unacquainted with business transactions, it was continued in his care, together with all the residue of his personal property, as trustee. That the accounts rendered by the widow, as administratrix, the last of which was rendered on the 20th of February, 1816, were in reality drawn up by Rufus K. Page, and signed by her as a mere matter of form, and were full of errors and mistakes

The bill further charges, that Rufus K. Page, as trustee, fraudulently appropriated and converted to his own use certain portions of the property, viz.: 1st. That he sold the brig Emmeline for the sum of $13,000, and converted the whole proceeds of the sale to his own use, without ever rendering any account of them. 2d. That he falsely represented to the administratrix, that a copartnership had existed between John O. Page and himself, by which he was entitled to a portion of the goods in the store of J. O. Page, in Hallowell, as well as of a portion of the credits belonging to the establishment; while, in fact, no such copartnership had ever existed, and the whole merchandise credits of the store were the sole property of John O. Page. 3d. That he induced the administratrix, by false and fraudulent representations, to give up, without consideration, certain promissory notes due from him to the estate of John O. Page. 4th. That, as trustee, at the death of John O. Page, he came into possession of the ship Horatio, which was then unfinished, and on the stocks; and that his duty was to sell the ship, and pay over the proceeds to the administratrix; but, in breach of his trust, he grossly and fraudulently neglected so to do, and suffered the vessel to deteriorate and decay, until she became of little or no value, so that the estate lost the proceeds and benefits, which should have accrued from such sale; and that the ship Horatio might and could have been sold for the sum of $12,000. The bill further states, that the administratrix, Sarah Page, died in 1836, and that the plaintiff, on the 28th of October, 1828, married Louisa Page, the daughter of Sarah Page, then of age, and that he was appointed administrator de bonis non of the estate of John O. Page. The bill goes on to charge: 5th. That Rufus K. Page has admitted to several persons, that he had property in his hands, which he had appropriated, and claimed to hold by virtue of a certain paper, purporting to be the will of John O. Page; but that, in fact, such paper, on being offered for probate, was set aside as invalid; and that J. O. Page therefore died intestate. That he has also declared, that he made sales of John O. Page's property, among which was a sale of the brig Emmeline, for $13,000, the proceeds of which he converted to his own use. That prior to the death of John O. Page, the defendant had apparently been possessed of scarcely any property; but that, with the proceeds of this fraudulently converted property, he had entered largely into business, and received large profits therefrom, for which he ought to account, as trustee. 6th. That from the nature of the transactions and lapse of time, the plaintiff has not full information relative to the other parts of the accounts of the property, but believes and avers, that it was fraudulently appropriated and converted to the use of Rufus K. Page. That since the winter of 1834, the plaintiff had no suspicion of a breach of trust, or that the accounts were erroneous, and that he had not until recently obtained sufficient information to authorize him to proceed against Rufus K. Page. That once, when applied to, Rufus K. Page agreed to submit the whole matter to the decision of some disinterested person, but that when requested to carry such agreement into effect, he absolutely refused so to do. And that a further proposal has been made to him to investigate the accounts between him and J. O. Page, and between him and the administratrix; with which he refuses to comply.

The bill prays, that the said Rufus K. Page may answer the premises and render an account of all the matters therein contained, and a full statement and account of all the property of the said John O. Page, at the time of his death, and of all the property, that ever came into the possession or control of the defendant, or of any person, subject to his directions, as trustee; and that he shall pay to the plaintiff whatever may be due on a fair settlement of the accounts subsisting between him and the estate of the said John, going back to the time of the said John's death, and making examination of all accounts, with interest on all sums due from the defendant, and it concludes with the prayer for general relief.

The defendant pleaded the statute of limitations, and also made answer, in substance, as follows: That he believes, that John O. Page died intestate, in foreign parts, in manner as stated in the bill, and that Sarah Page was appointed administratrix. That after such a lapse of time, he is unable to specify particularly the property, which the said intestate left. But believes, that an inventory was returned by the administratrix of all his real and personal estate to the sum of between $70,000 and $80,000, which is now on file in the office of the register of probate, for the county of Kennebec. That John O. Page was for some time in the business of building and sailing vessels, but his business having considerably increased, and he being feeble in health, he proposed in May, 1806, to take the defendant, who had been formerly a clerk in the store, into copartnership. The proposal was assented to, and the copartnership was formed without written articles of agreement, but verbally and without limitation of time. The agreement was, that the stock owned by the said

John and already in the store, should be turned in, as a part of the capital of the firm, which was to be under the name of Rufus K. Page. An inventory of the stock was taken, and it amounted to the sum of $1013.-36, which was entered to the credit of the said John. It was agreed also, that he should add thereto $2,000 as a part of the capital, which was accordingly done. The care and labor was to devolve upon the said Rufus K. The profits were to be divided in the proportion of five eighths part to the said John, and three eighths to the defendant; and the said John was to have the privilege of reserving and advising in relation to the business. The defendant, in May, 1806, commenced and prosecuted the business, according to the terms of the agreement, from that time until the death of the said John dissolved the copartnership. That the said John was in the habit of frequenting the store, and inspecting the books. That, by agreement, whatever goods were taken by either were charged to his account. The business was profitable; but no settlement was made before the death of the said John. That besides the business of the store, the said John was extensively employed with sundry persons, distinct from the firm, in the building of vessels; and that in the year 1809, jointly with Caleb Stevens, now deceased, and the defendant, he built the brig Emmeline, and fitted her for sea in 1810, he owning one half, and the said Stevens one fourth, and the defendant one fourth, which were paid for by them respectively. Besides this, that the defendant attended to other business of the said John, not connected with the store; to wit, the said John contracted with the said Stevens to build the Horatio, afterwards called the Albert Gallatin, of which the said John was the owner of three fourths, and Albert Stevens of the other one fourth, and which was unfinished when the said John left this country; and that the care and business of building the said vessel devolved on the defendant. But that he was, in no wise, the trustee of the said John, except as a copartner, and in advising and aiding his wife in the management of his business; that Sarah Page was appointed administratrix, and the will, which was set aside, bequeathed to him, in consideration of his services, as he supposed, the interest of the said John in the Horatio; but that he does not rely upon the will, inasmuch as it was set aside.

The defendant further states, that in returning an inventory of the goods and estate of the said John, all his personal estate was included, as he believes. That on the 19th of October, 1811, the said administratrix, by the advice of her father-in-law, the late Nathaniel Dummer, and of the late Thomas Bond, Esq., her brother-in-law, and of the late Chandler Robbins, Esq., the intimate friend of her late husband, as well as of herself and family, sold to the defendant, the share of the brig owned by her intestate, being one half part, for $3,000, according to the best of his recollection; and a bill of sale was made to him and dated October 19th, 1811, which he is ready to produce, and for which he made payment. That he owned the vessel until the year 1816, when he sold her for the nominal sum of $8,000, receiving bank bills, then at a discount, in payment, and that the said defendant believes the administratrix consulted her best interest in such sale, inasmuch as during the year, that he owned the vessel, the restrictions of commerce and the ensuing war with Great Britain kept her out of employment, and many expenditures were necessary in repairs. That all money, or goods, furnished by the said John were duly credited to him on the books, unless a note was given by the defendant; and when that was the case, the note was not retained in the store, nor ever after in his possession, until paid by him. And that all money and goods advanced to the said John were charged to him in the said books, from May, 1806, until his death, in February, 1811. That when the said John left the country, the debit side of his account was about $26,-000, and the credit side $24,000; that he continued to see the books until he left the country. That in February, 1812, the administratrix, by the advice of her counsel, Thomas Bond, Esq., appointed John Agry, of Hallowell, a merchant and ship-holder, and the said Chandler Robbins, her agents, to make a settlement of all accounts between her and her intestate and the defendant. That the settlement, which he believes to be correct, allowed the defendant a balance of between $8,000 and $9,000, principally arising from disbursements and supplies made by the defendant in building the said ship, after the said John left the country. That in payment, the defendant set off certain notes of his held by the administratrix, and for the balance gave the said administratrix the note for $3870.50, which was written and witnessed by the said Chandler Robbins, and which the defendant has paid, and now has in his possession. That these are the notes referred to in the bill, and the only ones, that were due from him.

The defendant further answers, that the accounts rendered by the administratrix were made out principally, if not wholly, by the said Chandler Robbins, with the advice of her counsel, T. Bond, and her father-in-law, Nathaniel Dummer; and all the information required of this defendant was truly and faithfully given, and no error was ever caused by him, by withholding, or causing to be withheld, any property, which ought to have been accounted for, and he supposes, that all such property was accounted for. That the Horatio received his strictest care and attention, until she was launched, which could not be done until the year 1811. That the administratrix desired to sell the vessel, and the defendant advised her so to do, and

endeavoured to aid her in selling it, though it was no part of his duty; but she could not. That the war with Great Britain, in 1812, suspended all commerce, and many ships decayed at the wharves. That in 1816, Jacob Barker offered to purchase the vessel, and to give payment in treasury notes, which were at a great discount, which proposal the administratrix declined; and that Israel Thorndike, Esq., of Boston, in about 1811, offered to purchase one half of the said vessel, and pay therefor in sails and rigging for her, which was declined. These were the only offers made. The vessel remained at Bath till 1816, when she was launched, and in the intermediate time, all care was bestowed upon her. In 1816, Barker made another offer to buy one half, and pay in rigging and sails for her, which the administratrix finally accepted. The sails and rigging were furnished, and the vessel set sail for New York, and on her passage leaked very much. When she arrived there, she was so rotten, that she could not be caulked, and she was also found defective in her upper works. Barker here offered $5,000 for the second half of the vessel, which proposal the administratrix, after advising, accepted; and that the bill of sale was made, and the consideration paid to the defendant, who paid it over to the said administratrix. The defendant wholly denies, that he acted neglectfully or fraudulently with regard to the sale of the said vessel, and says, that he never had an offer of $12,000. He also denies, that he has admitted within six months, that he claimed any portion of the property of the said John O. Page by virtue of the said John's will. He also denies, that he ever declared, that he sold any property of the said intestate, the proceeds of which he did not account for to the said administratrix; and he denies, that he ever said, that he sold the brig Emmeline for $13,000; though it was no concern of the administratrix, he having bought all her interest in the same; and that he made no extension of his business until four or five years after the death of the said intestate.

The defendant further answers, that the plaintiff had ample opportunity to examine into the affairs of the said estate, ever since his marriage, in 1828. That he was familiar with the business of merchandise and the subject of merchant's accounts, and was frequently at Hallowell, and always had free access to the papers of the said administratrix and the books of the firm; but that no complaint was ever made, until after the bankruptcy of the said complainant, which was about a year since.

The cause was shortly spoken to by Allen, in support of the plea, and by Robinson against it; but the court intimated, that the plea was unsustainable in its actual form.

STORY, Circuit Justice. It does not appear to me, that the learned counsel need trouble themselves to argue at large the point, as to the sufficiency of the plea. I will merely intimate the difficulties attending it; and will then hear them, if there be any remaining doubts on their minds. I am the more ready to do this, because proceedings and pleadings in equity are not as yet familiarly known to the profession in this district; and, therefore, it may not be useless also to suggest, that the bill itself seems to require amendments and alterations before it can be held valid as the ground for a decree.

First, then, as to the plea. It is a dry, naked plea of the statute of limitations, without any averments, negativing the special matters set up in the bill, which, if true, would avoid the operation of the statute. I take it to be clear, that the plea should contain in itself such averments; and the answer in support thereof should also contain a full discovery of the matters so set up in avoidance of the bar. It is not sufficient for the answer alone to negative such matters; for it is mere matter of discovery; but the plea should in itself, if true, contain a complete bar. This will be found stated at large by Lord Redesdale, in his excellent work on Equity Pleadings. Mitf. Eq. Pl. (by Jeremy, 4th Ed.) 239–243; Story, Eq. Pl. §§ 680–687, 754. The same doctrine was affirmed by Lord Cottenham, in Foley v. Hill (3 Mylne & C. 475), according to my understanding of the true import of his lordship's judgment.

Now, in the present case, there are various averments in the bill, which touch the validity of the bar of the statute. First, it states, that there were fraudulent representations made to the original administratrix of a partnership between the intestate and the defendant, which had no existence; secondly, a fraudulent sale made by the defendant of the brig Emmeline; thirdly, negligence and misconduct in the sale of the ship Horatio; and fourthly, the bill alleges certain declarations and admissions of the defendant within six months, which acknowledge, that he still has assets of the intestate in his hands. None of these allegations are in the slightest degree alluded to, or negatived in the plea. And, perhaps, it will also be found, that a single plea of the statute, with a negative of all these matters, would not be valid on account of their various nature; but that there should be distinct pleas and distinct answers severally to each of them, since they involve, or may involve, very different equities, as well as very different proofs.

Again. The plea is general, that the action accrued more than six years ago. But to whom it accrued, is not said. Now, the original administratrix died in 1826; and the present administrator de bonis non was not appointed until 1834, within six years of the filing of the plea. It is not said, that the cause of action accrued six years before the original administratrix died, or six years before the present bill was brought.

Again. The answer covers much more matter, than is strictly applicable to the mere

support of the plea. When the answer includes more than is necessary for such a purpose, it overrules the plea, and must so be held at the argument. A plea states some ground, why the defendant should not go into a full defence. Mitf. Eq. Pl. (by Jeremy) 298, 299; Story, Eq. Pl. §§ 688, 693. But if the answer goes into a full defence, that necessarily overrules it. In the present case, the answer, among other things, not strictly responsive to the matters, charged by the bill to repel the statute of limitations, goes on to set up a distinct defence of an account settled between the original administratrix and the defendant, in 1812, which it insists was conclusive, as to some of the matters, in respect to which relief is sought.

Upon these grounds, it seems to me, that the plea ought to be overruled. But there are also objections to the allegations of the bill in its present structure. I suggest some of them for the consideration of counsel.

The bill is brought by an administrator de bonis non against the defendant for an account of the intestate's estate. (1) For moneys and property of the intestate received in his lifetime. (2) For moneys and property of the intestate, received by him as agent of the former administratrix in her lifetime. The bill also makes a distinct claim for losses occasioned to the estate and to the administratrix by his negligence and misconduct in his agency. The intestate died in 1811. Administration was taken by his widow in 1812. The administratrix died in 1826. The present plaintiff was appointed administrator de bonis non in 1834. The bill is, therefore, brought for an account after a great lapse of time; and, as courts of equity never entertain any bills of this sort, where there has been negligence or laches in the party, it is incumbent upon the plaintiff to set up in his bill, the reasons, why the bill was not brought at an earlier period, in order to repel the presumption of laches or unreasonable delay. If the case turns upon fraud, mistake, concealment, or misrepresentation, the bill should state, what, in particular, the fraud, mistake, concealment, or misrepresentation was, and how, and in what manner it was perpetrated. General allegations, that there has been fraud, or mistake, or concealment, or misrepresentations, are too loose for purposes of this sort. The charges must be reasonable, definite, and certain as to time, and occasion, and subject matter. And especially must there be distinct averments of the time, when the fraud, mistake, concealment, or misrepresentation was discovered, and how discovered, and what the discovery is; so that the court may clearly see, whether, by the exercise of ordinary diligence, the discovery might not have been before made. For, if by such diligence the discovery might have been before made, the bill has no foundation on which it can stand in equity, on account of the laches.

Now, for all purposes of this sort, the bill is exceedingly loose, and vague, and defective. (1) The bill asserts a claim against the defendant for the brig Emmeline, sold after the death of the intestate by the defendant, belonging in whole or in part to the intestate, but which, it alleges, the defendant converted wholly to his own use. The time of the sale is not mentioned, nor whether under the agency, or with the consent of the administratrix, or not, or whether sold in her lifetime, or not. And yet it is almost a necessary inference, that the sale was in her lifetime, and with her consent; and no reason is assigned, why she did not receive the proceeds, or such as belonged to the intestate. (2) The bill also charges, that the defendant had received property of the intestate, under a false allegation of partnership with the intestate, and had not accounted for it. It is not stated with certainty, when the property was received; but it must have been in the time of the administratrix. It is not stated, that the administratrix had not the full means to inquire into, and to ascertain all the facts in her lifetime. Nor is it formally stated, in positive terms, that there was a fraudulent concealment of any particular facts; nor when the discovery, if any, was first made of the real facts; nor how, or in what manner, or by whom. (3) The bill also charges, that notes of the intestate, to the amount of $11,-000, were delivered up by the administratrix to the defendant, without payment or consideration, upon fraudulent representations. But it is not stated, when they were so delivered up; nor what in certainty the fraudulent representations were; nor when the fraud was first discovered, nor by whom, nor in what manner; nor whether, upon due diligence and inquiry, it might not have been fully ascertained long ago. (4) The bill also charges, that the ship Horatio, which was partly built in the intestate's lifetime, and was finished after his death, was sold by the defendant, as agent of the administratrix; and that by his negligence and misconduct in his agency, a great loss was thereby sustained. Now, if there was any wrong done to the estate in this particular, it was a wrong done by the agent of the administratrix, for which he would be personally liable to her, and she to the estate. But, as her agent, the defendant stood in no privity or connexion with the estate, so as to be responsible for such misconduct or negligence to any succeeding representative of the estate. How can an administrator de bonis non maintain a suit in law or equity against an agent of the former administratrix, for a violation of his duty to the latter in his agency? It is not a contract with the intestate; but a mere personal contract with the administratrix. There is no privity in such a contract between the administrator de bonis non and the defendant. The allegation of negligence and misconduct, is also stated with great looseness. It is not said in what the negligence or misconduct consisted. (5) Then, again, the bill charges,

that the plaintiff took administration de bonis non in 1834; and in very general terms alleges, that he did not learn the facts fully until recently, after making inquiries. But the bill does not state, what particular discoveries have been obtained, or when they were obtained, or by what inquiries, or in what manner, or at what time; nor whether the same sources of inquiry were not fully open and well known to the administratrix in her life-time, and might not then have been equally successful. Indeed, so far as can be gathered from the imperfect allegations of the bill, all the facts and acts, now relied upon as grounds of relief, took place in the time of the administratrix, and many years before her death.

Under such circumstances, after such a lapse of time, it being between twenty and twenty-five years after the alleged transactions took place, and ten years after the death of the administratrix, the court have a right to require, before the bill is entertained, that a clear case should be made out, upon the very face of the bill, calling for its interposition; and showing that the parties in interest have been guilty of no negligence or undue delay, in not applying for relief at an earlier period.

After this expression of the opinion of the court, the defendant asked leave to withdraw his plea, and the plaintiff asked leave to amend his bill, which were accordingly allowed by the court.

[Several amendments were subsequently filed, when, in 1843, the bill was dismissed. An appeal was then taken to the supreme court, where the decree of the circuit court was affirmed. 7 How. (48 U. S.) 819.]

Case No. 13,340.

STEARNS v. RIPLEY.

[Nowhere reported; opinion not now accessible.]

Case No. 13,341.

STEARNS et al. v. UNITED STATES.

[2 Paine, 300.] [1]

Circuit Court. [2]

COURTS—STATE AND FEDERAL—JURISDICTION OVER FEDERAL CAUSES—PENAL ACTIONS—SURETY —DISCHARGE IN STATE COURT.

1. The act of congress of August 2, 1813 (4 Bior. & D. Laws, 611 [3 Stat. 72]), giving to the state courts jurisdiction in certain specified cases of penalties, incurred under the laws of the United States, must be considered pro tanto a repeal of the judiciary act of 1789 [1 Stat. 73], whereby exclusive original cognizance of the same was given to the district courts.

2. Congress may vest exclusively in the courts of the United States all the judicial power of the United States; and no part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to the state tribunals.

[Cited in Sherman v. Bingham, Case No. 12,-762.]

3. The state courts may exercise jurisdiction in all cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the federal courts. Congress may revoke and extinguish the concurrent jurisdiction of the state tribunals in every case in which the subject-matter can constitutionally be made cognizable in the federal courts. But without an express provision to the contrary, the state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject-matter. It is, however, optional with the state courts to exercise such jurisdiction or not.

[Cited in McConologue's Case, 107 Mass. 166.]

4. The United States and the state governments are not to be considered as entirely foreign to each other. Although the laws of one state may be deemed as foreign in relation to the government and citizens of another state, because in no sense binding without the jurisdiction of the state, yet the laws of the United States are not to be considered as the laws of a foreign government, but rather as laws binding on the same people as the government and laws of the several states.

5. The state courts are not inferior tribunals in the sense of the constitution. Congress cannot, therefore, compel them to entertain jurisdiction in any case; but leaves them to consult their own duty from their own state authority and organization.

6. The jurisdiction of the state courts over federal causes is confined to civil actions for civil demands, or to enforce penal statutes. They have no criminal jurisdiction over offences exclusively existing as offences against the United States.

7. Actions for penalties being founded upon the implied contract which every person enters into with the state, to observe its laws, are civil actions both in form and substance.

8. In suits for penalties incurred under the act of congress of August 2, 1813 (4 Bior. & D. Laws, 611 [3 Stat. 72]), giving a moiety to the United States and the other moiety to the collector or informer, the state courts have jurisdiction.

9. The United States are a body corporate, having capacity to contract and to take and hold property, and in this respect stand upon the same footing with other corporate bodies; and if they prosecute their suits in the state courts and avail themselves of the state laws, such state process as they use for the purpose of enforcing their rights, must be subject to the state law.

[Cited in U. S. v. Tetlow, Case No. 16,456.]

10. Where, therefore, one committed to prison upon a judgment recovered against him as bail, in a suit for a penalty, under the act of congress, of August 2, 1813, brought in a state court, was discharged from imprisonment under a law of the state, and the defendant plead such discharge in bar of an action of debt brought by the United States on the bond given for the jail liberties, it was *held* that the plea was good, and a judgment rendered upon a demurrer to the plea was reversed.

[Error to the district court of the United States for the district of Vermont.

[This was an action of debt by the United States against Joseph Stearns and others. From a judgment in the district court in

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [District and date not given. 2 Paine includes cases from 1827 to 1840.]

favor of the United States (case unreported), defendants brought error.]

THOMPSON, Circuit Justice. This case comes up on a writ of error to the district court of Vermont. It was an action of debt brought by the United States, as assignees of the sheriff of the county of Bennington, and state of Vermont, on a bond given for the liberties of the prison; the action being for an escape in violation of the bond.

The defendants set up as their defence: 1st. That the judgment recovered against Stearns, and upon which he was committed to prison, was as bail for one William S. Cardell, who was prosecuted in the Bennington county court of the state of Vermont, for a penalty incurred under the act of congress of the 2d August, 1813 (4 Bior. & D. Laws, 611 [3 Stat. 72]), entitled "An act laying duties on licences to retailers of wine, spirituous liquors and foreign merchandise," and alleging such judgment was void for want of jurisdiction in the state court to entertain such suit. 2d. That Stearns, after his commitment, and before his escape, was discharged from imprisonment under the law of the state of Vermont relative to poor prisoners. To these pleas there was a general demurrer and joinder, and the district court gave judgment for United States upon the demurrer.

The ground upon which the first plea is attempted to be sustained is, that the state court of Vermont had no jurisdiction in the original cause out of which the action in the district court grew. It would certainly be going very great lengths to look back now to the original cause of action. A judgment having been recovered against Cardell, the original offender, without interposing any objection—and a judgment against Stearns, his bail—and no objection made until suit is brought upon the bond for the jail liberties, I am not prepared, however, to say that if the original cause was coram non judice, and absolutely void, it would be too late to take advantage of it. Under the judiciary act of 1789 (2 Bior. & D. Laws, p. 50, § 9 [1 Stat. 76]), exclusive original cognizance is given to the district courts in all suits for penalties and forfeitures incurred under the laws of the United States; but by the act under which the penalty in question was incurred, jurisdiction is given to the state courts in certain specified cases (4 Bior. & D. Laws, p. 613, § 5 [3 Stat. 73]) within which I must presume the present falls, as the plea contains no averment to the contrary. This act must, therefore, be considered pro tanto a repeal of the judiciary act of 1789, and unless unconstitutional, must give jurisdiction to the state courts. There has been great diversity of opinion entertained by different courts and different judges in the United States upon the question how far it was competent for congress to give jurisdiction to the state courts in cases coming under the laws of the United States. The cases in which these opinions have been drawn forth, have generally been criminal cases arising upon habeas corpus.

It seems to be admitted by all, that congress may vest exclusively in the courts of the United States, all the judicial power of the United States, but whether imperative upon congress so to do is a point upon which some diversity of opinion has been entertained. [Martin v. Hunter] 1 Wheat. [14 U. S.] 304. And it seems to be admitted, also, that no part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to the state tribunals.[3] And the judicial act of 1789 gives to the courts of the United States exclusive jurisdiction of all crimes and offences cogniza-

[3] That there are no equity courts in the state in which the court of the United States is held, nor laws regulating the practice in equity cases, does not prevent the exercise of equity jurisdiction in the courts of the United States which are bound to proceed in equity causes according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of common law. Gaines v. Relf, 15 Pet. [40 U. S.] 9. The practice of the English court of chancery is the practice of the courts of equity of the United States. State of Rhode Island v. State of Massachusetts, 14 Pet. [39 U. S.] 210. The supreme court is one of limited and special original jurisdiction; its action must be confined to the particular cases, controversies and parties over which the constitution and laws have authorized it to act; and, any proceeding beyond the limits prescribed, is coram non judice, and a nullity. Id., 12 Pet. [37 U. S.] 657. The circuit court has full jurisdiction, in equity, in cases of fraud, to the same extent, and with the same limitations, as the state courts of equity. Gould v. Gould [Case No. 5,637]. The courts of the United States, as courts of equity, possess jurisdiction to maintain suits in favor of legatees and distributees for their portion of the estate of the deceased, notwithstanding there may be, by the local jurisprudence, a remedy at law on the administration bond in favor of the party. This class of cases is of concurrent, not of exclusive jurisdiction. Pratt v. Northam [Id. 11,376]. Their equity jurisdiction is not limited or restrained by the local remedies in the different states; it is the same in all the states, and is the same which is exercised in the land of our ancestors, from whose jurisprudence our own is derived. Pratt v. Northam [supra]; Fletcher v. Morey [Case No. 4,864]. And its equitable jurisdiction may be exercised, although the case be not remediable in the state court. Fletcher v. Morey [supra]. The courts of the United States have an exclusive maritime jurisdiction, extending as far as the tide ebbs and flows. Those who furnish supplies, &c., for vessels in foreign ports, or in a state where the owners do not reside, have liens on the vessels, which they may enforce in a court of maritime jurisdiction, and the decree binds all parties interested. Thoms v. Southard, 2 Dana, 481. A steamboat having been libelled in a federal court having maritime jurisdiction in another state, and that court having directed a sale of the boat, and distributed the proceeds among various persons who became parties, and established claims for which the boat was liable; and, having made a final decree, settling the respective rights of the owners, claimants and mortgagees of the boat; and the decree being pleaded in a suit in Kentucky, this court presumes, nothing appearing to the contrary, that that court had jurisdiction

ble under the authority of the United States, except when the laws of the United States shall otherwise provide. And we accordingly find, in various acts of congress, this reservation is expressly made, and is done not by way of grant of any power but to remove a disability created by the judiciary act of '89. In the case of Martin v. More, 5 Wheat. [18 U. S.] 1, it was held by the supreme court of the United States that congress cannot confer jurisdiction upon any courts but such as exist under the constitution and laws of the United States; although the state courts may exercise jurisdiction in cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the federal courts. Chancellor Kent (1 Comm. 374) says: "The conclusion then is, that in judicial matters the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject-matter can constitutionally be made cognizable in the federal courts; and that without an express provision to the contrary, the state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject-matter."

There are numerous acts of congress in which duties have been imposed on state magistrates and courts, and by which they have

in rem, and of all the matters embraced by the decree; and holds it conclusive and final, notwithstanding the suit here was previously commenced upon some of the same claims. Id. The appearance of parties will enable a court of maritime jurisdiction to proceed upon contracts relating to a vessel, though the claims are not such as to give jurisdiction in rem. Id. 483. In a contract between a mortgagor and a mortgagee, being citizens of different states, an ejectment bill to foreclose may be brought in a court of the United States, by the mortgagee residing in a different state. M'Donald v. Smalley, 1 Pet. [26 U. S.] 520. A cross bill in the same court, or an injunction bill to stay the proceedings in a suit pending, or to obtain relief against a judgment recovered in the same circuit or district court of the United States, between the same parties, or their representatives, is not an original suit or proceeding within the meaning of that provision of the judiciary act of the United States which prohibits the bringing of a civil suit before a circuit or district court, by original process, against an inhabitant of the United States, in any other district than that of which he is an inhabitant, or in which he is found at the time of serving the writ. Bates v. Delavan, 5 Paige, 299. Where a circuit court of the United States has jurisdiction of a cause, the court of chancery of a state will not inquire into the regularity of its proceedings as to mere matters of practice, in a new suit founded upon the decree of such circuit court. Id. Where the amount claimed in the bill was less than one thousand dollars, the amount required to give jurisdiction in appeals, and writs of error, the appeal was dismissed, although the title to land might be inquired into incidentally. Bank of Alexandria v. Hoof, 7 Pet. [32 U. S.] 168. The jurisdiction of the district court of the United States for the district of Alabama, and the right of the plaintiff to prosecute his suit, having attached by the commencement of the suit in the district court, the right cannot be taken away or arrested by any proceedings in another court. An attachment of the debt by the process of a state court after the commencement of a suit in a court of the United States, cannot affect the right of the plaintiff to recover in the suit. Wallace v. M'Connell, 13 Pet. [38 U. S.] 136. The settled construction given by the supreme court to the 25th section of the judiciary act of 1789, is, that to bring a case within the reach of the section, it must appear on the face of the record of the state court, either by express terms, or by clear and necessary intendment, that the question of a construction of a clause of a statute of the United States did actually arise in the state court. Ocean Ins. Co. v. Polleys, 13 Pet., [38 U. S.] 157. To give the supreme court of the United States jurisdiction under the 25th section of the judiciary act, in a case brought from the highest court of a state, it must be apparent in the record that the state court did decide in favor of the validity of the statute of the state, and the constitutionality of which it brought in question on the writ of error. Two things must be apparent in the record: first, that one of the questions stated in the 25th section did arise in the state court; and secondly, that a decision was actually made thereon by the same court in the manner required by the section. McKinney v. Carroll, 12 Pet. [37 U. S.] 66. The local laws of a state of the United States can never confer jurisdiction on the courts of the United States; the jurisdiction must be vested by the laws of the United States. The Orleans v. Thoebus, 11 Pet. [36 U. S.] 175. Where a cause in chancery involves a naked question of title, the suit is local, and must be brought in the circuit court of that district where the lands lie. Massie v. Watts, 6 Cranch [10 U. S.] 148. But if it is a case of contract, or trust, or fraud, the principles of equity give the court jurisdiction wherever the defendant may be found; and the circumstance that a question of title may be involved in the inquiry, and even constitute the essential point on which the case depends, will not deprive the court of its jurisdiction. Id. In cases involving trust, contract, or fraud, a court of equity has jurisdiction in personam, wherever the person of the defendant is even casually to be found within its jurisdiction, although it may be unable to enforce its decree in rem, the property in controversy being out of its jurisdiction. Id. The courts of the United States have equity jurisdiction, to rescind a contract on the ground of fraud, after one of the parties to it has been proceeded against on the law side of the court, and a judgment has been obtained against him for a part of the money stipulated to be paid by the contract. Boyce v. Grundy, 3 Pet. [28 U. S.] 210. In the courts of the United States, the remedies in equity are to be not according to the practice of state courts, but according to the principles of equity as distinguished and defined in that country from which we derive our knowledge of those principles. Robinson v. Campbell, 3 Wheat. [16 U. S.] 212, 223. Consistently with this doctrine, it may be admitted that where, by the statutes of a state, a title which would otherwise be deemed merely equitable, is recognized as a legal title, or a title which would be good at law, is, under circumstances of an equitable nature, declared by such statute to be void, the rights of the parties, in such case, may be as fully considered in a suit at law in the courts of the United States, as they would be in any state court. Id. It has been settled, on great deliberation, that this court may exercise its original jurisdiction in suits against a state, under the authority conferred by the constitution, and existing acts of congress. State of New Jersey v. State of New York, 5 Pet. [30 U. S.] 284. The United States court has jurisdiction on appeal from the supreme court of the state of Ohio, in a case

been invested with jurisdiction in civil suits, and over complaints and prosecutions, in cases for fines, penalties and forfeitures accruing under laws of the United States; and it seems to be pretty generally admitted that the state courts are not bound to exercise jurisdiction although given, but it was optional with them to do it or not; and in some instances the state courts have acted in those cases, and in some have declined jurisdiction. In the state of New York, it has been settled that the state courts have concurrent jurisdiction upon habeas corpus with the United States courts, when the imprisonment was by an officer of the United States, by color or under pretext of the authority of the United States; and there has been the like practice in some other states, and in some jurisdiction has been declined. In the case of U. S. v. Dodge, 14 Johns. 95, the supreme court sustained a suit upon a bond for duties given to a collector of the United States customs. This was an action founded entirely upon the laws of the United States, and did not, and could not have existed prior to the adoption of the federal government. But the same court decided in the case of U. S. v. Lathrop, 17 Johns. 4, that they had no jurisdiction of a suit for a penalty incurred under the act now in question, and that jurisdiction could not be conferred by congress. This last case seems to be put upon the ground that the United States and the state governments are

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where was drawn in question, at the trial, the construction of the act by which Virginia ceded the territory she claimed north-west of the Ohio river to the United States, and of the resolution of congress accepting the deed of cession, and the acts of congress prolonging the time of completing titles to land within the Virginia military reservation; the decision of the supreme court of Ohio having been against the title set up under the acts of congress. Wallace v. Parker, 6 Pet. [31 U. S.] 680. If, upon a contract of sale, the purchaser pay a part of the purchase-money, and give his bond for the balance, and agree to give a mortgage upon the property purchased, to secure the payment of the bond, but fails to give it. and the vendor afterward conveys the property to another person; the court will decree the re-payment of the sum paid, and that the bond be delivered up and cancelled. Castor v. Mitchel [Case No. 2,507]. It was not sufficient to oust the jurisdiction of the equity side of the court, that the plaintiff has a remedy on the common law side; unless it appear that such remedy be adequate and complete to the object of the suit. Mayer v. Foulkrod [Id. 9,341]. Although a legatee has a remedy at common law, by the law of Pennsylvania, this does not oust the jurisdiction of the equity side of the circuit courts of the United States. To effect that, the common law side of those courts must be able to afford full, complete, and adequate remedy. Id. The judicial power of the United States extends to all cases arising under the constitution and laws of the general government; but the federal court can only exercise judicial power in cases in which it has been delegated to them by the laws of congress. Id. The act of 15th February, 1819 [3 Stat. 481], extends the jurisdiction of the circuit courts of the United States to suits both at law and in equity, arising under the patent laws; but it does not render the jurisdiction of those courts exclusive in such cases. Id. In the case of Crowell v. Randall, 10 Pet. [35 U. S.] 368, the court revised all the cases of jurisdiction under the 25th section of the judiciary act, and laid down the law as they wished it to be understood. Choteau v. Marguerite, 12 Pet. [37 U. S.] 507. Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit; to adjudicate or exercise any judicial power over them. State of Rhode Island v. Commonwealth of Massachusetts, Id. 657. And no court can, in the ordinary administration of justice in common law proceedings, exercise jurisdiction over a party, unless he shall voluntarily appear, or is found within the jurisdiction of the court sc as to be served with process. Such process cannot reach the party beyond the territorial jurisdiction. Id. The circuit court of the United States cannot entertain a bill of revivor where the controversy which it seeks to revive is now between citizens of the same state, though the parties in the original bill were citizens of different states. As where a bill of revivor was brought by an administrator, who was a citizen of the same state with the defendant, though his intestate was of a different state. Clark v. Matthewson [Case No. 2,857]. But where the parties are citizens of different states at the commencement of the suit, a subsequent change of domicil and citizenship will not oust the jurisdiction. Id. The courts of the United States, under the patent law of July 4th, 1836 [5 Stat. 117], have exclusive cognizance of suits in equity, relative to interfering patents, in cases where the court, under that law, is authorized to declare the patent inoperative and void, either wholly or in part, or as to any particular portion of the United States. Gibson v. Woodworth, 8 Paige, 132. A circuit court sitting as a court of law, may direct credits to be given on a judgment in favor of the United States, and may consequently examine the grounds on which such credits are claimed, and may direct execution to be stayed, until such investigation shall be made. U. S. v. McLemore, 4 How. [45 U. S.] 286. But it cannot entertain a bill on the equity side, for a perpetual injunction against the United States, from proceeding upon such judgment. Id. A decree or judgment cannot be given against the United States for costs. Id. The circuit court, as a court of equity, possesses no revisory power over the state courts, in the exercise of their jurisdiction. Tobey v. County of Bristol [Case No. 14,065]. The circuit court has ample power to entertain a cause over which the state court has jurisdiction, provided the circuit court have full concurrent jurisdiction. Id. When the circuit court possesses a full jurisdiction over a case, and the party has rights which he is entitled to have protected by its authority, the existence of concurrent jurisdiction in a state court, will not authorize it to decline jurisdiction over the cause; Story, J., Id. Although a party may have the right to sue in the courts of the United States, he still may elect to proceed in the state court. Delafield v. State, 2 Hill, 160. The jurisdiction of courts of probate in Louisiana, is confined to cases which seek an account and settlement of effects presumed to be held by the representative of a succession. It has not jurisdiction over cases of alleged fraud or waste, or embezzlement of the estate. Fourniquet v. Perkins, 7 How. [48 U. S.] 160. The district courts are courts of general civil jurisdiction. Id. Hence, where a petition was filed in the court of probate, against an administrator, praying that he might account, and also be held liable for mal-administration and spoliation, it was proper to transfer the case for trial to the district court. Id. The judgment in the district court being generally for the defendant, must be supposed to cover the whole case, and not to have rested upon only a branch of it, viz.: a release which was pleaded by the defendant. Id.

to be considered entirely as foreign to each other, and that the case falls under the rule, that the courts of one sovereignty will not take cognizance of and enforce the penal code of another. I cannot concur in this broad view of the relation in which the United States and the state governments stand to each other, or that the laws of the United States are to be considered as the laws of a foreign government. They are laws operating upon and binding on the same people as the government and laws of the several states. The laws of one state may be considered as foreign in relation to the government and actions of another state, because in no sense binding without the jurisdiction of the state. Not so with respect to the laws of the United States. The government of the United States and that of the states ought rather to be considered as parts of the same system. The law in question was binding on the people of the state of Vermont, and declared by the constitution to be the supreme law of the land, and the judges of this state are sworn to support the constitution. This was not a criminal prosecution, but a civil action to recover a penalty for breach of a statute. It was no more a suit or penalty created by a law of the United States, than was a suit for the collection of a duty-bond; both grew out of laws of the United States, and could not have existed without such laws. To sustain this suit, is not administering the criminal law of the United States. Actions for penalties are civil actions, both in form and in substance, according to Blackstone (3 Comm. 158). The action is founded upon that implied contract which every person enters into with the state to observe its laws. Cowp. 391; 2 Term R. 154; 4 Term R. 756. Congress cannot compel a state court to entertain jurisdiction in any case; they are not inferior courts in the sense of the constitution; they are not ordained by congress. State courts are left to consult their own duty from their own state authority and organization. Their jurisdiction of federal causes, says Chancellor Kent (1 Comm. 377), is confined to civil actions for civil demands, or to enforce penal statutes; they cannot hold criminal jurisdiction over offences exclusively existing, as offences against the United States. Every criminal prosecution must charge the offence to have been committed against the sovereign whose courts sit in judgment upon the offender. See 1 Kent, Comm. 370. The first plea, therefore, cannot be sustained.

With respect to the second question, as to the effect of the discharge from imprisonment, the statute of Vermont makes no exception in relation to claims or demands on the part of the United States; and I am not able to discover any sound principle upon which this case can be taken out of the statute by implication. The United States are a body corporate, having a capacity to contract, to take and to hold property, and in this respect stand upon the same footing with other corporate bodies; and if they will prosecute their suits in the state courts, and avail themselves of the state laws for this purpose, it is not perceived that any good reason can be given why such state process as they use for the purpose of enforcing their right, should not be subject to the state law. Had the suit been originally prosecuted in a court of the United States, and the imprisonment, under an execution, issued from such court, different considerations might have been presented. But there are no principles of prerogative applicable to the case, which will take it out of the statute, especially as this is not a debt exclusively due to the United States. The act gives a moiety only to the United States, and the other moiety goes to the collector or the informer, although the suit is in the name of the United States. The law authorizes the suit to be prosecuted in the name of the United States or the collector.

Exception has been taken to some informalities in the plea. These exceptions might have been entitled to some consideration, if they had been brought before the court upon a demurrer to the plea; but they come too late to be taken advantage of upon a writ of error.

The cause of action alleged in the declaration is substantially an escape from the prison limits. The plea sets up a discharge from the imprisonment, under the law of the state of Vermont; and all the material allegations in the plea to bring the case within the act, are substantially stated: and these were admitted by the demurrer. The judgment of the district court, upon the effect of such discharge, was, that it did not furnish any excuse for the escape, but that the bond for the jail limits was forfeited, notwithstanding such discharge under the state law. In this, I think, the court erred, and that the judgment must be reversed.

This view of the case might have rendered it unnecessary to express any opinion upon the first point; but as some question may possibly hereafter arise, whether the judgment recovered in the state courts was absolutely void or not, it was deemed expedient to express an opinion on that point also, although in this respect the judgment of the district court is not considered erroneous, but is reversed upon the other point in the case. Judgment reversed.

Case No. 13,342.

STEBBINS v. EDDY.

[4 Mason, 414.][1]

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

EQUITY — MISTAKE — VENDOR AND PURCHASER — QUANTITY.

1. Where a farm is sold at so much per acre, if the quantity be mistaken by the parties, a court of equity will relieve the party injured by the mistake.

[Cited in Trinkle v. Jackson, 86 Va. 241, 9 S. E. 986.]

2. In such case the vendee has a right to take the farm at the price of the real number of

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

acres, and to have compensation for the deficiency, if he has paid the consideration.

3. So where the sale is for a gross sum, and there is a positive representation of the quantity by the vendor.

[Cited in Farris v. Hughes, 89 Va. 933, 17 S. E. 519.]

4. But it may be otherwise, if the statement of the quantity be mere matter of description, and not of the essence of the contract: as where the contract contains the words, so many acres, "more or less," or "containing by estimation," &c.; for in such cases the vendee may take upon himself the risk of the quantity.

[Cited in Harrell v. Hill, 19 Ark. 102; Libby v. Dickey (Me.) 27 Atl. 255; Noble v. Googins, 99 Mass. 233; Tarbell v. Bowman, 103 Mass. 344. Distinguished in Belknap v. Sealey, 14 N. Y. 154. Cited in Paine v. Upton, 89 N. Y. 336; Pickman v. Trinity Church, 123 Mass. 7; Caldwell v. Craig, 21 Grat. 140; Crislip v. Cain, 19 W. Va. 496, 526; Depue v. Sergent, 21 W. Va. 333.]

5. But if there be any fraud or wilful misrepresentation of the quantity, equity will afford relief in these latter cases.

[Cited in Foster v. Swasey, Case No. 4,984.]

[Cited in Chrysler v. Canaday, 90 N. Y. 277; Morris Canal Co. v. Emmett, 9 Paige, 170.]

6. A sale was at first made of a farm upon a contract of so much per acre, to be ascertained by measurement. Afterwards the parties agreed to waive any measurement, and the vendee took the farm at the gross sum of $2500, supposing it to contain fifty acres, from the representation of the vendor; and in the deeds of conveyance the land was stated to contain forty-seven and a half acres, "more or less." *Held*, that as the vendor was not guilty of any fraudulent misrepresentation, but expressed his bonâ fide belief, the vendee was not entitled to relief in equity, although the quantity turned out, upon subsequent measurement, to be forty and a half acres only, each party having been well acquainted with the local boundaries of the farm.

[Cited in Phillbrook v. Enswiler, 92 Ind. 592; Cabot v. Winsor, 1 Allen, 551; Bradbury v. Haines, 60 N. H. 124; Davis v. Lottich, 46 N. Y. 400; Collette v. Weed, 68 Wis. 435, 32 N. W. 753.]

Bill in equity [by Artemas Stebbins against Michael Eddy] for a fraudulent misrepresentation in the sale of a farm, as to the quantity of land.

Mr. Randolph, for plaintiff.

Hunter & Robbins, for defendant.

STORY, Circuit Justice. This cause was argued at the close of the last November term of this court, and derives some of its interest and importance from the character of the parties, who are both clergymen, and the nature of the bill, which contains charges of fraud and misrepresentation. On the 21st of June, 1801, the parties entered into a written contract, whereby the defendant sold to the plaintiff a farm situate in Swansey, and agreed to execute a deed for the same in six weeks from that date. The plaintiff agreed to pay for the same at the rate of fifty dollars per acre. And the parties, "in consideration of the failure of the condition aforesaid," further bound themselves each to the other, "whichever may fail in the condition aforesaid," to pay the sum of fifty dollars. Both parties acted upon the supposition (in which they were doubtless mistaken in point of law), that the agreement was not binding upon them as an absolute sale, but that, at the option of either party, it might be rescinded upon the payment of the stipulated sum of fifty dollars. In consequence of this supposition, some correspondence took place between the parties towards the close of the stipulated period, as to the intention of the defendant to complete the conveyance, and on that occasion the defendant expressed his determination to fulfil his bargain. The ill health however, of the defendant, of which due notice was given to the plaintiff, postponed the actual execution of any deed to the plaintiff until the 17th day of August of the same year, when one tract, constituting part of the farm, was conveyed, at the request of the plaintiff, to one Winslow, a subpurchaser under him, and the residue was conveyed to the plaintiff. The deed to Winslow described the tract by metes and bounds, and as "containing seven and a half acres, be the same more or less;" and the deed to the plaintiff also described the residue of the farm by metes and bounds, and as "containing forty acres, be the same more or less." No measurement of the farm, though intended by the parties at the time of the original contract, took place; but upon the final negotiation, at the time of giving the deed, the land was affirmed by the defendant to contain, according to his belief, fifty acres and upwards; and the plaintiff, giving entire credit to the suggestion, paid or secured the consideration of twenty-five hundred dollars for the same, and has since discharged the whole amount. In point of fact, the land, as the bill asserts, upon a recent survey, contains forty acres and one half acre, and no more; and this assertion is not contradicted by the answer. The bill seeks compensation, for the asserted deficiency, at the rate of fifty dollars per acre, upon the ground, that the representation, that the same contained fifty acres, was fraudulent and deceitfully made, by the defendant, at the time of the execution of the conveyance, and was implicitly confided in by the plaintiff. The bill also prays general relief. The answer, in the most explicit manner, negatives any fraud and misrepresentation; but it admits that the defendant did, at the time of the original contract, as well as of the conveyance, represent to the plaintiff, that the farm contained, in his belief, fifty acres and upwards; and it asserts, that such was in fact the defendant's belief from all the information he had from old measurements and other sources. It further alleges, that at the time of the final negotiation the original contract of sale, at a specific sum per acre, was rescinded, and that the bargain was completed for a gross sum of $2500; and that the plaintiff distinctly understood,

that the defendant would not then complete the sale, unless for the sum of $2500, whether there were fifty acres or not, and the deed was drawn accordingly.

The first question, arising in the case, is, whether the original contract has been rescinded, so that it is no longer to be considered as a purchase at a stipulated price per acre, but a purchase for a gross sum, whatever might be the measurement of the farm. Upon the terms of the original contract it is quite clear, that the price was to be regulated by the acre, and if that contract formed the sole basis of the conveyance, it might be difficult to resist the plaintiff's title to a decree. The general rule in equity is, that, under such circumstances, if there is any mistake in the quantity, the party is entitled to take the land and have compensation for the deficiency. The reason is, that each party is supposed to be regulated in his bargain by the real quantity, and if there be any mistake as to the real quantity, the one has more, and the other less, than what both intended, either in land or price. In such cases the quantity conveyed constitutes an essential ingredient in the bargain, and is not mere matter of description. Equity, therefore, will correct the mistake, and put the parties in the situation in which they would have been, if the real facts had been known to them. This is the clear result of the authorities. Thus in Shovel v. Bogan, 2 Eq. Cas. Abr. p. 683, pl. 4, where A agreed with B, for the purchase of lands at so much per acre, and an old survey was produced, and the purchase money paid according to it, and there was a deficiency in the number of acres, the lord chancellor decreed compensation for the deficiency. Whether, in that case, there was fraud, or mere mistake, is, perhaps, not quite certain from the language attributed to the lord chancellor; but he deemed the production of the old survey a direct affirmation of the quantity, and therefore gave relief. The doctrine was fully recognized in Hill v. Buckley, 17 Ves. 394, where the master of the rolls said, "Where a misrepresentation is made as to quantity, though innocently, I apprehend the right of the purchaser to be, to have what the vendor can give, with an abatement out of the purchase money for so much as the quantity falls short of the representation. That is the rule generally, as, though the land is neither bought nor sold professedly by the acre, the presumption is, that, in fixing the price, regard was had, on both sides, to the quantity, which both supposed the estate to consist of. The demand of the vendor, and the offer of the purchaser, are supposed to be influenced, in an equal degree, by the quantity which both believe to be the subject of their bargain. Therefore a ratable abatement of price will probably leave both parties in nearly the same relative situation, in which they would have stood, if the true quantity had been originally known." Here, the principle was not only admitted, as to purchases by the acre, but it was applied to cases of purchases for a gross sum, where there is a positive representation of quantity. I say positive, for a different rule is, or may be, applied, where there are qualifying words annexed, as we shall presently see. And even where there is a positive statement of the quantity of acres, much may depend upon the manner and connexion of the statement, and the nature of the contract or conveyance, whether it is to be deemed mere description, or of the essence of the purchase. For support of this observation it is only necessary to refer to Mann v. Pearson, 2 Johns. 37; Powell v. Clark, 5 Mass. 355; Dagne v. King, 1 Yeates, 322; Smith v. Evans, 6 Bin. 102; and Boar v. McCormick, 1 Serg. & R. 166. But where there are qualifying words in the contract, as to the number of acres, such as the words "more or less," or "said to contain," or "containing by estimation," in these and the like cases, there has not as yet been adopted any general rule allowing the parties a compensation, either for deficiency or overplus, if the mistake has been innocent on both sides. In an anonymous case in Freeman's Reports (Freem. Ch. 107), it is reported, that a case was cited, where a man conveyed his land by the quantity of 100 acres, be it more or less, and it was not above 60 acres, but had no relief, because it was his own laches. Mr. Sugden (Vend., 3d Ed., c. 6) thinks this case open to much observation, and supportable only upon the ground of an actual conveyance before relief sought. But it may be explained upon another ground, and that is, that the boundaries were actually described, or the tract well known to both parties, though its reported contents were different from the real quantity. In Twyford v. Wareup, Finch, 310, where the conveyance stated, that there were so many acres by estimation, and the preliminary articles declared, that the lands completely contained so many acres, as were mentioned in a particular, which stated them as so many acres by estimation, the court denied relief for the deficiency. So in Winch v. Winchester, 1 Ves. & B. 375, where the particular of an estate, sold by auction, described it as "containing, by estimation, forty-one acres, be the same more or less," but it in fact contained five acres less, the master of the rolls thought, that merely upon this particular the party could not be entitled to any abatement of the purchase money. On that occasion, he said, "the effect of the words 'more or less,' added to the statement of the quantity, has never yet been absolutely fixed by decisions, being considered sometimes as extending only to cover a small difference the one way or the other; sometimes, as leaving the quantity altogether uncertain, and throwing upon the purchaser the necessity of satisfying himself with regard to it."

It was in the former light, that the words were considered by my learned brother, Mr. Justice Washington, in Thomas v. Perry [Case No. 13,908], and probably also in Nelson v. Matthews, 2 Hen. & M. 164, as it certainly was in Quesnel v. Woodlief, Id. 173, note, by the court of appeals of Virginia. See, also, Jollife v. Hite, 1 Call, 301. In the latter case, there was the ingredient of the sale being at a specific sum per acre, and in the former case, though the sale was for a gross sum, yet the title deeds of the vendor himself showed, that there was an over estimate in his own deed by twenty acres. These facts may have had a material influence in producing the decree for compensation. On the other hand in Hull v. Cunningham's Ex'rs, 1 Munf. 330, where the sale was for a gross sum, of a tract "said to contain 370 acres, be it more or less," the court held, that the purchaser took upon himself the risk of the quantity, and was not entitled to any abatement of the purchase money for any deficiency. Twyford v. Wareup, Finch, 311, proceeded on the same ground. So did Winch v. Winchester, 1 Ves. & B. 375; Smith v. Evans, 6 Bin. 109; Boar v. McCormick, 1 Serg. & R. 166; and Glen v. Glen, 4 Serg. & R. 488. In short, the latest cases generally concur with the doctrine laid down in the anonymous case in Freem. Ch. 107. It seems to me, that there is much good sense in holding, that the words "more or less," or other equivalent words, used in contracts or conveyances of this sort, should be construed to qualify the representation of quantity in such a manner, that, if made in good faith, neither party should be entitled to any relief on account of a deficiency or surplus. Nor am I prepared to admit that the fact, that the sale is not in gross, but for a specific sum, by the acre, ought necessarily to create a difference in the application of the principle. I do not say, that cases may not occur of such an extreme deficiency as to call for relief; but they must be such as would naturally raise the presumption of fraud, imposition, or mistake in the very essence of the contract. Where the sale is fair, and the parties are equally innocent, and the quantity is sold by estimation, and not by measurement, there is little, if any hardship, and much convenience in holding to the rule, caveat emptor.

But to recur to the question, whether the original contract has been varied or rescinded. The defendant positively asserts the fact in his answer (and it opposes on this point the allegations of the bill), that at the time of the conveyance the sale was for the gross sum of 2500 dollars, whether the quantity was more or less than fifty acres. This state of things is perfectly compatible with the terms of the original contract. It was necessary, by these terms, that the number of acres should be ascertained by a measurement and survey before the conveyance could be completed. There was nothing unnatural in an agreement of the parties to waive the measurement, and to finish the contract upon an estimate of the quantity. Each of them well knew the land and its boundaries, and each had, or at least might have, equal means of ascertaining the probable quantity. It is true, that the plaintiff placed great reliance on the statements of the defendant, and had confidence in his sincerity and good faith. If the defendant's statements contained his real opinion in sincerity and good faith, the confidence of the other party, though now shown to be erroneously given, ought not to prejudice him. If the mistake was mutual and innocent, it ought not to be visited with the same consequences, as if it were fraudulent. Now, the terms of the conveyance are very strong to prove, that the defence, so far as the point of waiver of the terms of sale by the acre is concerned, is well founded. In the first place, the land specified in the deed to Winslow is described as "containing seven and a half acres, be the same more or less," and in the deed to the plaintiff as "containing "forty acres, be the same more or less," making in the whole forty-seven acres and one half, and no more. So that upon the face of the deed the estimation is less than fifty acres. This certainly cannot be accounted for except upon the supposition that neither party deemed the estimate of fifty acres previously made as binding, controlling, or absolute, but merely as a fair representation of belief or probability. In the next place, the words "more or less" restrain even this representation of the number of acres in the deed. They show, that neither party contemplated the number of acres as of the essence of the contract, but as matter of description, as what both believed, and neither warranted, to be the absolute contents of the farm. The whole weight of the evidence is to the same effect. It shows, that the defendant did not undertake to affirm positively in the course or conclusion of the negotiation, that there were fifty acres, or any other certain number, but that he would not sell short of estimating the farm at fifty acres, that is, for 2500 dollars. How can the sale of forty-seven and a half acres, "more or less," on the face of the deeds, be reconciled with an absolute sale at fifty dollars by the acre for fifty acres? We must, therefore, take the case to have been, that the parties concluded their bargain, and made the conveyance for the gross sum of 2500 dollars, though the farm might exceed or fall short of that quantity. Suppose the farm had measured forty-seven and a half acres, could there have been any pretence for compensation to the plaintiff in the face of his deeds? Suppose it had exceeded fifty acres, could he have been compelled to pay more purchase money? The answer to each question must be in the negative. Upon this point the case of Twyford v. Wareup, Finch, 310, is very significant. The court there said, "that the articles were only a security and preparatory to the conveyance,

and the defendant, having afterwards taken a conveyance, shall not resort to the articles or to any particular, or to any averment, or communication afterwards; for such things shall never be admitted against the deed." So in Smith v. Evans, 6 Bin. 102, Chief Justice Tilghman considered, that the original contract, which was for three tracts of land, containing 991¼ acres, at a specified price by the acre, was done away, or rather conclusively closed, as to quantity, by taking a deed by metes and boundaries of the tracts as "containing 991¼ acres, &c., by the same more or less." "By accepting this deed (said he) it appears to me, that the agreement, so far as concerned the quantity, was closed, both parties consenting to estimate it at 991¼ acres." And though the deficiency in that case was 88 acres, as there was no pretence of fraud, the court enforced payment of the securities for the whole purchase money. This case is far stronger than the present; but it has much in its principle, which commends it for adoption in practice. My judgment accordingly is, that the original contract of sale at fifty dollars by the acre was so far waived or modified by the parties, that the number of acres did not form the basis of the ultimate conveyance, but the farm was purchased upon an estimate assumed by the parties, and at a gross sum.

This leads me to the next, and, indeed, upon the structure of the bill itself, to the only important point of the controversy; and that is, whether there has been a fraudulent misrepresentation of the quantity by the defendant. The case has been argued also upon the ground of mere mistake; but the bill does not put the charge under this aspect, nor assume it as a ground of relief. The court, therefore, must deal with the case, as it is, secundum allegata et probata. The whole stress both of the allegations and proofs is, that the defendant represented his opinion and belief of the quantity in such a manner, as to gain the entire confidence of the plaintiff. There is no pretence, that the plaintiff made any positive assertion of fact, in the nature of a declaration of his knowledge, or of his warranty of quantity. The whole was confined to an expression of opinion and belief, and was so understood and acted upon by both parties. The contradiction, therefore, of the defendant's good faith is to be established, not by showing, that the quantity is different from the representation, but that the opinion and belief of the plaintiff were fraudulently misrepresented to the injury of the plaintiff. It has been suggested at the bar, that fraud cannot be predicated of belief, but only of facts. But this distinction is quite too subtle and refined. The affirmation of belief is an affirmation of a fact, that is, of the fact of belief; and if it is fraudulently made to mislead or cheat another, to abuse his confidence, or to blind his judgment, it is in law and morals just as reprehensible, as if any other fact were affirmed for the like purpose. The law looks, not to the nature of the fact averred, but to the object and design of the affirmation.

It is very material in this part of the cause, that the defendant's answer is so full, direct, and circumstantial in the denial of the fraud and misrepresentation. In a court of equity nothing short of clear and decisive testimony by two witnesses, or by other circumstances quite equivalent, ought to outweigh such an answer. In the complaint brought by the plaintiff before the church, of which the defendant is the pastor, there is an allegation of fraud; but if the testimony of the witnesses, as to the occurrences which took place before the proper authorities on that occasion, is to be credited, the plaintiff abandoned that charge, and denied his intention to make or persist in it. Such an admission would go very far to weaken the force of the charge.

The circumstances principally relied on to sustain the charge are, in the first place, the conduct of the defendant about the time of executing the conveyance. He made inquiries as to the state of the plaintiff's mind in relation to the purchase, and whether he was eager and earnest for the bargain. Having received information that the plaintiff was, in the language of a witness, "pretty fierce" to buy, the argument attributes to him the determination to make the most of his advantages. This may be a circumstance not wholly without weight; but it is surely too slight to rouse a suspicion of grave and intentional fraud. It may show wariness, and watchfulness, and worldly prudence in ascertaining how to negotiate with a willing purchaser; but it can scarcely pass for more than the indication of a wish to drive a close and thrifty bargain.

Another circumstance of more significance is the fact of the representation of the property in the probate inventory of the father's estate, presented and sworn to by the defendant, as executor under his will. The defendant took by a deed from his father one of the three tracts of land composing the farm, estimated at about twenty acres. The father, by his will, gave a parcel, estimated to contain about twenty-two acres, to one person, and another parcel, estimated to contain about one acre, to another person; and the residue of his real estate was devised to the defendant. In the inventory, the real estate of the father is represented to be "forty acres of land with one dwelling-house thereon." The argument drawn from these facts is, that, deducting the 23 acres given to other devisees, there could remain not exceeding 17 acres devised to the defendant; and therefore, uniting the tract, thus devised, with that which the defendant took by deed, there was within his own knowledge an estimated quantity, not exceeding thirty-seven acres. This argument is met on the other side by the allegation, that the inventory was by mere estimation,

and not by measurement; and that in cases of this sort it is not usual, especially where the estate is solvent, to be exact in the statement of the number of acres. The executor affirmed the inventory simply, because it was so returned by the appraisers. There is weight in this suggestion; and it derives some aid from the devise of the tract of twenty-two acres, which is described in the will, not by absolute quantity, but by metes and bounds, as containing "about 22 acres, be the same more or less." The circumstance, however, is not without importance; and it certainly called upon the defendant for much caution in his affirmations as to the quantity.

Another circumstance is, that upon a prior negotiation with certain persons of the name of Sherman for the purchase of the estate, the defendant represented the farm to contain forty-five acres. This fact comes out from both of the persons who negotiated for the purchase. But both agree that it was a mere estimation, and not a positive representation. A certificate of this fact was laid before the church meeting; and another witness asked the defendant at another time, why this representation was made. His answer was (as the witness states), "that it was in time of war, when it was not prudent for a man always to tell exactly what he was worth." I own that this excuse is very unsatisfactory. In the case of an intended sale it could form no ground for an undervaluation of the property, whatever might be the case for other purposes. The excuse, under any circumstances, if it involved a known misrepresentation, would not be very creditable; and it is less easily reconcilable with the high standard of moral purity, so appropriate in clergymen, than with that which is found in the common business of human life. The view, however, in which it bears on the present controversy, is not one of ethics, but of fact. Does it show, that the defendant himself misrepresented his own opinion and belief to the plaintiff, or, only, that he sometimes, when his own interest was concerned, used language without much care, and in a loose and inaccurate sense?

The other circumstances of the case have not presented any serious difficulty to my mind. This circumstance, I am compelled to admit, is calculated to make an unfavorable impression. It has a tendency to diminish, in some degree, that undoubting confidence, with which one would listen to the direct denials of the answer. But after pausing with much deliberation upon all the facts, I cannot say, that this circumstance ought to overcome them. The representation in the conveyances is of forty-seven acres and one half only; and here, giving this testimony its whole force, the prior representation reduces the quantity to forty-five. This difference is not such as would or ought, ordinarily, to introduce a presumption of ill faith. The estimates of men of quantities, in themselves uncertain, and unmeasured, may differ at different times from various circumstances, without any suspicion of wilful misrepresentation. What is matter of opinion, in such cases, carries with it the elements of doubt. Better information, more reflection, and more guarded attention may honestly change the belief of the party; and if his interest lies that way, it more readily draws his judgment to the most favourable conclusion. It would sound harsh, under such circumstances, to found a decree as upon fraud, where there might be innocent mistake, loose and inconsiderate assertion, or negligent inquiry. Especially would it be harsh to press such considerations against a solemn denial under oath, unless the judgment of the court could not justly avoid the conclusion. The case of fraudulent misrepresentation does not appear to me to be made out, so that a court of equity ought to interfere. My opinion is, that the bill ought to be dismissed; but it is not a case for costs for the defendant.

The district judge concurs in this opinion, and therefore let there be a decree of dismissal without costs. Decree accordingly.

STEBBINS (GILL v.). See Cases Nos. 5,431 and 5,432.

Case No. 13,343.

STEDMAN et al. v. HAMILTON et al.

[4 McLean, 538.] [1]

Circuit Court, D. Indiana. May Term, 1849.

CONTINUANCE—AFFIDAVIT—SUFFICIENCY OF.

An affidavit that the defendant can show, by a certain witness, that the goods were damaged when bought, for which the note sued on was given, without alleging that the fact was unknown to the plaintiff, is not sufficient ground for the continuance of a cause.

[This was an action by Stedman, Maynard & Co. against Hamilton & Hamilton.]

OPINION OF THE COURT. A motion is made for a continuance on an affidavit, that the note on which the action was given was for merchandize—a part of which, at the time of sale, was damaged, which fact the affiant, one of the defendants, believes he can prove, if the case is continued. That process was served only a few days before the time expired for service of process; that the clerks of plaintiffs, and Composette, clerk of defendants, reside in Ohio; and their attendance can not be procured at the present term. This affidavit is insufficient. It does not show that the unsoundness of the goods was unknown to the defendants. It does not show the extent of the defects in the goods. The writ was served thirty-five days

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

before the commencement of the present term, and the material witness is in the employ of defendants, and, it is said, not more than thirty-five miles from his residence. These considerations are sufficient to deny the motion for a continuance, without going into the consideration whether the defense could be set up, if proved.

STEDMAN (LOTHROP v.). See Case No. 8,-519.

Case No. 13,344.

STEEGMAN et al. v. MAXWELL.

[3 Blatchf. 365.] [1]

Circuit Court, S. D. New York. Nov. 30, 1855.

CUSTOMS DUTIES—PROTEST—FUTURE APPLICATION—THREAD LACES.

1. A protest against the payment of 25 per cent. duty charged on thread laces, claiming that the laces are liable to a duty of only 20 per cent., is a sufficient protest, under the act of February 26, 1845 (5 Stat. 727).

[Applied in Frazee v. Moffitt, 18 Fed. 586. Cited in Davies v. Miller, 130 U. S. 287, 9 Sup. Ct. 561.]

2. Where a person engaged in the importation of thread laces, protested, in proper form, against the exaction of 25 per cent. duty on a particular importation, claiming that it was liable to only 20 per cent. duty, under a specified schedule of the tariff act then in force, and added, in the same protest, "I mean this protest to apply to all like exactions heretofore paid, and to all future, and shall claim a return thereof:" *Held*, that that was a sufficient protest, under the said act of 1845, against the exaction, when made on any future importation by the same party, without the repetition of the protest on each importation.

[Cited in Hutton v. Schell, Case No. 6,961; Wetter v. Schell, Id. 17,470; Ullman v. Murphy, Id. 14,325; Arthur v. Morgan, 112 U. S. 501, 5 Sup. Ct. 244; Schell's Ex'rs v. Fauche, 138 U. S. 562, 11 Sup. Ct. 380.]

3. Thread laces, being a manufacture of linen and cotton, first introduced into trade in the United States after the passage of the tariff act of July 30, 1846 (9 Stat. 42), are liable to a duty of 20 per cent., under Schedule E of that act, and not to a duty of 25 per cent., as "cotton laces, etc.," under Schedule D of that act.

This was an action [by Henry Steegman and others] against [Hugh Maxwell] the collector of the port of New York, to recover back an excess of duties. The jury found a verdict for the plaintiffs, subject to the opinion of the court on a case.

John S. McCulloh, for plaintiffs.

J. Prescott Hall, for defendant.

BETTS, District Judge. The plaintiffs, from the year 1849 to the year 1852, inclusive, imported thirty-two invoices of laces from Liverpool into this port, and entered them at the custom-house, as subject to a duty of 20 per cent. A duty of 25 per cent. was imposed upon them, and was exacted by the defendant. This action is brought to recover back $1,392.30, the difference of duties so paid.

It was proved, that the goods in question were invoiced as thread laces and lawn laces, and were composed of linen and cotton combined in the manufacture. They are a new article in trade, manufactured wholly by machinery, and were first introduced into commerce and trade in the United States in 1847 or 1848, and are known in commerce as thread laces. They have never been known commercially under the denomination of "cotton laces," "cotton insertings" and "cotton trimming laces," which articles were well known in commerce prior to the passage of the tariff act of 1846, and are composed wholly of cotton.

Exception is taken, on the part of the defendant, to the sufficiency of the protests in this case. In most instances, a protest was indorsed on each entry, and was written and signed prior to the payment of the duty exacted. These protests were all, in substance, that the plaintiffs protested against the payment of 25 per cent. duty charged on thread laces (or loom thread laces), claiming that said laces were liable to a duty of only 20 per cent. This, in our judgment, was sufficiently "setting forth distinctly and specifically the grounds of objection to the payment" of the duty demanded, to meet the requirements of the act of February 26, 1845 (5 Stat. 727). Dutiable articles are scheduled, by the tariff act of July 30, 1846 (9 Stat. 42), under the rates of duties imposed upon them. A notice to the collector that a denomination of goods which is justly liable to a duty of only 20 per cent., as "thread laces," is wrongfully placed by him under the schedule of 25 per cent. duties imposed on "cotton laces, cotton insertings, cotton trimming laces, cotton laces and braids," is notice to him, adequately distinct and specific, of the grounds of objection to the payment demanded, to satisfy the provisions of the statute. Some of the protests designate the particular schedule and name under which the importation should be ranked; but we think the more common form of protest before recited is a sufficient compliance with the statute, to authorize the plaintiffs to maintain their action.

In August, 1849, the plaintiffs made, upon one of the entries, the following protest in writing: "We hereby protest against being compelled to pay 25 per cent. duty on thread lace and inserting in 165 a 167, because the article is so known commercially, and is provided for under Schedule E of tariff act of 1846, at a duty of 20 per cent. We mean this protest to apply to all like exactions heretofore paid, and to all future, and shall claim a return thereof." The point raised by this protest was considered in Marriott v. Brune [Case No. 2,052], 9 How. [50 U. S.] 619, 636. The circuit court in Maryland decided that a prospective notice was a compliance with the act of congress, and the supreme court affirmed that

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ruling in respect to the facts then present, but with some hesitation as to adopting it as a general principle. Nothing has since transpired in that court recalling the decision then made, and, in this circuit, it has since been regarded and acted upon as laying down the true rule. We perceive no legal reason for calling upon the plaintiffs in this case to reiterate their protest at every entry of their goods, when they are engaged in a trade in a specific description of commodities, and have distinctly apprised the collector that they shall claim a return of all duties exceeding 20 per cent. ad valorem, exacted on their future importations of those goods. The collector must be assumed to act against a notice as specific, in such case, as if it were repeated to him toties quoties as often as invoices and entries are presented. Judgment for plaintiffs.

Case No. 13,345.

In re STEELE et al.

[7 Biss. 504;[1] 16 N. B. R. 105.]

District Court, E. D. Wisconsin. July. 1877.

BANKRUPTCY—VALIDITY OF LEVY—ATTACHMENTS—LIEN—PRIORITIES.

1. Where an attachment upon property of the bankrupt for its full value is dissolved by an adjudication, a judgment creditor who has made a levy subject to such attachment is not entitled to priority as against the assignee.

[Cited in Re Nelson, Case No. 10,100; Claridge v. Kulmer, 1 Fed. 402.]

2. But where a creditor has obtained a valid and effectual lien by attachment, and has prosecuted his suit to judgment, and made an execution levy, his lien under such levy is to be considered as prior in time to that of other creditors who have levied attachments intermediate the attachment and execution levy of such creditor, and is not affected by the dissolution of such attachments.

[In the matter of Roscoe R. Steele and others, bankrupts.]

Mr. Pereles, for petitioners.

Jenkins, Elliot & Winkler and Mr. Noyes, for assignee.

DYER, District Judge. The petitioners, S. A. Field, and Blair & Persons, who are creditors of the bankrupts, apply for an order directing the assignee to pay to them the amount of certain judgments, recovered by them against the bankrupts before the bankruptcy, and upon which judgments they claim that they obtained, by virtue of execution levies, liens upon certain property. The facts necessary to consider are these:

On the 3d day of January, 1877, John Bromley and others, creditors of the bankrupts, commenced suit against their debtors in the circuit court of Milwaukee county, to recover the sum of three hundred and nineteen dollars and thirty-five cents and interest, and attached a certain stock of goods belonging to the bankrupts. On the same day Henry Newberger and others commenced suit by attachment in the state court against the bankrupts to recover the sum of one thousand three hundred and twenty-eight dollars and five cents and interest, and attached the same stock of goods attached in the action before named. On the same 3d day of January, the petitioner, Samuel A. Field, commenced an attachment suit against the bankrupts before a justice of the peace, to recover about the sum of two hundred dollars, and attempted to attach the same goods, subject, however, to the two attachments before mentioned, which were prior in time. On the fourth day of the same month, the petitioners, Blair & Persons, commenced an attachment suit against the bankrupts before a justice of the peace, to recover about the sum of seventy-five dollars, and attached said stock, subject to said prior attachments. On the 5th day of January, Enoch R. Artman and others, creditors of the bankrupts, commenced an attachment suit against them in the circuit court of Milwaukee county, to recover the sum of two thousand one hundred and ninety-two dollars and sixty-two cents and interest, and attached the same property, subject to the prior seizures.

According to an inventory and appraisal made by the officer under the first attachments, the entire stock of goods attached in all the cases was of the value of two thousand four hundred and fifty-eight dollars and one cent. Facts disclosed by the affidavits show that, in the suit brought by the petitioner Field, no valid seizure under the attachment issued in that case was made, but on the 18th day of January, 1877, judgment was obtained for two hundred and sixteen dollars and twenty-nine cents, and execution was on the same day issued, and levy under the execution upon said stock was made, subject to the prior attachments. Judgment was also rendered January 11th, in the action commenced by the petitioners, Blair & Persons, for the sum of seventy-six dollars and fifteen cents, and execution was issued on the same day, and levy made, subject to the lien of prior attachments. There is no evidence that these judgments were obtained, or the execution levies made, by any collusion with the debtors. Judgments were never obtained in the actions commenced respectively by Bromley et al., Newberger et al., and Artman et al.; but subsequently, and within four months subsequent to the 3d day of January, when the first attachment was issued, bankruptcy proceedings were instituted against Steele & Rolf, and they were adjudged bankrupts, and an assignee was chosen. On the 8th day of February, 1877, the sheriff holding the stock of goods under the attachments and execution levies made a general surrender of possession of the goods to the assignee, excepting a certain portion set apart under the levies upon execution made in favor of petitioners, Field and Blair

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& Persons, and which portion, when so set apart, it would seem was left with the assignee as custodian, under an agreement that it was to be re-delivered on demand, or that the assignee would pay the amount of the executions.

Upon this state of facts, petitioners claim that they are entitled to be paid the amount of their judgments in full.

The three attachments pending at the time of the adjudication in bankruptcy were dissolved by operation of law. Inasmuch as no valid seizure under attachment was made in the action brought by the petitioner Field, he acquired no lien upon the property, until his execution levy, January 18th, if indeed any was then acquired. The levy then made was necessarily subject to the attachments in favor of Bromley, Newberger, and Artman, which were prior in time, to say nothing of the attachment in favor of Blair & Persons. The value of the entire property attached being two thousand four hundred and fifty-eight dollars and one cent, and the demands in favor of Bromley, Newberger, and Artman, amounting in the aggregate to three thousand eight hundred and forty dollars and two cents, it appears that, at the time of the execution levy by Field, the entire value of the property was covered by demands, to secure which the three prior attachments before named were issued. In other words, all the right which the petitioner Field acquired was by a levy on property already subject to attachments to its full value. The question, then, is, did the dissolution of the prior attachments inure to the benefit of the judgment creditor, and can he be let in to claim priority as against the assignee in bankruptcy?

Upon this question the courts have not been silent; and without extended discussion it may be determined upon a brief review of the decisions.

In the Case of Klancke [Case No. 7,864], the property of the bankrupt was seized upon attachment. After the levy of the attachment, judgments were obtained by other creditors and executions were issued and levied upon the property previously attached. The amount of the prior attachment exceeded the gross amount of the property; and the property having been converted into money, and bankruptcy proceedings having been commenced against the debtor, the judgment creditors applied for payment in full, claiming that the attachments having been discharged, and they having a bona fide levy under their executions before the filing of the petition in bankruptcy, the lien of their executions was saved, and that they were entitled to preference. Judge Benedict denied the application, holding that the provisions of the act for preserving existing securities do not indicate any intention to improve the condition of any creditor or create new rights; that all the right which the judgment creditors acquired was by a levy on property already subject to an attachment to its full value, and that such a levy gave the judgment creditors no security, and did not entitle them to apply to the court for a payment of their judgments in full out of the proceeds of the estate.

The case of Johnson v. Rogers [Case No. 7,408], was one where the bankrupts had executed a general assignment of all their property for the benefit of creditors. Subsequently certain creditors commenced actions and recovered judgments which were claimed to be liens upon real estate. Bankruptcy followed, and a contest arose between the assignee in bankruptcy and the judgment creditors respecting the validity of the liens asserted by these creditors. And although Judge Wallace holds that, if an assignment is void as intended to hinder creditors, a creditor may obtain a lien upon the real estate by getting a judgment against the debtor, and upon the personal property by the levy of an execution thereon, and that such liens will be valid as against the assignee in bankruptcy if they are obtained before the commencement of the bankruptcy proceedings, he nevertheless lays down this proposition in his opinion: "If the assignment had been void only because contrary to the provisions of the bankrupt act [of 1867 (14 Stat. 517)], and the assignee in bankruptcy had obtained a decree setting it aside upon this ground, the judgments of the several creditors would not have been liens upon the real estate; as against these judgments the assignment would have been effectual to transfer the title to the original assignees. If these creditors had no liens prior to the commencement of the proceedings in bankruptcy they would acquire none thereafter, and the assignee in bankruptcy would take the property as it was at the commencement of the proceedings, for distribution to all the creditors of the bankrupt, in conformity with the terms of the bankrupt act."

The Case of Beisenthal [Case No. 1,236], determined in the circuit court of the United States for the Northern district of New York, was also one of voluntary assignment of property for the benefit of creditors without preference. Afterwards, creditors recovered judgments and issued executions by virtue of which levies upon personal property were made. Subsequently, bankruptcy proceedings were commenced against the assignors, and the question was, whether the assignee in bankruptcy was entitled to the proceeds of the property to the exclusion of the execution creditors' claim of priority. The assignment made by the bankrupts was not made to hinder, delay, or defraud creditors, but was held void under the bankrupt law against the assignee in bankruptcy; and Judge Johnson holds that, upon avoidance of the assignment by the assignee in bankruptcy, judgment creditors who had levied upon the property, after the assignment and before the commencement of the proceedings

in bankruptcy, have no priority over the assignee. He says: "When the assignee recovers the property, he takes it as the debtor had it at the time of the act which the assignee avoids, so far as creditors of the debtor are concerned. Avoiding the transfer in favor of the assignee in bankruptcy does not revest the property in the debtor, but vests it directly in the assignee, who takes it by virtue of the statute. The transfer by the debtor, good against him and good against his creditors, prevents any lien by subsequent judgment or execution. Upon the property so situated the statutory transfer to the assignee in bankruptcy operates directly, and cannot be subjected to the liens of intervening judgments and executions without overthrowing both the language and the policy of the bankrupt law in its most vital provisions."

In the Case of Badenheim [Case No. 716], it was held that where the property of the bankrupt had been attached, and other creditors had subsequently obtained a judgment under which an execution levy of the same property was made, and bankruptcy proceedings followed, by virtue of which the attachment was dissolved, the seizure under the attachment held the property free from the lien under the execution up to the dissolution of the attachment by the bankruptcy proceedings, so that there was no time at which the lien under the execution could attach.

While perhaps the reasoning in the last-mentioned case is liable to be questioned, the general principles laid down in the cases referred to seem to be sound. It is not to be overlooked that we are dealing with a case where the prior attachments embrace demands sufficient in amount to exhaust the entire value of the attached property. If those attachments were to stand untraversed and unaffected by the bankruptcy proceedings, the judgment creditor now claiming priority would get nothing. The attachments being dissolved as a consequence of the bankruptcy proceedings, to permit a subsequent judgment creditor to intercept the fruits of avoiding the attachments, and thus prevent equal distribution, in the language of Judge Johnson, "would subvert the whole laudable purpose of the bankrupt act so far as creditors are concerned." The analogy in this respect between the case of an attachment and that of an assignment for the benefit of creditors is apparent, and the same principles may be invoked in determining the rights of parties in both cases.

Both the assignment and the attachment are good against the debtor and against his creditors. Both are avoided only by operation of law. No more in one case than in the other where the entire property is exhausted by the attachment, or covered by the assignment, can intervening judgments and executions secure to particular creditors, liens which have priority against the assignee in bankruptcy. Attachments issued within a limited period before the commencement of bankruptcy proceedings are dissolved by the bankrupt law for the benefit of all creditors, and not for the benefit of a few; and it was not intended by the law to bestow upon particular creditors new or better rights, as the result of the avoidance of such attachments.

It should be observed, that in the case of MacDonald v. Moore [Case No. 8,763], Judge Blatchford held that when an assignment is set aside at the suit of an assignee in bankruptcy, a creditor who levied on the property assigned, before the commencement of the proceedings in bankruptcy, and after the execution of the assignment, is entitled to priority. The ruling in this case, as will be seen, is not in accord with the other cases cited, and though the supreme court of the United States has strongly enunciated the principles upon which, under the bankrupt law, the rights of judgment creditors are to be determined (Wilson v. City Bank [17 Wall. (84 U. S.) 473], cited by Judge Blatchford), it seems irreconcilable with a just administration of the law to hold that where the property of a debtor has been attached to its full value, and where a subsequent judgment creditor makes a levy upon the same property, that such creditor gets a security which, upon dissolution of the attachment by reason of bankruptcy proceedings, gives him priority.

The position of the case of the petitioners Blair & Persons is different. They made an effectual and valid levy by attachment on the 4th day of January, 1877. Their attachment was subject only to the attachments in favor of Bromley et al., and Newberger et al. The aggregate amount of the demands in those two cases was one thousand six hundred and forty-seven dollars and forty cents. This did not exhaust the full value of the attached property, but left a surplus of eight hundred and ten dollars and tixty-one cents, upon which Blair & Persons could acquire an effectual lien. Holding their attachment levy, they prosecuted their suit to judgment and made execution levy, which was in force when bankruptcy proceedings were commenced. It is true that, intermediate their attachment and execution levy, other creditors—Artman et al.,—commenced suit by attachment against the bankrupts, and made seizure of the property, which seizure was in force at the time of the execution levy by Blair & Persons. But the right or lien acquired by Blair & Persons by virtue of their attachment was prior in time, and its priority as to the surplus of the property over and above the attachments of Bromley and Newberger continued to time of judgment, and was preserved in the execution levy. Blair & Persons were then in the position of judgment creditors, holding, at the time bankruptcy proceedings were commenced, an effectual lien by bona fide execution levy on property more than sufficient

to pay their demand and also the demands of prior attaching creditors. The dissolution of the attachments in the then pending actions by operation of the bankrupt law did not improve their condition or extend their rights. They occupied the same position after the discharge of the attachments that they held before, and their lien must be recognized.

The application for payment of the judgment in favor of Field will be denied, and that in favor of Blair & Persons will be granted.

Case No. 13,346.

In re STEELE.

[2 Flip. 324;[1] 19 N. B. R. 41; 8 Cent. Law J. 86.]

District Court, W. D. Tennessee. January 11, 1879.

BANKRUPTCY—EXEMPTIONS.

1. Where the register allowed the bankrupt, who was engaged in commerce, a watch of small value: *Held*, proper, as the same was a necessary article.

[Cited in Stewart v. McClung, 12 Or. 431.]

2. The court construes the words in the bankruptcy act [of 1867 (14 Stat. 517)] "other articles," "necessaries," and "wearing apparel," also what is meant in the books by "necessaries."

In bankruptcy.

HAMMOND, District Judge. By agreement between the assignee and the bankrupts, the question is submitted for the opinion of the court, as if on certificate of the register, whether or not the refusal of the assignee to allow them each his gold watch as exempt property, is proper under the circumstances set out in the agreement of facts. John Steele has been allowed, and claims no exemption except this watch, which is described as "a plain, old style, single case gold watch, which he has owned for twenty-five years or more, and which would scarcely sell for twenty-five dollars." R. L. Steele has been allowed household furniture worth not more than one hundred dollars. The kind and value of his watch is not stated.

The decisions on this subject are conflicting. I have examined a good many cases on the general subject, and find that the conflict grows out of the diverse views as to whether the particular articles claimed are necessaries or luxuries, useful or only ornamental. It is said in Montague v. Richardson, 24 Conn. 338, that each case must depend upon its own peculiar circumstances. I think this is a correct view, and that in some cases the assignee may and should allow a watch or other time-piece, and in others he should not. These parties were a firm of merchants, and their valuable assets had been surrendered to their creditors. They proposed to engage again in commercial pursuits. It was held in Harrison v. Mitchell, 13 La. Ann. 260, that a desk and iron safe were exempt as necessary implements, to carry on the business of a commercial man.

It would not be doing any great violence to the meaning of the term "wearing apparel," as used in the bankrupt act, to include in it a gold watch of moderate value. The definition of the word "apparel," as given by lexicographers, is not confined to clothing; the idea of ornamentation seems to be a rather prominent element in the word, and it is not improper to say that a man "wears" a watch or "wears" a cane. The exemption law of Arkansas says that "wearing apparel shall be exempt, except watches." Ark. Dig. 503, 504; James, Bankr. 58; Avery & H. Bankr. 68. In Peverly v. Sayles, 10 N. H. 356, under a statute which exempted "wearing apparel necessary for immediate use," it was held that an overcoat and a suit of clothes "to go to meeting in" were included. In Ordway v. Wilbur, 16 Me. 263, cloth sent to a tailor to be made into clothes was in that form held to be exempt as "apparel."

In Bumpus v. Maynard, 38 Barb. 626, the debtor was in bed—his clothes were on a chair, and his watch on a table. The officer was sued for refusing to levy on them, and it was held that they were exempt as "wearing apparel," notwithstanding they were not on the person. There are some expressions in the case which indicate that possibly the court did not intend to include the watch as "wearing apparel," but it is probable they did. It was decided in Smith v. Rogers, 16 Ga. 479, that a watch was not wearing apparel. But in Mack v. Parks, 8 Gray, 517, it was held, in a case where an officer with an attachment asked the debtor to let him look at his watch, and being permitted tore it from his person by breaking the cord to which it was attached, that the watch was exempt from seizure at common law, because by that law wearing apparel on the person was exempt from levy or distraint. See Freem. Ex'ns, § 232.

We have no state statute in Tennessee, that I can find, exempting wearing apparel, and we depend on this common law principle for immunity in such cases. It is said in Richardson v. Duncan, 2 Heisk. 220, that our exemption laws are to be liberally construed, and this is the universal doctrine of modern times. In that case it was held that an "ass" is included in the statute which exempts "a horse, mule, or yoke of oxen;" and in Webb v. Brandon, 4 Heisk. 285, an ox-wagon is included in the description—"one two-horse wagon." But whether a watch may be included in the statutory exemption of "wearing apparel" or not, it certainly may be allowed as "other necessaries" under certain circumstances.

The act (Rev. St. 5045) says: "There shall be excepted from the operation of the conveyance the necessary household and kitchen

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furniture, and such other articles and necessaries of the bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars." Under this clause the late Judge McDonald, of the district of Indiana, held in Re Thiell [Case No. 13,882] that a cheap watch might be included, but the same learned judge held in Re Cobb [Id. 2,920] that mere articles of luxury and ornament, such as watches, pianos, and the like, should not be allowed. In Re Graham [Id. 5,660], Hopkins, J., refused to allow watches. Some other cases, cited in the district courts, where the identical question has been considered, have not been accessible for examination; but I presume, as in these cases, they all turn on the question whether or not the particular watch, under the circumstances, was an article of necessity only, or an article of luxurious ornament, in which too much money had been invested to allow it in justice to the creditors. It will be found in all the cases where the law does not exempt the article itself, when value is immaterial, that this question of the reasonable or unreasonable value of it controls the case. The question is to be determined not solely by an appraisement of the particular article, but also by the attendant circumstances, or, as this statute puts it, "having reference in the amount to the family, condition, and circumstances of the bankrupt." The assignee is to determine the question, not by mere arbitrary choice on his part, but by the exercise of a sound legal discretion, subject to the final decision of the court, in the exercise of its supervising power. In re Feely [Id. 4,714]; In re Thiell [supra].

The phrase "other articles and necessaries" is a comprehensive but indefinite expression, and I have been at pains to discover the principle that is to direct the assignee and the court in the exercise of the discretion. This act is framed like other exemption acts, and doubtless, with full knowledge of the adjudications of the state courts under similar statutes. In Leavitt v. Metcalf, 2 Vt. 342, the statute exempted "such suitable apparel, bedding, etc., and articles of household furniture as may be necessary for upholding life." It was held that "one brass timepiece" was included, and the court say there were two former decisions exempting the "debtors' only time-pieces," but they are not cited. "It must be admitted," say the court, "that there is a great convenience in a family having some means of keeping time, even in health, but more especially in sickness. We do not pretend that a time-piece is absolutely necessary for subsistence, and also many other articles that have always been considered exempt under this statute. The word 'necessary,' or 'necessaries' has ever been considered, in legal language, to extend to things of convenience and comfort, and to things suitable to the situation of the person in society, and is not confined to things absolutely necessary for mere subsistence." An instructive case is that of Hitchcock v. Holmes, 43 Conn. 528, where it is said we may "pass beyond what is strictly indispensable, and include articles which, to the common understanding, suggest ideas of comfort and convenience. But having done this, the obligation is upon us to exclude all superfluities and articles of luxury and ornament." Certain expensive furniture, including a costly clock, were, therefore, excluded; but a dissenting judge thought the clock should have been allowed. A piano was thought to be a luxury, because "it is not an article of mere comfort, and does not minister to a want universally felt." Dunlap v. Edgerton, 30 Vt. 224. In Garrett v. Patchin, 29 Vt. 248, it was said the term "necessaries" means that which is convenient or useful—which a man procures for his own personal use, unless extravagant. And see Montague v. Richardson, 24 Conn. 338, which cites McCullough v. Maryland, 4 Wheat. [17 U. S.] 316; Davlin v. Stone, 4 Cush. 359, which says, "the articles may be of that plain and cheap character which, while not indispensable, are to be regarded amongst the necessaries of life, as contradistinguished from luxuries." See, also, Willson v. Ellis, 1 Denio, 462, and In re Thornton [Case No. 13,994]. Guided by these humane and liberal principles of construction, I should say that to a commercial man a plain, and not extravagantly costly watch, such as this bankrupt owns, is, in the quaint language of the Vermont statute, "necessary for upholding life." The watch of John Steele should be allowed. As to the other I cannot determine, its value not being stated. If the parties cannot agree, they may have leave to make further application in the matter.

This case is inserted because of the discussion of exemptions in general. The learning on the subject is fully gone into, and may afford aid in the examination of questions arising under state laws.

STEELE (BAS v.). See Cases Nos. 1,087 and 1,088.

STEELE (LEGGETT v.). See Case No. 8,211.

Case No. 13,347.

STEELE v. RICHARDS.

[Cited in Roberts v. Sheldon, Case No. 11,916. Not reported; opinion not now accessible.]

STEELE (SAWYER v.). See Cases Nos. 12,406 and 12,407.

Case No. 13,348.

STEELE v. THACHER.

[1 Ware (91 Davies), 85.] [1]

District Court, D. Maine. Dec. Term, 1825.

SEAMEN—CRUELTY OF MASTER—DESERTION—PARENT AND CHILD—ADMIRALTY JURISDICTION.

1. Repeated acts of cruelty and oppression on the part of the master will justify a seaman in deserting the vessel; but not a single act of assault and battery, although it may exceed the bounds of moderation, unless there be reasonable grounds for apprehending that such acts of oppression will be repeated.

[Cited in Bush v. The Alonzo, Case No. 2,223.]

[Cited in Gabrielson v. Waydell, 135 N. Y. 19, 31 N. E. 969.]

2. The decisions of the courts of common law in England, under the statute of 13 & 15 Rich. II., upon the jurisdiction of the admiralty, are not binding on the courts of this country.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867. Cited in dissenting opinion in Waring v. Clarke, 5 How. (46 U. S.) 490.]

3. The grant of admiralty jurisdiction by the constitution of the United States has been uniformly held both by the legislative and judicial departments of the government, to be more extensive than that allowed by the courts of common law, under the construction of these statutes, to the high court of admiralty in England.

[Cited in U. S. v. The New Bedford Bridge, Case No. 15,867.]

4. If a tort be committed partly on land and partly on the high seas, if it be one continued act, the admiralty has jurisdiction over the whole matter.

[Approved in Plummer v. Webb, Case No. 11,233.]

5. A parent may maintain a libel in the admiralty for the wrongful abduction of his child, being a minor, and carrying him beyond the sea.

[Cited in Mendell v. The Martin White, Case No. 9,419; The Dauntless, 7 Fed. 367.]

[Cited in Grand Rapids & I. R. R. Co. v. Shower, 71 Ind. 454.]

6. And this action may be maintained although the child, at the time of the abduction, was not an inmate of the father's family, and although the child may have been principally left to support himself by his own labor, unless it appears that the father has abandoned all care of his child.

[Cited in Magee v. Holland, 3 Dutch. (27 N. J. Law) 95; Wodell v. Coggeshall, 2 Metc. (Mass.) 93.]

7. The father is bound to support his children during their minority, and while he does this he is entitled to the custody of their persons and to the fruits of their labor. He may renounce or abandon his rights, but he cannot by his own act discharge himself from the obligation of supporting them.

This was what, in the technical language of the admiralty, is called a cause of damage, brought by Steele for certain wrongs alleged by him to have been done by the respondent, to his son, being a minor under the age of twenty-one. The libel alleged that in February last, Capt. Thacher, master of brig Jane, at Portland, shipped John Smith Steele, the libellant's son, to go a voyage on the high seas from Portland to the West Indies; that in pursuance of this contract the said John went the voyage from Portland to Grenada, and was thus transported out of the state without the parent's consent, by which means he has lost the services and society of his son, etc. In another allegation, the master is charged with divers assaults and batteries on the said John, by means of which the father has lost his services, etc. In a third allegation, the master is charged with having by his ill-treatment tortiously discharged and abandoned him in a foreign port. In a fourth, a discharge by consent is alleged, so far as a minor could consent. The master, in his answer, alleged that he shipped John Smith, who is proved to be the person in question, as the apprentice of one William G. Johnson, at the request of said Johnson, and denied that he is the son of the libellant; denied the assaults and batteries, any further than was justifiable as moderate correction, and denied the discharge, and charged a desertion by the said John Smith. It was proved at the trial, that John Smith Steele shipped, as is alleged in the answer, by the name of John Smith; Johnson was surety for the month's wages which were paid in advance, and expended in clothing. His name is on the shipping paper immediately under Steele's, and below it is a memorandum in these words: "Mr. Johnson signs as surety that he is an apprentice to him." Something appears to have been said at the time of shipping, of the boy's being Johnson's apprentice, but no indentures were shown or asked for; and in his deposition, Johnson says that the memorandum was written after he signed, and that he never understood what it was until it was exhibited to him on the trial. He says that Steele never was his apprentice, but that he took him to teach him the trade of a barber, and, not being satisfied with his conduct, had dismissed him. Steele performed the outward voyage, and deserted at Grenada, since which he has not been heard from. He was proved to be the son of the libellant, by a witness who was present at the marriage of his parents, and at his birth, and who had seen him occasionally since. The testimony of this witness, to which exception was taken in the argument, was corroborated by the unexceptionable evidence of Mr. Costelow, who knew him as a member of the libellant's family, and that he was commonly considered as his son, by his neighbors. Against this testimony nothing was opposed but a doubtful rumor that he was the son of the libellant's wife, before marriage. It was in evidence that John lived in his father's family until about eight years ago. Since that time it does not appear with certainty where he has lived. The libellant's witness says he supposed he lived with his father, or elsewhere by his consent, but not living in the same town with the libellant, he cannot speak with certainty. It was proved by the respondent that he had been in Portland about seven weeks, at the

[1] [Reported by Hon. Ashur Ware, District Judge.]

time of his shipping; that when he came here he stated that he was his own man, acted for himself, and engaged himself to Johnson as an apprentice, to learn the trade of a barber. It does not appear that during this time the father claimed authority over him, nor does it appear that he knew where the boy was, or made any inquiries for him. But the son acted independently, and represented himself to be an emancipated minor.

Orr & Daveis, for libellant.
Longfellow & Adams, for respondent.

WARE, District Judge. In considering the questions which arise in this cause, we may begin by laying out of the case the second, third, and fourth allegations in the libel, as being unsupported by any satisfactory evidence. There is no color of proof to support that part of the libel which relies on an assault and battery, and a consequent loss of service. Admitting the battery to be proved, this part of the libel can only be sustained by proof of a consequent loss of service, and there is not a particle of evidence which goes to establish that fact. The allegation of a discharge by consent is distinctly negatived by direct proof of a desertion. As to the other point, that Steele was, by the cruelty of the master, compelled to leave the vessel, the evidence is by no means satisfactory. It is in evidence that the master corrected him on the outward passage, but it is also shown that he was negligent and careless in the discharge of his duty, and insolent in his manners. The marine law authorizes the master to correct the negligent or disorderly conduct of a mariner by moderate chastisement, and he does not seem, in this instance, to have exceeded those limits which the law allows and justifies. Much less can it be pretended that there was such harshness and severity as would justify a seaman in abandoning the vessel.

There may be cases of such extreme and persevering cruelty on the part of the master as will justify him in deserting. But it must be a strong case. I am, as at present advised, far from being prepared to hold that a battery, simply because it is excessive, will be a justification, even though it should pass very considerably beyond the limits of a moderate discretion. As a general rule, it seems to me that another ingredient should enter into the case. The seaman who proposes, on this ground, to justify a desertion, should not only exhibit proof of the injury, but a just and reasonable ground of apprehension that it would be causelessly repeated, either by showing a general disposition to cruelty on the part of the master, or the existence of some particular pique or malevolence toward him personally. The policy of the law discourages the separation of the mariner from the vessel before the termination of the voyage, especially in a foreign port. But in the present case there is not only an entire failure of any proof of this kind, but the pretext is not made out of unreasonable severity in the particular instance alleged. We are brought back to the first allegation in the libel, the shipping of John Smith Steele, and transporting him out of the country without the consent of his father. But it is contended that admitting the illegality of the master's conduct, and that he may be holden to answer it in the proper form, the subject-matter of this allegation is not within the jurisdiction of this court.

In the much disputed question, as to the extent and boundaries of the admiralty jurisdiction, it has never been a matter of doubt whether this court had jurisdiction over torts committed on the high seas. In former times, it seems to have been thought that for such torts a remedy could be given by no other court. Such appears to have been the opinion of Lord Coke, the great antagonist of the admiralty; at least, such seems to be the most obvious meaning of his words. "Altum mare," he says in his commentary on Littleton, "is out of the jurisdiction of the common law," and "within the jurisdiction of the Lord High Admiral." Co. Litt. 260a. And in his argument against the jurisdiction of the admiralty, in 4 Inst. 140, the jurisdiction of this court over all things done exclusively on the high seas is admitted in its fullest extent, and the whole tenor of his argument implies that it was exclusive of that of the courts of common law. Blackstone apparently adopted the idea of Coke, for he speaks of injuries done on the high seas as being "out of the jurisdiction of our ordinary courts, and therefore to be remedied in a peculiar court of their own." 3 Bl. Comm. 106. The points which are labored by Coke with the greatest earnestness, are, 1st, That if any part of the transaction takes place within the body of a county, the jurisdiction of the common law attaches to the whole, and that wherever the courts of common law can take cognizance of the matter, the jurisdiction of the admiralty is excluded. On this ground, it is argued that when a marine contract is made on land, to be executed wholly on the high seas, the admiralty is ousted of its cognizance of the cause, for the common law attaching to the contract from the place where it is made, withdraws the subject-matter, which is clearly and, it would seem to be Coke's idea, exclusively of admiralty jurisdiction, from the cognizance of that court to the courts of common law. The notion of a concurrent jurisdiction seems not to have occurred to him as a possibility, or to have been studiously and cautiously kept out of view. Each jurisdiction appears to stand in his mind as exclusive of the other. 4 Inst. 136, Mich. 31, 11, 6, note 315; Id. 140, Temps. E. 1, tit. "Avowry," 192; Id. 141, 7 R. 2, tit. "Trespass on Statute," pl. 54.

The second point pressed in his argument is, that harbors, creeks, havens, rivers, &c., are within the body of some county, and that

all matters there transacted are within the jurisdiction of the courts of common law, to the exclusion of the admiralty. If the exception taken in the present case can prevail, it must be on the ground that the tort was committed partly on the land. Whatever authority the opinion of Lord Coke might have had with the age in which he wrote, certain it is that his reasoning has not been considered as satisfactory by succeeding judges; for though the jurisdiction of the admiralty over matters taking place wholly on the high seas remains now undisputed, yet, either by right or by wrong, the courts of common law have acquired over the same matters a jurisdiction which at this day is equally unquestionable. Lindo v. Rodney, 2 Doug. 614, note. The principle, also, that if a thing be done partly on the land and partly on the high seas, the jurisdiction of the admiralty is excluded, has been shaken by the exceptions of bottomry bonds and mariner's wages. Over these contracts, though made on land, the admiralty exercises, in opposition to the opinion of Lord Coke, an undisturbed jurisdiction. But with these exceptions, the doctrine held by Lord Coke is supported by a series of judicial decisions in England, which decisively establish it as the law of that country. It is on this principle that the jurisdiction of the admiralty is excluded in cases arising on policies of insurance, charter parties, bills of lading, and contracts of material-men, these contracts being made on land. Yet in each of these cases except the last, which is executed on land, if the parties went on the water to enter into the contract, the jurisdiction of the admiralty would attach, and yet it is most certain that that of the courts of common law would not be excluded. So far, therefore, as Lord Coke is considered as holding the doctrine that these jurisdictions are reciprocally exclusive of each other, his opinion is not law at this day.

But the courts of this country have not considered themselves as bound by the opinion of Lord Coke, and the decisions of the common law courts of England on writs of prohibition. These decisions are founded on the construction of the statutes of 13 & 15 Rich. II., which have been held not to extend to this country. The construction which they have at different times received has not been uniform in England, and that upon which the courts of that country have finally settled down may justly be ascribed fully as much to the jealousy of the courts of common law as to the application of any just rules of interpretation. De Lovio v. Boit [Case No. 3,776]. The vice admiralty courts in this country, before the Revolution, always exercised a larger jurisdiction than the high court of admiralty in England. De Lovio v. Boit [supra]. And the grant of admiralty and maritime jurisdiction in the constitution has, both by the legislative and judicial departments of the government, been construed to be more extensive than that exercised by that court under the construction of the statutes of Richard II. The judiciary act puts all revenue seizures made on waters navigable from the sea by vessels of ten or more tons burden, on the admiralty side of the court, an extent of jurisdiction palpably at variance with the construction given to those statutes by the courts of common law. 2 Bior. & D. Laws, c. 20, p. 63, § 9 [1 Stat. 76]. The decisions of the courts of the United States are so numerous and full to this point, that it is barely necessary to refer to a few. In the case of The Gen. Smith, 4 Wheat. [17 U. S.] 438, the admiralty is held to possess a general jurisdiction in cases of material-men, by proceeding either in rem or in personam. So in The Jerusalem [Case No. 7,294]; Stevens v. The Sandwich [Id. 13,409]; North v. The Eagle [Id. 10,309]. In the case of Manro v. Almeida, 10 Wheat. [23 U. S.] 473, the court decided that an admiralty court may proceed by attachment to compel the appearance of a party in torts as well as contracts, though such process would not be allowed in England. In the case of The Apollon, 9 Wheat. [22 U. S.] 363, the seizure was made in Belle river, within the admitted jurisdiction of the king of Spain, and brought to the port of St. Mary's for adjudication. The master brought his libel against the collector for the damages occasioned by the illegal seizure. Here no part of the tort, from its inception to its termination, was committed on the high seas. It commenced within the acknowledged jurisdiction of a foreign power, and was consummated within the body of a county in the state of Georgia. Yet the jurisdiction of the admiralty does not appear to have been questioned. In fact the distinction taken in the English reports, that where a thing is done partly on the land and partly on the high seas, the jurisdiction of the admiralty is excluded, has not, to my knowledge, received the sanction of any judicial decision in this country, but on the contrary it has been most explicitly denied. De Lovio v. Boit [Case No. 3,776].

In this case the question as to the jurisdiction must be determined by the locality of the act, whether it was done on the high seas. The act, complained of by the libellant, is the shipping his son, a minor, at Portland, and transporting him to parts beyond the sea, to wit, to Grenada, in the West Indies, without his consent. The contract was made on shore; but the contract, admitting it to be illegal, does not constitute the tort. The execution of the contract is that in which the tort consists, and that was on the high seas. If it be said that it had its inception on land, and within the body of a county, the answer has been already given, that the English cases on this point are not held to be law in this country; but where the substance of the tort is committed on the high seas, when it there has its consummation, if it be all one continued

act, the jurisdiction of the admiralty will attach to the whole matter, though part of it may have taken place on land and within the body of a county. This principle seems to be reasonable in itself, and in the mass of inconsistent and contradictory authorities with which the English books abound, on the subject of admiralty jurisdiction, we can find direct authority for it, though I will not contend that it stands uncontradicted. In Com. Dig. tit. "Admiralty," F. 5, it is said: "If the libel be founded on a single continued act which was principally on the sea, though part was on the land, a prohibition will not go." Such, precisely, is the present case. On the whole, I cannot bring my mind to doubt but that this court, sitting as a court of admiralty, has a clear and undoubted jurisdiction over the subject-matter of this allegation in the libel. I might have disposed of this part of the case by simply referring to the case of De Lovio v. Boit [supra], where the whole question of the admiralty jurisdiction is discussed with an ability and learning which leaves nothing to be added to the subject. But the objection was strongly urged by the counsel for the respondent, and as the point raised in this case, was not before the court in judgment in that referred to, a respectful attention to the argument of the learned counsel required that it should be fairly examined.

We come then to the question on its merits arising under the first allegation of the libel, the wrongful abduction of the libellant's child. It is argued that there is no sufficient proof that John S. Steele is the libellant's son. Though the testimony on this point is not very direct nor positive, it is such as in the absence of any conflicting proof ought to be held as satisfactory. This fact being considered as settled, the general authority and rights of a parent, as far as it is necessary to consider them in the present case, are not the subject of doubt. That he has the general right of control over his child, and is entitled to the custody of his person and to the fruits of his labor, is not questioned. A stranger who violently or clandestinely withdraws the child from the parent's authority, and appropriates to himself the fruits of the child's industry, does a wrong to the parent for which the law will give him an appropriate remedy. Nor is it perceived that the case will be altered in principle by the child's consent to the fraud on the parent. For this purpose he has no legal consent to give. James v. Le Roy, 6 Johns. 274. And so far as it is an attempt to conclude the rights of a parent, it is utterly void.

But these parental rights may, like other rights, be waived or renounced, and that either expressly or by implication. The parent may renounce his right to the earnings of his child, by a special agreement with the child that he shall have the exclusive enjoyment of them himself. Besides, these parental rights are connected with parental duties, and may be forfeited by a neglect of these duties. The parent is bound to maintain, to protect, and to educate his child; and this is an obligation that is imposed upon him by the law of nature, independent of the municipal law of the state. His right of control over the person of his child, and that of taking to himself the fruits of his labor, have their foundation in the performance of these duties. If the parent turns his child out of his house, and refuses to maintain him, or if he abandons all care of him, suffers him to go at large, withholds all support and protection of his child, and obliges him to support himself, he forfeits his right of control over his person and all claims to the fruits of his labor. By such a renunciation of the parental power the child becomes, in a qualified sense at least, independent and competent to act for himself. He violates no duty of filial obedience and infringes no parental rights, by entering into engagements with others by which he may provide for his own well-being, nor can such engagements be impeached by a parent who neglects to discharge towards his child his own parental obligations. To allow a parent such a control over his child, while he contributes nothing to his support or protection, or to uphold the parental rights while all the parental obligations are neglected, would be giving an extension to the parental power that it seems to me is neither sanctioned by the law of nature nor by our own municipal law. When a minor child is thus abandoned, a stranger may enter into any proper contract with him for his labor, and pay the minor his wages without being liable to account to the father. These principles, which seem reasonable in themselves, are sanctioned by the most approved elementary writers on the law, as well as by judicial decisions. 1 Bl. Comm. c. 16; Jenney v. Alden, 12 Mass. 375; Nightingale v. Withington, 15 Mass. 272. The libellant has, therefore, no just cause of complaint against Capt. Thacher for entering into this contract with his son; and if I rightly understand the authorities, he could maintain no action in his own right for the wages of his son if the contract had been faithfully performed on his part.

But different considerations arise when the father sues for a wrong done to his child. Though a father may renounce his rights, he cannot, by any form of renunciation, annul his obligations. These are imposed by the law, and do not cease to be binding, or lose any of their obligatory force, because he neglects to fulfil them. The father is bound to support his children during their minority, and this is an obligation from which he cannot discharge himself by any act of his own. As some compensation for the performance of this duty, he is entitled, during the same

period, to the fruits of their labor. But the obligation does not depend on their ability to recompense him by their industry, for he is equally bound to support them whether in sickness or in health. If Capt. Thacher had in this case, by any personal injury, disabled the boy from supporting himself, and thrown him back as a charge on his father, this would have been an injury for which the father might have recovered damages. For there is no principle of law more universal than this, that every one is bound to repair the damage which is occasioned by his own wrongful and illegal act. But this is not the gravamen that is charged in the libel. The ground of the libellant's complaint is the abduction of his child, that he is carried out of the country, withdrawn from his care and protection, and not returned, whereby he is deprived of the benefit of his services, of the comfort of his society, and of the control of his person. The question is, whether upon the facts proved in this case, he is entitled to claim damages on this ground. It does not appear from the testimony that the son had been an inmate of his father's family for the last seven years; nor is, indeed, the contrary proved, though it seems rather the more probable inference from the whole testimony taken together. For the last seven months, at least, he has been a resident in this town, has acted for himself, free from all oversight or control on the part of his father, maintaining himself by his own industry, and engaging his services to whom he pleased. When a minor is left in this way to support himself by his own resources, without any aid or care from his parent, the parent can surely maintain no suit for the loss of his services against a stranger who gives him employment and pays him wages, for this is all the means of support which the neglect of the parent has left him.

But it does not necessarily follow, because the father has left his child principally to his own guidance, to make his way in life as he can, and support himself by his own industry, that he has renounced all care of him, and abandoned all interest in his welfare. A child may live abroad, and that parental oversight and control over him be retained in a great degree, which is so salutary and important to the inexperience of youth, when it is exercised with prudence and discretion. If a father is unable, from poverty, to discharge all the duties to his offspring, which the parental relation imposes on those who are in more affluent circumstances, it is not to be presumed, without proof, that he voluntarily neglects those which are within his power. He may feel as deep an interest in the well-being of his children as those who are more fortunate in being able to contribute more towards that object, and his paternal authority may be exercised with great benefit to them in many ways. These domestic rights of the poor are as sacred in the eyes of the law as those of the rich, and are often, without doubt, employed as wisely and with as salutary an influence. The public has also a deep interest in maintaining this paternal power and domestic discipline when it is employed for the good of the child, in preserving him from vice and dissoluteness, and training him to habits of industry and sobriety. It seems to me, therefore, that the abduction of a minor child, and withdrawing him from the supervision and control of the parent, even if he is not an inmate of his father's family, and though he may be principally left to support himself by his own exertions, unless it appears that the father has abandoned all care of his child, is a wrong to the parent for which he is entitled to a remedy.

When Capt. Thacher shipped Steele, he knew him to be a minor, and though he might, under the circumstances, be justified in entering into the contract with him, he could hardly be authorized to conclude that his father and natural guardian had abandoned all his parental rights. If the allegation in the libel were proved that he wilfully and intentionally left him in a foreign country, or if it were shown that he neglected to bring him home when he might have done it, or that by his harshness and cruelty he had driven him to a desertion, my opinion is that the libellant would be entitled to damages. The difficulty, in my mind, does not lie in the principles of law upon which the counsel have put the case, but in the proof. There is no positive proof that the master refused to bring him back; on the contrary, it is admitted that he deserted. But it is contended that there was a criminal neglect in not securing him after his desertion, for the purpose of bringing him home, which, as he was known to the master to be a minor, he was bound to have done. It is stated by one of the witnesses that he saw Steele several times after his desertion, near the vessel. But there is no evidence that this fact was communicated to the master, or was known by him. It is said by another witness that the master, on the outward voyage, expressed his dissatisfaction with Steele, and said he wished he could make him desert. This would deserve consideration, connected with other circumstances, if his treatment of Steele were such as to tend to produce that result. But there is no evidence of unreasonable severity on the part of the master towards him. Steele was sometimes corrected, but his conduct was such as to justify the correction. Upon the whole, my opinion is that the libel ought to be dismissed.

STEELE, The MARY. See Case No. 9,226.

Case No. 13,349.

STEELMAN v. TAYLOR.

[3 Ware, 52;[1] 19 Law Rep. 36.]

District Court, D. Massachusetts. March, 1856.

AFFREIGHTMENT—DIMINUTION DURING CARRIAGE—SHIPPING—CLAIM FOR SHORTAGE—USAGE.

1. Quære, how far the responsibility of a master of a vessel, for the accuracy of the accounts of the lading and delivery of a cargo, may be affected by the usage of a particular trade.

2. In a common contract of affreightment, the master is entitled to full freight on all the goods laden and borne on the bill of lading, though they may be by natural causes, and without his fault, deteriorated in quality, or diminished in quantity when delivered.

[Cited in brief in The Muriel, Case No. 9,944.]

[Cited in Gage v. Libby, 14 Allen, 263.]

In admiralty.

J. A. Loring, for libelant.

Mr. Mackie, for respondent.

WARE, District Judge. This is a libel for freight claimed to be due on a cargo of coal, shipped at Philadelphia in the schooner Mesrole, for Fall River. According to the bill of lading, one hundred and nineteen tons were laden, while but one hundred and ten and a fraction ($^{105}/_{2246}$) were delivered, the delivery falling short nearly nine tons; the consignee refuses to pay freight for more than was delivered, and claims to charge against the freight on the one hundred and ten tons, the price of the nine tons short delivery. It is stated by Mr. Dunn, a witness examined for the respondent, that there is usually a loss of about one per cent, on hard coal, like this cargo, by the degradation and waste of the coal in loading and unloading. But making this allowance, there will still remain a deficiency of about seven and a half tons.

It was not questioned at the hearing but that all the coal that was actually laden at Philadelphia, was delivered at Fall River; and the difference between the two accounts of the lading and the delivery, can only be explained by an error in the one account or the other; either there must have been an overcharge in the account of the lading, or an error the other way in the amount of the delivery.

To prove the correctness of the bill of lading, the master has taken the depositions of two witnesses at Philadelphia, Myers, the superintendent of the wharf where the coal was taken into the vessel, and Kennedy, the weigh-master, who weighed it and kept the tally. The coal was brought to the scales in barrows, where it was weighed, and thus transported to the vessel in the barrows. Each barrow contained two hundred and twenty-four pounds when it was passed into the vessel. Kennedy noted each one as it was weighed in his tallying. This was kept in a book used for that purpose, and a copy of it is annexed to his deposition. The number of barrows marked gives one hundred and twenty-three and a half tons, in which there were four and a half tons of waste and screenings, and these being deducted leave one hundred and nineteen tons net. This was the only account taken. The mate was on board the whole time, and the master occasionally, while the coal was taken in, which occupied the time from 11 a. m. to 4 p. m. It is ordinarily the duty of the mate to take the account of the cargo as it is received; but if he neglects to do it with the master's knowledge, the master must be held responsible for the correctness of the account, by whomsoever it is taken, as he, in the bill of lading adopts it. In this case the account was taken by the servant of the vendor or consignor. If there was an error in the account to the amount indicated by the delivery, it is quite clear that it must have been intentional and fraudulent. It could not have been accidental.

The cargo was delivered at Fall River from the vessel into carts. It was suggested that there was a loss of coal in swinging the bucket from the vessel to the carts, by the dropping of coal into the dock. But the loss in this way could have been but a trifle. The carts when loaded were taken, by the direction of the consignee, to Cook's scales, there weighed, the account taken, and then carried to Taylor's coal-yard. The delivery occupied one day and part of another. Taylor engaged Macomber to receive the coal in carts, and Macomber employed six other teams. The depositions of six of the seven teamsters have been taken by the respondent, and they say that all the coal taken by them was weighed at Cook's scales. One of the carters and owners being out of the country, the respondent has not been able to obtain his deposition. Mr. Dunn, the regular clerk to take the account of coal weighed at these scales, was absent at the time of the delivery of this cargo, and the account was taken by three different persons of different portions of the cargo. While the cargo was being weighed and delivered, coal was brought from the yard for consumers, and weighed at the same scales. And it may be further remarked, that there is no positive evidence that the coal taken by Lowney was weighed at these scales.

From this account of the loading and delivery, it appears to be altogether most probable that the error was in the account of the delivery. From the change of the weighers at Cook's scales, of loads from the vessel, and the intermingling of loads for delivery to consumers, an error may be easily supposed to have been made without any imputations of fraud; while if so considerable an error was made at Philadelphia, it must have been fraudulent. A court is more ready to suppose a mistake than fraud, and if the decision is to be by the balance of probabilities, it must be in favor of the master.

[1] [Reported by George F. Emery, Esq.]

But there are other considerations that belong to the case. The master is bound to see not only to the receiving personally or by his agent, but also to the proper delivery; he must at his peril deliver it to the consignee named in the bill of lading. But the consignee has also a duty to perform. When he is notified, he must seasonably be on the wharf to receive his goods. Mr. Taylor came there in the morning after the vessel arrived, and sent his teams. The delivery to the teamsters was a delivery to him. Lowney, as well as the others, was in his employment. And if he, as was suggested, may have carried his loads to another, and not to Taylor's yard, though this is certainly not probable, the loss must fall on Taylor, for the master was discharged by a delivery to his teamster.

The principal doubt that I have felt in this case is, whether the master took all that care to see to the accuracy of the account taken, both of the lading and delivery, which is required by law, and by the usage of this trade. If he did not, and the account shows a short delivery, my opinion would be that he must suffer for it, and that his claim for freight must be limited. to the amount which he shows to have been delivered. In this case the discrepancy between the two accounts and the uncertainty as to the true amount of the cargo, must be imputed to his neglect. No evidence was offered to a common usage in this respect. It may easily be believed, that much less care is required in the delivery of a cargo of coal, than of a cargo of goods in bales and boxes, the value of which is great in proportion to their volume and weight. In the absence of all proof, I shall take it for granted, that, in this trade, it is usual for the parties to trust to the common weighers and tally men employed at each end of the voyage. In this case, I find it stated by one of the witnesses, that the coal was carried by Taylor's order to Cook's scales to be weighed. If the custom is as I suppose it to be, no satisfactory reason occurs to my mind why one party should, more than the other, be held responsible for the accuracy of the accounts. It is not pretended but that all the coal that was laden was in fact delivered; and if there is no reason for supposing fraud, there can, I think, be but little doubt that the error was made in the account of the delivery. The master is therefore, I think, entitled to full freight, according to his bill of lading. I have little doubt that this decision meets the justice of the present case, but I do not feel quite so much confidence, that it may not relax too much the obligation of the master, as to his care in seeing to the correctness of the accounts of the lading and discharge of his vessel. This obligation may be more or less stringent, according to the nature of the cargo; and it may be more or less affected by the customs of a particular trade. There is no other evidence as to the custom of this trade before me, than what results from the general testimony in the case, and I infer that the coal was received and discharged, and the account taken in the usual manner.

A question was raised on the testimony of Mr. Dunn, who states in substance that, when coal of this kind is accurately weighed, there will be a loss in the delivery of about one per cent; on this cargo a loss of one and one-fifth of a ton. If the question fairly arises in this case, it is argued that freight is due only on the amount delivered, and assuming the account of the lading to be correct, that freight should be allowed on one per cent less. I think otherwise. It has been a question, when goods from natural causes have become deteriorated in the course of the voyage so as to be worthless, whether the consignee may not abandon them for the freight. And it has been held by authors of high authority in maritime law, that he may. But the better opinion, I think, and that supported by the better reasons, is, that he cannot, and that in such a case, the master is entitled to full freight on all that is laden. The loss is not attributable to his fault, but to the intrinsic vice of the goods, and by the principles of natural law, the loss falls on the owner. "Res perit domino." And this decision is conformable to the principles of the contract of hiring. The engagement of the carrier is to transport and deliver the goods. This is the whole of his obligation, and this he has performed so far as depends on him, whether the merchandise is in good condition, or is degraded and deteriorated from natural causes, over which he has no control, and for which he is not responsible. For a like reason in this case, the master is entitled to freight on the whole quantity laden, if it has not been diminished by his fault.

I allow freight for the whole amount borne on the bill of lading, according to the terms of the contract. A claim is made in the libel for three days' demurrage, occasioned by this controversy about the freight. This claim strikes me as a novelty; but, however that may be, I think it ought not to be allowed in this case.

STEEN & CIVERGIUS FACTORY, ETC. (UNITED STATES v.). See Case No. 16,-383.

STEERE (ASHBY v.). See Case No. 576.

Case No. 13,350.

STEERE v. FIELD.

[2 Mason, 486.][1]

Circuit Court, D. Rhode Island. June Term, 1822.

ESCAPE—LIBERTY WITHIN WALLS—MAKING TURNKEY—RHODE ISLAND PRACTICE.

1. At common law it is not an escape in a gaoler to allow prisoners confined for debt the

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

liberty of all the apartments within the gaol walls, for confinement within the walls is salva et areta custodia.

[Cited in U. S. v. Knight, Case No. 15,539.]

2. Quere. Whether it be an escape to allow such prisoners the liberty of the prison limits?

3. But it is an escape in the gaoler to make a prisoner for debt a turnkey, and to entrust him with the keys of the outer doors, as well as inner doors, at all times by night and by day.

4. If the gaoler be committed to his own gaol, on execution by the sheriff, and no new keeper is appointed, it is an escape of the gaoler, for which the sheriff is accountable; but it is not an escape of the other prisoners, if they are in fact kept in custody under the gaoler's authority or his agents.

[Cited in Skinner v. White, 9 N. H. 213.]

5. In Rhode Island, the doctrine as to escapes is that of the common law, and the statutes giving the liberty of the limits to prisoners, on giving bonds not to escape, &c., have not altered the common law.

[Cited in Gwinn v. Hubbard, 3 Blackf. 15.]

6. In Rhode Island, an action of debt for an escape is a legal remedy, that action being incorporated into their laws by implication, from their adoption of the English laws.

Debt against the defendant, the late sheriff of Providence county, in the state of Rhode Island, for an asserted escape of one Joseph Witmarth, who was committed to the gaol of that county, upon an execution in favor of the plaintiff, while the defendant was sheriff, and of course while he had the care and custody of that gaol in virtue of his office. The cause was tried at the last November term, on the general issue, nil debet, and a verdict was then found for the plaintiff, subject to two questions of law: (1) Whether an action of debt was a proper remedy in this case. (2) Whether upon the facts there was in point of law an escape of the prisoner.

The judgment and execution in favor of the plaintiff against the prisoner, and his commitment to the gaol in execution, were admitted at the trial. It was also in evidence, that at the time of the commitment, Stephen Witmarth, the brother of the prisoner, was keeper of the gaol under the defendant. The gaol consists of a single building, three stories high. On the lower floor the gaoler occupied for himself all the rooms for family purposes. A part of the second story was used for prisoners confined for debt, who had the liberty of the yard; and the remaining part of the second, and the whole of the third, story, were used for prisoners, who were in close confinement. The only avenue to the prisoner's rooms in the upper story was through the kitchen on the lower floor. There were no walls round the gaol, and the liberties or limits had no visible lines or fences to mark them. During the imprisonment of Joseph Witmarth, he never gave any bonds for the prison liberties, and was never locked up in any room by day or by night. He was allowed to go at his own pleasure into all the apartments in the house, was entrusted with the keys of the outer and inner doors of the gaol, as well when the gaoler was abroad, as at home, and acted generally as a turnkey and assistant of the gaoler, receiving, discharging, and locking up prisoners, and perfoım.ng other official duties for him. His control over the keys of the gaol was never limited to any particular times or occasions. During the day time, the outer doors of the gaol were usually left unlocked. There was no evidence that Joseph Witmarth ever went out of the gaol house after his commitment. But his brother, the gaoler, while Joseph was in imprisonment on this execution, was himself committed to the same gaol, and remained there a prisoner for some days. During this period, Joseph Witmarth had the gaol keys as usual, and the defendant (the sheriff) did not appoint any other keeper of the gaol, and did not visit the gaol oftener than had been usual with him at other periods.

There was no proof of any appropriation of any particular part of the gaol to the gaoler, or to the prisoners, under legislative or any other public authority. The appropriation, such as it was, was made by the gaoler or the sheriff at his own pleasure, and with reference to his own accommodation.

Such were the material facts, upon which, at the trial, a verdict was directed to be taken for the plaintiff, with a view to the more solemn consideration of the cause, upon an argument at bar.

Mr. Searle, for plaintiff, contended, on the first point, that debt was the proper form of action, and cited 1 Chit. Pl. 81; Bullard v. Bell [Case No. 2,121]; [Raborg v. Peyton] 2 Wheat. [15 U. S.] 386. He admitted, that in England the common law remedy, under such a state of facts, was case according to the usual practice, but that debt would equally well lie. And that it could not be denied, that debt was the statute remedy. That the English statute and common law, in force at the time of the separation of this country from Great Britain, so far as the same was applicable to our institutions and circumstances, and not repugnant to any of our own statutes, formed a part of our common law. 1 Mass. 59; 2 Mass. 534; 2 Bin. 594; [Respublica v. Mesca] 1 Dall. [1 U. S.] 73. That the records and precedents of the courts of Rhode Island would fully prove, that the action of debt had been the uniform remedy in cases of this description, from the earliest times. That certain acts of the general assembly of Rhode Island, passed in the years 1700, 1749, and 1767, expressly made the English statute and common law the law of Rhode Island, in all cases not provided for by the statutes of the then colony, where the same was applicable. And that the statute of the state of Rhode Island, passed since the Revolution (in 1798) which was relied upon by the counsel for the defendant as effecting a repeal of the former acts, was in truth susceptible of but one conclusion, and that fully affirming the former acts, and sanctioning the opinion now advanced.

Upon the second point, whether, upon the

facts in this case there was in point of law an escape of the prisoner, it was contended:

(1) The defendant's giving to the prisoner the liberty of the gaol, as proved in the case, was an escape. That an escape may be committed, whilst the prisoner remains within the walls of the prison, is established by a train of decisions, extending from a period long anterior to the time of Lord Coke down to the present day. In Westby's Case, 3 Coke, 71, it is expressly decided, that an escape may be committed within the walls of the prison, and the court observes, "that the law doth adjudge one, who remains in prison to escape." So where a woman, a keeper of the prison, marries her prisoner, it is an escape of the prisoner, though he never leaves the walls of the prison. 1 Plow. 17; 2 Bac. Abr. 515, "Escape," B, 3; 3 Com. Dig. 601, "Escape," C. So where the inheritance descends to the prisoner, it is an escape, though he remains within the walls. 3 Com. Dig. 601, "Escape," C, 6. So when the prisoner is committed, and no one is at the prison to take charge of, and confine him. 3 Mass. 310. Committing a sheriff to his own gaol is also an escape. 6 Johns. 22. In Boyton's Case, 3 Coke, 44, it is said to have been adjudged as early as the 24 Hen. VIII. that prisoners on execution should not go at liberty within the prison. And the same principle is recognized and established in Dalt. Sher. 485; Dyer, 249; 1 Rolle, Abr. 817; 10 Vin. Abr. 83, "Escape," C, 1; 11 Mass. 161; 3 Mass. 101. It has been suggested by the counsel for the defendants, that these decisions are founded upon statutes. In this, however, there is a mistake; they are the principles of the common law, and in full operation long before the statute alluded to was enacted. 3 Com. Dig. 597, B, 1. And see the authorities before cited. This statute did not originate these principles, but made further ones, giving to keepers of certain prisons additional powers over their prisoners in specified cases, in order to oblige them to a more speedy compliance with their duty. 2 Bac. Abr. 512, "Escape," B, 1. In 3 Mass. 101–103, before cited, the common law principles and decisions are reviewed by the able and distinguished chief justice of the supreme judicial court of that state, and all the questions upon this point decidedly put at rest. It is observed by the adverse counsel, that the chief justice in one part of that opinion says that the prisoner's going to the pump within the limits was no escape, and hence would seem to infer his right to be upon the liberties. But in that case the prisoner had given bond for the liberty of the yard, and that was the reason, why the going to the pump was no escape.

Impressed with the high authority of this decision, and its conclusive nature, the counsel attempt to consider it as founded in some degree upon the statutes of that state, between which and those of this state upon this subject there is, they say, a difference. But its force and application cannot be so evaded. The court expressly treat of the common law, and distinctly state the principles of it. At common law, says the chief justice (page 101), the sheriff had power, &c., and refers to Dalton & Impey, who are clearly treating of the common law principles. Nor is there any material difference between the statutes of the two states. Their language is very similar, and their provisions are clearly the same, as far as they relate to any question included in the case at bar. 3 Mass. 103; Laws R. I. 1798, p. 224, §§ 8, 9. From these authorities then it is perfectly clear, that an escape may be committed, while the prisoner is within the prison walls. The reason seems to be plain; it is because he is not in legal custody there. By all the authorities, his personal presence is not enough to constitute legal imprisonment. But the person must be in safe and close custody, in strict ward, in the custody of a keeper, of competent authority to restrain him. It is settled by all the authorities, and admitted on the other side, that if the prisoner is without the limits although with a keeper, it is an escape. And yet the same authorities say, that if the prisoner is at his liberty within the prison, or is without it in custody of a keeper, it is an escape. The cases before cited put his being at liberty within the walls, and his being without them with a keeper upon precisely the same ground. It is clearly an escape in both instances.

Imprisonment consists of two great characteristics. It is a confinement or restraint of the person (1) in a proper place; (2) in proper custody. And if either of these is wanting, there is no imprisonment, and of course there is an escape. A debtor may be committed, and within the four walls, and yet as to the question of escape not a true prisoner, because not in proper custody, or rather in no legal custody at all. So he may be in actual custody by an officer with a legal precept, and of competent authority to restrain him, and yet if he is not restrained in a proper place it is an escape. Hence if a prisoner is ordered to court under a habeas corpus, and his keeper carries him out of the proper road, or stays too long, &c., it is clearly an escape. Hob. 202; 10 Vin. Abr. 83. Hence when the sheriff arrests one on execution, and carries him out of the direct road to the gaol, or loiters too long on the way, it is an escape, although the sheriff is with him. 1 Bos. & P. 26; 9 Johns. 329; 3 Com. Dig. 600. So by the laws of Rhode Island the prisoner must not only be in gaol but in custody. Dig. 1798, p. 196, "Form of Execution."

The reason and the justice of these principles seem to be plain. In the first instance, although the person or debtor is within the walls, yet he is not in custody; that safe

and close custody, which the law requires. The place is right, but the custody, the restraint, is wanting, and therefore there is an escape. In the second, there is an actual custody, but it is exerted out of its proper place, and therefore there is an escape; and in both cases the sheriff is undoubtedly liable. The statute of Rhode Island, of 1747 (Old Laws, p. 34), it is submitted, places this question beyond all doubt. It is "An act for the ease of prisoners for debts;" and the first granting to prisoners the liberty of the yard. By this statute and its preamble, it appears, that persons were closely confined in scanty little rooms, under lock and key, to the injury of their healths. That if they had the liberty of the house, they would support themselves, &c.; and it was doubted whether a bond for this liberty was valid in law. The act then provides, that it shall be lawful for the sheriff to grant and allow to prisoners for debt apartments in the prison, and the liberty of the yard, on their giving bonds to the sheriff for the use of the creditor, to remain true prisoners, &c. By this act it is perfectly demonstrated, that no sheriff ever dreamed he could grant the liberty of the yard to a prisoner upon any terms whatever; and the doubt was, whether, even with a bond, he could grant the liberty of the house. Without such bond, no pretence of such a right is even suggested. This act and all the subsequent acts put the liberty of the house and of the yard upon the same ground precisely; that of previously giving bond with sureties. This statute is not merely explanatory, but grants new powers, and makes new provisions. It provides that it shall be lawful to grant or allow these favours to prisoners on bond. And if it should be a fact, that previous to this statute sheriffs had occasionally indulged prisoners within the prison walls, upon a supposition of right, the statute most unquestionably repeals that right, and prohibits that indulgence in future. It explicitly and emphatically prescribes the mode and condition upon which, and upon which alone, the liberty of the house or yard can be granted to a prisoner. See 11 Mass. 162, 633; 7 Mass. 101.

The statute in question is similar in its provisions to all the subsequent statutes on the subject, except the bond is required to be given directly to the creditor, and the rate of interest has been occasionally varied. The statute of 1798, which is now in force, is also conclusive on this point. Dig. 1798, p. 126, §§ 8, 9. The eighth section, like the former act, prescribes the only terms, upon which the liberty of the house or yard can be granted to debtors. The language of both acts is similar. Independently of these provisions the prisoner must be kept in that safe and close custody, designated by the common law, and established by the current of decisions already referred to. And this is fully confirmed by the ninth section (page 127), which provides, that if the bond given for the enlargement of any prisoner is sued, &c. the principal and his sureties shall not have the privilege of the house and yard, but shall be committed to close gaol. This section calls the liberty given, an enlargement, clearly implying that the restraint, which before was limited to close and safe confinement in strict ward, is enlarged to the house and yard. And further, the principal and sureties are to be committed to close gaol. Now this section did not introduce any new kind of restraint or imprisonment as to this class of debtors; it merely intended, that they should be in the same custody, and under the same restraint, that debtors were, independent of the statute, that is, safe and close custody in the prison.

The counsel for the defendant has alluded to the decisions of New York and Connecticut, in support of his argument. The statutes of those states and the regulations of their prisons are, it is believed, totally different from those of Rhode Island. In New York, the court consider the liberties of their gaols similar to those of the Fleet and Marshalsea. In Connecticut, the liberties are fixed and settled by the supreme court, and their use by prisoners allowed upon such terms as they judge expedient. 1 Back. Sher. 165 et seq.; 2 Back. Sher. 2, 8, et seq. Whether the decisions in New York are correct or not, may, I apprehend, be seriously doubted. In both states, judicial decisions are founded upon state regulations, which make a part of their system of local law, and can have no influence here, where the statutes are essentially different. It has already been remarked, that our statutes and our common law upon the subject in controversy are similar to those of the state of Massachusetts, the decisions of whose laws upon every point involved in the case at bar are clearly in favor of the plaintiff. In New York, the ancient common law has been recognized as existing in England, as contended for by the plaintiff's counsel. It is however considered, that their statutes have modified it relative to sheriffs. gaols and gaol liberties. Their statutes are in a great measure a compilation of the English statutes, embracing that of 8 & 9 Wm. III. Under these statutes their courts have adjudged the liberties to be a mere extension of the prison walls and which the sheriff cannot refuse a prisoner, who offers competent security. When upon the liberties (with or without bond) the prisoner is reputed to be in the keeper's custody, and if he departs, the keeper can retake him. But the case here is totally different. When a bond is given, the custody of the keeper is at an end, and should the prisoner depart from the gaol yard, it is not to be pretended, that the keeper or sheriff, or the committing creditor, can retake and imprison him, nor that the sheriff is liable for an escape. In the case at bar, no bond of any kind was taken. Upon any principle whatever, therefore,

the decisions in New York can afford no defence to the present case. Jansen v. Hilton, 10 Johns. 549.

(2) It was further contended on the part of the plaintiff, that making the prisoner turnkey, and giving him the keys of the gaol was also an escape. The reason assigned in the books, why these acts constitute an escape is, that the prisoner having the keys of his own prison is no longer in restraint; he is not in safe and close custody, nor in strict ward. And although he may remain within the walls, it is nevertheless an escape, as he is not there by restraint. He cannot be said to be in custody of the sheriff, when that custody has been voluntarily relinquished, and the means of enforcing restraint, or continuing the custody, voluntarily surrendered to the prisoner. Such a case is adjudged to be an escape, for the same reason, that committing a sheriff to his own gaol, or a woman keeper marrying her prisoner, or the inheritance descending to a prisoner, are adjudged escapes. It is because there is no legal custody. Platt's Case, 1 Plow. 36; Cas. t. Hardw. 296; 3 Com. Dig. 601, "Escape," C. "If the sheriff makes a prisoner gaol keeper and gives him the keys, it is the escape of the sheriff." 5 Mass. 312. "For the prisoner (say the court), by being the keeper, and having the keys, is no longer restrained of his liberty." The reason is obvious. He cannot confine himself. Imprisonment is actual restraint by external power, having the right to restrain; but a man cannot exert this power upon himself, and the moment it is attempted, his prison doors are open and he is free. It is argued on the other side, that the turnkey, in the case referred to in the books, actually left the prison and walked into the street, and in that way committed the escape, and 3 Com. Dig. 601, is cited. But the departure of the turnkey from prison is not the escape spoken of in the authority, nor was it the foundation of the action. He returned before action brought, and was within the walls. In cases of involuntary escape, return before suit is equal to capture on fresh pursuit, and is a good defence. If such a defence would have availed in that case, it would have been made, for it is not pretended, that any permission was given to leave the gaol, except delivery of the keys. But it is not pretended by any of the authorities, that such a defence would be sustained, and for this plain reason. The escape was voluntary in the sheriff; the escape was completed within the walls, the moment the keys were delivered to the prisoner, and his being without the limits was only evidence of the escape being voluntary on the part of the sheriff.

(3) The plaintiff's counsel also insisted, that Stephen Witmarth, the keeper, having been committed to gaol was an escape in the prisoner. It seems to be clear upon authority, that committing the keeper, is an escape, not only of himself, but of all the prisoners, of whom he was the keeper. 2 Bac. Abr. 515, "Escape," B, 3; Dalt. Sher. 487; 10 Vin. Abr. 78, "Escape," A, 2, 12; Style, 465; 1 Keble, 202, pl. 2; 3 Com. Dig. 601, "Escape," C. The reason of this principle is obvious. When the keeper is committed, it is a termination of his authority. He cannot be the keeper of a prison, in which he is a prisoner. In contemplation of law he is supposed to be locked up, and his ability and power to act are gone. "When the underkeeper (gaoler) is committed to prison, his employment is thereby determined." Per Sewell, C. J., 11 Mass. 184. In 5 Mass. 312, it is decided, "that committing the keeper is an escape," and on this ground, that he cannot keep himself. This is the true foundation, I apprehend, of all the decisions on this point, that his imprisonment ends his authority as keeper; so that he can neither restrain himself nor others. And his authority being so at an end, the prisoners are all without a keeper; they are not in safe and close custody. In fact, they are in no custody at all, either actual or constructive, for there is no person there, who does, or who has a right to, have them in custody. And this by all the authorities is clearly an escape. Some of the cases say, it is an escape, unless the keeper first secure his prisoner. In this case it is in proof, that Joseph Witmarth was not secured, but that he had the same liberty in and over the house, and the custody of the keys, in the same manner, while Stephen Witmarth was committed, as before. It is also in proof, that no new keeper was appointed; nor was the sheriff at the prison according to the recollection of the witnesses, while Stephen Witmarth was in confinement.

Whipple & Burgess, for defendant, contended that an action on the case, and not debt, was the proper remedy for the plaintiff. The injury alleged is an escape. This is a tort. The remedy for a tort should be such an action as will give damages proportionate to the injury. If a debtor, who has no means of making payment, be suffered to escape, what can be the damage to his creditor? Imprisonment cannot coerce payment from the totally insolvent. It would be otherwise, if a rich, obstinate, and fraudulent debtor were imprisoned. Imprisonment might coerce him to make payment. Hence the common law, with all the wisdom of common sense, gives the action on the case as a remedy for an escape. 10 Vin. 77; 2 Inst. 382; Cro. Jac. 658. By St. 1 Rich. II., c. 12, an action of debt is given against the warden of the Fleet, if he permits prisoners in execution for debt to escape. By an equitable construction of this statute it extends to all sheriffs and other keepers of prisons. This statute was enacted A. D. 1376, about 450 years ago. Since that time the subjects of the crown of Great Britain have had their option in cases of escape, to pursue their remedy, either by action of the case or action of debt.

It is contended by the counsel for the plain-

tiff, that the statute of Westm. II., giving the action of debt, is not now in force in this state as an English statute, but as common law. On the other hand we contend, that the statutes of England never were in force in Rhode Island, as common law. That although in other states, many English statutes in force at the time of the emigration of our ancestors were justly considered as a part of their common law; yet the case was different in Rhode Island, because our assembly did not leave to the courts the task of deciding what statutes should be in force and what not, but performed that task themselves from time to time. In 1700, all the English statutes were "introduced into practice" by an act of our assembly, in cases in which we had no statute of our own. Afterwards, from time to time, our assembly specified a part only of the English statutes, and declared that they were "hereby" introduced into notice. Many acts were passed on the subject, and the English statutes to be in force, diminished to a small number. A part of the statute of Westm. II., was introduced, and we contend, that that excludes all other parts. In 1798, the laws of our state were revised, and the fifth section reads thus: "That in all cases, in which provision is not made, either at common law, or by the statutes aforesaid, the statute laws of England, which have heretofore been introduced into practice in this state, shall continue to be in force, unless the general assembly shall especially provide therefor." The preamble to that section is important; "And whereas in the aforesaid Digest, statute provision may not have been made in all cases, unprovided for at common law," "Be it enacted," &c., as above. In 1767 the legislature by an act, designate particular acts, of parliament, to be in force in this state, beginning at a period long antecedent to the emigration of our ancestors. Among these acts is the statute of Westm. II., "de donis conditionalibus." Whether it was the intention of the legislature to introduce the whole of this, or only such parts as relate to estates tail, is very doubtful. Much of that voluminous statute relates to local affairs; such as taking fish in particular rivers in England. The whole never could be practised upon here. The statute of Gloucester, the whole of which is expressly introduced, relates to subjects of general concern entirely, and so of the other statutes, the whole of which are introduced.

The counsel, however, for the plaintiff may take their choice; if a part only was introduced, it was that part relating to estates tail, and all the other parts are excluded. If the whole was introduced, it was introduced as an English statute. And when it was repealed in 1798, no practice under it can be set up as common law. If the legislature in 1798 meant to repeal the statute, they meant of course to put an end to the practice under it. It will be observed, that the language of the legislature in 1767, relative to the English statutes designated, is, that they are hereby introduced. Their language in 1798, is, the statutes of England "heretofore introduced into practice." Introduced by whom? By the courts of law? No. By the bar? No, but by themselves. They did not mean to leave that duty with the courts, as in the other states, Pennsylvania for instance. See a late case in Yates' Rep. Neither did they mean, that all the statutes of England in force at the emigration of our ancestors should be considered as common law here. For if all those statutes were in force as common law, why introduce a part of them as English statutes? If they had been silent as to all statutes previous to the emigration, and introduced some, that were passed since, it might be concluded, that they were silent, because they considered the ante nati, as already in operation; and introduced the post nati, because they would otherwise have no force. But inasmuch as in 1700, they introduced all the English statutes, and in 1767 introduced by a new revision only a part, those that were omitted, were in effect repealed. They were not to be practised upon any longer. It will also be observed, that in the act of 1767, it is said, that on subjects not provided for by our own statutes, nor by the acts of parliament aforesaid, "the laws of England" are to govern. That expression undoubtedly means the common law, as contradistinguished from acts of parliament. It would be taking great pains to select a part of the acts of parliament, and then by one stroke of the pen introduce the whole, if we should give to those words a more enlarged meaning.

Inasmuch then as the legislature of this state have undertaken to select from the English statute book certain acts of parliament, what they have selected were in force as English statutes, and what they left behind, they meant should not be in force. If they took a part of the statute de donis only, the other parts are excluded, and no practice of the courts or bar can give them life. Suppose the whole of the statute de donis to be introduced by the statute of 1767, did the legislature repeal it in 1798? It is evident, that in 1798, the legislature did not mean to continue in force all the English statutes, that were introduced in 1767. What part then did they mean to continue in force? Why, such parts as related to subjects, concerning which no provision was made by our own statutes, or by the common law. It will not do to say, that the English statute makes a better provision than the common law; but does the common law provide any remedy against a sheriff for an escape from gaol? I say, that it does provide a remedy, and a better remedy, than the English statute. An action of the case is the remedy at common law, and considering the feebleness of our gaols, the only remedy, that ever ought to be allowed of. In England, where the sheriff provides his own prison, and where, from

their very structure, an escape without some fault of the jailor is hardly possible, debt may be in most cases a proper remedy. But in Rhode Island, where gaols are built by the government, and so little different from common dwelling houses, that escapes without any fault of the jailor are of common occurrence; the action of debt would be unjust and oppressive in its operation.

The counsel for the plaintiff give up the action of debt as a statute remedy, and say it is in Rhode Island a common law remedy. This action of debt, which is drawn fresh from the bowels of a feudal statute, this action of debt, which in England for six hundred years has been used as a statute remedy, is all at once in Rhode Island changed in its nature. The consequences of admitting such a construction are indeed alarming. The judicial, is placed above the legislative authority, and no repeal of any statute is of any force. The legislature put an end to its existence as a statute law, and the courts resort to the practice under that very statute, as evidence of common law; thus continuing in force under a new name the law, which was intended to be repealed. If our legislature never had introduced any of the English statutes, but they had been practised upon by common consent, that common consent would have formed the unwritten common law. But with us, the English statutes were introduced by matter of record, and if it exists now, it must be as a record. It has none of the features of common law about it. But supposing the action of debt well lies in this case, the next question is, whether in point of law, the prisoner, Joseph Witmarth, did escape.

(1) The plaintiff relies on three facts as evidence of an escape: (1) That Joseph Witmarth, the prisoner, had the liberty of the gaol house; (2) that he was made turnkey; and (3) the commitment of Stephen Witmarth, the jailor. The first proposition of the plaintiff is, that a jailor is guilty of an escape, by giving to his prisoner the liberty of the gaol house. The affirmation of this proposition throws the burden of proof on the plaintiff. Now so far from showing this to be a settled principle, we state boldly, perhaps imprudently, that there is not even a dictum in the books in favor of it. Every thing, that is said in the old books and repeated by Judge Parsons in 3 Mass. 101, 102, against suffering a prisoner to go at large, either within or without the prison, relates, as that great man expressly says, "to sheriffs, who have the appointment of their own gaols for debtors in execution." The reason and necessity of such a principle to such a keeper are obvious. The whole kingdom may be made a prison. But that the keeper of a gaol, erected by public authority, cannot give to his prisoners the liberty of the gaol house, is a doctrine never contended for before. Even under the statute of Westm. II., keepers of prisons were impowered to confine their prisoners in irons, but were not obliged to do it. "They may do it," says Lord Coke, "if need be." A much stronger ground may be contended for, consistently with authority, than the case at bar requires, not only, that a jailor has a right to grant the liberty of the prison house, but of any part of the prison. Chief Justice Parsons, in his charge to the jury (3 Mass. 88), says expressly, that they must find for the defendants, unless they are satisfied, that Willis went to the outer pump. His going to the pump within the picket fence, but without the prison house, was decided not to be an escape. It is true, that in another part of the case (page 103) he says, that the prisoner "must be confined not only within the prison, but within the gaol house." This difference probably arises from his construction of the statute of Massachusetts, relative to prison bonds. But he no where contends for the doctrine, that the liberty of the house may not legally be allowed. Debtors confined under the statute of Westm. II. were considered in the light of criminals, and as to them a strict rule prevailed. The whole doctrine of salva et arcta custodia comes directly from that statute. It is a stranger to the common law. "There is a great difference, says Viner, (title "Escape," C, 2), between the restraint of prisoners in execution under this act for arrears of rent, &c." and ordinary cases. In Vin. tit. "Escape," C, 6, it is said, "that a man in prison, &c. ought not to go out, though with a keeper, but yet imprisonment must be custodia et non ponea, &c." The ancient authorities relative to the ease and favour, which the marshals and wardens might legally shew their prisoners, come nearer to our case. because their prisons were erected, at least governed, by public authority. From those authorities it appears, that prisoners, unless restrained by an order of court, were allowed the liberty of the prison house and yard, and in some instances of an adjoining garden. 10 Vin. Abr. A. 17; Noy. 38; Bulst. 145; Poph. 85; Cro. Eliz. 366.

The above cases shew, that by the ancient common law, previous to the statute establishing rules to prisons, the keepers of prisons of every description might legally grant to their prisoners the liberty of the prison house. Since that statute it has been adjudged, that the rules are but an extension of the prison walls, and that the same liberty, which might formerly be granted by the sheriff within the walls, may now be legally granted within the rules. 2 Term R. 120. It will be at once admitted by the counsel for the plaintiff, that if the sheriff of the county of Providence has a right to grant the rules without bond, he has a right to grant the liberty of the house. This construction of the English statute has been adopted in Connecticut. 1 Back. Sher. 177; 2 Root, 174. And in New York (6 Johns. 121), Spencer, Justice, says, "It has frequently been decided in this court, since the statute allowing gaol liberties, that a sheriff

may let a prisoner in execution go within the liberties, without taking a bond, which is for his indemnity." The force of these decisions cannot be evaded by a pretended difference in the statutes of New York, Connecticut, and Rhode Island. There is no substantial difference between them. The phraseology of the English statute is admitted to be somewhat stronger than that of Rhode Island, but not sufficiently so to alter the construction in this respect. The decision in 3 Mass. is on the peculiar language of their statute.

But there is another reason in favor of the English construction, that applies with peculiar force to Rhode Island, and which perhaps has no influence in Massachusetts. It is this: In 1720 an act of our general assembly was passed, introducing all the statute laws of England in cases, in which we had "no law of the state in particular." At that time we had prisons and prison rules, and we have abundant proof to show, that sheriffs have been in the habit of granting the rules to prisoners sometimes with, and sometimes without bonds, as far back as the memory of man extends. Now we ask, how our prison rules were established? The common law of England is silent on the subject, and we had no statute of our own, and yet we had prisons and prison rules. The answer is easy and undeniable, the English statute was in force in this state. We practised under it, probably for a century, and by a comparison of the act of 1747 of our general assembly with the English statute, it will be seen, that it was not the intention of the legislature to introduce a new rule, but to confirm and establish the then prevailing practice. Doubts had arisen on the subject, and to remove them that act was passed. The language of all our subsequent acts is the same substantially, as that of 1747. So much has this subject of prisons and prison rules been considered a matter entirely of usage and practice in Rhode Island, that as late as the year 1800, it was found, that the limits of the gaol yard (or rules) in the county of Providence, depended entirely upon tradition. We know its extent by no record, no law, no written document whatever; and in that year the legislature confirmed by an act, what had been established by usage. However different therefore the statutes and usages may have been in Massachusetts, all our laws on the subject are of English origin, our practice previous to 1747 was the same as in England. Since the act of the assembly in 1747 sheriffs continued to give what we call the liberty of the yard without bonds; and that practice continued in some of the south counties until within three years. It was enough to put a stop to the practice, that doubts were entertained on the subject by some gentlemen of the bar. It is hoped, that those doubts will be removed by a judicial decision.

One other argument against the proposition, that a jailor has no right to allow to his prisoner the liberty of the gaol house, and we shall dismiss this part of the subject. It is a fact, that that liberty has been granted in England and in this country, as long as we have any knowledge of the subject. Many prisons in England are now standing, that were built centuries ago. They are like Newgate, the Fleet, and other prisons, that were rebuilt after the riots in 1780. They have yards adjoining them for the accommodation of the prisoners. Newgate, which is the sheriff's prison, was built in the 13th century, and if we mistake not, of the same form, though not so large as the present building. There is not a prison in London of any note without a yard, into which the prisoners, even the criminals, are daily admitted. We can find no record of any actions ever having been brought on account of these indulgences. In all the New England states, and in New York (probably in all the states in the Union), jailors give the liberty of the gaol house to such of their prisoners, as they choose to confide in. A usage so uniform and so ancient forms a rule of itself, at least it requires a clear and well settled rule to overturn it. If however the court should be of opinion, that usage is not decisive, was there an escape of the prisoner? Let it be remembered, that this action is brought against the sheriff for an alleged escape of Joseph Witmarth, and that this man was committed on the suit and execution of the plaintiff, and that ever since that time the said Joseph has remained, in consequence of that commitment, within the walls of the prison. The action is therefore founded on an escape implied, not an actual escape; an escape in law, not in fact; not by going at large, and whithersoever he would, but by staying in confinement within the walls of a prison. It is the first action of this kind brought for an implied escape, to be found in all judicial history. We agree that certain obiter dicta of certain judges intimate, that there may be an implied escape, and that by one statute of England a certain act of the sheriff may be deemed an escape. But the books furnish no instance of an action in any such case. Westby's Case most resembles an action for a constructive escape. The old sheriffs of London neglected to assign the prisoner on the execution of Westby to the new sheriffs. He escaped and went at large. An action for the escape was brought against the old sheriffs. It was adjudged to lie. They had neglected to assign the prisoner, which the court decided was the same thing, as if they had discharged him from commitment. There had been an actual escape, and the question was, to what time it referred. The court adjudged, that it referred to the time, when the old sheriffs, by neglecting to assign the prisoner, permitted and gave him liberty to

go at large. Coke, pt. 3, p. 71. In this case had the new sheriffs detained the prisoner there would have been no escape.

The doctrine of "salva et arcta custodia" is no part of the common law, but the production of statute. Coke in his 2 Inst. 387, commenting on the statute of Westminster, as it relates to the strict confinement of prisoners, says, but this the "gaoler could not do by common law, as by all our ancient books it appeareth." How prisoners for debt in execution came to be strictly confined, we learn from 10 Vin. p. 83. Boyton's Case, 3 Coke, 49. In 24 Hen. VIII., a decree and order were made in the star chamber for that purpose; and the keepers of all prisons in London, were directed to observe the said order and decree, upon pain of £100. After this time, and in 9 James I. (Bulst. 145), in the case Scriven v. Wright, on motion of the plaintiff, that the defendant had too much liberty, though committed on plaintiff's execution for debt, and that he lived at his pleasure without any restraint, and therefore, for the more speedy payment of his debt, the court was moved, that he be in salva et arcta custodia the court ordered, that he should be restrained of his liberty. Was the sheriff or keeper charged with an escape? No. Yet the prisoner had lived at his pleasure without any restraint. Doubtless, he had had the liberty of the prison house, yard and liberties. In Beecher's Case, Noy, 38, 10 Vin. Abr. 75, the defendant was in execution in the Fleet for £12,000, and being there, he had the liberty of the garden, and to play at bowles; on motion for the creditors, it was ordered by the court, that he should be in strict custody in his chamber. It was said by Popham, and denied by none, that if the prisoner be confined to his chamber by order of court, and the warden of the Fleet suffer him to have the liberty of the house, it will be an escape. There was no escape alleged in this case, yet Beecher had had the liberty of the house and garden, nor could there have been an escape by his having these liberties, unless he had been sentenced by the court to arcta custodia, in his chamber. The doctrine of close confinement under lock and key, and in irons, for debt on execution was unknown to the common law. The true common law doctrine seems to be this, that whenever a man is committed to any prison on execution for debt, the court may make an order, that such prisoner shall be confined to his chamber, but if no such order be made, the keeper may give him the liberty of the house. If he actually escape, it will be a voluntary escape as to the sheriff, because he might, if needful, have confined the prisoner under lock and key, or if refractory, in irons. Bac. tit. "Escape"; Vin. Id. This power of the English courts seems to be incident to their judicial authority, and to extend alike to all the prisons in England. The statute of Westm. II. c. 11, aided by the authority of the star chamber, may have originated some new rules concerning keeping prisoners. But all the cases concerning arcta et salva custodia, are confined to the period of Henry VIII., and the three succeeding reigns. Even before the statute of 8 & 9 Wm. III., the system seems to have been gradually changing.

(2) But we are told, that appointing the prisoner a turnkey was an escape. In Rhode Island there is no such officer known in the law as a turnkey, and if there were, the said Joseph was never appointed to that office. By the statute, the sheriff may appoint deputies and a gaoler. He cannot appoint a turnkey, nor can the gaoler appoint any kind of deputy. Neither is it in evidence, that either the sheriff or gaoler ever appointed the prisoner, or attempted to appoint him, the turnkey of the prison. The most, that is sworn to, is, that he occasionally locked and unlocked the inner doors. He was never empowered to go on the outside of the gaol and lock it up. He never had the control of the keys of his own prison. This theory of the escape of a prisoner by being appointed turnkey is founded on a state of facts, which does not exist in this state. It supposes, that the turnkey, in order to discharge the duties of his appointment, must of necessity be without the walls of the prison. This is not true in fact, for in every gaol in this state the jailor resides within the walls of the prison, and the doors are open all day, and are locked at night on the inner side. In England, and in most counties of Massachusetts, the gaol and the jailor's house are separated and distinct buildings, and the gaol is locked up on the outer side. He, who exercises the office of turnkey, must therefore of necessity go without the walls of the prison, both in England and in Massachusetts. It is for this reason, that appointing a prisoner a turnkey necessarily operates as an escape.

(3) But the plaintiff further says, that the sheriff permitted the prisoner to escape, because Stephen Witmarth, the gaoler, was committed to gaol after the commitment of the prisoner, and before the commencement of his action. This proposition is attempted to be proved by the obiter dicta of Glyn in Style, 465, and on the supposed case of Bendison v. Lenthall, 1 Keble, 202, and 10 Vin. Abr. 76. Bendison had judgment against Lenthall, and prayed to have him in execution. The court said they would appoint a new marshal, unless he would pay the debt, and so commit him; otherwise it would be an escape of all the prisoners. Lenthall was marshal. If Lenthall had been committed being marshal, and an action had been brought against him for the escape of a prisoner in his custody, and he had been adjudged guilty of an escape, then would the authority have been in point, provided the sheriff had been committed, instead of Stephen Witmarth, the gaoler, in the case at bar. But the case is no authority, because

it is not an adjudged case, and because it is contrary to the principles of common sense. To commit the marshal cannot be an escape of the prisoners under him, because he cannot be committed. Three things are necessary to a commitment; first, an officer to make a commitment; second, a prisoner to be committed; and, third, a gaoler, sheriff, or marshal, to receive the prisoner. In the case cited, and in the case at bar, there were but two persons; Lenthall the marshal could not be committed, because there was no person to whom to commit him. If he could not be committed, then it is idle to say, it would be an escape of all the prisoners to commit him. Could he be committed to the custody of a third person, when there was no third person to receive him?

So in the case at bar, Stephen Witmarth, the gaoler, was arrested and brought to the gaol. He was either committed, or he was not committed. If he was committed, it must have been to some third person, competent to receive him and hold him in custody; this could have been none but the sheriff. If the sheriff were there to receive him, then was he there to keep the gaol and hold the custody of all the other prisoners; and therefore, Joseph Witmarth did not escape. If he were not committed, it was because the sheriff was not there to receive him, and he could not be committed, unless to some third person, to receive and to hold him in custody, that is, to the sheriff. But if he was not committed, he was suffered to go at large, and might keep the gaol, and hold the custody of all the other prisoners.

STORY, Circuit Justice. This cause has been argued with great ability and learning; and I have received much light and instruction from the elaborate discussion, which it has undergone. I have considered the question with as much deliberation and care as I have been able; and it now remains for me to pronounce that judgment, which on the best reflection I have been able to form.

The first question is, whether an action of debt lies in Rhode Island for the escape of an execution debtor. That debt lies in England in such a case, at least, since the statute of Westm. II. c. 11 (13 Edw. I.), and the statute of 1 Rich. II. c. 12, has not been denied at the bar; and is indeed supported by a weight of authority altogether incontestible. See 2 Inst. 377, 379, 380, 382; Jones v. Pope, 1 Saund. 34, and note 1; Id. 36; Platt v. Sheriffs of London, 1 Plow. 35; Alsept v. Eyles, 2 H. Bl. 108; Bonafous v. Walker, 2 Term R. 126. The only point is, whether that remedy has either by usage or statute been incorporated into the law of Rhode Island. It is not necessary, in my judgment, to consider how far the common law and statutes of England, applicable to its situation, were to be considered as introduced by adoption into the colony of Rhode Island at its first settlement, or under the charter of Charles II.,—though certainly the current of American as well as British authority sets very strongly in favour of the affirmative (5 Bac. Abr. "Prerogative," C; 2 P. Wms. 75; Blankard v. Galdy, 2 Salk. 411; Com. v. Knowlton, 2 Mass. 530; 3 Bin. 595),—because there is an express colonial statute on this subject. By the act of Rhode Island, of the 30th of April, 1700, it is enacted, "That in all actions, matters, causes, and things whatsoever, when no particular law of this colony is made to decide and determine the same, that then, and in all such cases, the laws of England shall be put in force to issue, determine, and decide the same, any usage, custom, or law to the contrary hereof notwithstanding." It is too clear for argument, that this statute completely adopts the English statute, as well as common law, in all cases not otherwise provided for; and as no colonial statute existed touching remedies for escapes, it follows, that the remedy of an action of debt was virtually coupled with the local law. Assuming this to be the correct conclusion, and it seems to me undeniable, it remains only to inquire, whether by any subsequent statute the operation of this act has been suspended or repealed. There is no pretence of an express repeal; but an attempt has been made to deduce a repeal by implication from statutes subsequently made. The statute of 1767, after expressly declaring, that the courts of the colony shall be governed by certain statutes of parliament, which it enumerates in detail, as "hereby introduced into this colony," proceeds to provide in the second section, "that in all actions, laws and things whatsoever, where there is no particular law of this colony, or act of parliament introduced for the decision and determination of the same, then and in such cases, the laws of England shall be in force for the decision and determination of the same." It does not appear to me, that this statute in the slightest degree varies the operation of the act of 1700; it is merely affirmative of its provisions. The enumeration of certain statutes, as introduced, cannot justly be considered as denying the adoption of any others; but was probably inserted ex majori cautela; and at all events the second section completely repels any such constructive repeal. Then comes the act of 1789, which, after declaring the Digest, then made of the statutes of the state to be in force, and reciting, that "in the aforesaid Digest statute provision may not have been made in all cases unprovided for at common law," enacts, "that in all cases, in which provision is not made, either at common law, or by the statutes aforesaid, the statute laws of England, which have heretofore been introduced into practice in this state, shall continue to be in force, until the general assembly shall expressly provide therefor." Dig. 1798, p. 78, § 5. Now I do not think it material to inquire, whether it be the common law of England, or the common law of Rhode Island (supposing there is a difference), which is alluded to in this statute, though upon sound principles of construction it seems difficult to

avoid the conclusion, that the latter was intended (Com. v. Knowlton, 2 Mass. 530, 534; 3 Bin. 595); nor whether the common law of Rhode Island, at least since the act of 1700, is not to be considered the common law of England, as modified and amended by the acts of parliament, and the local usages and doctrines of the colony; for in my view of the question, the effect of the act of 1798 will be the same, which ever construction is adopted. Notwithstanding what is argued by counsel in Platt's Case, 1 Plow. 35, to the contrary, there does not seem any reason to suppose, that debt was a remedy for an escape at the common law; for according to all analogies of that law, it lay not in cases of tort, but of contract only, where the claim was for a sum certain; and it seems impossible to conceive, that the injury to the plaintiff in cases of escape could always be a sum certain. From the nature of the case, it is a tort, sounding in damages, and perpetually varying in measure and extent. The statutes of Westm. II., and 1 Rich. II., were, in my judgment, introductive of new law; and such seems to have been the general if not the universal opinion of the profession, so far as it can be gathered from judicial decisions. Bac. Abr. "Escape," F; Bonafous v. Walker, 2 Term R. 126. Assuming therefore, that the common law referred to in the act of 1798 is the common law of England, as the counsel for the defendant contends, it establishes only, that debt for an escape was not a remedy given by that law, or in the language of the act, it is "a case in which provision is not made at common law." It would be too narrow a construction to hold, that if there was some remedy at the common law, the act of 1798 did not save a new statute remedy, introduced by practice into Rhode Island. The obvious purpose was to save all English statutes, then in force, which gave remedies and rights unprovided for by the common law, or by the state statutes. And at all events the act is merely affirmative, and in no respect touches former statutes, with which the provisions in the Digest are not inconsistent. That the remedy of debt for escapes had been introduced into practice in this state is clear from the extracts from the judicial records, with which I have been furnished, since the year 1767. And the legal conclusion from these extracts is greatly fortified by the language of the statutes of 1700 and 1767. Without going more at large into the subject, I am satisfied, that debt is a proper and legal remedy in Rhode Island in cases of escape.

The other question is of much greater importance and difficulty. At the threshold of the examination, which it is my duty to make, I wish to declare, that the decisions of other states upon the doctrine of escapes can have no authority in this case, unless so far as they rest upon the common law, or upon English statutes. Whatever may be the correctness or incorrectness of any decisions founded upon expositions of local statutes and usages in other states, we have nothing to do with them. The question is res integra here, and the parties have a right to have it settled upon principle.

I shall consider the case under the three aspects, in which it has been presented by the counsel: (1) Whether suffering the prisoner to go at large within the walls of the gaol was an escape; (2) whether the prisoner's being entrusted with the keys, and performing the other duties of a turnkey or assistant to the gaoler was an escape; (3) whether the commitment of the gaoler to the gaol during the prisoner's confinement without any new appointment of a keeper was an escape.

In Rhode Island (as in most, if not all of the other states), the county gaols (in which alone prisoners in execution are authorized by law to be confined) are built and maintained by the public. As early as 1729 an act of the legislature required a gaol to be erected in each county, where one was not already erected, meet and convenient for the security of prisoners. The sheriff in virtue of his office has the custody of the gaol, and is authorized to appoint a keeper of it, and is made responsible for the neglect and misfeasance in office of his deputy and gaoler. Dig. 1798, p. 400 et seq. The limits of the gaols, as far as any evidence has been laid before the court, were probably fixed from time to time by the legislature; and the present limits of the gaol in Providence were fixed by a resolve of the legislature in 1800. At what time the liberty of the yard was first authoritatively granted to prisoners confined for debt does not directly appear. But very probably it did not exist anterior to the act of August, 1747. That statute after reciting in its preamble, that honest and unfortunate men are "thrown into prison, where they have been closely confined in scanty, little rooms under lock and key, to the prejudice of their health and ruin of their families, many of them being of some occupation, that if they had the liberty of the house, they could at least support themselves and families by their business;" and reciting also, that a doubt had arisen, "whether a bond made to the sheriff, that a man shall be a true prisoner, and not make an escape, is valid in law;" proceeds to enact, that it shall be lawful for the sheriff to allow to "any person imprisoned for debt upon mesne process or execution a chamber or lodging in any of the apartments belonging to such prison, and liberty of the yard within the walls and limits thereof, upon reasonable payment to be made for such chamber room, such person giving bond," &c. with sufficient sureties, &c. upon the condition specified in the statute. That condition is in substance, that he shall continue a true prisoner in the custody of the gaoler and his deputies and servants within the limits of the prison, until lawfully discharged, without committing any manner of escape. And in case of any escape, it authorizes an assignment of the

bond to the creditor. This statute is in substance preserved in the Revision of 1798, with an additional section, that when judgment is obtained upon such prison bond, neither the principal nor the sureties thereon shall be entitled to any relief under the act, "but they shall be committed to close gaol" until the execution is paid or discharged. The form of execution provided by the legislature commands the sheriff, &c. for want of goods and chattels to take the body of the judgment debtor, and him to "commit unto the county gaol, and in custody to keep within the said gaol, until the execution is discharged." These are all the statutes of Rhode Island bearing on the subject, and they leave the question of what constitutes an escape to be decided according to the common law and statutes of England adopted in that state.

Was it then an escape at common law to allow a prisoner to go at large within the walls of the gaol? It is said, and truly, that to suffer a prisoner to have greater liberty than the law allows, is an escape; but this leaves the question exactly, where it was before, for the inquiry still is, what is the liberty, that the law allows in such cases. It is also said, that the prisoners are to be kept in salva et arcta custodia. This is true; but it remains to inquire, what that safe and close custody is. By the ancient common law prisoners were not allowed to be kept in irons for the reason assigned by Bracton, "quia carcer, ad continendos non ad puninedos haberi debeat." Rom. Law, Brac. lib. 3, fol. 105; Fleta, lib. 1, c. 26; Mirror, Just. c. 2, § 9; Id. c. 5, § 1; 2 Inst. 380. And Lord Coke significantly observes, that where the law requireth, that a prisoner should be kept in salva et arcta custodia, yet that must be without punishment to the prisoner. 3 Inst. 35. The statute of Westm. II. c. 11, is the first instance, where authority is given to the sheriff, if need require, to keep the prisoner in irons, and that in terms, though not in consideration, is confined to servants, bailiffs, and receivers. And the very language of that act, which first gave the action of debt for an escape, declares, that the sheriff or keeper of the gaol shall take heed, that "he do not suffer him to go out of the prison" by writ of replevin, or other means, without the assent of the creditor and if he does, gives the action. The statute of 1 Rich. II. c. 12, which in terms applies only to the warden of the Fleet, but has been held by construction to apply to all sheriffs and gaolers, declares, "that no warden of the Fleet shall suffer any prisoner, there being by judgment at the suit of the party, to go out of the prison, by main prize, bail or baston, without making gree to the parties, &c." and if he does, it gives the creditor an action of debt. Selw. N. P. "Debt," p. 542, § 9; Bonafous v. Walker, 2 Term R. 126. Nothing can be clearer than that by the terms of these ancient statutes the action was not contemplated, unless the prisoner went without the walls of the prison; and there is some reason to infer, that nothing short of this was then supposed to be an escape. I have examined all the cases cited at the bar, and have made extensive researches to ascertain, whether there is any English case, in which it has been judicially held, that it is an escape for a prisoner to be permitted to go at large within the prison walls; or that locking up in a certain room is necessary to constitute "salva et arcta custodia." I find no such case, unless that cited from the star chamber be such, and upon that I shall have occasion particularly to comment. I exclude here from consideration the cases of constructive escapes from incompatible duties or rights, because they fall properly under another head. The general silence of the books upon such a doctrine raises a pretty strong presumption, that no such duty was imposed by law upon the gaoler to confine his prisoners in locked rooms. If his prisoners were restrained within the walls of the gaol, I cannot perceive, why in reason the confinement may not justly be deemed close and strict, especially as it is a confinement not for punishment, but for custody. The exigency of the writ of execution is to keep the prisoner in safe custody within the gaol, not that he shall be kept locked in confinement in any particular room within the walls. In contemplation of law it is an imprisonment, where the party is restrained of his liberty by force, or against his will; and therefore, says Lord Coke, he that is in the stocks, or under lawful arrest, is said to be in prison, although he be not infra parietes carceris, for there may be a prison in law, as well as in deed. 2 Inst. 589. A fortiori, a person may be said to be in close custody, where he is confined within the walls of the prison. Beecher's Case, Noy, 38, appears to me perfectly consistent with this doctrine. It is proper to recollect, that the Marshalsea and Fleet prisons are subjected to the entire control and order of the respective courts of king's bench and common pleas, and that these courts have authority to prescribe the limits and liberties, as well as the rules for the management and custody of the prisoners. Com. Dig. "Imprisonment," C. D. Beecher was imprisoned in execution for debt in the Fleet, and being there he had the liberty of the garden, and to play at bowles. And upon motion by his creditors, it was ordered by the court, that he should be in strict custody, in his chamber. "And it was said by Popham, which none denied, that if the party be confined to his chamber by order of court, and the warden of the Fleet suffer him to have the liberty of the house, that it shall be an escape." Now it may be admitted, that, if after an order by a court having competent authority, confining a party to his chamber, the gaoler suffer him to go at large

within the house, it is a violation of his duty, and is an escape. But the just conclusion from this is, that without such an order such a liberty would not be an escape. And this is corroborated by the report itself, for if the indulgence to Beecher had been deemed an escape in point of law, the proper remedy for the warden would have been an action of debt against the warden, and not an application to the court for the more strict confinement. And the report itself informs us, that such liberty was usually granted to the prisoners in the Fleet. If it had been inconsistent with what the law deems a safe and close custody, it seems incredible, that any court of justice should have allowed such a wanton abuse, thereby sanctioning an undeniable wrong. In the same maner I interpret the resolutions of the judges on occasion of the plague in London, as reported in Cro. Car. 466, and Hut. 129. The judges there proposed, that the prisoners might be removed to some house in the country, for the warden "there to keep them as prisoners sub arcta and salva custodia, as they should be kept in their proper prisons, and not to be as home keepers in their own houses." Not the slightest suggestion is made of the necessity of confining them in locked apartments within the prison. Small's Case, 2 Bulst. 148, stands upon the same ground. A motion was there made in court to have some redress in the prison of the Marshalsea for the government of prisoners there in execution, "who having so great liberty there in the prison, and in continually going abroad by bail and baston, so that they will lie there, consume their estates, and do not pay their creditors." Lord Chief Justice Coke said, that by the statute of 1 Rich. II. c. 12, prisoners sub custodia are not to go out of the prison by bail and baston, unless by the command or writ of the king, or by agreement of the parties, and that such kind of liberty given by their keeper without such warrant was an escape in law. And he added, "therefore we will confine them to be sub ferris in arcta custodia." The grievance here complained of was not, that the prisoners were at large within the prison, but that by bail, or baston,—which I presume means the custody of a keeper or tipstaff (Dalt. Sher. 140, 475),—they went without the prison, against the express provisions of the statute of Richard. And notwithstanding his lordship s harsh determination for the future,—the legality of which is very doubtful (Scriven v. Wright, 1 Bulst. 145),—it is perfectly clear, that the practice of allowing prisoners the liberties of the limits continued down to the period of the statute 8 & 9 Wm. III. c. 27, and received judicial sanction, and was then finally confirmed by parliament. In Lenthall v. Cooke, 1 Lev. 254, 1 Saund. 161, the legality of bonds taken by the keeper of the king's bench prison, upon granting the prisoners the liberties of the rules, was directly in question, and the court held them good, if not given for ease and favor, and gave as a reason, that the prisoners were so numerous, that the house could not hold them, but that they were permitted to lodge within the rules, and therefore there was good reason to take security for their true imprisonment, and constant usage had been to take such obligations. Now it is material to remark, that there was no pretence in the argument, that this indulgence had been granted under authority of any rule of court. It was a usage of the gaoler's; and if such indulgence had been an escape at common law, the bonds must have been void. The court therefore manifestly considered, that imprisonment within the walls was sufficient in point of law; and that the rules of the prison were to be deemed constructively the walls of the prison. The same case is reported in 2 Keble, 422, and Sid. 384; but comparing them together, they do not seem to me to vary the conclusion to be drawn from the more accurate statements of the other Reports. See, also, Mosdel v. Middleton, 1 Vent. 237; Case of the Warden of the Fleet, 2 Mod. 221. The foregoing observations apply with equal force to the case of Scriven v. Wright. 1 Bulst. 145. There, a motion was made in behalf of Scriven, that the defendant being in execution for debt. and having more liberty than was convenient for a prisoner to have, might be kept in close custody in fetters. The court refused to have the prisoner put in irons, as not warranted by any precedent, but ordered, that he should be restrained of his liberty. Yet if such liberty was an escape. the plaintiff had an adequate remedy independently of any such judicial order. The statute of 8 & 9 Wm. III. c. 27, does not appear to me to be introductive of any new law; but merely confirms the antecedent practice; and was probably intended, as well to correct other abuses, as to take away the right of the courts by summary interferences to deprive any particular prisoner of the customary indulgence. It enacts. that all prisoners in execution, &c. committed to the custody of the marshal of the king's bench, or warden of the Fleet, shall be actually detained within their prisons or the respective rules of the same; and if they, "or any other keeper or keepers of any prison," shall permit or suffer any prisoner in execution, &c. to go or be at large out of the rules of their respective prisons, except in virtue of some writ, &c. every such going or being out of the said rules shall be adjudged an escape. This act is merely in the affirmative; and if before the statute the going at large within the rules was an escape, I see nothing in the act, which takes away the common law on the subject. In truth, the statute considers the rules to all intents the same as the walls of the prison; and it does not even affect to consider any indulgence of liberty within the rules as an escape or violation of

duty. 2 Bac. Abr. "Escape," B, 1; Bonafous v. Walker, 2 Term R. 126.

It has been supposed in argument, that this statute is confined in its provisions to the king's bench and Fleet prisons; but some of its provisions apply to all prisons; and the section in question in terms extends "to any other keeper or keepers of any prison." And no case has been cited, in which a narrower construction has been supported.

The Star Chamber case remains for examination. It is no where reported at large; but the following brief minute of it is to be found in Dyer, appended by him to the case of Worlay v. Harrison, 2 Dyer, 249. I shall give it verbatim. "See well the statute of 1 Rich. II. c. 12, for this matter of imprisonment in execution, and how a prison and prisoner shall be ordered; and also a decree and order made in the star chamber, t. 24 Hen. VIII., by the advice of Fitz James and Norwich, chief justices of the benches, Fitzh' and Spelman, justices, that by law such prisoner shall not go at large within the prison, nor out of the prison with the warden, but shall be kept straitly in custody, &c. And an injunction thereupon given to the wardens of the prisons throughout all London to observe the said order and decree under pain of £100." Same case, cited Dalt. Sher. 140, 475. This is the whole report; and it is apparent, that it was not a decision made judicially upon a question of escape. It was merely an order and decree made by the judges with reference to the London prisoners, over which they had jurisdiction to make orders and regulations, declaring, that the prisoners shall not go at large within the prisons. It is therefore not an exposition of antecedent law, so much as a law for the future government of those particular prisons. And doubtless, it was made in the true spirit of that age and of that memorable court, signalized by its oppressions and its unrelenting severity; and in the spirit, which Lord Coke seemed zealously to cherish in better times against unfortunate debtors, consigning them to close custody in vinculis. The same case is cited in Boyton's Case, 3 Coke, 44 a, and in Rolle, Abr. 87, pl. 50; but they are mere transcripts from Dyer.

It is upon the authority of this case, or rather order of court, that the whole doctrine of constructive escapes for being at large within the prison walls has been attempted to be established. If it be considered as a positive rule of the court for the government of prisons within its jurisdiction, as upon its face it purports to be, there is certainly no objection to its legality, whatever there may be to its policy or humanity. But if it be taken as an exposition of the common law on the subject, it seems to me not entitled to any serious weight. There is no adjudged case, which supports it; and the prior as well as subsequent usages and opinions in England recognised as they are by the decisions and statute already adverted to, pronounce an indirect judgment to the contrary. I confess, that a case from the star chamber, in times of tyranny and irresponsibility, does not come strongly recommended to my mind, especially when it savours of the infliction of punishment under the pretence of a civil remedy. I do not believe, that the common law is in this instance justly expounded; and until my judgment is better satisfied by an authority, to which I must bow, I shall continue to hold the opinion, that the safe and close custody of the common law does not prohibit the gaoler from allowing prisoners in execution for debt the liberty of all or any of the rooms within the walls of the prison. See report of a committee of the house of commons on the prisons in London, in 1814, which corroborates this view of the subject. I leave untouched, because it is unnecessary to decide in this case, the question, whether he may not also allow them at his peril and his pleasure, consistently with his duty, the liberty of the prison yard or limits. And the practice in the gaols of Rhode Island during a long period of granting such an indulgence is no mean proof of what the professional opinion upon the subject has hitherto been. Until the case of Bartlett v. Willis, 3 Mass. 86, I doubt whether a more rigid doctrine was ever supposed to exist in New England; and Clap v. Cofran, 7 Mass. 98, was the first judicial decision, in which it was held, that suffering the prisoner to be in the apartments within the prison appropriated to the gaoler was an escape. See, also, McLellan v. Dalton, 10 Mass. 190. And in that case, when again before the court, it was held by the court, that if there had been no distinct appropriation of apartments within the gaol to particular uses, it was no escape. 10 Mass. 373. This opinion must have proceeded upon the ground, which I now maintain, viz. that, suffering a prisoner to be at large within the prison walls is not per se an escape; for the apartments of the gaoler, when appropriated by law exclusively for his use, are deemed by the court to be no part of the prison. Even with these modifications the doctrine in the cases of Bartlett v. Willis, and Clap v. Cofran, were so repugnant to the general practice, as well as to legislative policy, that it is now well known that the whole doctrine was immediately abolished in respect to future cases by the legislature; and the remedy in past cases was abridged in a very summary manner. Act March 4, 1809; Act June 20, 1809; Act Feb. 28, 1811; Act June 27, 1811; Act Feb. 29, 1812. It may be added, that the decisions in Massachusetts, although they profess to receive the doctrine of the common law as to escapes, are ultimately founded on what is deemed the proper construction of the provincial and state statutes.

A different opinion as to the common law appears to prevail in New York. Liberties or limits, are there prescribed by law as appurtenances to the gaol, and prisoners in execu-

tion for debt are by statute entitled to the use of those liberties upon giving bond to commit no escape. It has been held, that by these provisions the gaols are enlarged from the four walls to the extent of the liberties; and that, as the bond is given only for the indemnity of the sheriff, he may waive that indemnity and grant the liberties without such bond. Dole v. Moulton, 2 Johns. Cas. 205; Holmes v. Lansing, 3 Johns. Cas. 73; Peters v. Henry, 6 Johns. 121. It is plainly, therefore, the doctrine of the court, that at common law granting the prisoners liberty within the prison or rules is not an escape; and indeed it has been expressly decided, that the statutes relative to gaol liberties have not altered the common law as to the liability of sheriffs for escapes. Jansen v. Hilton, 10 Johns. 549; Barry v. Mandell, 10 Johns. 563. In Connecticut the decisions are to the same purpose; for it is there held, that a gaoler may allow to a prisoner committed on civil process the enjoyment of the liberties of the prison, either on bond, or his bare promise to remain a true prisoner; and that to permit prisoners to enjoy the limits is no escape; for while they are within the limits they are to every legal intent and purpose within the prison. 1 Back. Sher. 177. I have not been able to trace any decisions in any other state affirming a more narrow rule. The late case of Houlditch v. Birch, 4 Taunt. 608, appears to me to confirm the general doctrine. There, the sheriff, instead of taking the party in execution to the common gaol, kept him for fourteen days in a lock up house kept by the sheriff for that purpose; and it was held no escape. It is well known, that these lock up houses are merely designed to secure debtors, and to leave them more at liberty than they would be in the gaol, and give them better accommodations. Yet this was thought by the court as strong close custody, as the law requires.

I have examined the cases more at large, than I should otherwise have felt necessary, because there is a diversity of opinion among American judges, as to what the common law on this subject is. I have already stated the result of my own deliberate examination; and if it differs from that of judges, for whose memories I entertain a most sincere reverence and respect, I can only regret it as the unavoidable consequence of the infirmity of human judgment. My duty is to expound the law, as it appears to my own conscience and understanding; and it is a consolation, that my opinion on this point stands approved by some of the most enlightened tribunals in our country.

If I entertained any doubts upon this point, which certainly I do not, it might be material to consider, whether the statute of 8 & 9 Wm. III. c. 27, was not adopted in Rhode Island, so far as it concerned gaolers and gaols in general, by the colonial act of 1700. If it was, then, as there is no subsequent statute, that has changed the common law construction as to the right of gaolers to allow their prisoners the benefit of the prison limits at their discretion without giving bonds for security, it would follow, that, after the liberties were established in Rhode Island, the gaolers might have allowed their prisoners the use of those liberties, independently of the act of 1747. But it is unnecessary to dwell on this point, as I am very clear upon the general ground of the common law. I lay no stress upon the distinction in the act of 1798 between "close gaol," and the liberties of the yard, because the prisoner in this case never left the "close gaol," as contradistinguished from the liberties; and the provision of the act undoubtedly denies to principal and sureties upon escape bonds the use of the liberties; but it leaves the terms "close gaol" to be determined by their meaning at common law.

The second question, as to making the prisoner a turnkey, &c. is one of far more nicety in itself; but is in a great measure settled by authority. It is in effect, whether there can be a constructive escape in point of law, when there has been no actual escape in point of fact from the prison walls or limits. The whole doctrine of escapes rests upon the notion, that there should be an imprisonment of the party within the proper limits. There may be an imprisonment, either by physical restraint, or by superior force acting as a moral restraint upon the party. Thus a person is not less in imprisonment by being in the presence of an officer, who has arrested him, and restrains his liberty of action, than he would be by a personal detention by imposition of hands, or the application of fetters. Com. Dig. "Imprisonment," G. But in order to constitute imprisonment there must be actual or constructive custody or restraint. That a person is at liberty to go, where he pleases without any restraint, acting or ready to act upon him, either physically or morally, seems to exclude the notion of imprisonment. The law has therefore adjudged, that where a party imprisoned is allowed any liberty or authority incompatible with the notion of custody, not merely salva et arcta custodia, but of any custody at all, it shall be deemed an escape. Whether this doctrine be formed in over refinement of reasoning or not, it is not for me to inquire. It is sufficient for me, if it be so well established a doctrine, that I am not permitted judicially to deny it. Upon the ground already stated, it has been held, that if a woman is warden of the Fleet prison, and marries a person imprisoned in the Fleet, it is an escape in the woman, and the law adjudges the prisoner to be at large; for he cannot be imprisoned without a keeper, and he cannot be in the custody of his wife. Plow. 37, a; Com. Dig. "Escape," C. And see Westby's Case, 3 Coke, 71, 76. So if the warden of the Fleet, who hath an office in fee, dies seized, his son and heir being then imprisoned there, and the office descends to him, being in prison, the law adjudges

him out of prison, although he has fetters upon him, for he cannot be his own prisoner, and no man may be lawfully detained in prison without a gaoler or keeper. Plow. 37, a; Com. Dig. "Escape," C. And see Westby's Case, 3 Coke, 71, b. In like manner, if the sheriff be arrested and committed to the county gaol, it is an escape, for he cannot be imprisoned in a gaol, of which he has the custody. Day v. Brett, 6 Johns. 22; Somes v. Lenthall, Style, 465. Upon the same principle, if the gaoler himself be committed to the gaol, and the sheriff is not there, nor any other keeper appointed by him to receive and confine the prisoner, it has been held to be an escape. Colby v. Sampson, 5 Mass. 310; Gage v. Graffam, 11 Mass. 181. So it is asserted to be an escape, if the sheriff make a prisoner of the gaol keeper, and give him the keys. Id. The making a turnkey of a prisoner, so that he has the keys of the prison in his custody and lets people in and out of the prison, has been held at the common law a voluntary escape. That was the case in Wilkinson v. Salter, Cas. t. Hardw. 310; for although there was an actual escape without the prison in that case, yet there had been a recaption and return, which would have been a good defence, if the escape had been merely negligent. But Lord Hardwicke held it a voluntary escape, because the prisoner was entrusted with the keys of the prison, so that he might go out when he would. The case does not point exactly to the present question, but it affords a strong presumption, that the mere fact of making the party a turnkey, and trusting him with the keys, is per se a constructive escape. But supposing the case doubtful, it appears to me, that such, by the just analogy of the law, is the legal inference. When a prisoner, as in the case now before me, is permitted to act, not merely as a turnkey, but to have the possession and custody of the keys and all the doors, as well when the gaoler is abroad as at home; and to perform all the duties of an assistant, without any restraint whatsoever as to his person either by day or night, he cannot be justly deemed in any proper sense of the law to be in custody, much less in safe and close custody. The gaoler allows him for the time the complete command of the gaol; and I cannot distinguish his case in principle from those, which have been already stated. It is not the mere absence of physical restraint that makes it an escape, but it is that combined with the voluntary yielding up the right of future custody, so that there can be no recaption, if the prisoner leaves the limits. And such is manifestly the construction, which the law puts on the act, for upon such voluntary escape the gaoler loses all right of future imprisonment of the party. I do not rely upon the fact, that the outer door was ordinarily left open in the day time, as an abandonment of custody; but it is certainly a very strong circumstance to show the extreme negligence of the keeper as to prisoners, who had not given bonds.

The remaining point, as to the effect of the commitment of the gaoler himself during the period of the prisoner's confinement, may be disposed of in a few words. That commitment, without any new keeper being appointed by the sheriff, was clearly upon authority an escape of the gaoler himself, for which the sheriff would have been liable. But it was not an escape of the other prisoners, if in point of fact they were kept in custody; for although a man may not imprison himself, being gaoler, he may hold others in prison, and he may act as gaoler for the sheriff over others, even when he is himself committed to the gaol as a prisoner. It is sufficient in such cases, if there be a virtual custody by some person having authority from the sheriff, which as to all other persons the gaoler in such cases has. Nor is there any thing in the authorities cited at the bar, which, properly considered, contradicts this. The case of Somes v. Lenthall, Style, 465, was an application to the king's bench to commit the defendant, then the marshal of the king's bench prison, and the court refused it, giving as a reason, "we can commit him to no other prison but the Marshalsea, for that is the prison of this court; and to commit him to that prison, of which he is the keeper, without securing the prisoners there, before we do it, will be an escape in law of all the prisoners." And the same doctrine was held in Bendison v. Lenthall, 1 Keble, 202. See also 2 Bac. Abr. "Escape," B. 3. This doctrine at most establishes no more than, that if the sheriff himself is in actual custody under an order of court, so that he cannot guard his prisoners, he virtually leaves the prison without any keeper. But if his under keeper only is committed, and his other prisoners are in fact securely kept, there seems no reason to hold it a constructive escape of such prisoners; for the under keeper is in contemplation of law at large, and if permitted to be so in fact, he may well be a keeper of the other prisoners. If the law were otherwise, it would follow, that if the sheriff were to make a prisoner his turnkey, it would be an escape of all his other prisoners, which has not been pretended. In truth, the authority of an under keeper over other prisoners is not determined by the mere fact of his own commitment, that commitment being in point of law only for an instant.

I have finished all, that I have thought it necessary to say upon this case; and am of opinion upon the whole, that the action is well brought, and that the conduct of the gaoler in making the prisoner an assistant turnkey, and allowing him at all times the control of the keys of the outer and inner doors of the gaol, and an unlimited liberty throughout all the apartments, constitutes a constructive escape, for which the defendant is liable; and that therefore judgment ought to be rendered on the verdict for the plaintiff.

STEFFENS (UNITED STATES v.). See Case No. 16,384.

Case No. 13,351.

STEGALL et al. v. STEGALL et al.

[2 Brock. 256.] [1]

Circuit Court, Virginia.[2] June 22, 1825.

DOWER—FORFEITURE—LEAVING HER HUSBAND—OPEN ADULTERY—PERSONAL ESTATE—UTERINE BASTARDY — PRESUMPTIONS — TESTIMONY OF MOTHER—ISSUE TO TRY LEGITIMACY.

1. Under the act of assembly of Virginia (1 Rev. Code, c. 107, § 10), which declares, that if a wife willingly leave her husband, and go away and continue with the adulterer, she shall forfeit her dower, &c.; that part of the provision which relates to her willingly leaving her husband, is satisfied by any separation which is voluntary on her part: and any separation is voluntary which is not brought about by the husband's act, or by some constraint on her person. Therefore, where the husband wished his wife to accompany him, and she refused, although her parents objected to her going, and she excused herself on that ground, and because of reports that he was married to another woman, the separation must be considered voluntary on her part.

2. The words "and go away and continue with the adulterer," are satisfied by an open state of adultery, whether the woman reside in the same house with the adulterer, or in another house; whether in her own, or a friend's house, or his; or whether with or without the ceremony of marriage; in either case, she forfeits dower.

3. The claim of the wife to a distributive share of her husband's personal estate, stands on a different ground; her right to it under the statute of distributions is absolute, and she does not forfeit it by her conduct, however unworthy (1 Rev. Code, c. 104, § 29); and the court of equity is bound to carry this statute into effect, though the conduct of the claimant in equity has been reprehensible.

4. The presumption of law is in favour of the legitimacy of a child born in wedlock; but this presumption may be rebutted by other testimony. It is true that a mere probability of non-access by the husband, is not sufficient to repel the presumption: but it is not necessary for the party objecting to the legitimacy, to prove that non-access was impossible. If the evidence places the non-access beyond all reasonable doubt, it is sufficient to repel the presumption of legitimacy.

[Cited in Egbert v. Greenwalt, 44 Mich. 250, 6 N. W. 654; Watkins v. Carlton, 10 Leigh, 567.]

5. If a man marries a woman in such an advanced state of pregnancy, that the situation of his wife must have been known to him, it must be considered as a recognition of the child, afterwards born, as his own; any conduct of the husband after the birth, indicating a belief that the child is his, is decisive. But where the marriage takes place where the pregnancy is probably unknown; where the acquaintance between the parties most probably commenced too late for the husband, according to the law of gestation, to be the father of the child afterwards born; where the common opinion of the neighbourhood assigns the child to another man; where the boy grows up, not in the house of the husband of the woman, nor looking on him as a father, nor being considered as a son, and the reputation of the woman is not good; these are all circumstances which go strongly to repel the presumption of legitimacy.

[Cited in Dennison v. Page, 29 Pa. St. 422.]

6. A court of equity should direct an issue to try the fact of legitimacy, where the circumstances above narrated are supported by the depositions in the cause.

7. The unsworn declarations of the mother, that her son, born six months after marriage, is the son of another man, are not admissible to prove his illegitimacy, and a fortiori, the declarations of that man are not admissible; if their evidence is proper, their depositions should have been taken.

8. The general report of the neighbourhood on the question of legitimacy, is not to be disregarded, but its weight depends on the circumstances of the case, on the remoteness of the time when the fact occurred, and the difficulty of producing any positive evidence respecting it.

In equity.

MARSHALL, Circuit Justice. This suit is brought by Catharine Stegall, widow of John Potter Stegall, deceased, and by James Wright, and Martha his wife, and Jordan R. Sherwood, which said Martha and Jordan, are the children of the plaintiff, Catharine, and claim to be the children of the said John Potter Stegall, deceased, against Beverly Borum, administrator of the said John Potter Stegall, and John Jennett, and Elizabeth his wife, and William Smith, and Nancy his wife, and Elisha Hodge, which said Elizabeth and Nancy claim to be the children of the said John Potter Stegall, by a subsequent marriage, and which said Hodge is the purchaser of Nancy Smith's portion of the real estate. The object of the suit on the part of Catharine Stegall is to recover her dower and distributive share of the personal estate of the said John Potter Stegall, and on the part of the other plaintiffs, to recover their just share of his lands and personal estate. The bill states the intermarriage of the plaintiff, Catharine, with the said John Potter Stegall, and their intercourse with each other, which, though they did not live together, was continued for some years, during which the plaintiffs Jordan and Martha, who are his children, were born, and that this intercourse was continued until it was broken off by his marriage with Susannah Portwood, the mother of the other defendants; that he continued to reside with the said Susannah until his death, which happened in the year 1818 or 1819; that Elizabeth was born before marriage, and is, consequently, illegitimate, not having been recognised, or if recognised, still illegitimate. The answers of the children of the second marriage, assert their legitimacy, and controvert the marriage of the plaintiff, Catharine, who, about the year 1800, intermarried with Henry Hill by whom she has sev-

[1] [Reported by John W. Brockenbrough, Esq.]

[2] [District not given.]

eral children. They also deny that the plaintiffs, Martha and Jordan, are the children of John Potter Stegall. The answer of the administrator states, that he has, in obedience to a decree of the county court, delivered over the slaves to the persons who were supposed to be the distributees.

As the claims of the several parties in this suit stand on distinct principles of law and fact, they will be separately considered; and, first, that of the plaintiff Catharine, who claims her dower in the land, and her distributive share of the personal estate of the deceased.

The facts that the plaintiff, Catharine Stegall, was the lawful wife of John Potter Stegall; that she lived separate from him in adultery with another man, to whom she was probably married, are satisfactorily proved. Her counsel, however, insist, that separation from her husband and her subsequent connexion with another man, are to be justified by the circumstances of the case. Her husband, it is said, was supposed to be married to another woman, and her parents would not permit her to accompany him. The words of the act of assembly are: "But if a wife willingly leave her husband, and go away and continue with her adulterer, she shall be barred forever of action to demand her dower, that she ought to have of her husband's lands, if she be convicted thereupon, except," &c. 1 Rev. Code 1819, p. 404, c. 107, § 10. So far as respects that part of the provision which relates to the wife's willingly leaving her husband, I think it is satisfied by any separation which is voluntary on her part; and I think any separation voluntary, which is not brought about by his act or by any restraint on her person. In this case, it does not appear that her person was restrained, and the authority of her parents ceased on her marriage. Her husband wished her to accompany him, and she refused. The separation must therefore be considered as voluntary on her part. The report that he was married with another woman does not justify her refusal to accompany him, because it was not true, in fact, and she ought not to have acted upon it. But if his real situation was such as to justify separation, it could not justify her subsequent conduct. That was incompatible with the continuance of her claims on him as a husband. The words, "and go away and continue with her adulterer," would, I am much inclined to think, be satisfied by an open state of adultery, whether the woman resided in the same house with her adulterer, or in separate houses; whether in her own or a friend's house, or in his; whether with or without the ceremony of marriage, which, in this case, is absolutely void, and which, if performed in the belief that her marriage with Stegall was a nullity, may justify that act to her own conscience, but cannot justify her claim to dower in Stegall's estate. I think it perfectly clear that she is not entitled to dower in his lands.[3]

Her claim to a distributive share of his personal estate stands upon different ground. The act of assembly (1 Rev. Code, p. 382, c. 104, § 29, gives a lawful wife an absolute right to a portion of her husband's personal estate, and she does not forfeit that right by her conduct, however unworthy it may be. This court is, I think, as much bound by that act, as a court of common law would be. The principle, that a court of equity will not interfere in aid of a person whose conduct has been reprehensible in the particular case in which its aid is asked, applies, I think, to cases in which the party has a remedy at law; and if ever applied to one in which no remedy at law exists, it must be a right which originates merely in equity, and may therefore be withheld or granted according to circumstances; but a right given by a statute cannot, I think, be denied by a court of chancery, if it can be asserted in no other court. In such a case, a court of chancery can exercise no more discretion than a court of common law. The plaintiff, Catharine, is therefore entitled to her distributive share in John Potter Stegall's personal estate.

The next claim to be considered, is that of Jordan R. Sherwood, formerly Jordan R. Stegall, her eldest son, who was born six months after the marriage took effect. Being born in wedlock, he is legitimate, unless the conclusion of law can be met by such testimony, as according to principles settled in adjudged cases, is sufficient to repel it. There is no positive testimony showing the first acquaintance between the parties. Joseph Gill was well acquainted with Stegall, lived within three miles of Colonel Sherwood, the stepfather of Catharine, the plaintiff, with whom she resided, and does not recollect seeing Stegall in the neighbourhood before his marriage. Penelope Sherwood, her half-sister, was about three years old when the marriage took effect; and her recollection as to the length of time Stegall was at her father's house, cannot be accurate. Her present impressions must depend more on the statements she has heard in

[3] Lord Coke, in his commentaries upon St. Westm. II. c. 34, from which the section of our law quoted by the chief justice is taken, says: "If the wife elope from her husband, that is, if the wife leave her husband, and goeth away and tarrieth with her adulterer, she shall lose her dower until her husband willingly, without coercion ecclesiastical, be reconciled unto her, and permit her to cohabit with him, all of which is comprehended shortly in two hexameters:

'Sponte virum mulier fugiens et adultera facta,
Dote sua careat nisi sponsi sponte retracta.'

And if she goeth with or to the avowtrer, this is a departure and a tarrying, albeit she remaineth not continually with the avowtrer, or if she tarrieth with him against her will, or if he turn her away, or if she cohabit with her husband by the censures of the church, in all these cases she loses her dowry." 1 Thom. Co. Litt. 609, 610. See, also, 2 Co. Inst. 434.

the family, than on her positive memory. She would represent the first appearance of Stegall at the house, to have preceded the birth of Jordan about eight months. Polly Pinny represents the first visit of Stegall to have preceded the marriage five or six weeks, and the birth to have followed it seven or eight months. But the proof is satisfactory, that the marriage did not precede the birth more than six months, so that the first visit of Stegall to the family cannot have taken place more than seven, or at most, eight months before the birth of the plaintiff, Jordan, and there was no reason to suppose that the birth was premature. There is, however, no testimony that the acquaintance between the parties commenced with this first visit, and although Stegall lived in Halifax county, in Virginia, about sixty or seventy miles from the residence of Catharine Newby, in Franklin county, in North Carolina, yet the presumption that he had no access to her before this visit, is not so violent as to contradict the conclusion which the law draws from the marriage, unaided by other circumstances. This presumption, however, is supposed to derive considerable strength from the testimony, that according to the reputation of the neighbourhood, Jordan was the son of William Bowers; that Bowers claimed him, and that Catharine herself said that he was the son of Bowers. If the declaration of the mother is admissible testimony, it would be entitled to great weight, if it should not be conclusive; but the counsel for the plaintiff contends, that these declarations are inadmissible. In arguing this point, the admissibility of the mother, as a witness, has been affirmed by the defendants and denied by the plaintiffs; but I think it unnecessary to decide this point, because the question before the court does not, I think, depend upon it. If the mother could not be received as a witness, it follows that her declaration cannot be received as testimony against her son; and if she could be received as a witness, then her deposition ought to have been taken.[4]

It is said, that hearsay is good evidence in cases of pedigree, and in cases of legitimacy; but it is the hearsay of persons who are dead, or whose testimony is unattainable. There is, I think, no case in which the declaration of one person can be admitted as evidence against another, when that person may be examined as a witness. I am compelled, therefore, to reject the declarations of the mother, whatever may be my private confidence in their truth. The same principle applies to the declaration of Bowers, who is not proved to be dead, and who could, perhaps, go no further than to state his chance of being the father of the boy.

The general report of the neighbourhood, cannot be entirely disregarded; but the weight to which this, and all other hearsay testimony is entitled, depends on the circumstances of the case. Hearsay is admitted only from necessity; and its weight must depend on the circumstances of the case, and much on the remoteness of the time when the fact occurred, and the difficulty of producing any positive testimony respecting it. The supreme court has said, in the case of Mima Queen v. Hepburn, 7 Cranch [11 U. S.] 290, that it will not extend the exceptions to the rule that hearsay is inadmissible further than they have been already carried.[5]

The result of the whole testimony is, that the presumption that Jordan is not the son of John Potter Stegall, is strong; but not so strong as to approach impossibility. It becomes, necessary, therefore, to inquire what degree of improbability has been considered by courts, as sufficient to overrule the conclusion of law.

The plaintiffs contend that the rule must prevail, unless there be a physical impossibility, that the husband can be the father. The defendants insist that the ancient rule is relaxed, and that the facts, like most others determinable by human tribunals, must depend on probabilities, and on the comparative weight of testimony. Mr. Blackstone, in his Commentaries (volume 1, p. 457), says: "That children born during wedlock, may, under some circumstances, be deemed illegitimate; as if the husband be out of the kingdom." "But, generally, during the coverture, access of the husband shall be presumed, unless the contrary be shown, which is such a negative as can only be proved by show-

[4] Mr. Selwyn, in his treatise on the Law of Nisi Prius, under the head of "Legitimacy," title, "Ejectment," says, that "the wife is a witness of necessity as to the fact of adulterous intercourse, because that lies within her own knowledge, and she is the only person who may be supposed privy to it, except the adulterer. This case, therefore, affords an exception to the general rule, which prohibits the wife from being examined against her husband, in any matter affecting his interest or character. But non-access must be proved by other testimony than that of the wife, and this rule holds, though the husband be dead." So, in Com. v. Shepherd, 6 Bin. 286, Chief Justice Tilghman said, that "the woman" (the husband, in that case, being alive, or not shown to be dead) "would be a competent witness, from the necessity of the case, upon common law principles. I do not mean that she would be a witness to all purposes, but only as far as the necessity extends, that is, to prove the criminal connexion. Further than that, she ought not to go; because every thing else is capable of proof by other persons, and nothing but necessity will warrant the dispensing with the rule, that a woman shall not be a witness in a matter wherein her husband is concerned," &c. "That the wife may be a witness to the extent I have mentioned and no farther, I consider as well established in the cases of Rex v. Reading, Cas. t. Hardw. 79, and Rex v. Inhabitants of Bedel, Id. 379, 2 Strange, 1076, Andrews, 8."

[5] [Mima Queen v. Hepburn] 7 Cranch [11 U. S.] 290; 2 Pet. Cond. R. 496. Reviewed and confirmed in Davis v. Wood, 1 Wheat. [14 U. S.] 6; 3 Pet. Cond. R. 465.

ing him to be elsewhere; for the general rule is 'presumitur pro legitimatione.' After a divorce, a mensa et thoro, the children are bastards; but in a voluntary separation by agreement, the law will suppose access, unless the negative be shown." Mr. Blackstone goes no further than to state the general presumption of law, and, consequently, that the onus probandi is thrown on him who would establish illegitimacy; but does not intimate that stronger testimony would be required to prove non-access, than in any other case of an alibi; in all which cases the degree of negative proof which is required, must depend, in some degree, upon the strength of the positive testimony. The fact of marriage, is the fact on which the plaintiffs rely as the positive testimony in this case; and it is the testimony on which the law erects the presumption of legitimacy; but it cannot be denied that a marriage, so early after conception, that the husband might not have discovered the pregnancy, does not afford so strong an inference in favour of his belief that he was the father of the child, as a marriage after the fact of pregnancy had become notorious. In Pendrell v. Pendrell, 2 Strange, 925, the husband and wife parted after living together some months, she staying in London, and he going to Staffordshire. After a separation of three years, the plaintiff was born, and it being uncertain whether the husband had visited London within the year, an issue at law was directed; and upon strong evidence of no access, the legal presumption in favour of legitimacy was overruled, and the law left to the jury, whose verdict was against the plaintiff. The case informs us that the evidence of no access was strong, but does not say what that evidence was. There is, however, no hint that it was such as to make access impossible. It is also observable that there was, probably, some doubt whether the husband had not been in London within the year. The circumstances are not fully stated in the case; but, so far as they are stated, there is no reason to suppose that there was any other proof of an alibi, than is afforded by the general residence of the husband in Staffordshire, and of the wife in London, without any testimony that he had visited London, or she Staffordshire. It is worthy of observation that evidence was admitted that the mother was of ill fame.

The case of Goodright v. Saul, 4 Durn. & E. [4 Term R.] 356, turns upon the legitimacy of John T. Hales, whose title was set up by the defendant. Elizabeth Tilyard, the great-grandmother of John T. Hales, had intermarried with Simon Kilburn, with whom she lived in Norwich some time without having any children. The husband then went away, after which, Elizabeth lived publicly with Joseph Hales, during which time a son, Joseph, was born, (from whom John T. Hales descended), who was always considered in the family as a bastard. It did not clearly appear where the husband was during this time, but one very old witness proved that he went to London, where it was supposed he remained, and returned to Norwich after the death of his wife. The son, Joseph, went by the name of Hales. The counsel for the defendant insisted on the presumption of law, in favour of legitimacy; and the judge instructed the jury, that though it was not absolutely necessary to prove the husband out of the realm in order to bastardize the issue, yet it was incumbent on the party insisting on that fact, to prove that the husband could not by any probability have had access to the wife at the time, which, he conceived, had not been shown in the present instance. The jury found for the defendant, and on a rule to show cause, a new trial was granted. Ashurst, J., said he was convinced he had laid too much stress on the necessity of proving non-access, when the husband was within the realm, by witnesses who could prove him constantly resident at a distance from his wife. That the husband in this case left the wife and went to reside at another place, as it was believed, in London, and that there was no direct evidence of his access: there was other evidence which went strongly to rebut the presumption of access; a very forcible circumstance was, that himself and his family had taken the name of his putative father. The instruction given to the jury in this case was, that it was necessary to prove that the husband could not, by any probability, have had access to the wife, and that the testimony did not amount to such proof. This instruction was declared to be erroneous, and must have been so either in its general principle, or in the particular application of the principle. The general principle was, that it was necessary to show that the husband could not, by any probability, not possibility, have had access to the wife; and the particular application of the principle was, to the case of living openly with another man, and having a son at the time, who was considered in the family as the child of that other man, and who took the name of the putative father. This case shows clearly, that without positive proof of non-access, circumstances may rebut the presumption arising from marriage.

The case of Rex v. Luffe, 8 East, 193, turned on the legitimacy of a child born in wedlock, where the proof of the non-access of the husband until within a fortnight of the birth, was positive. In the course of the trial, Lord Ellenborough said: "Where the thing cannot certainly be known, we must call in aid such probable evidence as can be resorted to, and the intervention of a jury must, in all cases in which it is practicable, be had to decide thereupon; but where the question arises, as it does here, and where it may certainly be known from the invariable course of nature, as in this case it may, that no birth could be occasioned and produced within those limits of time, we may venture to lay down the rule plainly and broadly, without any dan-

ger arising from the precedent." In giving his final opinion in the cause, the language of his lordship is much more positive. After stating cases which show that a natural incapacity of the husband to be the father, constitutes an exception to the rule of law, he adds: "And, therefore, if we may resort at all to such impediments arising from the natural causes adverted to, we may adopt other causes equally potent and conclusive, to show the absolute physical impossibility of the husband being the father; I will not say the improbability of his being such, for upon the ground of improbability, however strong, I should not venture to proceed." "The general presumption," he also said, "will prevail, except a case of plain natural impossibility is shown." Justice Grose said: "In every case, we will take care, before we bastardize the issue of a married woman, that it shall be proved that there was no such access as could enable the husband to be the father of the child." Justice Lawrence said: "It had been shown that imbecility from age, and natural infirmity from other causes, have always been deemed sufficient to bastardize the issue, all which evidence proceeds upon the ground of a natural impossibility that the husband should be the father of the child. Then why not give effect to any other matter which proves the same natural impossibility?" Le Blanc lays down the old rule and says: "Afterwards, the rule was brought to this, that where there was an impossibility that the husband could have had access to the wife, and have been the father of the child, there it should be deemed illegitimate; and in Goodright v. Saul, the court held that there was no necessity to prove the impossibility of access, if the other circumstances of the case went strongly to rebut the presumption of access. If it do not appear, but that he might be the father, the presumption of law still holds in favour of the legitimacy." This is certainly a very strong case in favour of the opinion that positive proof of non-access is required to bastardize a child born in wedlock. The force of the decision, however, is in some degree diminished by two considerations; the first is, that access was clearly impossible. The question, therefore, was not whether illegitimacy might be proved where access was possible, but whether it was the legal consequence of the impossibility of access. When the judges proceeded to recognise the rule that legitimacy must be presumed where access was possible, they undoubtedly travelled out of the case before them; and although these obiter opinions are entitled to great respect, they do not stand on the same ground with opinions given on the very point which is decided. The second consideration is, that the case of Rex v. Luffe, was not a jury cause, but a case to be decided entirely by the court; and unless we suppose Lord Ellenborough to have changed his view of the case on hearing the whole argument, this circumstance was not without its weight; his language during the trial certainly countenances this idea. It is not entirely unworthy of remark, that though the chief justice and Grose, J., lay down the rule positively, Lawrence, J., avoids it, and Le Blanc, J., is not so explicit as the two whose opinions were first given.

This question is said in Phil. Ev. p. 118, to have been afterwards considered by the judges in the case of the Banbury Claim of Peerage, in which, Phillips says: "The principle laid down in the case of Goodright v. Saul, was affirmed." "It was held that where the husband and wife are not proved to be impotent, and have had opportunity of access to each other during the period in which a child could be begotten and born in the course of nature, the presumption of legitimacy arising from the birth of the child during wedlock, may be rebutted by circumstances inducing a contrary presumption; and the fact of non-access, (that is, the non-existence of sexual intercourse,) as well as the fact of impotency, may always be proved by means of such legal evidence, as is strictly admissible in every other case where a physical fact is to be proved." I have searched in vain for a report of this case, and must, therefore, be content with the statement Phillips makes of it.[6]

The case of Bowles v. Bingham, 3 Munf. 599, is also a very strong case in favour of the presumption of law in favour of legitimacy, and the judge who delivered the opinion, unquestionably admits the law to be, that legitimacy must be presumed unless its impossibility be shown; but the same opinion shows that in the actual case, intercourse between the husband and wife at the time of conception, was probable, and the decision was in favour of the injured party.

The conclusion to which I am brought by a comparison of the cases I have had an opportunity of examining, is, that the presumption of law is in favour of the legitimacy of a child born in wedlock, but that this presumption may be rebutted by other testimony, which does not go to the full extent of absolute impossibility. I will not say that mere probability is enough; I think it is not enough; the known connexion of a woman with another man while she cohabited with her husband, or might, upon any reasonable calculation, be supposed to have intercourse with him, would weigh as nothing. In such case as this, if the marriage had taken place in such an advanced state of pregnancy, that the situation of the wife must have been known to the husband, I should be disposed to consider it as a recognition of the child afterwards born. Any conduct of the husband after the birth, indicating a belief that the child was his, would have been entitled to great weight, and

[6] 1 Wheat. Selw. N. P. (4th Am. from 7th London Ed.) p. 613.

would probably have been decisive; but in this case, the marriage took place when the pregnancy was probably unknown. The acquaintance between the parties, most probably commenced too late for the husband, according to the law of gestation, to be the father of the child afterwards born; the common opinion of the neighbourhood gave the child to another man; the boy grew up, not in the household of Stegall, not looking upon him as a father, not being considered as a son, and the presumption of law derives no aid from the reputation of the woman. Under all these circumstances, the court would be restrained from directing an issue, only by the opinion that the presumption of law must prevail, unless it be clearly impossible that the husband can be the father of the child. As I am not of that opinion, but think that this presumption of law may be rebutted by testimony which places the negative beyond all reasonable doubt, I shall direct an issue to try the legitimacy of the plaintiff, Jordan R. Sherwood.[7]

It will be unnecessary again to go through the law of the case in relation to the claim of Martha Wright. The probability that she is legitimate, is not stronger than that in favour of her brother, and I shall direct an issue as to her likewise. It will be unnecessary to discuss the rights of the defendants, until this issue shall be tried.

NOTE. The court directed that issues be made up and tried at the next term, to ascertain whether the plaintiffs, Martha Wright and John R. Sherwood were the children of John Potter Stegall, or not. At the November term of the court, 1825, the cause was continued until the next term, and leave given the parties ad interim, to take further testimony, each party giving due notice to the other of the time and place of taking the same. At the May term ensuing, a jury was empannelled to try the above issues and after very full argument, the jury not being able to agree on a verdict, were discharged. Another jury was empannelled at the December term, 1826, to try the same issues, and the case was again very laboriously argued, but this jury being also unable to agree upon a verdict, was likewise discharged. On the 6th day of June, 1827, the court, Marshall, C. J., and Hay, J., being present, on the motion of the plaintiffs set aside the order of June, 1825, directing issues to be made up and tried to ascertain the legitimacy or illegitimacy of the two plaintiffs, Martha Wright and Jordan R. Sherwood, and proceeded to render a decree, an extract from which is subjoined:

"The court is of opinion that the plaintiff, Catharine Stegall, formerly Catharine Newby, who was lawfully married to John Potter Stegall, now deceased, in the latter part of the month of December, 1789, was his, the said John Potter Stegall's lawful wife; but as it is in proof, that the said Catharine willingly left her said husband, and for many years before, and at the time of his death, lived in adultery with another man, she is, for that cause, by the act of assembly of Virginia, in such case made and provided, barred of all claim to dower of the lands of her said husband; and yet, not being precluded by the laws of Virginia, on account of her separation from her husband, and adultery, from her share of her said husband's personal estate, she is entitled to a widow's share of the distributable surplus of the said John Potter Stegall's personal estate. The court is further of opinion, that upon the proofs in the case, considered in reference to the principles of law applicable to such case, the plaintiffs, Jordan R. Sherwood and Martha Wright ought, and are to be deemed the legitimate children of the said John Potter Stegall, deceased, by his wife, the said Catharine. The court is further of opinion, that the marriage of the said John Potter Stegall, deceased, with Susannah Portwood, after his marriage with the plaintiff, Catharine, and while his wife, the said Catharine, was living, was null and void, and that the said Susannah Portwood was not entitled either to dower of his real or to a distributive share of his personal estate; but that, nevertheless, by the act of assembly of Virginia, in such case made and provided, the defendant, Nancy Smith, daughter of the said Susannah, by the said John Potter Stegall, born after the

[7] The opinion of Chief Justice Marshall, in the above case of Stegall v. Stegall, is fully sustained by the opinion of the supreme court of Pennsylvania, in the case of Com. v. Shepherd, 6 Bin. 286. That was a criminal prosecution against Shepherd for fornication with Sarah Myers, and begetting a bastard child by her. Sarah Myers, the prosecutrix, was married in 1801. She lived with her husband two or three years after the marriage, when he went away to New York, where he had resided ever since. The father of the prosecutrix took her back to his own house in Kensington, and she had, for the most part, uniformly resided under his roof. When absent, in 1811, and the following spring for three months, engaged as a nurse in different places, the defendant frequented her company, was with her late at night when the families had gone to bed, and once was with her all night. Her husband was not known to have been in her company for several years prior to the birth of the child, which took place, (by the testimony of the mother), on the 24th of December, 1812. But a witness swore that he saw Myers, the husband, in the Philadelphia market, on the 10th of June, 1812, and it appeared that he was seen at the same place, about a month before, and also in the spring of 1811. The prosecutrix also swore that the defendant had promised to marry her, had frequent criminal connexion with her, and was the father of the child. She did not know whether her husband was dead or not; and the counsel for the prosecution in the court below, asked her when she last saw her husband? To this question the defendant's counsel objected, and, after a long discussion, the judge overruled the objection, and she answered that she had not seen him for eight years. In his charge to the jury, Yates, J. said, that if, upon a consideration of all the evidence, they should be of opinion that the husband had not had access to his wife, and that the child was really begotten by the defendant, they might find him guilty of both fornication and bastardy; but that they were not to consider any thing that fell from Sarah Myers as evidence of non-access. Per Tilghman, C. J.: "In this the judge was clearly right. In old times it seems to have been holden, that a child born of a married woman, whose husband was within the four seas which bounded the kingdom, could not be considered as illegitimate. This was unreasonable. When the husband has access to his wife, it is right that no evidence, short of absolute impotence of the husband, should bastardize the issue. But when they live at a distance from each other, so that access is very improbable, the legitimacy of the child should be decided upon a consideration of all the circumstances. The law was laid down in Pendrell v. Pendrell, in the fifth year of Geo. II. (2 Strange, 925), and has ever since been considered as settled." On the question of the competency of the wife as a witness, see note of this same case, supra.

said illegal marriage of her said parents, and during the coverture, and the defendant, Elizabeth Jennett, daughter of the said Susannah, born before her said marriage with the said John Potter Stegall, but recognised by him after his marriage with her mother, and during the coverture, as his, the said John Potter's child ought, and are, both to be deemed the legitimate children of the said John Potter Stegall. Consequently, the court declares, that the said Jordan R. Sherwood, Martha Wright, Nancy Smith, and Elizabeth Jennett are the lawful heirs and distributees of the said John Potter Stegall, deceased, entitled each to an equal share of his real and personal estate."

Case No. 13,352.

In re STEIN.

[16 N. B. R. 569.][1]

District Court, S. D. New York. Aug. 31, 1877.

BANKRUPTCY—PREFERENCE—PROVING PREFERRED DEBT.

1. A creditor who has received a preference contrary to the provisions of section 5084 of the Revised Statutes cannot prove his debt after the preference has been recovered from him by the assignee.

[Cited in Re Black, Case No. 1,459; Re Kaufman, Id. 7,627; Re Graves, 9 Fed. 821. Disapproved in Re Cadwell, 17 Fed. 693.]

[Distinguished in Jefferson County Nat. Bank v. Streeter (N. Y. App.) 12 N. E. 707.]

2. Where M., in pursuance of a scheme to obtain a preference for H., a creditor of the bankrupt, purchased logs of the bankrupt and subsequently took a transfer of a note held by H. *Held*, that he held such note as trustee for H., and that the acceptance of the logs was a preference.

[In the matter of Alexander Stein, a bankrupt. For another case involving this litigation, see Case No. 12,480.]

Dailey & Mackin, for assignee in bankruptcy.

Castner & Love, for Miller.

BLATCHFORD, District Judge. Section 5084 of the Revised Statutes provides, that every person who has accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to the provisions of the bankruptcy statute, shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom, until he shall first surrender to the assignee all property, money, benefit, or advantage received by him under such preference. Section 12 of the act of June 22, 1874 [18 Stat. 180], among the causes for which a person may be put into involuntary bankruptcy, specifies as one, that, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, he has made a payment, gift, grant, sale, conveyance or transfer of money or other property, estate, rights or credits, with intent to give a preference to one or more of his creditors, or with the intent, by such disposition of his property, to defeat or delay the operation of the bankruptcy statute, and then proceeds thus: "And if such person shall be adjudged a bankrupt, the assignee may recover back the money or property so paid, conveyed, sold, assigned or transferred contrary to this act, provided that the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended; and such person, if a creditor, shall not be allowed to prove for more than a moiety of his debt; and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy."

If Miller was not a creditor when he accepted the logs, and so did not accept a preference, there is nothing to prevent his proving the debt he has proved by his amended proof. If he is to be regarded as a creditor accepting a preference, then, inasmuch as the preference has been recovered from him by the assignee in bankruptcy by suit, he must be regarded as having accepted the preference under the circumstances specified in section 5084, and as not having surrendered to the assignee the property he received under the preference, and so being barred by that section from proving such debt. How is his position affected by section 12 of the act of 1874? I see no conflict between the provisions of section 5084 and those of section 12 of the act of 1874. The meaning of the latter section seems to be, that although a person taking a preference may be in a position, under section 5084, to prove his debt, because he has made a surrender, he shall not even then prove for more than half of his debt, if the case is one of actual fraud on his part. Under section 5084, actual fraud is of no consequence, if there be a surrender. A suggestion made by me in Re Riorden [Case No. 11,852], which was not in point in that case, to the effect that the provision in section 12 applies only where there has been a recovery, is not, I think, on more careful consideration, well founded. I see no ground for holding that there was any intention in section 12 to provide for, or to recognize that there could be any proof of a debt after a recovery, it having been the settled construction, under section 5084, that there could be no surrender after a recovery. Section 12 calls its own enactment a "limitation on the proof of debts." It is such. It says that a person in a certain position shall not be allowed to prove for more than a moiety of his debt. It does not say that any one shall be allowed to prove a debt. The provision in section 5084 is, also, a limitation on the proof of debts. It says that a person in a certain position shall not prove his debt. Section 12 says, that "this limitation on the proof of debts shall apply to cases of voluntary, as well as involuntary bankruptcy." The limitation in

[1] [Reprinted by permission.]

section 5084 applies to both classes of cases. The limitation in section 12 is a limitation added to the limitation in section 5084.

It only remains to consider whether Miller is a creditor accepting a preference. It is contended for him that, when he purchased the logs, he was not a creditor; that he took the transfer of the note from Hoyt after he purchased the logs from Stein; that he could not receive a preference unless he was a creditor at the time; and that he has done nothing to vitiate the note since he took a transfer of it. The answer to this view is that the evidence shows that the scheme was one devised by Miller to enable a preference to be obtained for a part of the note held by Hoyt, to the extent of the value of the logs which Miller obtained from Stein. It was indifferent to Miller whether he should pay Stein or Hoyt for the logs; but, if he should pay Hoyt, Hoyt would secure a preference pro tanto. The evidence shows that while Miller is the legal holder of the note, as respects the estate in bankruptcy, he holds it really as trustee for Hoyt, and that he obtained the logs really for Hoyt's benefit.

The amended proof of debts must be expunged.

Case No. 13,353.

STEIN et al. v. GODDARD et al.

[1 McAll. 82.][1]

Circuit Court, California.[2] July Term, 1856.

PLEADING AT LAW—PATENTS—CASE—ASSIGNMENT—JOINDER.

The infringement of a patent is a tort; but as the wrongful act is not committed with direct force, the form of action is that description of tort called trespass on the case. *Held*, the assignees of a patent, though it is conveyed to them in separate, undivided parts, may all join at the time of the infringement with the holders of the title, in an action for the recovery of damages for an infringement of the patent.

The action was brought to recover damages for the alleged violation of a patent. The plaintiffs sue as assignees of the patent for the state of California. A demurrer was filed by defendants; and the ground on which it rested was, that the complaint or declaration showed upon its face that the assignment of the patent to the plaintiffs is for separate interests, one undivided third part being assigned to one, and two undivided third parts to the other plaintiffs.

Shafter, Park & Shafter, for plaintiffs.
Crockett & Page, for defendants.

McALLISTER, Circuit Judge. It is argued that the interests of the plaintiffs as assignees being separate, they cannot maintain a joint action. This is the sole ground on which the demurrer rests. To sustain it, reference has been made by counsel for the demurrer to various authorities collated in 1 Chit. Pl. 10. These cases affirm the familiar principle that in actions arising ex contractu, where the legal interest and cause of action of the covenantees are several, each may and should sue separately for the particular damages resulting to him individually. This principle and these authorities do not apply to the case at bar. Here, the legal interest is joint. The quality of the interest is not destroyed or affected by the quantity in which it is distributed. The whole joint interest in this patent for the state of Calfornia is in the plaintiffs, and for an injury to that interest they may sue jointly. The authorities cited apply exclusively to actions ex contractu, and have no application to this action, which is not brought on a joint contract, but founded on tort. The infringement of a patent is a tort; but as the wrongful act is not committed with direct force, and the injury is the indirect effect of the wrongful act of the defendant, the form of action is that description of tort called "trespass on the case." Hind. Pat. 252. The cases which do apply to the present, are to be found in 1 Chit. Pl. 113. These assert the principle that "when two or more persons are jointly entitled, or have a joint legal interest in the property affected, they must in general join in the action, or the defendant may plead in abatement, and though the interest be several, yet if the wrong complained of caused an entire joint damage, the parties may," &c. If there could be any doubt on this point, it is dissipated by authority. Hindmarch (Pat. 252) tells us, if a patent has been assigned in several shares, all the assignees may join in bringing an action; and it is conceived it makes no difference whether the title of the several assignees accrues to them by only one or several deeds. In Whittemore v. Cutter [Case No. 17,600], a joint action for the violation of a patent was sustained, which had been brought by the patentee and his assignee. "The statute (say the court) gives to the assignee all the right and responsibility which the original inventor had in the undivided portion of the patent which is conveyed; and an action may well be maintained by all the parties who at the time of the infringement are the holders of the title." In the case at bar, the plaintiffs allege themselves to be the owners of the whole title and interest in the state of California; and this is admitted by the defendants' pleading.

The demurrer in this case is hereby overruled, and an order will be entered accordingly; and it is further ordered that defendants pay costs, which shall be entered in the order overruling the demurrer.

[1] [Reported by Cutler McAllister, Esq.]

[2] [District not given.]

STEINBERG (CLAFLIN v.). See Case No. 2,777.

STEINBROOK (MUNGOSAH v.). See Case, No. 9,924.

Case No. 13,354.

Ex parte STEINER.

[1 Pa. Law J. 368.]

Circuit Court, E. D. Pennsylvania. Nov. 10, 1842.

BANKRUPTCY—PAYMENT BY ASSIGNEE FOR OVERWORK—DEFINITION—"OPERATIVE."

An apprentice regarded as an "operative," within the fifth section of the bankrupt act of 1841, and his master, who was now bankrupt, having, before the bankruptcy, made an express agreement to pay him for all overwork, the court directed the assignee to pay the apprentice accordingly.

Huber, a certificated bankrupt, had made an agreement (while in business as a cutler, and long before the bankruptcy) with two of his apprentices (the petitioners) to pay them for "all overwork, according to the rate of wages that should be paid from time to time to journeymen." The facts were proved by Huber himself. The question was whether, being apprentices, the petitioners could be regarded as operatives, and so entitled to priority under the fifth section of the bankrupt act, which prefers to a certain amount "any person who shall have performed any labor as an operative in the service of any bankrupt." It was admitted that the claim was a meritorious one. The doubt on the subject was caused by the decision of the supreme court of Pennsylvania in Bailey v. King, 1 Whart. 113. In that case the mistress had been in the habit of making a pecuniary advance to her apprentices for all work done by them beyond a certain amount, but, this compensation was to be dependent on the apprentice's regular attendance at church, and his keeping regular hours at home; and the payment was refused because the apprentice had staid out all night, contrary to express direction. The chief justice said, in behalf of the court, that it was a question of grave concern whether the enforcement, by legal means, of agreements like the one before the court, was not forbidden by considerations of policy; that the relation of a master to his apprentice, if not parental, was at least pupillary; that in the case before the court the recompense was essentially in the nature of a premium to industry and good behavior; that, being so, it ought to be left to the master's award; for that, if promises designed as mere incentives to good conduct were to be the subject of suits at law, no master would make such promises. The whole court, being "entirely satisfied" on this subject, reversed the judgment below, which had been in favour of the apprentice. The court took occasion, however, to distinguish the case from that of Mason v. The Blaireau [2 Cranch (6 U. S.) 240], and called that "a very different case" from the one before them. The present case was not argued.

BALDWIN, Circuit Justice. It is admitted that a master has a right to the reasonable labour of his apprentice, but where the master, prescribing how much time is reasonable, or how much the apprentice shall give, as of course, to his work, makes a special agreement to pay the apprentice for such work as he may voluntarily do beyond this, the court does not perceive that the agreement is of such a sort as necessarily contravenes any law. If a provision of the kind in question were incorporated in the indentures of apprenticeship, it would obviously be valid; and no adequate reason has been assigned for distinguishing an agreement made afterwards. Cases may be where the enforcement of agreements by a master in favour of his apprentice would contravene the laws or policy of a state; but the case now before us depends upon the construction of the bankrupt law, whose language in this particular is comprehensive. The case is very analogous to one which arose in Mason v. The Blaireau, 2 Cranch [6 U. S.] 240. There a master and his apprentice, being at sea, had saved a derelict ship, under circumstances of great peril; and the master, in addition to his own portion of the salvage money, claimed to have received that which had been decreed to the boy. But the court said that the claim was one which they felt "no disposition to support" unless the law of the case was clearly with the master; and that the authorities cited in his favour did not come up to the case. They add: "The right of the master to the earning of the apprentice in the way of his business, or of any other business which it substituted for it, is different from a right to his extraordinary earnings which do not interfere with the profits the master may legitimately derive from his service." Page 270. The same doctrine had been incidentally declared before this decision in The Beaver, 3 C. Rob. Adm. 292, where Sir William Scott divided a salvage fund between an apprentice and his master, in the proportion of £150 to £500, or of one to three and one-third. In one respect the case before us is stronger than either of those just cited. There the question as to what constituted extraordinary service, and what was a proper compensation for it, was settled by the court; while here both points have been determined by the master himself.

Upon the authorities, the comprehensive language of the act, and the admitted fairness of the claim, the court is of opinion that the petitioners may be regarded as operatives pro tanto, and that it would be too severe a construction which would exclude them from the priority.

Case No. 13,355.

STEINHAM v. UNITED STATES.

[2 Paine, 168.][1]

Circuit Court, D. Vermont.[2]

PENAL ACTION—ILLEGAL IMPORTATION—MANIFEST—WHO BOUND TO DELIVER—DECLARATION—WITNESS—ACCOMPLICE.

1. Under the act of congress of March 2, 1821 [3 Stat. 616], regulating the entry of merchandise, the master of a vessel is not the only person bound to deliver a manifest of merchandise imported in the vessel. That duty devolves on him who has the charge and control of the merchandise; and for a violation of the law he is subject to its penalty.

2. And it is not essential that he should be actually on board the vessel when it enters the waters of the United States. As, where one put goods belonging to him on board a boat in Canada, and after she had proceeded about a mile and crossed the line, got on board himself, and remained on board until his goods were landed, he was held subject to the penalty for not delivering the manifest.

3. The act of congress declares that it shall be the duty of every person coming from a foreign territory, adjacent to the United States, into the United States, with merchandise, to deliver the manifest. The declaration averred that the defendant came from a foreign territory, viz., from Montreal, and the evidence was, that he did not come from Montreal, but from Caldwell's Manor. *Held*, that after judgment the allegation under the videlicit might be rejected as surplusage.

4. An accomplice being a competent witness, it is not erroneous for a court to direct a jury to find a verdict upon his uncorroborated evidence, if they believe him.

[Cited in Collins v. People, 98 Ill. 586; People v. Clough, 73 Cal. 352, 15 Pac. 7.]

[In error to the district court of the United States for the district of Vermont.]

At law.

THOMPSON, Circuit Justice. This case comes up on a writ of error to the district court; and the errors complained of arise upon a bill of exceptions taken at the trial. It was an action of debt brought by the United States for an alleged violation of an act of congress, entitled "An act further to regulate the entry of merchandise imported into the United States from any adjacent territory," passed the 2d March, 1821. The declaration alleges that certain goods (describing the same) were, on the 1st day of Sept., 1822, brought and imported by the defendant from a foreign territory, adjacent to the United States, into the United States, to wit, from Montreal, in the province of Lower Canada, into Swanton, in the district of Vermont, which goods, wares and merchandise, were subject to the payment of duties by the laws of the United States. That the defendant was coming from a foreign territory adjacent to the United States, to wit, from Montreal aforesaid into the district of Vermont, with the said goods, wares and merchandise, and did arrive at Swanton aforesaid with the same, and did not deliver any manifest of the goods to any collector or deputy collector, as by law required, although there was an office legally established and kept at Swanton aforesaid, for the entry of merchandise imported, &c., contrary to the form of the act in such case made and provided.

The evidence in support of this allegation consisted of one witness only, who testified in substance that he was at Caldwell's Manor, in the province of Lower Canada, in company with the defendant, when he purchased the goods; that he and the defendant put the goods into a small boat, of which George Hilliker was owner and master, and that the articles were brought into the United States by Hilliker, in said boat; that the boat came to the shore at Alburgh, within the district of Vermont, and about one mile from the place in Canada where they were put on board; and the witness and the defendant who had come by land from Canada to Alburgh, then got on board the boat, and came with the said goods to Hilliker's house in Highgate, in the district of Vermont; when the witness of the defendant unloaded the goods from the boat, a part of which were carried by them to Swanton Falls, and the remainder left in the charge of Hilliker. There was no evidence that any entry of the goods was made or manifest produced to any collector or deputy, or any duties paid; and upon this evidence the court charged the jury if they believed the witness, the United States were entitled to recover the penalty claimed. The jury found a verdict for the United States.

The errors which have been alleged and relied on to reverse this judgment, are:—(1) That the master of the boat was the proper and only person to deliver the manifest, and that he alone is liable for the penalty. (2) That the allegations in the declaration are insufficient. (3) That no recovery could be had upon the uncorroborated testimony of an accomplice.

The first objection will depend upon the construction to be given to the act of congress. The act declares that it shall be the duty of the master of any vessel, except registered vessels, and of every person having charge of any boat, canoe, or raft, and of the conductor or driver of any carriage or sleigh, and of every other person coming from any foreign territory adjacent to the United States, into the United States, with merchandise subject to duty, to deliver immediately on his arrival within the United States, a manifest of the cargo or loading of such vessel, boat, canoe, raft, carriage, or sleigh, or of the merchandise so brought from the foreign territory, at the office of any collector or deputy collector which shall be nearest to the boundary line, or nearest to the road, or waters, by which such merchandise is

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [Date not given. 2 Paine includes cases from 1827 to 1840.]

brought; the manifest to be sworn to. And the act then declares that, if the master, or other person having charge of such vessel, boat, canoe, or raft, or the conductor or driver of such carriage or sleigh, or other person bringing merchandise as aforesaid, shall neglect or refuse to deliver the manifest, &c., the goods, vessel, boat, &c., shall be forfeited to the United States, and such master, conductor, or other importer, shall be subjected to pay a penalty of four hundred dollars.

No reasonable construction can be given to the terms, "other person and other importer," without applying them to a description of persons other than the commanders of vessels, boats, &c., and the drivers and conductors of sleighs and carriages. They must have been intended to embrace every description of person whose employment is not specifically designated, and who shall import or bring into the United States from any adjacent foreign territory merchandise subject to the payment of duties; and the provision would be very inadequate to the object intended by the act, unless these words should receive such construction. A passenger on board a boat might with impunity smuggle any goods, at least such as he could carry about his person, and over which the master of the boat could have no control. The duty of exhibiting the manifest devolves on him who has the charge and control of the merchandise; no other person could perform the duty, he would not have the means in his power to enable him so to do. The goods in the present case were clearly imported, or brought into the United States, by the defendant, within the sense and meaning of the act. He put them on board the boat in Canada, and took them from on board within the United States; he was not to be seen on board the boat at the moment she crossed the line. It was, however, but about one mile from the place where the goods were put on board the boat, to the place where the defendant got on board; and the jury had a right to infer that this was a mere attempt to evade the letter of the law. The master of a boat, or the driver of a carriage, cannot be bound to search every person who may be on board, to see if they have not some article of merchandise upon which duties are payable; and for small articles for which no bill of lading is given, or freight received, and in no way under the control of the master, he could not make out a manifest. He could not know, or have a right to inquire whether the owner of the goods having the charge and custody of them, intended to violate the law. The defendant is, therefore, the party on whom the penalty in this case must fall.

2. The second exception, as to the defects of the allegation in the declaration, is not well founded. It is sufficient if the declaration pursues substantially the words of the act, and this it does in the present case. It alleges that the goods were brought by the defendant from a foreign territory adjacent to the United States, into the United States, to wit, from Montreal in the province of Lower Canada, to Swanton, in the district of Vermont. The act does not require that the declaration should state to whom the foreign territory belonged. That is immaterial; and if necessary, the whole allegation under the videlicit might be rejected, and the declaration at all events, after judgment, would be good. If any objection could have arisen on this part of the case, it was, that the allegation was not supported by the evidence. The witness proved that the goods were purchased at Caldwell's Manor, and of course were not brought from Montreal; but no such objection was taken on the trial, and if it would have been well founded it comes too late now.

3. The last exception is not founded upon any facts appearing on the trial. The bill of exceptions states, that the court delivered its opinion to the jury, that they might give a verdict for the plaintiffs, on the unsupported and uncorroborated evidence of an accomplice, if they believed he swore the truth. But the witness in this case was not an accomplice; he had no interest whatever in the goods, from anything that appears, or any knowledge that the defendant intended to evade the law. It was an opinion, therefore, given by the court upon an abstract question, not applicable to the case, and if erroneous, would be no ground for reversing the judgment. But there was no error in the opinion on this point, had it been called for by the case. There can be no question but an accomplice is a competent witness. It is laid down in the books as a universal rule, that both in civil and in criminal cases, a particeps criminis may be examined as a witness, notwithstanding the immorality or the illegality of his conduct, provided he has not been convicted of any crime that incapacitates him. The objection, therefore, resolves itself entirely into a question of credibility, and this is exclusively a question for the jury, and comes within the rule laid down by the court. It may be proper, in many cases, for the court to caution a jury against convicting upon the uncorroborated evidence of an accomplice; but if he is both competent and credible, it would involve an absurdity to say his testimony was not sufficient to establish a fact. The rule, however, I consider well settled as authority, and the fitness and propriety of it on principle need not be urged. Starkie, Ev. pt. 4, pp. 17, 23; 2 Camp. N. P. 133. The judgment of the district court must, accordingly, be affirmed with costs.

NOTE. Messrs. Amos & Phillips, the editors of the 8th edition of Phil. Ev. p. 30 et seq., in discussing the weight to which the testimony of an accomplice is entitled, say:

"Since accomplices are competent witnesses, it appears to follow as a necessary consequence,

that if their testimony is believed by a jury, a prisoner may be legally convicted upon it, though it be unconfirmed by any other evidence. It is the peculiar province of the jury to determine on the degree of credit to be attached to any competent evidence submitted to their consideration; and it has accordingly been laid down in many cases as a settled rule, that a conviction obtained by the unsupported testimony of an accomplice is strictly legal. Cases cited in text to 7th Ed., p. 41, note 2, with the edition of 1 Hale, P. C. 303; per Lord Denham, 7 Car. & P. 152, and per Alderson, J., Id. 273. See, also, State v. Haney, 2 Dev. & B. 390; State v. Hardin, Id. 407. But great injustice would result if it were the practice of juries to convict upon the unsupported evidence of accomplices, whose testimony, though admitted from necessity, ought always to be received with great jealousy and caution. For, upon their own confession, they stand contaminated with guilt; they admit a participation in the very crime which they endeavor by their evidence to fix upon the prisoner; they are sometimes entitled to reward upon obtaining conviction, and always expect to earn a pardon. Accomplices are therefore of tainted character, giving their testimony under the strongest motives to deceive; and a jury would not in general be justified in giving to such witnesses credit for a conscientious regard to the obligation of an oath. Sometimes they may be tempted to accuse a party who is wholly innocent, in order to screen themselves, or a guilty associate; and if the prisoner has been their participator in crime, they may be disposed to color and exaggerate their statement against him, with a view to hide their own infamy, or, by obtaining his conviction, to protect themselves from his vengeance, and secure the expected benefit. The doctrine, therefore, of a legal conviction upon the unsupported evidence of an accomplice has been greatly modified in substance and effect; and it has long been considered as a general rule of practice, that the testimony of an accomplice ought to receive confirmation, and that, unless it be corroborated in some material part by unimpeachable evidence, the presiding judge ought to advise the jury to acquit the prisoner.

"It has been laid down that the practice of requiring some confirmation of an accomplice's evidence must be considered in strictness as resting only upon the discretion of the presiding judge. See per Lord Ellenborough, in Rex v. Jones, 2 Camp. 132; and see State v. Haney, and State v. Hardin, ut supra. And this, indeed, appears to be the only mode in which it can be made reconcilable with the doctrine already stated, that a legal conviction may take place upon the unsupported evidence of an accomplice. But it may be observed that the practice in question has obtained so much sanction from legal authority, that a deviation from it on the part of a judge in any particular case, would, at the present day, appear singular and of questionable propriety. Although the judge does not, in express language, declare that a case depending on the unconfirmed evidence of an accomplice, is insufficient in law to warrant a conviction, but merely advises the jury not to place credit on the evidence; yet, as it is not likely an instance should arise in which the jury would disregard the advice so given, and convict the prisoner, the substantial result appears to be nearly the same, as if the practice had depended on a rule of law, instead of being the exercise of the discretion of the presiding judge. The only distinction appears to be, that if the judge were to submit a case of this nature to the jury without any such recommendation, and a conviction ensued; or, if a jury were to convict in opposition to the recommendation of the judge, it could not properly be said in either case, consistently with the authorities on the subject, that the conviction would be illegal.

"From the anomalous nature of the rule of practice requiring confirmation, more especially from the circumstance that it is considered in law to rest merely upon the discretion of the presiding judge, and that it appears in fact to have originated in the exercise of such discretion, it might be expected that some difference of opinion would arise as to the nature and extent of the necessary confirmation. It is clearly unnecessary that the accomplice should be confirmed in every circumstance which he details in evidence; for there would be no occasion to use him at all as a witness, if his narrative could be completely proved by other evidence free from all suspicion. See report of the trials at York, on special commission, 1813, pp. 16, 17, 50, 150, 165, 201, particularly the charges of Thompson, C. B., in Rex v. Swallow, and of Le Blanc, J., in Rex v. Mellor. The rule on the subject which has generally been laid down is, that if the jury are satisfied that he speaks truth in some material part of his testimony, in which they see him confirmed by unimpeachable evidence, this may be a ground for their believing that he also speaks truth in other parts, as to which there may be no confirmation. Id., and Despard's Case, 28 How. State Tr. 488, and per Lord Ellenborough, 31 How. State Tr. 325; Rex v. Barnard, 1 Car. & P. 88. So far all the authorities agree; but the point upon which a difference of opinion and practice appears to have prevailed is, as to the particular part or parts of the accomplice's testimony which ought to be confirmed. In some cases it has been considered that the confirmation ought to be such as affects the person of the prisoner, and connects him directly with the crime; but in other cases this description of confirmation has been considered unnecessary, and it has been held, that confirmation of the accomplice in other parts of his testimony, which do not affect the identity of the prisoner, may be sufficient to entitle the accomplice to credit, and to warrant the judge in leaving the case to the jury without a recommendation to acquit.

"In the first case in which this question appears to have been expressly raised, two prisoners had been convicted on the evidence of an accomplice, who was confirmed as to the circumstances attending the offense, but not as to the identity of the prisoners; and the judges were unanimously of opinion that the conviction was good, upon the general ground already mentioned; namely, that a prisoner may legally be convicted upon the unconfirmed evidence of an accomplice. Rex v. Atwood, Leach, Crown Cas. 464, cited in 7 Term R. 609. In a case occurring shortly afterwards, a similar decision took place, and, as it appears, on the same ground. At the trial the court observed, that the practice of rejecting an unsupported accomplice was rather a matter of discretion with the judge, than a rule of law; and the case having been left to the jury, and the prisoner convicted, the judges afterwards held the conviction good. Rex v. Durham, Leach, Crown Cas. 478. It was, however, said in this case, that the witness (a receiver) was rather an accessory after the fact than an accomplice in the fact. In Rex v. Smith and another, reported in a note to the last case, where the only witness affecting the prisoners was an accomplice, the court admitted the rule of law, that the uncorroborated testimony of an accomplice was legal evidence, but thought it too dangerous to suffer a conviction to take place on such testimony, and the prisoners were acquitted. The same general doctrine was subsequently laid down in Rex v. Jones, 2 Camp. 132, 31 How. State Tr. 325, by Lord Ellenborough, who there referred to a case in which the judges were of opinion that four prisoners had been properly convicted upon the testimony of an accomplice, whose evidence had been confirmed as to three of the prisoners, but not as to

the fourth. And in the report of the York trials under a special commission, it was laid down by C. B. Thompson, that confirmation need not be of circumstances which go to prove that the accomplice speaks truth with respect to all the prisoners, (when several are tried,) and with respect to the share they have each taken in the transaction; for, if the jury are satisfied that he speaks truth in those parts in which they see unimpeachable evidence brought to confirm him, that is a ground for them to believe that he speaks also truly with regard to the other prisoners, as to whom there may be no confirmation. Rex v. Swallow; 31 How. State Tr. 325. Again, in a later case, where an accomplice was confirmed as to one of several prisoners jointly indicted, but not as to the others, Bayley, J., told the jury, that if they were satisfied from the confirmation, that the accomplice was a credible witness, they might act on his testimony with respect to the prisoners, as to whom he had not been confirmed, and they were convicted. Rex v. Dawbar, N. P. Cas. 34, and see Rex v. Barnard, 1 Car. & P. 88, per Hullock, B. In Birkett's Case, Russ. & R. 252, on a case reserved, the judges were of opinion that an accomplice did not require confirmation as to the person charged by him, if he were confirmed in the other particulars of his statement. And in a very recent case at the Old Bailey, before Lord Denham, Mr. Justice Park and Mr. Baron Alderson, when the counsel for the prosecution stated that he should not be able to confirm an accomplice, who was to be called as a witness, with regard to the persons of the prisoners, but only as to the general circumstances of the case, Lord Denham said he considered, and he believed his learned brothers concurred with him, that it was altogether for the jury, who might, if they pleased, act on the evidence of the accomplice without confirmation; but observed, that a person so situated, would not be likely to receive any great degree of credit. Rex v. Hastings, 7 Car. & P. 152. The prisoner was, however, acquitted, as on hearing the case there was contradiction rather than confirmation.

"The authorities above stated appear to show, as it has been before observed, that the rule, which requires some confirmation of an accomplice to be given, is to be considered, not as a strict rule of law, but as a practice depending on the discretion of the presiding judge. And these authorities also show, that judges, in the exercise of their discretion, have generally, if not always, considered that some confirmation ought to be given, but have not considered evidence, affecting the identity of the prisoners charged, to be essential for the purpose of confirmation. On the other hand, there are several recent decisions in which judges, in the exercise of their discretion, have thought confirmatory evidence of identity ought to be given. Thus, in the case of Rex v. Addis, 6 Car. & P. 388, an accomplice who was the principal witness, was corroborated as to collateral facts, none of which tended to connect the prisoner with the accomplice, or with the transaction: Mr. Justice Patteson observed, that the corroboration ought to be as to some fact or facts, the truth or falsehood of which would go to prove or disprove the offence charged against the prisoner. And in a subsequent case (Rex v. Webb, Id. 595), where it was proposed on the part of the prosecution, to confirm the accomplice as to the mode in which the felony was committed, Mr. Justice Williams said, that something ought to be proved which would tend to bring the matter home to the prisoners, and that confirming the accomplice as to the mode in which the felony had been committed, was not enough to entitle his evidence to credit, so as to affect other persons; that in fact this would be no confirmation at all, since every one would give credit to a man avowing himself a principal felon, for at least knowing how the felon was committed. In a later case, on an indictment against two persons, the same doctrine was laid down by Mr. Baron Alderson (Rex v. Wilkes, 7 Car. & P. 272), who pointed out the distinction between confirmation as to the circumstances of the felony, and confirmation affecting the individuals charged; the former only proves that the accomplice was present at the commission of the offence; the latter shows that the prisoner was connected with it. In summing up, the judge observed, that confirmation merely as to the circumstances of the felony, was really no confirmation at all; that it was true, the jury might legally convict on the evidence of an accomplice only, if they could safely rely on his testimony, but that he always advised juries not to act on the evidence of the accomplice, unless confirmed as to the particular person charged with the offence. After adverting to the facts of the case, as affecting the two prisoners, the same judge stated to the jury, that if they thought the accomplice was not sufficiently confirmed as to one, they would acquit that one, and that if they thought he was confirmed as to neither, they would acquit both. In another case (Rex v. Moores, Id. 270), where a thief and receiver were jointly indicted, the same learned judge expressed his opinion, that confirmation as to the thief, did not advance the case against the receiver. And in a former case of a similar description, where there was a slight confirmation as to the receiver, but none as to the principal felon, Littledale, J., thought the case failed altogether, and that the accomplice ought to be confirmed as to the principal, before the jury could be asked to believe the witness' testimony. Rex v. Wells, Moody & M. 326. The ground of this decision appears to have been, that it was necessary to establish the guilt of the principal, by confirming the accomplice as to him, before the question of the guilt of the receiver could arise.

"From the class of cases which have been last cited, it will appear that the recent practice of several judges, in exercising their discretion as to the evidence that ought to be adduced, in order to entitle an accomplice to credit, has been to require a confirmation upon some point affecting the person of the prisoner charged; and that when several prisoners are jointly tried, confirmation is to be required as to all of them before all can be safely convicted. Indeed, it would be difficult to assign a satisfactory ground for requiring confirmation as to the person of a prisoner indicted alone, and dispensing with confirmation as to prisoners jointly indicted: the same reasons which render confirmation necessary in the former cases, appear to require it in the latter; if a distinction between the two cases were allowed, a prisoner's acquittal or conviction, upon an accomplice's testimony, might depend upon the mere accident of his being indicted alone, or jointly with others. It will be observed, that it is still laid down by judges, even when calling for this personal confirmation, that the jury, if they think proper, may legally convict upon an accomplice's testimony unsupported; and that in the absence of such support, they do not withdraw the case from the jury, but only advise them not to give credit to the accomplice. Whether the rule of practice, which, as we have seen, has been recently followed, will be adopted as a general rule, by which all judges will consider themselves bound, may, perhaps, not be wholly free from doubt, but the weight of the latter authorities appears to be in favor of such a rule. The distinction between confirmation, as to the manner in which an offence was committed, and as to the parties by whom it was committed, is of obvious importance; and although cases may arise, in which, from the confirmation of an accomplice, as to the circumstances attending the commission of a crime, the jury may be led to conclude that the accomplice speaks truth with regard to the person charged, still as the two

points are, in general, essentially different, great caution is to be used in drawing such a conclusion. If the witness has really been an accomplice, as he states himself to be, he must be acquainted with the manner in which the offence was committed; and in describing the manner, it would not, in general, be the interest or desire of an accomplice to swear falsely. But with respect to persons concerned, there may be strong reasons to infer the existence of motives which would induce an accomplice to fabricate or pervert some facts against a party charged, notwithstanding the other facts related by him may be indisputably true, or even notwithstanding the general consistency of his story may be clearly established.

"This subject, so important in itself, has created much difference of opinion at the Irish bar. See an anonymous pamphlet by an Irish barrister, Dublin, 1824; the object of which is to prove that some evidence of personal identity ought to be given in all cases. And see the tract of C. B. Joy, which, though recently published, was written some years ago, in answer to the former pamphlet. The lord chief baron considers that the rule of practice, requiring confirmation, may be satisfied by corroborating parts of the accomplice's evidence, not affecting the persons of the prisoners. In the preface, the learned writer states, that he was induced to publish his treatise in consequence of the cases of Rex v. Addis and Rex v. Webb, cited supra. But the subsequent cases to the same effect, were probably not published when the tract of the chief baron appeared; they are not referred to by him, neither does he allude to the previous case of Rex v. Wells, supra. It appears that the practice of requiring confirmation, when the case for the prosecution is supported by an accomplice, applies equally when two or more accomplices are brought forward against the prisoner. In a case in which two accomplices spoke distinctly to the prisoner's guilt, Mr. Justice Littledale told the jury that, if their statement were the only evidence against him, he could not advise them to convict; observing, that it was not usual to convict on the evidence of one accomplice without confirmation, and that, in his opinion, it made no difference whether there were more accomplices than one. Rex v. Noakes, 5 Car. & P. 326. But see Joy's work, cited supra, page 100, contra, though he does not cite Rex v. Noakes. He refers to the speeches of the Sol. Gen. and Mr. Serg. Best, in Rex v. Despard, 28 How. State Tr. 428. See on this subject the anon. pamph. cited supra, observations as to the trial of the incendiaries of Wild Goose Lodge—arson by more than 100 persons marching in three parties, from distant points not connected with each other. The accomplices were selected as witnesses from different parties. See further, on the general subject, Sir T. Witherington's arg., 5 How. State Tr. 176; discussion on Layer's Case, 16 How. State Tr. 158; Sir R. Atkyn's remarks, 9 How. State Tr. 721, as to the evidence of an indicted accomplice; Murphy's Case, 19 How. State Tr. 705; Sir T. Copley's remarks in Watson's Case, 32 How. State Tr. 513; Lord Ellenborough's charge in Watson's Case, Id. 583; Lord Tenterden's charge in the Cato-street conspiracy, 33 How. State Tr. 689. It appears to have been held in a late case, that a confirmation by the wife of an accomplice, would be insufficient; it was said that the wife and the accomplice must be considered as one, for this purpose. Rex v. Neal, 7 Car. & P. 168, per Park, J. In another recent case, in which the prisoner was indicted for manslaughter at a fight, it was objected that all persons who had been present, were principals in the second degree, and that their evidence ought to receive confirmation, as in the case of accomplices; but Mr. Justice Paterson was of opinion that they were not such accomplices as would require any further evidence to confirm them. Rex v. Hargrave, 5 Car. & P. 170."

Case No. 13,356.

STEINKUHL v. YORK et al.

[2 Flip. 376.] [1]

Circuit Court, W. D. Tennessee. March 31, 1879.

REMOVAL OF CAUSES—INDISPENSABLE PARTIES—SEPARABLE CONTROVERSY—CLOUD ON TITLE—TRUST DEED TO SECURE DEBT—PARTIES—EJECTMENT—JURISDICTION.

1. The federal courts have no jurisdiction, by removal from a state court of a bill, to remove a cloud from the title of the plaintiff, where the trustee in a deed of trust to secure a debt and the creditor secured have been made parties defendant, they being citizens of another state, and the defendant in possession whose title is attacked and who executed the deed of trust, being a citizen of the same state as the plaintiff. There is in that case no such separable controversy between the plaintiff and the nonresident defendants as can be wholly determined between them, whether the jurisdiction by removal be claimed, under the act of March 3, 1875 (18 Stat. 470), or that of 1866 (Rev. St. § 639 [14 Stat. 306]).

2. It is one of the peculiarities of the equitable jurisprudence of Tennessee, that a claimant of land out of possession may file a bill in equity to remove the deeds of an adverse claimant in possession as clouds on his title; but whether a federal court of equity could maintain such a bill may be doubtful. The question is not raised in this case. It might result only in a repleader on the law side of the court as an action of ejectment, and not defeat the jurisdiction entirely.

Motion to remand.

Metcalf & Walker, for the motion.

T. B. Edgington, contra.

HAMMOND, J. This bill was filed in the chancery court of Tipton county by the plaintiff, who is a citizen of Tennessee, against York and others, who are citizens of the same state, against Schaller and Gerke, who are citizens of Ohio, and Hahn, who is a citizen of Kentucky. It is brought here on the petition of these nonresident defendants alleging a difference of citizenship and a controversy wholly between them and the plaintiff; and the plaintiff moves to remand for want of jurisdiction. It is not sought to be removed on account of the subject matter in controversy. It appears from the bill that the plaintiff held title to the land in controversy by a title bond from one Trigg, who is dead. Although the purchase money was all paid no deed has ever been made. On the 13th day of November, 1867, defendants Schaller and Gerke recovered in this court a judgment against the plaintiff here upon which an execution issued that was levied on the land in controversy. The plaintiff filed his petition in bankruptcy in this district on the 23d day of November, 1867, and an assignment of his property was duly made to the assignee. The marshal sold the land under the execution, and on the 27th of January, 1868, executed to the purchasers, who were

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

Schaller & Gerke, the execution plaintiffs, his deed therefor. They obtained possession, it is alleged, by collusion with the tenant, and on the 31st of January, 1871, conveyed the land by deed to one Bass, who executed certain notes for the purchase money, and secured them by a deed of trust with power of sale to defendant Hahn as trustee. Bass sold to defendants York and Noblin on the 1st of January, 1873, and they are in possession claiming to be the owners of the land. They became involved in litigation in Shelby county with the executor and heirs of Trigg, and the proceedings are set out in this bill to show that by them York and Noblin have prevailed in the litigation and sustained their title as against the Triggs. It is not material to take further notice of these allegations as they do not affect the question here. The controversy with the Triggs is wholly independent of any controversy involved in this motion, and cannot influence the judgment on it.

The assignee in bankruptcy, on the 9th day of January, 1874, sold the land as the property of the plaintiff, at public sale, the plaintiff himself becoming the purchaser and receiving the assignee's deed. It is this title through the assignee which he seeks to maintain by this bill. He alleges that the title of the defendants through the execution sale is void for various reasons assigned and properly averred in the bill, the most important of which are that, the title levied on was not a legal title, because he only held it by title bond that gave him only an equitable estate not subject to sale by execution at law, and that certain formalities as to notice were not pursued by the marshal, whereby no title passed with his deed. It does not appear whether the Bass notes, given to Schaller & Gerke and secured by the deed of trust to Hahn, have ever been paid; but the bill asks for information on that subject, and demands proof that they remain unpaid.

The prayer of the bill is that the execution sale and all the subsequent conveyances grounded on it be set aside and removed as clouds from the plaintiff's title, and for general relief.

It is the settled law of Tennessee that, an adverse claimant out of possession, although he may bring ejectment for the land, may also go into equity and file a bill to remove the deeds which stand in his way as clouds on his title; and the court having jurisdiction for that purpose will, having canceled the deeds, put the plaintiff in possession. Johnson v. Cooper, 2 Yerg. 524; Jones v. Perry, 10 Yerg. 59; Almony v. Hicks, 3 Head. 39; Anderson v. Talbot, 1 Heisk. 407, which was the case of a sheriff's deed; Williams v. Talliaferro, 1 Cold. 39; Porter v. Jones, 6 Cold. 318.

It is said by Chancellor Cooper, in his note to Hickman v. Cooke, 3 Humph. 640, which seems to be somewhat contrary to the other cases, that this doctrine in Tennessee is the result of judicial legislation, and whether the equity courts of the United States will follow it or not it is not now material to determine. On removal of such a case it might become on repleader a pure action of ejectment on the law side of the court, and the jurisdiction not be entirely defeated. The only question is who are the necessary and indispensable parties to such a bill? I have searched the cases to find out if this has been determined and do not find any case on that subject except Mullinix v. Perkins, 2 Cold. 87, where it is said, "if the mortgage is in fee and the mortgagee is dead, the heirs-at-law of the mortgagee or other party, in whom the legal title is, must be made a party." This would indicate that Hahn, the trustee, is a necessary party, because the holder of the legal title. It also decides that the administrator of the mortgagee is not a necessary party. This would seem to indicate that the holder of the debt secured is not indispensable, and the mortgagee himself would be necessary, not because of his debt, but because of his title, for the same case holds that his heirs-at-law must be parties. I have no doubt whatever that the holder of the legal title is an indispensable party always, whether he be a mortgagee holding the fee, or a trustee holding it in part. And the argument in favor of our jurisdiction here is, that such holder of the legal title is the only indispensable party, and that the case stands as if an ejectment at law had made the tenant in possession a party, and the landlord had come in and become substituted as the real party in interest, the tenant being only nominally and not beneficially interested. I think this would be so if York and Noblin were only tenants in that sense, that is lessees from the owner for a term of years. But they are not such tenants. They are indeed the owners of the land subject to the incumbrance upon it in favor of Schaller & Gerke for the Bass notes. That incumbrance out of the way and they have the whole fee legal and beneficial.

Upon payment of the Bass notes the title would be complete in them without any conveyance from the trustee. Carter v. Taylor, 3 Head. 30; Williams v. Neil, 4 Heisk. 279, 283.

It seems to me that in a court of equity such ownership renders the owners indispensable parties to any bill which seeks to cancel their deeds and compel them to surrender the possession. Hahn, the trustee, is only necessary because he holds the legal title. It is true in one sense he is trustee for both debtor and the creditor in such an assignment for the benefit of a creditor; but he is only a naked trustee as to him, unless a surplus is realized, and I think in no proper sense does he represent the grantor so as to dispense with him as a party defendant to

a bill involving the title. If sued alone, the trustee would properly plead that the grantor should be joined with him. He would represent sufficiently the creditors who are the beneficiaries of his trust. Kerrison v. Stewart, 93 U. S. 155. But I do not think this principle would apply to him in his capacity as a representative of the grantor.

The controversy is not wholly between Steinkuhl, the plaintiff, and Schaller & Gerke, because they are only the holders of notes secured by the deed of trust on the land. They have no other interest in it, and but for that would be wholly unnecessary parties, because by their deed to Bass they parted with their title. Hahn, the trustee, is not a necessary party because he represents the holders of the notes, as we have already deduced from the case of Mullinix v. Perkins, supra, but because he holds the legal title. The controversy of the plaintiff with Schaller & Gerke and Hahn (as their representative,) is only incidental. The accident of Schaller & Gerke having been one of the mesne conveyancers and the purchasers at the execution sale, does not alter it. It is not because they were such purchasers they are made parties, but because of their deed of trust. Bass is not made a party and need not be, I think; neither would Schaller & Gerke have been necessary if their grantee had not secured them by a deed of trust on the land. Their interest in the controversy depends wholly on the fact that these notes may be yet unpaid. There is then in this bill as between the plaintiff, and Schaller & Gerke, and Hahn, or either of them, no controversy which is wholly between them and which can be fully determined as between them, such as is required to give this court jurisdiction. Act March 3, 1875 (18 Stat. 470).

I do not see that the jurisdiction can be any better maintained under the act of 1866 (Rev. St. § 639), if we concede it has not been repealed by the act of 1875. The case of Fields v. Lownsdale [Case No. 4,769], held that a suit to quiet title against tenants in common might be removed as to one of them. And in McGinnity v. White [Id. 8,802], it was held that one copartner might under certain circumstances remove the case as to himself; and there are other cases of similar import. But I think this can be done only where the cause of action is joint and several, or may be severed as between the defendants without further inconvenience than that of having two or more suits. Tenants in common have no estates dependent upon each other; not so with a creditor holding a deed of trust to secure his debt. His estate in the land is part and parcel of that of the owner of it who has executed the deed. It is only an incumbrance, and it is obvious that a bill in equity, which would leave out the owner and be filed alone against the incumbrance or where the controversy did not concern the debt, but was wholly about the land, would be fatally defective. If on such a bill between Steinkuhl and Schaller and Gerke, and Hahn, the trustee, this court should hold the title of the plaintiff here better, and that of the others void; and on same facts the state court should hold York & Noblin's title better than that of the plaintiff derived through the assignee in bankruptcy, I doubt if Schaller & Gerke would be precluded by the decree here from foreclosing their deed of trust. They could say, having had your title sustained by a court of competent jurisdiction our deed of trust is fastened upon it as a lien. The lien holder cannot be separated from the general owner in a controversy about the title; they must both stand or fall together. Gardner v. Brown, 21 Wall. [88 U. S.] 36; Cape Girardeau & S. L. R. R. Co. v. Winston [Case No. 2,390]. York and Noblin are necessary parties to any relief which is asked against Schaller & Gerke, or Hahn their trustee, just as well under the act of 1866 as that of 1875. Indeed, both acts, so far as they relate to this question, are substantially the same.

The cause will be remanded to the chancery court of Tipton county. Motion granted.

NOTE. No question was made or determined as to this being a case "arising under the constitution and laws of the United States," of which the court might acquire jurisdiction under the act of 1875. The petition for removal did not present that ground. See Woolridge v. McKenna, 8 Fed. 650.

Case No. 13,357.

In re STEINMAN.

[6 Biss. 166;[1] 10 N. B. R. 214; 6 Chi. Leg. News, 338; 31 Leg. Int. 269; 21 Pittsb. Leg. J. 200.]

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

BANKRUPTCY — DENIAL OF SAME — STATEMENT OF CREDITORS—VERIFICATION.

Since the amendment to the bankrupt act of June 22, 1874 [18 Stat. 178], a statement of his creditors filed by the debtor on denial of bankruptcy must be verified.

In bankruptcy. [In the matter of Louis E. Steinman, a bankrupt.] This was a creditor's petition filed previous to the passage of the amendment of June 22, 1874, and amended immediately thereafter by adding new petitioning creditors and inserting the required allegations as to the number and amount of creditors.

Adolph Moses, for debtor, on the return day of the rule to show cause to the amended petition, presented a denial that the requisite number of creditors had joined in the petition, with a list of creditors annexed. The denial was not verified.

J. H. Bissell, for petitioning creditors.

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

BLODGETT, District Judge. Although the law does not expressly require that the list of creditors presented by the debtor, in denial that the requisite number and amount have joined in the petition, should be sworn to by him, the general intent of the act would seem to indicate that it should be done. Where the petitioning creditors have made out a prima facie case, if the debtor wishes to deny it, he should do so under oath, as the list of his creditors must be particularly within his own knowledge, and the petitioners are entitled to the benefit of a sworn list, that they may have some assurance that fictitious claims are not inserted.

The practice in this district will be uniformly to require the list of creditors filed by the debtor to be properly verified.

NOTE. The amendment of June 22d, 1874, does not require the denial of the debtor, that the petitioners constitute the requisite proportion of his creditors, to be sworn to, but in the absence of a rule of the supreme court on the point, it is proper to require such denial to be verified by the oath of the debtor, and for like reasons the list of his creditors filed by the debtor should be verified in like manner. In re Hymes [Case No. 6,986].

STEINMAN v. The CIRCASSIAN. See Case No. 2,724.

Case No. 13,358.

Ex parte STELL.

[4 Hughes, 157.]

Circuit Court, E. D. Virginia. 1882.

RAILROAD COMPANIES — NEGLIGENCE — CHILD ON TRACK — EQUIPMENT OF TRAIN — REMOTE AND PROXIMATE CAUSE—EQUITY—ISSUE FOR JURY.

[1. The rule requiring railroad companies to exercise the utmost care and diligence, applies, in the absence of statutory provisions, only in favor of passengers, and not to the case of a child trespassing upon the track. In the latter case, the company is required to do only what prudent owners of railroads are doing in respect to their trains and equipments. East Tennessee & G. R. Co. v. St. John, 5 Sneed, 526, distinguished.]

[2. An engineer running over a track which is clear for a long distance ahead is not prohibited by any rule of prudence or duty from taking his eyes off the track momentarily, to avoid being hit by the iron door of the furnace, which the fireman is just throwing open.]

[3. Where a child is run over upon the track, by a train having hand brakes only, which might have been stopped in time if fitted with air brakes, the failure to equip the road with air brakes is only a remote cause of the accident, the proximate cause being the child's coming upon the road helpless and unattended.]

[4. A petition against the receivers of a railroad to recover damages for causing the death of a child upon the track will not be referred to a jury when, upon the facts which are made to appear, the question of negligence is one of law, rather than of fact.]

On the petition of G. W. Stell, administrator of L. N. Stell, deceased, claiming $10,000 damages for death caused by a railroad train, on his motion for a jury and issue out of chancery.

HUGHES, District Judge. The evidence submitted to me seems to show the following state of facts: The regular eastward-bound passenger train of the Atlantic, Mississippi and Ohio Railroad came to Ford's Depot on its schedule time, about one o'clock in the afternoon of the 6th July, 1877. The engineer, Robinson, in the few moments of stoppage, got down and oiled his engine, and then moved his train off eastward at the usual speed, going first down a grade of 27 feet per mile for some distance, to a switch, and then passing on upon a slightly ascending grade of 19 feet to the mile. The track was straight to, and for a considerable distance beyond, the place where the accident which is the subject of this suit occurred, which place was distant about a quarter of a mile from the depot. When the train got to the switch which has been mentioned, there was nothing on the track in sight ahead. Just there the fireman began to fire up, and the opening of the furnace door caused the engineer to look down for a moment, to avoid being struck by the heavy iron door. On looking up again, the engineer saw a child at a distance of some 450 feet ahead on the track. Then, he says in his evidence, "as quick as I could, I reversed the engine and blew the whistle, and did all in my power to stop the engine. When the engine did stop, I brought the reverse lines to the centre notch, so as to keep still in the event the child had not been struck." "I did not see anything on the track when I left the depot, though I saw some object a short time before when I was oiling up the engine." "The brakes had not been previously defective during the day, or afterwards." "They were the common hand-brake in use on all the railroads in Virginia that I had run on up to that time." The attempt of the engineer was ineffectual to check up his train in time, and the child was run over by the engine and part of the train, sustaining injuries which resulted in its death in a few hours.

The witness Williams says: "The train was right opposite my house when it first blew, and that is, I think, about one hundred and fifty yards from where the child was killed." "The second time the train blew, it was different from what I had ever heard it at that place before, and I then looked out and saw the child on the track." "I didn't see the killing exactly, because I turned my back when I saw that the train was going to run over the child." The testimony varies as to the distance from the Williams house to the place of the accident; but it is a liberal estimate to fix it at 450 feet. It is not denied or questioned that the engineer did all that could be done by him from the instant of seeing the child on the track, to prevent the accident. The wit-

nesses who were near by seemed to believe the accident to have been inevitable. One of them, Mr. Williams, turned his face away when he heard the whistle, and saw the position of the child. The testimony of the child's brother, Charles F. Stell, shows that the child could not have been on the track many moments before the accident, and would seem to support the engineer's statement that the track was clear at the moment when he looked down to avoid being struck by the furnace door. At the place of the accident the grade of the railroad was about two feet below the general surface of the ground. The child's parents lived nearly opposite, on the north side of the road, in a building situated about thirty yards distant. There was no fence between this dwelling and the railroad. There was at the place of the accident a ditch on the side of the road, across which was a cross-tie serving as a pass-way. The child was about two years old, a little girl. No one was near or in charge of it when the accident happened. It had wandered from its parents' door to the railroad. The Westinghouse automatic continuous air-brake had not been adopted on the division of the A. M. & O. Railroad from Lynchburg to Norfolk, but had been adopted on the division west of Lynchburg. Negotiations had been made for putting it on the passenger trains of the eastern division, but it was not actually put on until some short time after the accident.

The letter of R. M. Sully, which is part of the evidence, gives the following results of experiments made with the Westinghouse air-brake, coupled with the remark that they were test trials, probably made under very different conditions from any likely to be obtained in the ordinary routine of railway operations, in which the brakes were carefully adjusted for specific tests, and doubtless applied to the driving wheels of the locomotive as well as to every car wheel in the train: At Chicago, train moving at 32 miles an hour, stopped in 350 feet. At Chicago, train moving at 40 miles an hour, stopped in 370 feet. On Kansas Pacific, train moving 40 miles an hour, stopped in 250 feet. On Penna. Railway, train moving 30 miles an hour, stopped in 420 feet. Mr. Sully adds the remark that his own experience is, that no such results can be obtained in the actual working of any railroad. He mentions the case of accident on his own (the Petersburg) railroad, where a passenger train with the Westinghouse brake upon it ran over a tramp lying on the track, and checked up in a space of 500 feet after the most prompt and energetic action of the engineer. Mr. Fink, one of the receivers of the A. M. & O. Railway, on which this accident occurred, says, on the subject of brakes: "When the receivers took charge of the A. M. & O. R. R., in June, 1876, the continuous power brakes then in use were known to be imperfect, and improvements were made looking to their improvement. It is true that the ordinary Westinghouse air-brake had then been adopted by several roads in this country; but it is admitted that the use of this brake, and in fact the use of any brake which is not automatic in its action, involves in the long run serious disaster; and I myself prefer the ordinary hand-brake to this form of brake, because I consider it safer in the long run." "It was with the view of adopting the best form of brake (the most reliable brake under all circumstances) that the receivers delayed the introduction of the continuous power brake on the A. M. & O. Railroad. They adopted the Westinghouse automatic air-brake just as soon as they were satisfied that the improvements in the form of brake had arrived at a state which justified the abandonment of the ordinary hand-brake and the adoption of the continuous power brake." "I may state that there are many roads in this country, some of them wealthy corporations (the New York Central & Hudson River Railway, for one), which have as yet not adopted the continuous power brake; while in England the so-called 'battle of brakes' is still going on."

Such, I think, are the facts which determine this case; and I have no reason to suppose that they would be changed by any evidence likely to be placed before a jury. The case is before me on a motion for an issue out of chancery. I am now to pass only on the question of negligence,—whether or not there was negligence, and whether this is a question of law for the court or of fact for a jury. The question of damages would be an after consideration.

This is not a suit by a passenger against a railroad company, for negligence in managing its train, from which the passenger claims damages for injuries sustained. The obligations of a railroad company to its passengers are such as to exact of its agents the utmost care and caution. But the present is the case of a trespasser upon the property of a railroad company claiming damages for injuries caused by the alleged negligence of the managers of the road in running a train over the trespasser. In such a case, only such care and caution are required as a prudent man would exercise in the emergency in which the injury was sustained. True, the engineer was bound to do all that was possible to be done in immediate connection with the accident to prevent injury to the trespasser. But his employers are not responsible to the trespasser for any remote, anterior causes to which the accident might be traced, if they shall have done, in respect to them, what prudent owners of railroads should do in equipping and running their trains. What the law might exact of them in respect to passengers does not furnish the standard of duty by which their obligation to the general public is determined. As to the general public, they are only required to do what prudent owners of railroads are doing in respect to their trains

and their equipments. It is true that in Tennessee and probably other states the utmost care and caution is required of railroad managers, as well towards the general public, as towards passengers; but this is only by virtue of express statute. It was on this statutory provision that the supreme court of Tennessee based its decision in the case of East Tennessee & G. R. Co. v. St. John, 5 Sneed, 526, cited by plaintiff's counsel. In Virginia there is no such statutory provision, and the standard of ordinary prudence and care is that which regulates the responsibility of railroad managers to the public at large.

The child which was killed in this case having been a trespasser, it is incumbent upon petitioner to overcome the presumption of law in favor of the defendants, that there was no negligence on the part of the engineer, and to show affirmatively that such care and caution as a prudent man would have observed was wanting on the part of the defendants, and of the engineer in charge of the train. It is not denied that the engineer, Robinson, did everything that was possible to save the child from the moment he saw it on the track.

But the petitioner complains that there was fault on the part of the defendants in two respects:

(1) He charges that the engineer was in fault in taking his eyes off the track to avoid being struck by the iron door of the furnace just before seeing the child. The simple question on this point is, whether a prudent engineer, running over a track that was clear for a long distance before him, was prohibited by any rule of prudence or duty, by taking his eyes a moment from the road, from saving himself by what was probably an involuntary impulse from a threatening personal injury. This is a question of law, more than of fact; and I cannot think that any chancellor would need the advice of a jury, or consent to be controlled by it on such a question.

(2) The plaintiff also charges that the receivers were in fault in not having provided the Westinghouse air-brake for their passenger trains before the time of this accident. It is by no means certain that this brake could have changed the result, even if it had been in use on this occasion. The testimony and opinion of an expert, Mr. Sully, seem to show that it could not, and the presumption that it would is rather violent. But assuming that this brake might have helped to avoid the accident, and that its not having been put on the train was an act of negligence, yet such an act of omission was but a remote cause of the accident. if cause at all. The immediate cause was the child's coming on the road unattended, helpless and unconscious of danger, just at the time the train was due and approaching with the usual noise produced by its rapid motion. In the recent case of the Richmond & D. R. Co. v. Anderson, 31 Grat. 812, the court of appeals of Virginia cite and quote as law Trow v. Vermont Cent. R. Co., 24 Vt. 487, where the supreme court of Vermont say: "Where the negligence of the plaintiff is proximate, and that of the defendant is remote, or consisting of some other matter than what occurred at the time of the injury, in such case no action can be maintained, for the reason that the immediate cause was the act of the plaintiff." This is emphatically the case in respect to a trespasser on a railroad, for, in respect to him, the company, provided it has used ordinary care, is under no obligation as to the general manner of equipping its property and running its trains, and is only bound, when an accident becomes imminent, to do all in its power to avoid injuring the trespasser at that particular time. A great number of cases might be cited, beginning with Davies v. Mann (better known as the "Donkey Case," decided in the English court of exchequer), 10 Mees. & W. 546, and embracing numerous English and American decisions, in which it has been expressly or impliedly held that, where injuries are inflicted by railroad companies or defendants in like relations to the public upon trespassers upon their roads, they are only responsible for acts of negligence which are immediately connected with the accidents from which the injuries result. But, even if such were not the law, I still do not see that enough of doubt is left by the evidence in this case to justify my sending the question of negligence to a jury.

It is settled that, at least as to passengers, railroad companies are bound to supply themselves with the best machinery and implements available for running their roads; and I have no doubt that, if a company should neglect to do so for so long a time, and in such a manner as to establish the presumption of indifference to their obligations in this respect, a court would hold them responsible, certainly to passengers, for injuries resulting from such laggardness or penuriousness. But in the present case it is shown that the continuous brakes in use previously to Westinghouse's latest improvement were defective; that the Westinghouse brake had but shortly before been brought to such perfection as to secure the confidence of the receivers of the Atlantic, Mississippi and Ohio Railroad; and that, having recently become satisfied of its safety and efficiency, the receivers had adopted it on the division of their road west of Lynchburg at the time of this accident, and were then preparing to place it upon the passenger trains of the eastern divisions. There can be no just inference from these facts of indifference to or neglect of duty in respect to brakes on the part of these receivers. I am not disposed to deny to men charged with the large interests and grave responsibilities of these receivers the exercise of such cautious and judicious discretion as becomes and justly belongs to them, in adopting so very important an appliance of railroad trains as these brakes are; nor do I

think a court or a jury is as competent to determine what brakes are the safest for railroad trains, or at what time it is prudent to adopt them, as professional railroad men having the largest experience and fullest information on the whole subject. Nothing is shown by the evidence before me, and I am persuaded that nothing can be shown, tending to establish the conviction that these receivers failed to employ the special knowledge possessed by them as railroad experts, and to exercise the discretion imposed upon them by their relations to the public in a thoroughly conscientious manner. On neither of the grounds, therefore, on which the petitioner claims a jury in this case, do I think he is entitled to such a reference as to the question of negligence.

The evidence submitted presents pure questions of law, and the principles of law governing the case as arising upon the evidence before me are such that it would be difficult for any additional evidence likely to be attainable by the petitioner to vary them. The principles on which the present motion for a jury depends are identical with those which have been passed upon by the courts in several prominent cases. One of these is Herring v. Wilmington & R. R. Co., 10 Ired. 402, where the court say: "What amounts to negligence is a question of law. * * * The cars were running at the usual hour, and at the usual speed; not through a village, or over a crossing place, or turning a point; but upon a straight line where they could have been seen for more than a mile. * * * There is no evidence that the engineer was not in his place and on the lookout. It (i. e. negligence on his post) cannot be inferred from the fact that he made no effort to stop until he got within 25 or 30 yards of the negroes (who were run over), for that is entirely consistent with the supposition that he had seen them for half a mile," etc., etc. Such was the character of the facts of a case in which the question of negligence arising upon them was held to be a question of law. It is true that there are many decisions in the reports in which a contrary ruling has been made; but there are two very recent cases in which the decisions were rendered by courts which establish the law for all courts in this state. The first of these is the recent case, cited already in another connection, of the Richmond & D. R. Co. v. Anderson, 31 Grat. 812, in which the question of negligence depended upon evidence very similar to and principles precisely the same as in the one at bar, and in which the Virginia court of appeals, on a demurrer to evidence, took the case from the decision of the jury, held the question to be one of law for the court, and ruled accordingly The other case to which I allude was that of Railroad Co. v. Jones, 95 U. S. 443, where the supreme court of the United States say upon a view of the facts set out in the record (facts similar in the principles of law involved to those in the present case): "The plaintiff was not entitled to recover. * * * If the company (defendant below) had prayed the court to direct the jury to return a verdict for the defendant, it would have been the duty of the court to give such direction, and error to refuse"; thus holding that it was error to turn over to a jury the decision of the question of negligence arising upon the evidence, but should have decided that question itself. The motion now before me is settled by the two last cases cited, and is overruled.

A copy.
Teste. M. F. Pleasants, Clerk.

STELLE (McLAUGHLIN v.). See Case No. 8,873.

STELLMAN (DAY v.). See Case No. 3,690.

Case No. 13,359.

STELLWAGEN v. LIFE ASS'N OF AMERICA.

[14 Blatchf. 349.] [1]

Circuit Court, N. D. New York. Nov. 12, 1877.

NEW TRIAL—SURPRISE—EVIDENCE TO BE PRODUCED.

When a motion for a new trial on the ground of surprise is made, because witnesses have failed to testify as they represented, before the trial, they would testify, the question is, whether the evidence to be produced on another trial is such as will probably secure a different result.

[This was an action on an insurance policy by Magdalena Stellwagen against the Life Association of America. Heard on motion for a new trial.]

Delavan F. Clark, for plaintiff.
Benjamin H. Austin, for defendant.

WALLACE, District Judge. Witnesses for the defendant, having represented to the defendant's attorney that they were cognizant of material facts for the defence, were subpœnaed by the defendant, and, on the trial, denied all knowledge of the facts, under circumstances which justify a strong inference that they committed perjury. The defendant now moves for a new trial, on the ground of surprise; and the only question I deem it material to consider is, whether the evidence which it appears the defendant can produce upon another trial is such as will probably secure a different result from that of the former trial, for, unless such is the case, the motion should be denied.

The action is on policies of insurance upon the life of John Stellwagen. The defence, so far as it is now in question, is based upon a breach of warranty as to facts set forth in the application for insurance, and upon fraudulent concealment; and, within the present issues, the evidence should be such as to authorize the

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

jury to find that some of the parents or brothers of John Stellwagen had been afflicted with pulmonary or other diseases, hereditary in their nature, to the knowledge of John Stellwagen, or that there were no material facts except those which had already been answered in the application, respecting the physical or mental condition of John Stellwagen, or his personal or family history, of which the officers of the defendant ought to be informed, or that the cause of the death of the brother of John Stellwagen was fraudulently concealed. Concisely stated, if the evidence which, it appears, the defendant can produce upon a new trial, would authorize the jury to find that Daniel Stellwagen, the brother of the insured, had been afflicted with insanity, or committed suicide while insane, and that the insured had knowledge of the fact, there should be a new trial: otherwise, not.

The testimony on the former trial together with that which the affidavits show the defendant can obtain, is sufficient to authorize a jury to find that Daniel Stellwagen was insane, but, I am of opinion, is insufficient to support a finding that John Stellwagen had knowledge of his brother's insanity. The substance of the evidence, disregarding that which is merely hearsay, is an entry in the records of the Erie county poor-house, made in the year 1850, showing the commitment of Daniel Stellwagen as an insane pauper, the finding of a coroner's jury, to the effect that Daniel Stellwagen "came to his death by committing suicide, or accidentally falling while laboring under a mental derangement of mind," and the testimony of three witnesses, who worked with Daniel for several months, shortly prior to his death, and who detail the acts upon which they predicate their opinion of his insanity.

The incompetent evidence bearing on this question is to be laid out of the case. Neither the verdict of the jury at the coroner's inquest, nor the entries in the books of the poor-house, can be proved, without evidence showing that they had been brought to John's attention before he applied to be insured; and all that remains is inadmissible, because hearsay, except that which relates to the conduct of Daniel, upon which the witnesses base their opinion of his insanity. This conduct, as described in the affidavits, is not marked by any decisive symptoms of insanity, and, if it should be assumed that John had observed it, of which there is no proof, is as consistent with other theories of the moving cause as with that of insanity. Excluding from consideration Daniel's death by insane suicide, and his confinement as an insane person, the remaining facts which are capable of proof by competent testimony, would not authorize a jury to find a fraudulent suppression in the application, or that John knew his brother had been afflicted with a hereditary disease. It is to be observed, that all the acts upon which insanity is predicated, occurred over twenty years prior to the application for the insurance; that no admissions of John as to any knowledge regarding Daniel's physical or mental condition are proffered; that none of the witnesses speak of any conduct of Daniel when John was present; and that the conduct upon which they base their opinions of insanity, though consistent with that theory, is not inconsistent with other deductions. While the relationship between John and Daniel, and the fact that they lived in the same city, afford strong moral evidence that John knew of his brother's insanity, if it existed, it is not legal evidence, in the absence of any proof of intimacy between them. The brother who survives the insured, who had equal facilities for information with John, testified, on the former trial, that he had never heard that Daniel was insane. The burden of proof is on the defendant, to show John's knowledge of his brother's insanity, and this cannot be proved by speculation or conjecture.

I attach but little importance to the defence predicated on the statement, in response to a question in the application, that no material facts respecting the family history of the insured existed, of which the officers of the defendant ought to be informed. Information had already been given, by the answers to the questions in the application, of every conceivable fact about which the officers of the defendant deemed it necessary to inquire. If the information was correct, the question was a mere drag-net, for the purpose of procuring some technical defence to the policy; if not correct, the defendant had the means to avail itself of substantial and meritorious defences.

In conclusion, while it can hardly be claimed that the defences arising from the breach of warranty can be maintained with any practical chances of success, the evidence in support of them is not sufficient, considered in its theoretical importance upon the result of a new trial, to justify the granting of the motion. A new trial is, therefore, denied.

Case No. 13,359a.

STENCHFIELD v. ROBINSON et al.

[2 Hask. 381.] [1]

Circuit Court, D. Maine. Feb., 1880.

PARTIES—EQUITY—EFFECT OF DECREE.

Equity courts will refuse relief, when the rights of parties who cannot be subjected to the jurisdiction of the court are so bound up in the subject matter of the suit and relief sought that a decree would afford no protection to some of the parties in court, and would not bar a future suit against them touching the same subject matter by the absent parties.

[This was a bill in equity by Anson G. Stenchfield against Edward Robinson, administrator of Nathaniel Kimball, Alexander H. Howard, and Joseph Baker.] Bill seeking to enjoin Baker from collecting from Robinson

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

an unpaid balance of an execution against Kimball's estate in favor of Howard, that Baker has in his hands, and asking that Robinson may be decreed to pay the same to the orator, who claims that the amount due thereon belongs to him. Respondents assert that parties without the jurisdiction of the court claim to own the execution, and that the bill should be dismissed for want of necessary parties.

Hanno W. Gage and Sewall C. Strout, for orator.

Joseph Baker, for respondents.

FOX, District Judge. The complainant, a citizen of Massachusetts, brings this bill against the respondents, all citizens of Maine. The bill alleges that on the 23d day of July, 1863, a suit was commenced by Howard against the executrix of the last will of Kimball in the supreme court of Maine for the county of Kennebec, and that final judgment was recovered by the plaintiff for $14,723.50 on the 21st day of May, 1877, and that the execution, which issued on the judgment, is now in the hands of Baker.

The complainant further charges that, during the pendency of said suit, certain agreements were entered into between him and Howard and one Matilda K. Page in relation thereto, whereby for good and valuable considerations between them, it was stipulated and agreed that the amount of such judgment as should be rendered in the suit should be divided between them in the proportion of one-third to each, as set out in a memorandum in the hand writing of Howard, annexed to this bill as Exhibit A; and that by virtue of said agreement a trust was created in behalf of the complainant for one-third of said judgment, $4,907.85 with interest from May 21st, together with his reasonable disbursements in the cause and other causes amounting to $359.23, and that due demand has been made therefor; that on June 27th, Robinson paid over to Baker the proportion to which Howard and Matilda K. Page were entitled, and that Howard does not make any further claim to said execution.

It is also averred that Matilda K. Page long since deceased, and that Samuel Kidder and Henry R. Page, of Lowell, and citizens of Massachusetts, were duly appointed her executors, and that complainant is informed they have received the proportion of said judgment to which they as executors of M. K. Page are entitled, and that he is informed and believes that the time fixed by the statutes of Massachusetts within which action can be brought against said executors has long since elapsed, by reason of which he is advised they are not necessary parties to this suit.

It is also averred that after verdict was rendered in said cause for the plaintiff, at the request of Howard, the complainant consented that Jos. Baker might be employed as an attorney in said cause, and thereby became acquainted with the complainant's interest in the demand, and that he has since caused certain suits to be instituted against the complainant in Kennebec county, and caused said Robinson to be summoned therein as his trustee. Certain interrogatories are propounded to said Howard, and an injunction is asked to restrain Howard and Baker from collecting complainant's third of the judgment, and that Baker may be decreed to deliver up the execution to the complainant, and that Robinson, as administrator, be required to pay the complainant his one-third interest in Robinson's hands in trust for complainant.

Exhibit A, which is without date, is as follows: "The proceeds of the suit now pending in the Supreme Judicial Court of Augusta, A. H. Howard v. Julia Kimball, Ex., are to be divided as follows, viz.: One-third is to be paid to M. K. Page, one-third to A. G. Stenchfield and one-third to Peter Atherton, except the claim for primage, and in that the said M. K. Page is to have no interest, that claim amounting in all to about $900, being for money advanced by Mr. Howard to Capt. Kimball to be paid over to Capt. Ryan, but not accounted for."

It appears Howard had this large claim against Kimball's estate which Stenchfield was employed to collect; that a suit was commenced by him and he afterwards removed to Massachusetts; that subsequently Howard on the seventh of March, 1868, assigned to Matilda K. Page, whose husband was originally the party to whom the Kimball debt was due, two-thirds of the demand on condition of her defraying all expenses; that afterwards, in May, 1870, a written agreement was entered into by Mrs. Page with Stenchfield, by which he was to recover for his services and fees, one-half of the amount which Mrs. Page should receive, together with the costs collected of defendant.

Two-thirds of the execution have been collected, but no part of this has been paid to complainant, and one question, here presented is, whether Mrs. Page should, from her third, pay the charges of the additional counsel, Baker and J. S. Abbott, who had been employed in the case, or whether they are in whole or in part to be borne by complainant. But underlying this is a still more important matter, not suggested by either party, but which cannot escape the attention of the court, and that is whether the contract between Mrs. Page and the complainant, whether it was as is claimed by him in his bill, or as it appears in the instrument executed by him and Mrs. Page jointly on May 20, 1870, is or not an utter nullity, wholly void in law for champerty and maintenance; or if not utterly void, is so unfair and extortionate, that it can not be allowed to prevail, excepting as security for a reasonable compensation for complainant's actual services.

The only parties interested in this contract,

whatever it may have been, are the complainant and Mrs. Page's executors, the latter of whom have not appeared and been heard and are not represented before the court. If the contract is to be construed by the court, and its legal effect determined, these parties should both be present, with an opportunity for them to present their respective allegations, produce whatever evidence they may have, and by their arguments advise the court as to the validity of their respective claims. To some extent this has been done by the complainant; but no one has appeared in behalf of Mrs. Page's executors, and the court is in no manner advised as to what they may claim the contract and agreement to have been between Mrs. Page and the complainant, or as to the validity and effect of such a contract. All that is brought to the knowledge of the court is, that Mrs. Page once was entitled to two-thirds of the amount collected from this demand; that some contract was afterwards made between her and the complainant respecting his services as an attorney in prosecuting this claim, the terms of which are uncertain, and that two of the respondents by their pleadings insist that Mrs. Page's executors are the parties who are interested in contesting this claim of complainant's, and that they should be parties to this proceeding, and have their rights to this fund determined, so that the respondents may be protected, not only against any claim of the complainant, but also from any subsequent litigation which may hereafter arise with the estate of Mrs. Page; for it is very manifest that the executors of Mrs. Page, not being parties to this proceeding, will not be bound by any decree which may be rendered herein, but may afterwards enforce their claims against Baker and the execution debtor, without in any way being affected by any judgment here rendered.

Baker is a mere stake-holder of the execution, professing himself ready to deliver it to any party legally authorized to receive it; and Robinson is the judgment debtor, ready and desirous to pay the balance to any one who may be entitled to it, and who can give him such a discharge as will protect him as administrator.

Can this court, as the case now stands, by its decree thus protect these parties against the demands of a stranger, whose claims, as they are now disclosed to the court, are certainly not entirely without foundation? If it should hereafter be determined that the agreement between Mrs. Page and the complainant was in violation of law, and could not be sanctioned by any court, what defense could either Baker or Robinson interpose in a suit hereafter instituted by the executors of Mrs. Page? The decree in this case would, in the opinion of the court, be entirely res inter alios, not admissible in evidence, and would afford no defense in such further controversy.

A good deal of stress is laid by complainant on the suggestion that there has been a division of the amount of the judgment between these parties, and that a fixed and definite amount has been apportioned and set apart for the complainant. The only evidence in support of this idea is the memorandum, Exhibit A, annexed to the bill, and which was sent by Howard to this complainant. This, at most, can have no other effect than an acknowledgment by Howard of his understanding of the agreement between complainant and Mrs. Page, which, even as against Howard, would be open to explanation, and would not be in any sense conclusive, but which in no respect whatever can affect the rights of Mrs. Page.

It is contended that this bill may be sustained by force of Rev. St. § 737, which authorizes in some cases the court to assume jurisdiction when some of the defendants are not within the district, and proceed to adjudicate upon the rights of the parties who are properly before the court, the parties not within the jurisdiction not to be prejudiced by any such decree. This section was a reenactment of the act of 1839, c. 36 [5 Stat. 321], and has been frequently under the consideration of the supreme court; and in Shields v. Barrow, 17 How. [58 U. S.] 141, it was declared that so far as it touches suits in equity, it was no more than a legislative affirmance of the rule previously established.

"The act says it shall be lawful for the court to entertain jurisdiction; but, as observed by this court in Mallow v. Hinde, 12 Wheat. [25 U. S.] 198, when speaking of a case where an indispensable party was not before the court, 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right without the party being actually or constructively before the court.'

"So that, while this act removed any difficulty as to jurisdiction between competent parties, regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the case last mentioned. * * * It remains true, notwithstanding the act of congress and the 47th rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without affecting those rights."

In Barney v. Baltimore, 6 Wall. [73 U. S.] 284, Miller, J., says: "There is a class of persons having such relation to the matter in controversy, merely formal or otherwise, that while they may be called proper parties, the court will take no account of the omission to make them parties There is another class of persons whose relations to the suit are

such, that if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties if within its jurisdiction, before deciding the case; but, if this cannot be done, it will proceed to administer such relief as may be in its power between the parties before it. And there is a third class, whose interest in the subject matter of the suit and in the relief sought are so bound up with that of the other parties, that their legal presence as parties to the proceedings is an absolute necessity, without which the court cannot proceed. In such cases, the court refuses to entertain the suit, when these parties cannot be subjected to its jurisdiction."

In the opinion of the court, the present case falls within this third class, as neither of the respondents could defend themselves against a suit in behalf of Mrs. Page's executors, under any decree which might be given in the present case.

Reference is also made by complainant's counsel to section 738, Rev. St. A sufficient reply to this suggestion is, that complainant has in no respect availed himself of the provisions of this section, by procuring an order directing the executors of Mrs. Page to appear and become parties to this suit. Although two years had elapsed after the appointment of Mrs. Page's executors and prior to the commencement of this suit, it does not appear that when this suit was instituted they could have availed themselves of lapse of time in defence of the action.

The result therefore is that, the executors of Mrs. Page being necessary parties to this controversy, and not having become parties thereto, the bill must be dismissed without prejudice. In thus disposing of the case, it is a satisfaction to the court to feel assured that the complainant may at once avail himself of a choice of other remedies, by which his legal rights may be ascertained and determined without any great delay.

Bill dismissed for want of parties, with costs, but without prejudice.

Case No. 13,360.

STEPANOVIT v. GILLIBRAND AND FOUR THOUSAND NINE HUNDRED AND TWENTY-TWO BUSHELS OF WHEAT.

[N. Y. Times, March 30, 1864.]

District Court, D. Connecticut. 1864.

SHIPPING — ABANDONMENT OF CHARTER PARTY —LIEN FOR FREIGHT AND DEMURRAGE.

[1. A lien for freight, dead freight, and demurrage, expressly reserved by the charter party, attaches the moment cargo is put on board under a bill of lading made subject to the charter party.]

[2. Refusal of a charterer to fill the vessel up after furnishing a partial cargo does not relieve the master of the obligation to carry forward the cargo he has, if the same is sufficient security for the full freight; but if it is in bad condition, and depreciating so rapidly as in all probability to become insufficient as security, he is not bound to go forward with it, but may discharge it, and then enforce against it his lien for the freight and demurrage due under the charter party.]

[3. Where a charterer abandons his contract to load a vessel with wheat and flour, the measure of the dead freight to be recovered is the difference between the net freight for a full cargo of wheat and flour, and what would have been netted by any other reasonable cargo which by due diligence could have been obtained.]

[4. Under such circumstances demurrage is due the ship from the expiration of the lay days until she could, with reasonable diligence, have procured other employment.]

This was a libel upon a charter party filed by Martin Stepanovit, Jr., the master of the Austrian ship Imperatrice Elizabetta, against Edmund Gillibrand and 4,922 bushels of wheat. The vessel being in this port, the master, on the 9th of September, 1863, chartered her to Gillibrand by a written charter party to carry a full cargo of wheat and flour to London. By a clause in the charter the libelant was to have a lien on the cargo for freight, dead freight and demurrage. Thirty-five lay days were allowed for loading and discharging, to begin on September 11th. The wheat in question was shipped on board the vessel by Arkell, Tufts & Co., under a bill of lading stating that it was to be subject to the provisions of the charter party. Gillibrand refused to furnish any more cargo to the vessel. The wheat on board was found to be badly infected with weevil, by which it was heating and sweating. The first intimation of its condition came from the shippers. The wheat was then examined by experts and by the port wardens, and it was found to be entirely unfit to go forward on the voyage, and a sale was recommended for the benefit of all concerned. The wheat was discharged from the vessel and the libelant filed this libel against it to recover the sum due from Gillibrand under the charter and to enforce his lien. By an order of the court in the cause the wheat was sold, and the proceeds paid into the registry of the court.

Larocque & Barlow, for libelant.

Sherman & Benedict, for claimant.

HELD BY THE COURT (SHIPMAN, District Judge): That the lien on the goods created by the charter and recognized in the bill of lading attached the moment the wheat was laden on board the ship. That the obligation rested on the master, in spite of Gillibrand's refusal to fill the vessel up, to carry the wheat forward and deliver it at the port of destination, provided, and provided only, he had cargo enough on board to secure his freight for a full load. 3 Kent, Comm. (9th Ed.) p. 280. That the master was not bound to attempt to earn freight by carrying forward an article that in all probability would be so depreciated in value at the end of the voyage as to be inadequate to satisfy the claims of the ship under the charter. The

shipper, having laden his goods under the stipulations of the charter, is not only bound by them, but is responsible for the condition of the goods. That the admission in the bill of lading as to the good condition of the wheat is not conclusive between the parties. That the wheat is therefore responsible for the libelant's claim. As no freight was carried, the decree must be for dead freight and demurrage. The amount is to be measured by the difference between what a full cargo of wheat and flour would have netted under the charter and what would have been netted by any other reasonable freight which the master could have obtained, with due diligence, after the charterer had abandoned his contract. And as to demurrage, the ship should recover from the expiration of the lay days till she could have, with diligence, obtained other employment.

Case No. 13,361.

The STEPHEN ALLEN.

[1 Blatchf. & H. 175.] [1]

District Court, S. D. New York. Nov., 1830.

ADMIRALTY JURISDICTION — MARITIME LIENS — SURPLUS PROCEEDS OF VESSEL—SUIT IN REM—IN PERSONAM.

1. Courts of admiralty in this country are not limited in their jurisdiction by the rules of the common law.

2. Materials furnished to a vessel in another state than that to which she belongs, create a lien which is enforced in admiralty under the general maritime law.

3. For materials furnished a vessel in her home port, a lien is created, if at all, only under the state law, which lien is enforced, however, in the admiralty courts.

4. Under the statute of New-York, (2 Rev. St. 493) which gives such a lien where a debt of $50 or upwards is contracted a debt of $49, which, by the accumulation of interest, exceeds $50 at the time suit is brought upon it, is not a lien upon the vessel.

5. A right of action in rem, by a material man, for supplies furnished a vessel in her home port, which is lost by a neglect to prosecute within the time limited by the statute, may still be enforced against the surplus proceeds of the vessel in court.

[Cited in The Boston, Case No. 1,669; Remnants in Court, Case No. 11,697.]

6. This right to proceed against such surplus proceeds holds good where a party has a right to proceed in admiralty in personam, though not in rem, on the ground that the court has jurisdiction of the parties, and that the subject or fund is already under its control.

[Cited in The Lady Franklin, Case No. 7,983.]

7. So a master, who has a right to sue in personam for wages, may proceed by summary petition against such surplus proceeds.

The steamboat Stephen Allen, a vessel plying between the city of New-York and Middletown Point, in New-Jersey, was libelled for wages, on the 24th of September, 1830, by William Taws, a seaman employed on board of her, and, no claim having been interposed, she was condemned and sold, and, after payment of the debt to Taws, the surplus proceeds, amounting to $2,400, were paid into court. Petitions were presented by various parties for the payment of their claims out of the surplus fund. The firm of Heir, Maris & Co. claimed for wharfage, and for wood and materials furnished for the boat at Middletown Point prior to the 12th of September, 1830. Rowley, the master of the boat, claimed for advances made by him for seamen's wages, and for necessary repairs and supplies furnished the vessel prior to the 22d of September, 1830, and also for his own wages. Various material men claimed for supplies furnished and labor performed for the vessel in New-York, her home port, prior to the 11th of September, 1830. Two of these last were for sums more than $50 ($203.50 and $96.76), and two were for sums less than $50 ($5.62 and $49), though the interest upon the one of $49, to the time of the institution of the suit, if added to the principal, would make it exceed the sum of $50. Another petition was presented by Thomas J. Gardiner, praying that the whole of the surplus proceeds be paid to him, and that the other petitioners be postponed to him, he alleging that he was a bona fide mortgagee, without notice of any liens. It appeared that the vessel was registered, and that her papers were taken out, in the name of Thomas Freeborn, on the 6th of November, 1829; that, in December, 1829, Freeborn conveyed her, by an absolute bill of sale, to Gardiner; and that, on the 9th of June, 1830, she was registered in the name of Gardiner, who took the oath that he was her sole owner, and received a coasting license in the same month. Gardiner first petitioned the court for the proceeds on the 2d of November, 1830, and then swore that he was the sole owner of the boat. Several other claims were presented at the same time, and Gardiner's counsel thereupon asked and obtained leave to withdraw his petition, for the purpose of providing fuller evidence in support of his right as owner, which the other claimants announced would be contested. On the 8th of November, 1830, the day assigned for hearing the petitioners, Gardiner presented a new petition, as mortgagee, alleging that the bill of sale was taken by him as collateral security for a loan of $3,000, made by him to Freeborn.

Washington Q. Morton, for Heir, Maris & Co.

Michael Ulshoeffer and Samuel Sherwood, for domestic material men.

Franklin S. Kinney, for Rowley.

Gerardus Clark, for Gardiner.

BETTS, District Judge. The counsel for Gardiner resists the payment of the claims of the other petitioners, upon the grounds (1) that they were never liens on the vessel;

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

(2) that if they ever possessed that character, it had been lost before Gardiner's rights accrued; and (3) that the matters of the petitions are not within the jurisdiction of this court.

The general jurisdiction of the courts of the United States, in admiralty and maritime cases, is not limited by the rules of the common law. The General Smith, 4 Wheat. [17 U. S.] 438; The Amiable Nancy [Case No. 331]. By the civil law, vessels were liable to the claims of material men, and of those furnishing her with necessary supplies, as well in her home port as in a foreign one. 3 Kent, Comm. 168, note; Com. Dig. p. 42, pl. 5; Id. pp. 26, 34. And it seems that the same rule was understood to prevail in England until the jurisdiction of the courts of admiralty, which alone supported the liens, was taken away. Abb. Shipp. (Ed. 1829) 107–117; The Zodiac, 1 Hagg. Adm. 320, 325; 1 Rolle, Abr. 533; Court de Admiralitie, pl. 19. In this country, the general principle is fully recognised in relation to vessels in a foreign port. North v. The Eagle [Case No. 10,309]; The Jerusalem [Id. 7,294]; The Aurora, 1 Wheat. [14 U. S.] 96; Gardner v. The New Jersey [Case No. 5,233]. But it is so far modified or conformed to the rule existing in England in regard to domestic vessels, that whether there be a lien or not depends upon the local law where the lien is claimed, and not upon the general maritime law. Turnbull v. The Enterprise [Id. 14,242]; Clinton v. The Hannah [Id. 2,898]; Shrewsbury v. The Two Friends [Id. 12,819]; The General Smith, 4 Wheat. [17 U. S.] 438; The St. Jago de Cuba, 9 Wheat. [22 U. S.] 409; The Robert Fulton [Case No. 11,890]. This was the home port of the Stephen Allen. The supplies furnished her in New-Jersey would accordingly, by the maritime law, be chargeable upon the vessel; and the lien which would have attached to the vessel ought in equity to be sustained in respect to the proceeds. This principle will embrace the claim of the firm of Heir, Maris & Co.

The master petitions for the satisfaction of advances made by him for seamen's wages, and for necessary repairs and supplies for the vessel. The wages would be a charge upon the vessel, and many of the other claims, having arisen away from her home port, would have been liens in their origin, and would have fallen within the rule just indicated, had they remained in the hands of the original creditors. The case does not require the discussion of the question whether the master could avail himself of those liens as against the vessel herself, by means of an equitable substitution in the place of those whose debts he discharged, for the questions in this case arise upon the distribution of a surplus, and his claims may be disposed of upon another principle.

The foregoing are the only claims now before the court which, in proceedings in rem, would be enforced under its authority as a maritime court, and without regard to the laws of the state. If the other claims could be entertained originally in this court, as is intimated in The Robert Fulton [supra], the remedy against the vessel would not be under the ordinary powers of the court, but in conformity to the statute law of the state. Those claims are for repairs and supplies furnished the vessel at her home port. The law of the state gives a lien on vessels for work done, materials and supplies furnished, &c., when the debt amounts to $50 or upwards, and is contracted within this state. 2 Rev. St. 493. The claim of John Benson, for $203.50, for work done and materials furnished, comes within the terms of the act, and might have been enforced directly against the vessel, unless the lien was lost by some subsequent occurrence. The claim of John Patterson, for $96.76, rests upon the same footing. The claim of Michael Dougherty, for $5.62, for wharfage, and that of Mersereau F. Breath, for $49, for supplies, &c., also come within the character of debts provided for by the statute, but they are not sufficient in amount to be entitled to the privilege. Nor would the allowance of interest claimed by the petitioners in the latter case obviate the difficulty. The words of the act are: "Whenever a debt, amounting to fifty dollars or upwards, shall be contracted." Whether the debt is privileged or not, must be determined by its condition when contracted, that is, when the services are rendered or the supplies furnished, and no regard can be had to the state of the debt at any period subsequent to that time. If the debt was not a lien when it was created, it cannot become such subsequently. The sum of $49 was, therefore, the whole amount that could come within the provisions of the statute, and that is less than the sum necessary to a lien.

The liens which might have been enforced under the statute in regard to the other debts contracted in this port, were lost by the departure of the vessel therefrom. She plied as a freight and passage-boat between New-York and Middletown Point, from about the 10th of June, 1830, to the 13th of September, 1830, prior to which last-mentioned date all the debts were contracted. By the 2d section of the state statute, the lien ceases at the expiration of twelve days after the day of the departure of the vessel to any other port within the state; and it ceases immediately after the vessel leaves the state. If the waters to Middletown Point be within the jurisdiction of this state, the lien was discharged by the operation of the former branch of this section, and, if they were wholly out of the state, then by the latter; so that, in neither case, could it now be enforced against the vessel as a substantive ground of proceeding. With regard, therefore, to these domestic claims, none of them can attach to the fund in court upon the ground that they are subsisting liens on the vessel, which the pro-

ceeds, as representing her, ought to satisfy; and, if they can be now recognised by the court, it must be upon other principles. The higher remedy once possessed by them, though not acted upon and enforced, will not, however, prevent their coming upon the surplus and remnants, as there is an express recognition of such right in the act. 2 Rev. St. p. 499, § 42. In England, where the admiralty is not permitted to have cognizance of the claims of material men, &c., a practice has been sanctioned in the admiralty, of compensating such parties out of the surplus proceeds in court. The John, 3 C. Rob. Adm. 288. The propriety of affording such relief here would be much more manifest, as the subject matter is within the clear jurisdiction of this court. With us, all contracts for furnishing or refitting vessels are of a maritime character, and may be prosecuted in courts of admiralty and maritime jurisdiction, either in rem against the vessel, or in personam against those liable to pay. The General Smith, 4 Wheat. [17 U. S.] 438. I am aware of the resistance made to this doctrine in the opinion delivered by Mr. Justice Johnson in the case of Ramsay v. Allegre, 12 Wheat. [25 U. S.] 637. That opinion was not, however, delivered as the judgment of the court. The decision in the case was pronounced by another judge, and was concurred in by Judge Johnson, whose opinion was presented as a protestation against the jurisdiction of courts of admiralty, as declared in the case of The General Smith, 4 Wheat. [17 U. S.] 438, and other previous adjudications of the American courts. Judge Johnson labors to bring down the jurisdiction of our courts to that recognised by the common law courts in England as appertaining to the admiralty. Whatever value, therefore, I might be disposed to place upon that opinion as a legal criticism, it cannot have the effect of overturning rules previously established in relation to this subject; nor will it justify my forbearing to apply those rules to the case now before me. It ought to be remarked, too, that as matter of authority, that opinion stands opposed by American jurists of great name,—Abb. Shipp. (Ed. 1829) 111, 116; Zane v. The President [Case No. 18,201],—even if it is not to be considered as in opposition to the adjudication of the supreme court in the case of The General Smith. Without, however, determining the right of the parties referred to, to maintain a suit here, it must now be considered as the well-established course of proceeding in the American courts, to allow material men to be paid their claims out of surplus proceeds in court, without regard to the fact whether they have a lien in existence or not. Gardner v. The New Jersey [Id. 5,233]; Abb. Shipp. (Ed. 1829) 111, 116; Zane v. The President [supra]. And, in my judgment, Mr. Justice Washington, in the case last cited, places this allowance upon the true principle, namely, that the contract is, in its character, a maritime one, and may be enforced by action on the instance side of the district court. The remedy in rem may not be allowed, because not supplied by the lex loci; and that law will be observed in relation to the claims of material men in the home port of the vessel. But an action in personam may be maintained; and, as the court has thus jurisdiction over the whole subject matter, it will exercise it, by distributing the fund as if the claims were in actual suit. This principle does not seem to have been adverted to, in the previous cases, as the basis of the interference of the courts with the disposition of the surplus in the registry. So far as can be gathered from those cases, the courts appear to have assumed a quasi chancery authority to dispose of such surplus according to justice, and to have supposed that this anomalous control over the funds was called for ex necessitate rei, and to prevent palpable injustice. Judge Washington has suggested an authority for the exercise of this jurisdiction, of a more elevated character and more consonant to the principles of our jurisprudence. To this may probably be pertinently added the suggestion, that as the funds are to go ultimately to the owner of the vessel, the court will not exercise its discretion in delivering them to him, until justice is done to others who have claims of a maritime nature subsisting against such funds. The act of the court becomes purely judicial, and has relation to a subject and to parties all within its jurisdiction. If there is danger of injustice being wrought by decreeing upon summary petition, it will be competent for the court to require the claimant to commence his action, and the fund would be detained, to abide the event. The determination of the right and the disposition of the money would be made by the same tribunal, and the court could thus see, both that full justice was measured out to all parties, and that no unreasonable delay was allowed.

The claims before adverted to, being all of them suable in admiralty, the court, in the exercise of the broad equity with which it is clothed, will consider them entitled to the advantages which they would have possessed had suits been in actual prosecution in this court for their recovery, and will order their amounts to be satisfied out of the surplus in this court, unless the petitioner, Gardiner, has a priority of claim. The master's claim for his own wages will be placed upon the same footing. It was intimated by Mr. Justice Livingston, that a master might sue in admiralty, in personam, for his wages. The Grand Turk [Case No. 5,683]. The express point has since been decided by Mr. Justice Story, on full consideration. Willard v. Dorr [Id. 17,679]. The master's equity will, accordingly, be the same as that of the other claimants who have no actual lien.

It is, however, urged, that if these claims may come upon the surplus, they are to be postponed to that of the petitioner, Gardiner, who is alleged to be a bona fide mortgagee,

without notice of any liens. I shall not now consider what rule of allowance ought to obtain between a mortgagee and parties situated as these claimants are, where each applies to the equity of the court to be satisfied out of funds not produced by their own acts, or by means of incumbrances belonging to them, and which lie in the registry, subject to be delivered to the legal owners at the discretion of the court; for I shall decide that, with regard to all the creditors of the vessel who are now contending with him for the fund, Gardiner must be considered as her owner, and as possessing only the rights of an owner. The facts in the case show that he should be estopped, as it respects the other petitioners, from denying that he was owner, and from assuming the character of mortgagee, even if the original transaction was a mortgage as between him and Freeborn, which, under the circumstances disclosed, there is great reason to question. I feel compelled to remark further, that the evidence before me gives occasion for a strong presumption that Gardiner has no interest personally in the matter, but has allowed himself to be made use of to cover the interests of some party who keeps himself in concealment. Decree accordingly.

Case No. 13,362.

The STEPHEN CROWELL.

[Cited in The Mary E. Taber, Case No. 9,209. Nowhere reported; opinion not now accessible.]

Case No. 13,363.

The STEPHEN HART.

[Blatchf. Pr. Cas. 379.] [1]

District Court, S. D. New York. July 30, 1863.

PRIZE — ATTEMPT TO VIOLATE BLOCKADE — CONTRABAND GOODS.

1. Vessel and cargo condemned because, at the time of her seizure, the vessel was laden with and transporting articles contraband of war, with intent to furnish and supply them to the use and the aid of the enemy.

[Cited in The Springbok, Case No. 13,264.]

2. She was, when seized, navigated with the attempt and design to violate the blockade of ports of the enemy held in lawful blockade by the naval forces of the United States.

[Cited in The Peterhoff, Case No. 11,024.]

In admiralty.

BETTS, District Judge. The allegations and proofs of the respective parties in this suit, and the arguments of counsel on both sides therein, being fully heard and considered, and due deliberation had in the premises, and it satisfactorily appearing to the court thereupon: First, that the course of procedure in the suit, in its institution and subsequent prosecution, is regular and valid at law; second, that, at the time of her seizure, the vessel was laden with and transporting articles contraband of war, with intent to furnish and supply them to the use and aid of the enemy; third, that the vessel, when seized, was navigated with the attempt and design to violate the blockade of the port of Charleston and other ports of the enemy held in lawful blockade by the naval forces of the United States,—therefore, it is ordered and adjudged that the said schooner Stephen Hart and her cargo be condemned and forfeited as lawful prize of war.

Decree accordingly.

[For a subsequent opinion, see Case No. 13,-364.

[An appeal was taken to the supreme court from this decree. That court, at the December term, 1865, affirmed the decree of the district court. See The Stephen Hart v. U. S., 3 Wall. (70 U. S.) 559.]

1 [Reported by Samuel Blatchford, Esq.]

Case No. 13,364.

The STEPHEN HART.

[Blatchf. Pr. Cas. 387; [1] Betts, Pr. Cas.]

District Court, S. D. New York. July 30, 1863. [2]

PRIZE — ATTEMPT TO VIOLATE BLOCKADE — CONTRABAND GOODS.

1. In this case the cargo of the prize vessel, consisting wholly of articles contraband of war, was unladen and inventoried and appraised, and reported to the court, before the hearing. Nearly all of the cargo was delivered to the government, for its use, at the appraised value. The court, on the application of the libellants, permitted the cook of the vessel, and one of the witnesses, to be re-examined on one of the standing interrogatories, it appearing from his affidavit that he did not fully answer that interrogatory in relation to certain papers on board, although he had testified to the omitted facts on an examination made of him on board of the capturing vessel.

2. The court, on the application of the libellants, permitted the first mate of the vessel, one of the witnesses, to be re-examined on the standing interrogatories, it appearing from his affidavit that he had the virtual control of the vessel on her voyage, and had, on his examination, not disclosed the truth as to the true destination of the vessel and cargo.

3. The question of the admissibility of depositions given on the re-examination of persons found on board of a capturing vessel is one resting in the sound discretion of the court.

4. If, in this suit, the case, upon the depositions as originally taken, without the re-examination of the two witnesses, were a clear one in favor of the claimants, and free from all doubt, the court would hesitate, perhaps, to admit the re-examination.

5. A prize case is, in the first instance, to be tried on evidence coming from the captured. If, upon such evidence, no doubt arises, the property is to be restored; and the privilege, on the part of the captors, of giving further proofs is, in such cases, rarely granted.

6. Within these principles, the court has endeavored, in all proper cases, to exhaust the knowledge of the person found on board of captured vessels.

7. The instructions of the navy department of the United States to the naval commanders of the United States, of August 18, 1862, that

1 [Reported by Samuel Blatchford, Esq.]

2 [Affirmed in 3 Wall. (70 U. S.) 559.]

the vessel is not to be seized "without a search carefully made, so far as to render it reasonable to believe that she was engaged in carrying contraband of war for or to the insurgents, and to their ports directly, or indirectly by transshipment, or otherwise violating the blockade," are in accordance with settled public law.

8. The views of the members of the government of Great Britain as to the administration of prize law by the courts of the United States during the present war, as to the belligerent right of search, as to violation of the blockade, and as to the carrying of articles contraband of war, stated.

9. The course of trade during the present war, in regard to running the blockade from neutral ports in the vicinity of the enemy's country, commented on.

10. The question whether or not property laden on board of a neutral vessel was being transported in the business of lawful commerce is not to be decided by merely deciding the question as to whether the vessel was documented for and sailing upon a voyage between two neutral ports.

11. The commerce is in the destination and intended use of the property laden on board of the vessel, and not in the incidental, ancillary, and temporary voyage of the vessel, which may be but one of many carriers through which the property is to reach its true and original destination.

12. Nor is the unlawfulness of the transportation of contraband goods determined by deciding the question as to whether their immediate destination was to a port of the enemy.

13. The proper test to be applied is whether the contraband goods are intended for sale or consumption in the neutral market, or whether the direct and intended object of their transportation is to supply the enemy with them. To justify the capture it is enough that the immediate object of the voyage is to supply the enemy, and that the contraband property is certainly destined to his immediate use.

14. If a contraband cargo is really designed, when it leaves its neutral port of departure, for the use of the enemy in the country of the enemy, and not for sale or consumption in a neutral port, no principle of the law of nations, and no consideration of the rights and interests of lawful neutral commerce, can require that the mere touching at such neutral port, either for the purpose of making it a new point of departure for the vessel to the port of the enemy, or for the purpose of transshipping the contraband cargo into another vessel, which may carry it to the destination which was intended for it when it left its port of departure, should exempt the vessel or the contraband cargo from capture as prize of war.

15. The division of a continuous transportation of contraband goods into several intermediate transportations, by means of intermediate voyages by different vessels carrying such goods, cannot make a transportation which is, in fact, a unit, to become several transportations, although, to effect the entire transportation of the goods requires several voyages by different vessels, each of which may, in a certain sense and for certain purposes, be said to have its own voyage, and although each of such voyages, except the last one in the circuit, may be between neutral ports. Nor can such a transaction make any of the parts of the entire transportation of the contraband cargo a lawful transportation, when the transportation would not have been lawful if it had not been thus divided.

16. The inception of the voyage completes the offence. From the moment that the vessel with the contraband articles on board quits her port on the hostile destination, she may be legally captured. It is not necessary to wait until the ship and goods are actually endeavoring to enter the enemy's port. The voyage being illegal at its commencement, the penalty immediately attaches, and continues to the end of the voyage, at least so long as the illegality exists.

17. Where it is claimed that an enemy vessel has been transferred during the war to a neutral, competent proof of the transfer must be produced, or the vessel will be regarded as enemy property.

18. The registry of the vessel in the name of the neutral claimant as owner is not enough. The bill of sale of the vessel must be proved, or the payment of the consideration for the transfer.

19. Where enemy property is transferred to a neutral residing at the time in the enemy's country, the property is still regarded as enemy property.

20. In this case it was *held* that the claimant of the vessel had given up the entire control of her movements to the owners of her cargo, and had involved her in any illegality of which they or her master had been guilty in respect to the cargo.

21. The letters of instruction found on board of the vessel, and the absence of any manifest, bills of lading, or invoices, commented on as affecting the question of the destination of her cargo.

22. The test oaths to the claims commented on as affecting the same question.

23. The vessel had on board a flag of the enemy, which was secretly thrown overboard after her capture.

24. Alleged ignorance of her master as to her having on board articles contraband of war.

25. Letters of instruction not delivered up by the master to the prize master at the time of capture, but only produced by him on his examination on the standing interrogatories.

26. Attempted suppression, by the first officer of the vessel, of letters showing an intention to violate the blockade.

27. The spoliation of papers is a strong circumstance of suspicion. It is not, however, either in England or in the United States, *held* to furnish, of itself, sufficient ground for condemnation, but is a circumstance open to explanation. But if the explanation be not prompt and frank, or be weak or futile, if the cause labors under heavy suspicions, or if there be a vehement presumption of bad faith or gross prevarication, it is ground for the denial of further proof, and the condemnation ensues from defects in the evidence which the party is not permitted to supply.

28. *Held*, on the evidence, that the cargo of the vessel was intended, on its departure from England, to be carried into the enemy's country for the use of the enemy, by a violation of the blockade of some one of the enemy's ports, either in that vessel or in another vessel into which the cargo was to be transshipped, for the purpose of being transported by sea to the enemy's country.

29. *Held*, also, that the claimant of the vessel was, under the circumstances of this case, responsible for the use to which the master and the claimants of the cargo put the vessel, namely, the carrying, for a portion of the distance on its way to the enemy's country, of a cargo contraband of war, intended for the use of the enemy, and to enter the enemy's port, by a violation of the blockade.

30. The carriage of contraband with a false destination works a condemnation of the vessel as well as the cargo.

31. Vessel and cargo condemned for an attempt to introduce contraband goods into the enemy's country by a breach of blockade.

In admiralty.

BETTS, District Judge. The schooner Stephen Hart was captured, as lawful prize of war, by the United States vessel of war Supply, on the 29th of January, 1862, in latitude 24° 12′ north, and longitude 82° 14′ west, off the southern coast of Florida, about 25 miles from Key West, and about 82 miles from Point de Yeacos, in Cuba, and was sent to the port of New York for adjudication, under convoy of her captor. A libel was filed against her in this court on the 18th of February, 1862. On the 1st of May, 1862, a claim to the vessel was interposed by John Myer Harris, of Liverpool, England, as her sole owner. The test oath to that claim was made by Charles N. Dyett, the master of the schooner. On the same day, a claim was put in to the whole of the cargo of the schooner, by Samuel Isaac, on behalf of himself and Saul Isaac, as copartners and subjects of Great Britain, doing business in England under the firm name of S. Isaac, Campbell & Co., and claiming to be the sole owners of the cargo. The test oath to that claim was made by Samuel Isaac. On the 25th of October, 1862, another claim to the schooner on behalf of Harris was interposed. In this second claim Harris is described as late of Liverpool, England, but now of Sherbro', on the western coast of Africa, at present residing in England, merchant. This second claim sets up that he is the sole owner of the schooner, and is a subject of the crown of Great Britain.

In the test oath to the second claim of Harris, and which test oath is made by him, it is alleged that, on the 28th of September, 1861, he agreed to become the purchaser of the schooner for £1,750, to be paid October 28, 1861; that it was afterwards arranged that the money should be paid on the 14th of October; that an abatement of £5. 10s. 3d. was thereupon made from the purchase money; that the balance of £1,744. 9s. 9d. was paid; that the vessel was at Bristol, England, at the time of her sale; that, after such purchase, she took a cargo from Bristol to London, and was then loaded partly at London and partly at Erith, with a cargo of arms, ammunition, and military clothing; and that such cargo was the sole property of S. Isaac, Campbell & Co. It is to be noted that this test oath does not state from whom he purchased the schooner, or to whom he paid the money, or whether he received any bill of sale. It is also silent as to any hiring or charter of the vessel to S. Isaac, Campbell & Co. It states that the vessel "cleared for the port of Cardenas"; that it was not intended that she should "enter, or attempt to enter, any port of the United States"; that "her true and only destination with said cargo was Cardenas, where the same was to be delivered"; that the vessel was thence to sail to the claimant in Africa, if she obtained a suitable cargo for that country; and that the vessel and her cargo are British property.

The test oath of Samuel Isaac to the claim on behalf of S. Isaac, Campbell & Co. to the whole of the cargo, alleges that the cargo was shipped by that firm, consisting of himself and Saul Isaac, on or about December 2, 1861, partly at London and partly at Erith; that the vessel was bound for Cardenas, in the island of Cuba; that the cargo consisted of arms, ammunition, and military clothing, and is wholly the property of that firm; that its members are British subjects; that the vessel cleared for Cardenas; that the cargo was destined for Cardenas; that it was not intended that the vessel should "enter, or attempt to enter, any port of the United States, or that the cargo should be delivered at any port in the United States"; and that "the true and only destination was Cardenas, where the same was to be delivered, and the vessel was thence to sail to Africa, if she obtained a suitable cargo for that country." It does not set up any charter of the vessel.

The testimony in preparatorio, consisting of the depositions of Charles N. Dyett (the master), Benjamin H. Chadwick (the first mate), John Leisk (the cook and steward), Charles Nellman (the second mate), and Robert Allan (an able seaman), was taken in February, 1862. The case was not submitted to the judgment of the court until the term of July, 1863. It was suggested at the hearing, in excuse of what seemed to be the great delay in the case, that such delay was owing to the pendency before the supreme court of the United States, on appeal, until March last, of various prize suits, which it was supposed might dispose of material questions involved in this case. But, from such report of the decisions in those cases as this court has been furnished with, it does not appear that the main questions involved in the present case have been determined by the supreme court in any of the cases alluded to.

Various interlocutory proceedings took place in the present case, a reference to some of which is necessary.

Before the filing of the libel, and on the 14th of February, 1862, this court ordered that so much of the cargo of the schooner as consisted of arms, powder, and munitions of war should be placed in the custody of the commandant of the navy yard at New York, and that the prize commissioners should make a full inventory of all the articles delivered to the commandant, and that they should be appraised, and the appraisement be filed with the inventory. In pursuance of this order, the appraiser appointed by the court, Mr. Orison Blunt, discharged the cargo of the schooner, and stored it in the ordnance stores at the navy yard. In his report, which was filed on the 25th of March, 1862, he states that, in unloading the vessel, he did not have the benefit of any

invoice; that he took an accurate account of every case, box, and bale, and of their numbers and marks; that the vessel was stowed with great care, and the bales and cases pressed in with jackscrews, which made great precaution necessary in taking them out, for fear of an explosion of some of the ammunition or loaded shells; that, upon opening the afterhatch and taking out some of the cases, he discovered some four tons of powder, and also 1,008 loaded shell, with percussion primers affixed, and some 600,000 ball cartridges, or fixed ammunition for small arms, which were all removed and placed in the magazines of the navy yard; that, after all the cargo had been placed in the ordnance stores without any loss or damage, he opened every entire case and bale, and inspected and counted accurately every article, and found them to be all in good condition, and that every article was of value for use in the army and navy of the United States, except a large quantity of "Rebel buttons," manufactured in Great Britain, and stamped with a "Rebel device." The appraiser annexed to his report a catalogue of the cargo and his appraisement of each article. The following articles appear to have constituted the cargo of the vessel; 5,740 long Enfield rifles, with triangular bayonets; 1,260 short Enfield rifles, with saber bayonets; 660 rifled Enfield carbines, with saber bayonets; 2,640 British rifled muskets, with triangular bayonets; 200 British smooth-bore muskets, with triangular bayonets; 320 Brunswick rifles, with saber bayonets; 375 cavalry sabers; 6,800 gray blankets; 1,750 white blankets; 4 of Blakeley's 2¾-inch bore rifled cannon (six-pounders), with 2,000 cartridge bags and 1,008 shell for the same, loaded and capped; 120,000 cartridges, fixed ammunition for Enfield rifles; 100,000 percussion caps; 2,160 cartridge boxes; 4,095 knapsacks; 4,000 ball bags and belts; 100,000 Brunswick rifle cartridges; 410 minie rifle cartridges; 5,000 cartridges for smooth-bore English muskets, each cartridge consisting of a round ball and two buckshot; 1,540 yards of gray army cloth; 11,453 yards of steel mixed gray army cloth for uniforms; 625 gross of brass buttons "for infantry, artillery, and cavalry, for the Rebel army, marked 'C. S. A.'"; 15,432 pairs of stockings; 2,000 pairs of brogan shoes; 592 pairs of russet shoes, Blucher pattern; 762 pairs of black leather shoes, Blucher pattern; 2,220 waterproof covers for mess tins; 17 cases and 3 bales of trimmings for army clothes and uniforms, consisting of linings, cord, braid, lace, thread, buckram, etc.; 109 yards of scarlet cloth for army uniforms; 7,500 yards of white twilled flannel for lining for army overcoats; 2,250 yards of brown holland for the same purpose; 1,040 gross of buttons for army uniforms and clothing; 7,800 pounds of cannon powder; and a considerable quantity of cartridge paper, cones, and other appurtenances for small arms, gun slings, medicine, lint, bayonet scabbards, surgeons' equipments, scissors, thimbles, hooks and eyes, shears, canvas lining, alpaca, and tarpaulins. The appraisement of the entire cargo was $238,945.37.

Under orders of this court of the 3d of March and 16th of April, 1862, the Enfield rifles and certain other articles found on board of the schooner were delivered to the navy department for the use of the United States, at the appraised value of $169,467.50. By another order of the court, made March 4, 1862, another portion of the cargo, amounting to the appraised value of $14,196.11, was delivered to the war department, the ordnance department, and the sanitary department, for the use of the United States. Under an order of this court, made on the 7th of May, 1862, the schooner and the remainder of her cargo, which remainder amounted, at its appraised value, to $55,281.76, were sold at public auction. The vessel was sold for $10,000. The proceeds of the vessel and her cargo, including the amount paid by the navy and war departments for the articles taken by them, were paid into the registry of the court.

After the cook and steward, John Leisk, had been examined on the 13th of February, 1862, an affidavit made by him on the 25th of February, 1862, was presented to the court, in which he stated that, in giving his testimony before the prize commissioners, he did not fully answer the thirty-second interrogatory in relation to certain papers on board, and their description, and what was said on their being discovered, although he has testified to those facts on an examination made of him on board of the capturing vessel. An order was thereupon made by the court, on the same day, on the motion of the district attorney, that the thirty-second standing interrogatory be propounded anew to the witness Leisk, and that his additional answer thereto be received and added to his deposition, with the like force and effect as if the same had been taken at the time of his original examination. On the same day that interrogatory was again propounded to him, and his further answer thereto forms part of the depositions in preparatorio.

On the 24th of October, 1862, the court, on the motion of the district attorney, made an order that Benjamin H. Chadwick, the first mate, who had been examined in preparatorio, on the standing interrogatories, on the 13th of February, 1862, should be again examined by the prize commissioners on the standing interrogatories, and that the question of the admissibility of his evidence so to be given should stand over for future determination. This order was founded upon an affidavit made by Chadwick on the 21st of October, 1862, in which he stated that he was one of the persons captured on the Stephen Hart, and was entered upon her shipping articles as her first mate, although, in fact, he was intrusted with the virtual con-

trol; that he had examined a copy of his testimony given by him on his examination on the 13th of February, 1862, and found that his answers to the eleventh, thirty-sixth, and thirty-ninth interrogatories, as well as to any other which asked for the true destination of the vessel and her cargo on the voyage on which she was captured were imperfect, and did not disclose the entire truth in relation to the subject-matter inquired of; and that he desired the privilege of correcting the same on a re-examination, by stating that he well knew that the real destination of the cargo of the vessel, if not of the vessel herself, was one of the blockaded "Confederate ports of the Southern States," and that the port of Cardenas, in Cuba, was to be used simply as an intermediate port of call and of transshipment of the cargo, if it was there determined by Charles J. Helm, an agent there of the "Confederate States," whose instructions the witness was directed to follow, that the cargo should be transshipped into a steamer, which could with greater facility be used in running the blockade; that the witness was employed for that purpose by reason of his knowledge of the Southern coast, and of the navigation of the blockaded ports and harbors, and was so employed after his examination specially on that point at the countinghouse of S. Isaac, Campbell & Co., the owners of the cargo, in London, where, at the time, were William L. Yancey and other persons interested in the "Southern Insurrection"; that he, the witness, had been in no manner influenced to make such disclosure by the libellants or the captors, or any one in any manner connected with either of them, but had been induced to do so solely by the persuasions of his wife, who was a loyal woman then residing in Boston, and whose just reproaches had caused him to regret that he had ever lent his aid to such a cause, and to determine, as far as he could, to atone for whatever mischief he might have done. Upon the hearing of the motion for the further examination of Chadwick, the application was opposed by the claimants of the cargo, upon an affidavit, made by Chadwick on the 6th of May, 1862, in which he stated that certain letters and papers belonging to him were seized by the captors, and retained by them until the 28th of April, 1862, when, without any application to the court, a portion of them were taken from the rest of the papers seized on board of the schooner and handed over to him by Mr. Elliott, one of the prize commissioners; that the letters so handed to him were a part of the letters mentioned in the examination in preparatorio of John Leisk and stated by Leisk to have been placed by him in a teapot at the request of Chadwick, and to have been afterwards discovered by the crew of the capturing vessel. The court was subsequently furnished with an affidavit made by Mr. Elliott in which he stated that, after the arrival of the schooner at New York, one of the officers in charge of her placed in his hands some letters which he represented to be private papers belonging to Chadwick; that those letters were not presented by the prize-master as a part of the papers seized with the schooner as her papers, but as private letters belonging to Chadwick; that, under the advice of the assistant district attorney, and at the request and with the consent of Chadwick, the deponent carefully read the letters, and found them to be only private letters to Chadwick from his wife, and that there was not in them one word relating to the schooner, or her cargo, or her voyage, or her destination; and that thereupon, on the further advice of the assistant district attorney, the letters were handed to Chadwick as his private property, several months before his re-examination, and with no reference thereto, and with no knowledge or suspicion that any such re-examination would ever occur.

There were found on board of the schooner, at the time of her capture, her register and sundry bills, certificates, telegrams and letters, a clearance, two log books, a copy of the United States Coast Survey for 1856, and sundry other papers, but no invoices, no bills of lading and no manifest. The register of the schooner is dated at Liverpool, England, October 15, 1861. It represents her as having been built at Greenport, in the state of New York, in the United States, in the year 1859, and her foreign name as having been "Tamaulipas." Her tonnage is stated at 219.85 tons. Her owner is stated to be John Myer Harris, of Liverpool, merchant. The register contains the following printed memorandum at its foot: "Notice. A certificate of registry granted under the merchant shipping act of 1854 is not a document of title." On the back of the register is indorsed a certificate, made at the customhouse in London, on the 15th November, 1861, stating that Charles N. Dyett had that day been appointed master of the schooner. There were also found on board of the schooner a letter, signed "R. H. Leonard, ship Alexander, Confederate States," dated at Bristol, England, October 29, 1861, and addressed to Chadwick; and a letter from Leonard, addressed "to Mr. B. H. Chadwick, alias Tommy, first officer Stephen Hart," purporting to be written at Bristol, England, but without date; and a letter signed "John Johnson, ship Naomi, care J. P. Snell & Co., Bristol, England," and addressed "Mr. Benjamin H. Chadwick, schooner Stephen Hart, Surrey Canal, London," and dated at Bristol, England, October 29, 1861. The contents of these three letters will hereafter be specially referred to. By sundry certificates found on board of the schooner, it appears that she cleared from London, on the 19th of November, 1861, for Cuba, generally, neither the port of Cardenas, nor any other port in Cuba, being mentioned as her destination in any of her regular papers. There was also found on board of the schooner a letter in the following words: "71 Jermyn street, London, S. W., November, 19, 1861. J. Crawford, Esq're, H. M. Consul General, Havana—Dear Sir: In confirmation of my last, permit me to ask your assistance and advice for

Capt. Dyett, of the schooner 'Stephen Hart,' should he need it during his stay at Havana. Permit me to be yours. most faithfully, Saul Isaac." There was also found on board of the schooner a telegram from S. Isaac, Campbell & Co., 71 Jermyn street, London, to Lloyd's agent at Deal, received at Deal November 23, 1861, in the following words: "Please detain schooner Stephen Hart, bound for Cardenas, for orders. We pay all expenses. Reply per telegraph. Letter per post." There was also found a letter, dated "London, Nov. 22, 1861," in the following words: "Captain Dyett, Schooner Stephen Hart—Dear Sir: We require some matters arranged before the schooner leaves. You will receive this per Lloyd's agent. Attend to the orders, and wait until you hear from yours, truly, S. Isaac, Campbell & Co." There was also found another telegram from S. Isaac, Jermyn street, London, to Lloyd's agent, at Deal, received at Deal November 24, 1861, in the following words: "Capt. Dyett will proceed on his voyage at once, and make up for lost time. Wish him a successful trip."

The shipping articles of the crew of the schooner, found on board, are dated November 16, 1861, and specify that the voyage is to be "from London to Cuba and Sierra Leone, and any port and/or ports on coast of Africa, and/or North and/or South America and/or West Indies, and back to a final port of discharge in the United Kingdom. Voyage not to exceed twelve months." On these shipping articles the name of Benjamin H. Chadwick is entered as chief officer, his signature appearing upon them, and he is stated to be an American, aged 29 years, and to have last served on board the vessel called the "Tamaulipas," and to have been discharged therefrom at London, on the 2d of November, 1861. The date of his joining the Stephen Hart is stated as November 1, 1861, although he is placed in a list under the head of "substitution," with two others who were severally stated as joining the vessel November 22 and November 29, and no place is inserted as the place of his joining the vessel, although the place is inserted in the case of the other two substitutes. The wages of Chadwick are put down as £9 per calendar month, the wages of the mate, whose place he took, being stated at £6 per month. In one of the two log books found on board of the vessel, namely, the official log book, the name of Benjamin H. Chadwick appears as mate of the vessel, and no other person is named as mate; and the date of the commencement of the voyage is stated in that log book as November 19, 1861. In the other log book, which is an ordinary sea log book, there appears, under date of November 21, 1861, an entry in the handwriting of Chadwick, by whom that log book purports on its face to have been kept, to the effect that the mate had not come to perform his duty; and the log book then proceeds as follows: "Wherefore I, Benj. H. Chadwick, have this day engaged with Capt. Charles N. Dyett to proceed on the voyage, having been engaged as ship keeper on board since the 2d of the present month, the crew consisting of six seamen, cook and steward, captain, mate, and boatswain,—in all numbering ten persons." The shipping articles show eleven persons, there being seven seamen, one of the seamen, as appears by the official log book, having been shipped at Gravesend on the 22d of November, and discharged because of illness, at Deal, on the 29th of November, and another seaman having been shipped at Deal in his place on the last-named day. The name of one seaman which appears on the shipping articles does not appear on the official log book, and there is a memorandum on the shipping articles that he deserted. This reduces the number of persons composing the crew to ten, including Chadwick.

The entry on the title page of the sea log book is that the schooner was on a voyage from London to Cardenas, Cuba, commencing November 19, 1861, and that the log book is kept by Benjamin H. Chadwick. It appears, from entries in that log book, that the pilot took charge of the schooner "on a voyage to Cuba" on the 19th of November, and that she was on that day "towed by steam from the Grand Surrey dock to Erith, to take in the remainder of cargo," and that she arrived at Erith the same day; that, on the 20th November, she took in from lighters some sixty cases of cargo, and that on the evening of the same day she was towed to Gravesend; that she remained at Gravesend until the 22d of November, when she proceeded down the river, coming to anchor, in the afternoon, off the North Foreland light; that, on the 23d of November, she proceeded to the Downs, where she came to anchor, and where the "captain received instructions from parties in London" to wait until further orders; that, on the 24th of November, she received orders to proceed on her voyage; that she did not start until the 2d of December, her sea log commencing at noon on the 3d of December; that she pursued her voyage through December and January, no particular occurrence being noted until the 15th of January, when she passed 18 miles to the northeast of Desirada Island, one of the Leeward Islands, in the West Indies, and also between the island of Guadaloupe and the island of Montserrat, in the latitude of about 1° 30′ north; that from this point she proceeded to the southward of Hayti and to the northward of the island of Jamaica, passing the latter on the 21st of January, and thence to the southward of Grand Cayman Island on the 23d of January, and thence around the western end of the island of Cuba, making Cape St. Antonio, the extreme western point of that island, at 3:30 p. m. on the 26th of January, and seeing the last of Cape Antonio light, 20 miles distant, bearing south half east, at 10 p. m. of that day, her latitude by observation at

noon on the 27th of January, being 23° 24′ north. There are no entries in the log book after the latter hour.

The "Coast Survey" found on board of the schooner, as before mentioned, is a report from Prof. Bache, superintendent of the United States coast survey, for the year ending November 1, 1856, and contains, among other things, the following charts: A comparative chart of the entrance into Charleston harbor by Maffit's channel; a preliminary chart of the entrance into North Edisto river; a preliminary chart of the seacoast of South Carolina, from Charleston to Tybee, Georgia, with sailing directions; a preliminary chart of St. Simon's bar and Brunswick harbor; a preliminary chart of St. Mary's bar and Fernandina harbor; a comparative chart of the same; two charts of St. John's river; and a preliminary chart of the Florida Reefs. These charts, as folded in the book, have each of them written in pencil, on the outside, the nature of its contents, thus: "Maffit's Channel;" "North Edisto;" "sailing directions for several So. Ca. and Ga. ports;" "St. Simon's;" "Fernandina;" "St. John's river;" "Florida Reefs."

Capt. Dyett, on his examination in preparatorio, produced two letters, which are annexed to his deposition. One of them is a letter of instructions to himself from S. Isaac, Campbell & Co., and is dated "71 Jermyn street, Military Warehouse, late 21 St. James street, London, S. W., November 19, 1861"; and the other is a letter from Saul Isaac to "Charles J. Helm, Esq., care of J. Crawford, Esq., Havana," and is dated "71 Jermyn street, London, November 19, 1861." The contents of these two letters, and the circumstances under which they were produced by Capt. Dyett, will be referred to hereafter.

Before proceeding to a consideration of the merits of the case, it is proper to advert to the objections made to the second examination of the witnesses Leisk and Chadwick. The question of the admissibility of the second deposition of Chadwick was ordered by the court to stand over to be determined at the hearing of the main cause. The question of the admissibility of depositions given on the re-examination of persons found on board of a captured vessel is one resting in the sound discretion of the court, and no authority has been cited which decides that the practice is one that is not to be permitted under circumstances such as existed in the present case. The case of The Pizarro, 2 Wheat. [15 U. S.] 227, is not regarded as an authority against the course pursued in this case. While the court ought to guard the practice with care, lest it may be the means of introducing abuse, and of leading to fraud and imposition, the present case seems, on the fullest consideration, to be one in which the propriety of admitting the re-examination of the witnesses Leisk and Chadwick cannot be questioned. If the case, upon the depositions as originally taken, without the re-examination of the two witnesses, were a clear one in favor of the claimants, and free from all doubt, the court would hesitate, perhaps, to admit the re-examinations. But, upon the testimony without the re-examinations, the case is not only not one free from doubt, but one clearly calling for the condemnation of both the schooner and her cargo; and the matters testified to by these witnesses upon their re-examinations are not only entirely consistent in themselves, but are corroborated by the other testimony in the case, and by the documents and papers found on board of the schooner. The cases which were cited by the counsel for the claimants upon the point of the admissibility of depositions taken on re-examination (The Haabet, 6 C. Rob. Adm. 54; The Ostsee, Spinks, Pr. Cas. 189; The Leucade, Id. 227; The Aline & Fanny, Id. 327) do not bear at all upon the question as to the admissibility of these re-examinations. They merely affirm the well-known principles of prize law, that affidavits of the captors are not to be admitted where, on the evidence of the persons on board of the captured vessel, there are no circumstances of suspicion in the case; that the case is, in the first instance, to be tried on evidence coming from the captured; that if, upon such evidence, no doubt arises, the property is to be restored; and that the privilege on the part of the captors of giving further proof is, in such cases, rarely granted. Within these principles, this court has endeavored, in all proper cases, to exhaust the knowledge of the persons found on board of captured vessels. Thus, in the case of The Peterhoff, pending in this court at the time with the present case, the deposition of Capt. Jarman, the master of the captured vessel, had been taken on the 1st of April, 1863, he having intervened as claimant, for the interest of the principals, the owners of the Peterhoff and her cargo, and having made the test oath to such claim on the 21st of April, 1863. Some of the other witnesses having deposed to the spoliation of papers in the case, the court, upon an affidavit made by Capt. Jarman, and upon the application of the claimants, and notwithstanding the objections of the counsel for the libellants and the captors, permitted Capt. Jarman to be re-examined upon one of the standing interrogatories, and to add to his answer thereto the explanatory statement contained in his affidavit. This explanation, and the matters deposed to by him on his further examination, were intended to relieve the owners of the Peterhoff and her cargo from the injurious effects of his concealment, on his first examination, of matters which ought to have been testified to by him in answer to the standing interrogatories, and of matters which were testified to by other witnesses. The court is entirely satisfied that it exercised its sound discretion in permitting the re-examination in the case of The Peterhoff [Case No. 11,024],

and the exercise of a like discretion calls for the admission in evidence of the depositions of Leisk and Chadwick, taken on re-examination in the present case. They are, accordingly, admitted in evidence.

Very important questions of public law have been discussed before the court in the present case, and in the kindred cases of The Springbok [Case No. 13,264] and The Peterhoff [Id. 11,024], all of which, with the case of The Gertrude [Id. 5,369], have been pending before the court at the same time. In the latter case, no claimant appeared for either the vessel or the cargo, she having been captured while on a voyage from Nassau, in endeavoring to run the blockade into a port of the enemy. Many of the principal questions involved in the present case, and in the cases of The Springbok and The Peterhoff, are alike; and, as the conclusion at which the court has arrived in all of those cases is to condemn the vessels and their cargoes, I shall announce, in this case, the leading principles of public law which lead to a condemnation in all the cases.

On behalf of the libellants, it is urged in this case: (1) That the Stephen Hart and her cargo were enemy property when the voyage in question was undertaken, and when the capture was made; (2) that the schooner was laden with articles contraband of war, destined for the aid and the use of the enemy, and on transportation by sea to the enemy's country at the time of capture; (3) that, with a full knowledge, on the part of the owner of the vessel and of the owners of her cargo, that the ports of the enemy were under blockade, the vessel and her cargo were dispatched from a neutral port with an intention, on the part of the owners of each, that, in violation of the blockade, both the vessel and her cargo should enter a port of the enemy. On the part of the claimants, it is maintained: (1) That the transportation of all articles, including arms and munitions of war, between neutral ports in a neutral vessel, is lawful in time of war; (2) that, if a neutral vessel, with a cargo belonging to neutrals, be in fact on a voyage from one neutral port to another, she cannot be seized and condemned as lawful prize, although she be laden with contraband of war, unless it be determined that she was actually destined to a port of the enemy upon the voyage on which she was seized, or unless she is taken in the act of violating a blockade. It is insisted, on the part of the claimants, that the Stephen Hart was, at the time of her capture, a neutral vessel, carrying a neutral cargo from London to Cardenas, both of them being neutral ports, in the regular course of trade and commerce. On the other side, it is contended that the cargo was composed exclusively of articles contraband of war, destined, when they left London, to be delivered to the enemy, either directly, by being carried into a port of the enemy in the Stephen Hart, or by being transshipped at Cardenas to another vessel; that Cardenas was to be used merely as a port of call for the Stephen Hart, or as a port of transshipment for her cargo; that the vessel and her cargo are equally involved in the forbidden transaction; and that the papers of the vessel were simulated and fraudulent, in respect to her destination and that of her cargo. A condemnation is not asked if the cargo was in fact neutral property, to be delivered at Cardenas, for discharge and general consumption or sale there, but is only claimed if the cargo was really intended to be delivered to the enemy at some other place than Cardenas, after using that port as a port of call or of transshipment, so as to thus render the representations contained in the papers of the vessel false and fraudulent as to the real destination of the vessel and her cargo.

It would scarcely seem possible that there could be any serious debate as to the true principles of public law applicable to the solution of the questions thus presented; and, indeed, the law is so well settled as to make it only necessary to see whether the facts in this case bring the vessel and her cargo within the rules which have been laid down by the most eminent authorities in England and in this country. The principles upon which the government of the United States, and the public vessels acting under its commission, have proceeded, during the present war, in arresting vessels and cargoes as lawful prize upon the high seas, are very succinctly embodied in the instructions issued by the navy department on the 18th of August, 1862, to the naval commanders of the United States, and which instructions are therein declared to be a recapitulation of those theretofore from time to time given. The substance of those instructions, so far as they are applicable to the present case, is, that a vessel is not to be seized "without a search carefully made, so far as to render it reasonable to believe that she is engaged in carrying contraband of war for or to the insurgents, and to their ports directly, or indirectly by transshipment, or otherwise violating the blockade." The main feature of these instructions, so far as they bear upon the questions involved in this case, is but an application of the doctrine in regard to the captures laid down by the government of the United States at a very early day. In an ordinance of the congress of the Confederation, which went into effect on the 1st of February, 1782 (5 Wheat. [18 U. S.] append. p. 120), it was declared to be lawful to capture and to obtain condemnation of "all contraband goods, wares, and merchandise, to whatever nations belonging, although found in a neutral bottom, if destined for the use of the enemy."

The soundness of these principles, and the fact that the law of nations, as applicable to cases of prize, has been observed and applied by the government of the United States and its courts during the present war, was fully

recognized by Earl Russell, her Britannic majesty's principal secretary of state for foreign affairs, in his remarks made in the house of lords on the 18th of May last. Earl Russell there stated that the judgment of the United States prize courts, which have been reported to her majesty's government during the present war, did not evince any disregard of the established principles of international law; that the law officers of the crown, after an attentive consideration of the decisions which had been laid before them, were of opinion that there was no rational ground of complaint as to the judgments of the American prize courts; and that the law of nations in regard to the search and seizure of neutral vessels had been fully and completely acknowledged by the government of the United States. On the same occasion Earl Russell remarked: "It has been a most profitable business to send swift vessels to break or run the blockade of the Southern ports, and carry their cargoes into those ports. There is no municipal law, in this or any country, to punish such an act as an offence. I understand that every cargo which runs the blockade and enters Charleston is worth a million of dollars, and that the profit on these transactions is immense. It is well known that the trade has attracted a great deal of attention in this country, from those who have a keen eye to such gains, and that vessels have been sent to Nassau in order to break the blockade at Charleston, Wilmington, and other places, and carry contraband of war into some of the ports of the Southern States." He added: "I certainly am not prepared to declare, nor is there any ground for declaring, that the courts of the United States do not faithfully administer the law; that they will not allow evidence making against the captors, or that they are likely to give decisions founded, not upon the law, but upon their own passions and national partialities." He also said that, in a case of simulated destination,—that is, a vessel pretending that she is going to Nassau, when she is in reality bound to a port of the enemy,—the right of seizure exists.

The then solicitor of England (Sir Roundell Palmer) stated, in the house of commons, on the 29th of June last, referring to the cases of The Dolphin [Case No. 3,975] and The Pearl [Id. 10,874], decided by the district court for the Southern district of Florida (those vessels having been captured while ostensibly on voyages from Liverpool to Nassau, and it having been held by the court that the intention of the owners of the vessels was that they should only touch at Nassau, and then go on and break the blockade at Charleston), that, "if the owners imagine that the mere fact of the vessel touching at Nassau when on such an expedition exonerated her, they were very much mistaken"; that the principles of the judgment in the case of The Dolphin "were to be found in every volume of Lord Stowell's decisions"; that it was well known to everybody that there was a large contraband trade between England and America by way of Nassau; that it was absurd to pretend to shut their eyes to it; and that the trade with Nassau and Matamoras had become what it was in consequence of the war.

The foreign office of Great Britain, in a letter to the owners of the Peterhoff, on the 3d of April last, announced as its conclusion, after having communicated with the law officers of the crown, that the government of the United States had no right to seize a British vessel bona fide bound from a British port to another neutral port, unless such vessel attempts to touch at, or has an intermediate or contingent destination to, some blockaded port or place, or is a carrier of contraband of war destined for the enemy of the United States; that her majesty's government, however, cannot, without violating the rules of international law, claim for British vessels navigating between Great Britain and such neutral ports any general exemption from the belligerent right of visitation by the cruisers of the United States, or proceed upon any general assumption that such vessels may not so act as to render their capture lawful and justifiable; that nothing is more common than for those who contemplate a breach of blockade or the carriage of contraband, to disguise their purpose by a simulated destination and by deceptive papers; and that it has already happened, in many cases, that British vessels have been seized while engaged in voyages apparently lawful, and have been afterwards proved in the prize courts to have been really guilty of endeavoring to break the blockade, or of carrying contraband to the enemy of the United States.

The cases of The Stephen Hart, The Springbok [Case No. 13,264], The Peterhoff [Id. 11,024], and The Gertrude [Id. 5,369], illustrate a course of trade which has sprung up during the present war, and of which this court will take judicial cognizance, as it appears from its own records and those of other courts of the United States, as well as from public reputation. Those neutral ports have suddenly been raised from ports of comparatively insignificant trade to marts of the first magnitude. Nassau and Cardenas are in the vicinity of the blockaded ports of the enemy, while Matamoras is in Mexico, upon the right bank of the Rio Grande, directly opposite the town of Brownsville, in Texas. The course of trade, in respect to Nassau and Cardenas, has been generally to clear neutral vessels, almost always under the British flag, from English ports for those places, and, using them merely as ports either of call or of transshipment, to either resume new voyages from them in the same vessels, or to transship their cargoes to fleet steamers, with which to run the blockade, the cargoes being composed, in almost all cases, more or less, of articles contraband of war. The character and course of this trade, and its sudden rise, are very properly commented upon in a dispatch from the secretary of state of the Unit-

ed States to Lord Lyons, of the 12th of May, 1863.

The broad issue in the merits of this case is whether the adventure of the Stephen Hart was the honest voyage of a neutral vessel from one neutral port to another neutral port, carrying neutral goods between those two ports only, or was a simulated voyage, the cargo being contraband of war, and being really destined for the use of the enemy, and to be introduced into the enemy's country by a breach of blockade by the Stephen Hart, or by transshipment from her to another vessel at Cardenas. It is conceded in the argument of the leading counsel for the claimants that, if the property was owned by the enemy, and was fraudulently on its way to the enemy as neutral property, it was enemy's property, and was liable to capture, no matter whence it came or whither it was bound; and that, if the vessel were really intending and endeavoring to run the blockade, the property was liable to capture, no matter to whom it belonged or what was its character; but that if it was neutral property, in lawful commerce, it was safe from seizure.

The question whether or not the property laden on board of the Stephen Hart was being transported in the business of lawful commerce is not to be decided by merely deciding the question as to whether the vessel was documented for, and sailing upon, a voyage from London to Cardenas. The commerce is in the destination and intended use of the property laden on board of the vessel, and not in the incidental, ancillary, and temporary voyage of the vessel, which may be but one of many carriers through which the property is to reach its true and original destination. If this were not the rule of the prize law, a very wide door would be opened for fraud and evasion. A cargo of contraband goods, really intended for the enemy, might be carried to Cardenas in a neutral vessel, sailing from England with papers which, upon their face, import merely a voyage of the vessel to Cardenas, while, in fact, her cargo, when it left England, was destined by its owners to be delivered to the enemy by being transshipped at Cardenas into a swifter vessel. And such, indeed, has been the course of proceeding in many cases during the present war. Nor is the unlawfulness of the transportation of contraband goods determined by deciding the question as to whether their immediate destination was to a port of the enemy. Thus, it is held that, in order to constitute the unlawfulness of the transportation of contraband goods, it is not necessary that the immediate destination of the vessel and cargo should be to an enemy's country and port; for, if the goods are contraband, and destined to the direct use of the enemy's army or navy, the transportation is illegal. If an enemy's fleet be lying, in time of war, in a neutral port, and a neutral vessel should carry contraband goods to that port, not intended for sale in the neutral market, but destined to the exclusive supply of the hostile forces, such conduct would be a direct interposition in the war, by furnishing essentials in its prosecution, and would be a departure from the duties of neutrality. Halleck, Int. Law, p. 576, c. 24, § 11. The proper test to be applied is whether the contraband goods are intended for sale or consumption in the neutral market, or whether the direct and intended object of their transportation is to supply the enemy with them. To justify the capture, it is enough that the immediate object of the voyage is to supply the enemy, and that the contraband property is certainly destined to his immediate use. While it is true that goods destined for the use of the neutral country can never be deemed contraband, whatever be their character and however well adapted they may be to the purposes of war, yet, if they are destined for the direct use of the enemy's army or navy they are not exempt from forfeiture on the mere ground that they are neutral property, and that the port of delivery is also neutral. 1 Duer, Ins. 630; The Commercen, 1 Wheat. [14 U. S.] 388, 389.

If the contraband cargo of the Stephen Hart had been destined for the use of the fleet of the enemy lying in the harbor of Cardenas, there could be no doubt that it might lawfully have been captured as prize of war on its way to Cardenas. And, if the contraband cargo was really destined, when it left its port of departure in England, for the use of the enemy in the country of the enemy, and not for sale or consumption in the neutral port, no principle of the law of nations, and no consideration of the rights and interests of lawful neutral commerce, can require that the mere touching at the neutral port, either for the purpose of making it a new point of departure for the vessel to a port of the enemy, or for the purpose of transshipping the contraband cargo into another vessel, which may carry it to the destination which was intended for it when it left its port of departure, should exempt the vessel or the contraband cargo from capture as prize of war. If it was the intention of the owner of the Stephen Hart, or of the owners of her cargo, having control of the movements of the vessel, that she should simply touch at Cardenas, and should proceed thence to Charleston, or some other port of the enemy, her voyage was not a voyage prosecuted by a neutral vessel from one neutral port to another neutral port, but a voyage which was, at the time of her seizure, in course of prosecution to a port of the enemy, although she had not as yet reached Cardenas, and although her regular papers documented her for a voyage from London to Cuba. Such a voyage was one begun and carried on in violation of the belligerent rights of the United States to blockade the ports of the enemy, and to prevent the introduction into those

ports of arms and munitions of war. The division of a continuous transportation of contraband goods into several intermediate transportations, by means of intermediate voyages by different vessels carrying such goods, cannot make a transportation, which is, in fact, a unit, to become several transportations, although, to effect the entire transportation of the goods requires several voyages by different vessels, each of which may, in a certain sense and for certain purposes, be said to have its own voyage, and although each of such voyages, except the last one in the circuit, may be between neutral ports. Nor can such a transaction make any of the parts of the entire transportation of the contraband cargo a lawful transportation, when the transportation would not have been lawful if it had not been thus divided. The law seeks out the truth, and never, in any of its branches, tolerates any such fiction as that under which it is sought to shield the vessel and her cargo in the present case. If the guilty intention, that the contraband goods should reach a port of the enemy, existed when such goods left their English port, that guilty intention cannot be obliterated by the innocent intention of stopping at a neutral port on the way. If there be, in stopping at such port, no intention of transshipping the cargo, and if it is to proceed to the enemy's country in the same vessel in which it came from England, of course there can be no purpose of lawful neutral commerce at the neutral port by the sale or use of the cargo in the market there; and the sole purpose of stopping at the neutral port must merely be to have upon the papers of the vessel an ostensible neutral terminus for the voyage. If, on the other hand, the object of stopping at the neutral port be to transship the cargo to another vessel, to be transported to a port of the enemy, while the vessel in which it was brought from England does not proceed to the port of the enemy, there is equally an absence of all lawful neutral commerce at the neutral port; and the only commerce carried on in the case is that of the transportation of the contraband cargo from the English port to the port of the enemy, as was intended when it left the English port. This court holds that, in all such cases, the transportation or voyage of the contraband goods is to be considered as a unit, from the port of lading to the port of delivery in the enemy's country; that if any part of such voyage or transportation be unlawful, it is unlawful throughout; and that the vessel and her cargo are subject to capture, as well before arriving at the first neutral port at which she touches after her departure from England, as on the voyage or transportation by sea from such neutral port to the port of the enemy.

These principles were laid down and applied by the district court for the Southern district of Florida in the cases of The Dolphin and The Pearl, and the views of that court are fully adopted by this court, and are to be regarded as a part of the settled law governing prize tribunals. It is laid down, in Halleck on International Law (page 504, c. 21, § 11), that the ulterior destination of the goods determines the character of the trade, no matter how circuitous the route by which they are to reach that destination; that even where the ship in which the goods are embarked is destined to a neutral port, and the goods are there to be unladen, yet if they are to be transported thence, whatever may be the mode of conveyance, to an enemy's port or territory, they fall within the interdiction and penalty of the law; that the trade from an enemy's country through a neutral port is likewise unlawful, and that the goods so shipped through a neutral territory, even though they may be unladen and transshipped, are liable to condemnation; that it is an attempt to carry on trade with the enemy by the circuitous route of a neutral port, and thus evade the penalty of the law; that the law will not countenance any such attempt to violate its principles by a resort to the shelter of neutral territory; that any such voyage is illegal at its inception; and that the goods shipped are liable to seizure at the instant it commences. The same docrines are asserted in 1 Kent, Comm. (8th Ed.) p. 85, note a, in 1 Duer, Ins. p. 568, § 13, and in Jecker v. Montgomery, 18 How. [59 U. S.] 110, 115.

The same principles are maintained by the English authorities. In 2 Wildm. Int. Law, p. 20, it is asserted that no exemption from the consequences of sending goods to the enemy will be gained by sending them through a neutral country; that the interposition of a prior port makes no difference; that all trade with the enemy is illegal; that the circumstance that the goods are to go first to a neutral port will not make the trade lawful; and that it is not competent, during a war, for a British subject to send goods to a neutral port, with a view of sending them forward, on his own account, to an enemy's port, consigned by him to persons there, as in the ordinary course of commerce. These principles were laid down by Sir William Scott, in The Jonge Pieter, 4 C. Rob. Adm. 79. The particular doctrine thus asserted had reference to the trading of British subjects with the enemy of Great Britain. But the reason of the doctrine makes it equally applicable to the case of a neutral attempting to send contraband goods to an enemy of the United States through the interposition of a prior neutral port. In the case of The Richmond, 5 C. Rob. Adm. 325, an American vessel was seized in the port of St. Helena, and proceeded against as a prize, on the ground that she was going, under a false destination, to the Isle of France, an enemy's port, with contraband articles concealed on board, and with a view of selling the vessel there, as a vessel well adapted for a ship

of war, and for the service of privateering. Sir William Scott, in his judgment in the case, says: "It is difficult not to consider the Isle of France as the possible port of destination of this vessel, according to the original intention,—I say, as the possible port, at least, if not the principal and absolute port of destination of the original voyage. It cannot be denied, undoubtedly, that an American ship might go to St. Helena, and from thence to the Isle of France, or any other port of the enemy, provided the cargo was of an innocent nature. If, on the contrary, the cargo was of a noxious character, the circumstance of merely touching at an English port would not alter the nature of a voyage in itself illegal." He then comes to the conclusion that the vessel had on board articles contraband of war, —pitch and tar,—and holds that there are strong grounds to presume that the original destination of those articles was absolutely to the Isle of France. "But," he adds, "supposing that it was only of a shifting nature, and that it was merely eventual, that, in law, would be quite sufficient, and that, at least, must be taken to have been the design of the parties. If the intention was no more than this: 'I will go and sell pitch and tar at St. Helena, if I can; and, if I cannot, I will go with them to the Isle of France, and sell them there,'—that is an unlawful purpose, and every step taken in the prosecution of such a design is an unlawful act. The interposition of an English port would not make it innocent. The pitch and tar were going with an original destination, either positive or eventual, to the Isle of France." In the case of The Maria, 5 C. Rob. Adm. 365, Sir William Scott says: "It is an inherent and settled principle, that the mere touching at any port, without importing the cargo into the common stock of the country, will not alter the nature of the voyage, which continues the same in all respects, and must be considered as a voyage to the country to which the vessel is actually going for the purpose of delivering her cargo at the ultimate port." The doctrine here laid down is equally applicable to the cargo where it is carried to the ultimate port in a different vessel from the one in which it is carried to the intermediate port. In the case of The William, Id. 385, on appeal before the lords commissioners of appeal in prize cases, Sir William Grant, in delivering the judgment of the court, says: "Neither will it be contended that the point from which the commencement of a voyage is to be reckoned changes as often as the ship stops in the course of it; nor will it the more change because a party may choose arbitrarily, by the ship's papers or otherwise, to give the name of a distinct voyage to each stage of a ship's progress. The act of shifting the cargo from the ship to the shore, and from the shore back again into the ship, does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done. Supposing the landing to be merely for the purpose of airing or drying the goods, or of repairing the ship, would any man think of describing the voyage as beginning at the place where it happened to become necessary to go through such a process? Again, let it be supposed that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm that it was at such other place that the goods were taken on board. Would this contrivance at all alter the truth of the facts? Would not the real voyage still be from the place of the original shipment, notwithstanding the attempt to give it the appearance of having begun from a different place? The truth may not always be discernible; but, when it is discovered, it is according to the truth, and not according to the fiction, that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have been ended. That those acts have been attended with trouble and expense cannot alter their quality or their effect. The trouble and expense may weigh as circumstances of evidence to show the purpose for which the acts were done; but, if the evasive purpose be admitted or proved, we can never be bound to accept, as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it. Between the actual importation by which a voyage is really ended, and the colorable importation which is to give it the appearance of being ended, there must necessarily be a great resemblance." The cases of The Nancy, 3 C. Rob. Adm. 122, and The United States, Stew. Vice Adm. 116, were cases in which a voyage, consisting of different parts, was held to be not two voyages, but one entire transaction, formed upon one original plan, conducted by the same persons, and under one set of instructions; and it was held that, in cases of contraband, especially when there is anything of fraud or concealment, a return voyage is to be deemed connected with an outward voyage.

It is equally well settled that the inception of the voyage completes the offence; that, from the moment that the vessel, with the contraband articles on board, quits her port on the hostile destination, she may be legally captured; that it is not necessary to wait until the ship and goods are actually endeavoring to enter the enemy's port; and that, the voyage being illegal at its commencement, the penalty immediately attaches, and continues to the end of the voyage, at least so long as the illegality exists. Halleck, Int. Law, p. 573, c. 24, § 7; 2 Wildm. Int. Law, p. 218; 1 Duer, Ins. 626, § 7. The same doctrine is laid down by Sir William Scott in

The Imina, 3 C. Rob. Adm. 167, and in The Trende Sostre, 6 C. Rob. Adm. 390, note. In The Columbia, 1 C. Rob. Adm. 154, Sir William Scott says that the sailing, with an intention of evading a blockade, is beginning to execute that intention, and is an overt act constituting the offence, and that from that moment the blockade is fraudulently invaded. The same view is maintained by him in The Neptunus, 2 C. Rob. Adm. 110.

Such being the well-settled principles of public law, in reference to the carriage of contraband goods to the enemy, it only remains to be seen whether the Stephen Hart and her cargo are liable to condemnation according to those principles. If she was, in fact, a neutral vessel, and if her cargo, although contraband of war, was being carried from an English port to Cardenas, for the general purpose of trade and commerce at Cardenas, and for use or sale at Cardenas, without any actual destination of the cargo, prior to the time of the capture, to the use and aid of the enemy, then most certainly both the vessel and her cargo were free from liability to capture. The Stephen Hart was laden with a cargo composed exclusively of arms, munitions of war, and military equipments. It is urged, on the part of the claimants, that the vessel was a neutral carrier of the products of her own country, and of the property of neutral merchants, from one neutral port to another. A strong appeal has been made to the court not to permit the United States, as a belligerent, to stop the manufactures and commerce of all other nations, or to dictate the mode in which their trade shall be carried on. It is said that a peaceful neutral may quicken his industry and his commerce, and multiply his gains, by the high prices caused by the demands of those belligerents who have exchanged the character of producers for that of consumers and destroyers; that British merchants may lawfully seek to supply the quickened demand at the new price, or become the carrier for those whose ships are exposed to capture; that if, for any reason, they may not sell to the enemy of the United States directly, then they may sell to others who may sell to him; that if they are unwilling to run the blockade, they may sell to those who are willing to take the risk; that if they may not sell to Charleston, they may sell to Cardenas, without troubling themselves with the question whether Cardenas will sell freely to those who may come from Charleston to buy; and that the national wealth of the United States has been largely increased, during the warfare of other nations, by the employment of its citizens as neutral carriers in just such lawful commerce. But a neutral merchant ought not to forget that the duties which the law of nations imposes on him flow from the same principle which ought to control the action of his government as a neutral government; that, where he supplies to the enemy of a belligerent munitions or other articles contraband of war, or relieves, with provisions or otherwise, a blockaded port, he makes himself personally a party to a war, in which, as a neutral, he has no right to engage; that, under such circumstances, his property is justly treated as the property of an enemy; and that the observance of those rules which the law of nations prescribes for his conduct is a high moral duty. 1 Duer, Ins. 754, 755, § 24.

It is contended, on the part of the libellants, that the voyage of the Stephen Hart was originated and prosecuted with the illicit purpose of conveying to the enemy articles contraband of war, and of violating the blockade of a port of the enemy. It will conduce to a better understanding of the case to trace the previous history of the vessel, so far as we learn it from the evidence. She was built in the United States, and had been previously called the "Tamaulipas." At the time the war broke out she was owned in New Orleans, which place she left in June, 1861, while that port was under blockade, although she was allowed to proceed on her voyage after her papers had been examined by a blockading vessel. Before she left New Orleans, and while that port was a port of the enemy, and was under blockade, she was sold there, about May, 1861, to an English owner residing there. Chadwick testifies to this. He also says that he understood that this English owner, a person named Allen, gave a power of attorney to Capt. Ackley, the then master of the vessel, who was in the employ of Allen and who took the vessel to Cuba, and thence to England, authorizing him to sell her, and that she was sold in England to the claimant, Harris. All this appears upon the first examination of Chadwick. But no bill of sale of the vessel is produced either to Allen or to Harris, and there is no mention anywhere of the existence of any, not even in the test oath of Harris. Nor is there any proof of the payment of any consideration on either sale, other than hearsay evidence and the test oath of Harris. All the knowledge that Chadwick has on the subject of the sale to Harris is that Capt. Ackley, the former master of the vessel, told him that he had sold the vessel to Harris for £2,000, and had got his money, or the drafts for it. Capt. Dyett says that the only way he knows that Harris is the owner is by seeing his name in the register as owner. Neither Capt. Dyett nor Chadwick knows anything about any bill of sale of the vessel. Although, in the certificate of registry, which is dated at Liverpool, October 15, 1861, Harris is named as the owner, yet it is expressly stated in the certificate that that paper is not a document of title. Capt. Dyett says that he was appointed to the command of the vessel on the 15th of November, 1861, he thinks, which was four days before she was cleared at the customhouse in London; that he was appointed to such command by Messrs. Isaac, Campbell & Co., of London; and that Mr. Saul Isaac, of that firm, deliv-

ered the vessel to him. No charter party, chartering the vessel to the owners of the cargo, was found on board. Capt. Dyett says that there was no charter-party for the voyage, and Chadwick says that he does not know of any charter party. The only evidence of any payment by Harris for the vessel is his test oath to his claim. But in that test oath he does not state to whom he paid the purchase money, nor does he state that any bill of sale of the vessel was delivered to him, nor is the power of attorney from Allen, under which the sale is alleged to have been made by Capt. Ackley, produced, or its absence accounted for.

In the case of The Christine, Spink's Prize Cas. 82, during the recent war between England and Russia, where a vessel was claimed by one Schwartz, her master, as a citizen of Lubeck, and a neutral owner, he alleged that he had purchased her, just before the commencement of the war, from her Russian owners. Dr. Lushington says, in delivering the judgment of the court, after noting the fact that the master had been master of the vessel, under Russian colors, for eight months before the time of the alleged purchase, "This contract is a very suspicious one, not only on the ground that it was immediately antecedent to the war, but also on the ground that it was a purchase by the master. A party coming forward under such circumstances, and claiming the ship in a neutral character, is bound not only to produce, but to have on board, sufficient documents to satisfy the court that he possesses a bona fide title. I do not say that the court would bind him down to the production, in the first instance, of all the papers which it might ultimately deem necessary, to induce it to pronounce for a restitution, but I do say that it ought to be a contract of that nature, in itself, supported by such documents found on board as would give the court good reason to suppose that, if the opportunity of producing further proof were allowed, it would give him a title to restitution; otherwise, further proof is a mockery. There must be proof of payment in all cases where any suspicion arises as to the validity of the contract at the time of sale. It is quite vain to say, 'Mine is a bona fide, valid contract.' The money must have been paid before the master assumes the command, or ventures out on the high seas during war; otherwise, the ship would be liable to be condemned. The title on which the master claims—the bill of sale—is not here. Now, this may be a bona fide claim. I do not decide whether it is or not; but I decide that it is not legal, according to the usage and practice of the court, and the laws which regulate the court in matters of prize. If this important paper, which is the sole title deed, is not produced, what satisfaction can the court have? The title deed to the ship should be on board of the ship. If further proof were allowed in this particular case, could the court feel satisfied that it would receive a genuine document? The case is teeming with suspicion throughout. Is there any one document whatever produced that can satisfy the court that the transaction was bona fide, independently of all the circumstances I have mentioned? Certainly there is one document." That document was a certificate, showing that the ship's clearer appeared at Lubeck, and swore that he was lawfully authorized by the claimant, by power of attorney, and that the vessel commanded by the claimant solely and bona fide belonged to him. Dr. Lushington proceeds: "So that this gentleman makes oath, by virtue of a power of attorney from Captain Schwartz, which power of attorney is not produced. I have simply this document, which in no degree corroborates the claim." He then adds that, in a case where the question in dispute is the bona fides of the sale, it has always been held that proof of actual payment was essential, and decides that he cannot allow further proof in the case, and that the vessel must be condemned. In the case of The Sisters, 5 C. Rob. Adm. 155, Sir William Scott says: "A bill of sale is the proper title to which the maritime courts of all the countries would look. It is the universal instrument of transfer of ships, in the usage of all maritime countries, and in no degree a peculiar title deed or conveyance, known only to the law of England. It is what the maritime law expects, and what the court of admiralty would, in its ordinary practice, always require."

As the Stephen Hart was built in the United States, she must, on the evidence, be held to have belonged, at the commencement of the war, to a citizen of New Orleans, and her transfer, after the blockade was established, to a British subject, a resident of New Orleans, not being in any manner proved by competent evidence, she was still, in judgment of law, enemy's property, and liable to capture as such. But, in addition to this, even if it were shown that she had, in fact, been legally transferred to Allen, a British subject, residing in New Orleans, yet, as the domicile of Allen was in the country of the enemy at the time of the transfer, his status follows the character of that country in war, and the law of nations pronounces him an enemy. The Pizarro, 2 Wheat. [15 U. S.] 227; The Prize Cases, 2 Black [67 U. S.] 635, 674. Moreover, the transfer by Allen to Harris, even if that were sufficiently proved, having been made under a power of attorney, must, in judgment of law, be regarded as having been made at New Orleans by Allen, a resident of New Orleans, and as of the time when the power of attorney was given, and thus as having been made in a blockaded port of the enemy, in time of war, by a British resident there, and as leaving the vessel equally liable to capture as enemy property. The General Hamilton, 6 C. Rob. Adm. 61; The

Two Brothers, 1 C. Rob. Adm. 131. There is, therefore, abundant ground for condemning the vessel, irrespective of any of the reasons connected with the traffic in which she was engaged at the time of her capture; and the like conclusions follow in respect to the cargo.

The cargo of the vessel, composed of arms, munitions of war, and military equipments, is claimed as the sole property of S. Isaac, Campbell & Co., of London, who appear to be dealers in military goods. It is alleged by the claimants of the vessel and cargo that the real destination of the vessel and cargo was Cardenas, in the island of Cuba. But it is to be noted that the shipping articles specify the voyage as a voyage from London to Cuba (Cuba generally, not Cardenas or any other port in Cuba) and Sierra Leone, "and any port and/or ports on coast of Africa, and/or North and/or South America and/or West Indies, and back to a final port of discharge in the United Kingdom." All the other official papers found on board of the vessel, such as the receipt for the Dover harbor duties, the certificate of the shipping master for the clearance, the receipt for light duties at London, the receipt for harbor duties at Ramsgate, the certificate from the searcher's office of the London customhouse, and the victualing bill, speak of the voyage as one from London to Cuba. The telegram of the 23d of November, 1861, from S. Isaac, Campbell & Co., to Lloyd's agent at Deal, speaks of the schooner as bound for Cardenas. The title-page of the ordinary log book speaks of the voyage as one from London to Cardenas, Cuba. The label on the outside of that log book has the blank for the place at which the voyage commenced filled up with the words, "London, England," but the blank for the place of destination is not filled up at all. The blanks at the tops of the pages are filled up on only one page, although 62 pages are occupied with entries of the progress of the voyage, from the 19th of November, 1861, to and including noon of the 27th of January, 1862. The page referred to has, at the top, the voyage entered as "from London towards Cuba." On the first page, under date of November 19, 1861, there is an entry that the pilot "took charge of the schooner Stephen Hart on a voyage to Cuba." The title-page of the official log book speaks of the voyage as being one to "Cuba and Sierra Leone." None of the letters found on board are addressed to any person at Cardenas. But there was found on board a letter from Saul Isaac to Mr. Crawford, the British consul general at Havana, asking his "assistance and advice for Capt. Dyett, of the schooner Stephen Hart, should he need it during his stay at Havana."

The letter of instructions to Capt. Dyett from S. Isaac, Campbell & Co., produced by Capt. Dyett on his examination, directs him to proceed "to Cardenas, Cuba," and to report, on his arrival there, "to Charles J. Helm, Esq're, to whom you will consign yourself and vessel, and from whom you will receive all orders for your future actions with reference to the schooner and cargo, and you will be pleased to implicitly obey all orders given by Charles J. Helm, Esq're. * * * Mr. Helm may require the schooner for use at Havannah. Should he do so, you will at once make the best arrangements for the immediate return to England of yourself and crew. Should, however, any one wish to remain in the employ of Mr. Helm, we have no objection to his doing so. In case Mr. Helm has no use for the vessel after discharging the cargo, you will receive full instructions from Messrs. Isaac, Campbell & Co., by mail leaving on the 2d proximo, for proceeding to the west coast of Africa." The letter then directs Capt. Dyett to deliver, without delay, on his arrival, the letters which he has for Mr. Helm and Mr. Crawford, and also, immediately on his arrival at Cardenas, to telegraph "to Cahuzac Bros., Havana, who will, on receipt of message, communicate with you." The letter to Mr. Helm, thus referred to, was also produced by Capt. Dyett on his examination, and is from Saul Isaac, and is addressed "Charles J. Helm, Esq're, care of J. Crawford, Esq're, Havana." It says: "The bearer of this is Capt. Dyett, of the schooner Stephen Hart, for whom I ask the favor of your good offices. Should he require assistance or advice during his stay at Havana, he will hand you his instructions from my house to read, and I feel assured that you will in all matters find him a good man."

It is very manifest, from these documents, that Mr. Helm, Mr. Crawford, and Cahuzac Bros., the only parties named as having any concern in Cuba with the vessel or her cargo, were all of them to be found at Havana, and none of them at Cardenas, and that no person in Cardenas was consignee either of the vessel or the cargo; that it was contemplated that the vessel should go to Havana, if Mr. Helm required it, and be given up for use to Mr. Helm, at Havana, if he required it; that Capt. Dyett was to obey the orders of Helm in all his actions with reference to the vessel and her cargo; that Capt. Dyett and his crew were authorized to remain in the employ of Mr. Helm, if any of them desired to do so; and that Mr. Helm was to have the control of the discharging of the cargo of the vessel, and the right to use the vessel after the cargo was discharged. It is also to be noted, that these instructions to Capt. Dyett were not from Harris, the alleged owner of the vessel, but were from S. Isaac, Campbell & Co., who claim to be the owners of the whole of her cargo. No instructions whatever from Harris to Capt. Dyett were found on board, nor is it pretended that he had any from Harris. Harris appears to have given up the entire con-

trol of the vessel and of her movements to S. Isaac, Campbell & Co.; and, for these reasons, independently of all other considerations, the owner of the vessel must be held to have involved her in any illegality of which S. Isaac, Campbell & Co. or Capt. Dyett have been guilty in respect to the cargo of the vessel, especially in view of the facts, which Capt. Dyett states, that he was put in command of the vessel by that firm, and that there was no charter party for the voyage. Jecker v. Montgomery, 18 How. [59 U. S.] 110, 119.

The conclusion is irresistible, from the contents of the three letters referred to, that there was no intention whatever of discharging the cargo of the vessel at Cardenas; and that, if discharged at all in Cuba, it was to be discharged at Havana. As no manifest, bills of lading, or invoices, or any other papers, except the letter of instructions to Capt. Dyett, giving any information as to the character of the cargo, or its owners, or its consignees, were found on board of the vessel, the conviction is forced on the mind that the cargo had a single ownership and a single destination; that that ownership was one represented by Mr. Helm as its agent; and that that destination was to the place where his principals resided, and where they would derive the most benefit from the cargo. Who was Charles J. Helm? Capt. Dyett speaks of him as "Maj. Helm," and says that he resides in Havana. Chadwick, on his second examination, says that Helm was the agent for the "Confederate States" in Cuba. This being so, it may very well be inferred that this cargo of arms and munitions of war was destined to be carried into the enemy's country, as we find the vessel and her cargo placed, by the orders of S. Isaac, Campbell & Co., within the entire control and subject to the orders of Helm. But, independently of this, the evidence is irresistible, that the cargo was destined for the enemy's country. The test oaths, both of Harris and of Samuel Isaac, when examined carefully, fall far short of a frank and clear statement of an innocent destination for the vessel and cargo. The test oath of Harris says that the true and only destination of the vessel, with the cargo, was Cardenas, "where the same was to be delivered." This oath would be satisfied by a delivery of the cargo in bulk at Cardenas to Helm, and its transshipment there to another vessel, to be carried to a port of the enemy, in pursuance of such an original destination. It does not state that the destination of the cargo was not to a port of the enemy. And it states, in very suspicious language, that it was not intended that the vessel should enter, or attempt to enter, any port of the United States, but it does not state that it was not intended that the vessel or her cargo should enter, or attempt to enter, any port of the enemy of the United States, or any port blockaded by the naval forces of the United States. In all these particulars the test oath of Samuel Isaac to the claim for the cargo holds the same suspicious language, and is wanting in the same averments. The court searches in vain through these test oaths to find those full and honest allegations which should characterize the test oath to a claim made by a neutral really engaged in lawful and innocent commerce.

I shall now review the evidence in the case, in order to see to what conclusion it leads. Capt. Dyett says that he does not remember seeing any "Southern flag" on board of his vessel, although he says that, if the "Southern flag" were put before him, he should not know it. He admits, however, that, besides the English colors, under which the vessel sailed, and the American flag,—"that is, the stars and stripes,"—there were other flags in the vessel's bag. Chadwick says that they had the "Confederate" flag on board, and cut up the American flag to make a burgee of it. A "burgee" is defined by lexicographers to be "a distinguishing flag or pennant." Leisk says that the vessel had an American flag on board, and another flag that looked similar to the American flag. Nellman says that she had the American ensign, which was cut up on the voyage to make a burgee of, and also "a flag of the Confederate States of America"; that he saw that flag a few days before the capture, in the sail cabin, in a bag with the burgee; and that, on the day of the capture, he found the burgee on the floor in the main cabin, and made thorough search for "the Confederate flag," but could not find it. Allen says that they had the American colors on board, and another flag with stars and stripes, "but not as many stars as the old American flag"; and that he does not know whether that was the "Confederate flag" or not, as he never saw one, to know it, unless that was one. Chadwick, on his re-examination, says that, after the capture of the vessel, and while the captors were in charge, he took this "Confederate flag" from where it was hid in his clothes bag, and threw it overboard; and that this flag was intended to be displayed in connection with a peculiar one, called the "Isle of Man's flag," or signal, "which was adopted by the Southern States as a signal for a friendly vessel wishing to enter, and which should be protected, as far as possible, by them." This signal flag was probably the burgee of which the witnesses speak. Capt. Dyett says that the schooner was captured about 82 miles from Point de Yeacos, in Cuba. Chadwick says that the capture took place between Cuba and Key West, near the coast of Florida. Nellman and Allen say that the capture took place about 30 miles from Key West. Capt. Dyett says that the capture took place about 25 miles from Key West, and about 82 miles from Cardenas. Capt. Dyett says that the vessel was bound for Cardenas; that the contents of her cargo

were unknown to him, except that he saw some cases marked "Long Enfield," which he supposed contained "long Enfield guns," and he thinks he saw a few bales marked "Socks"; and that at Erith, below London, on the Thames, some packages were taken in stamped "Ball Cartridges." But, he says, "she had no goods on board which were contraband of war, or otherwise prohibited by law." He also says that he cannot state anything further in regard to the real and true property and destination of the vessel and cargo, except that, after he had discharged his cargo he was to proceed to Sierra Leone, as stated in his letter of instructions. Chadwick, on his first examination, says that they were bound to Cardenas; that the cargo consisted of powder and munitions of war; that he understood, from the captain and the shipping articles, that they were bound to Cardenas, and from there to Sierra Leone; and that he knows nothing beyond that. Leisk says that the vessel was bound to Cardenas and Sierra Leone; that he knew that her cargo, consisting of arms, powder, and soldiers' equipments, was contraband of war; and that he knows nothing about the destination of the vessel and cargo, except that they were bound to Cardenas. Nellman says that the vessel was bound to Cuba, Sierra Leone, or the West Indies, or some port in North or South America; and that he does not know to which of those several ports or places they were bound first. In this particular he confirms the very ambiguous and alternative language in the shipping articles. He also says that the cargo consisted of Enfield rifles, powder, cartridges, shot, shell, soldiers' accouterments, such as knapsacks, belts, and pouches, and some heavy boxes, which he thinks contained small cannon; and that the lading consisted entirely of warlike stores and articles. He thus manifests a knowledge of the cargo which is in striking contrast with Capt. Dyett's ignorance. Nellman says that he thinks that these goods are contraband of war. Capt. Dyett, however, says that Enfield rifles and ball cartridges are not contraband of war. Allen says that the vessel was bound to Cuba, and that the captain said he was going to Cardenas and from there to the coast of Africa. As to the cargo, Allen says that he had seen boxes marked "Long Enfields," which he took to be guns, and had heard there was powder, and had seen bales of blankets and other military equipments, and believes that she had a general cargo of arms and munitions of war.

Capt. Dyett says that he does not know who owns the cargo, but his impression is that it belongs to Isaac, Campbell & Co.; that he does not know who were the laders of the cargo, or for whose risk and account the goods were, or what interest Maj. Helm had in them; and that he does not know to whom they would belong if restored and delivered at their destined port. Chadwick says that he heard, in London, that Isaac, Campbell & Co. owned the cargo. Nellman says that he believes the cargo is owned "in the Confederate States of America"; that he heard Chadwick say so; that he never heard anything further concerning the cargo and its owners, except that Mr. Chadwick told him that the cargo was going to some place in "the Confederate States," and professed to know all about it. He also says that Mr. Hughes, who, he believes, is an agent for "the Confederate States," put the cargo on board, and was the lader thereof, and seemed to be the principal man, and had the most to say about the vessel and cargo; that the goods were to be delivered in the Southern States, at some port therein, and he thinks for the account or benefit of some person in those states; and that he believes, from what he heard on board the vessel, that the cargo was destined for some port in the Southern States, either to be carried there in that vessel, or to be transshipped and put in another vessel for the same purpose. He also says that he thinks that the vessel was in reality bound for Cuba, and that, after arriving there, he would receive instructions as to what particular port or place she would go to in the Southern States, or as to whether the cargo should be transshipped and put on board another vessel; and that Chadwick told him that a steamer would receive the cargo at Cuba very probably, and would carry it thence to some Southern port. Capt. Dyett says that he signed four bills of lading for the cargo, which were prepared by the broker and laid before him to sign; that he signed them without reading them, and does not know their contents; and that he had no bill of lading on board when he sailed, or at any time before his capture. He also says that he signed a manifest before the collector of London, and left it at the office of the brokers, Speyer & Haywood, in London, and has not seen it since; that the manifest was in the usual form, and made from the bills of lading; and that the bills of lading and manifest were to be forwarded to him at Cardenas. He also says that there were no invoices on board of the vessel.

Capt. Dyett, on the capture of the vessel, did not give up to the prize master the letter of instructions from S. Isaac, Campbell & Co. to him, or the letter from Saul Isaac to Charles J. Helm, of November 19, 1861. He only produced them on his examination in preparatorio, after his arrival at New York, in answer to the searching inquiries of the standing interrogatories. He says that he did not give up those letters to the prize master, because he did not know that he was bound to give them up. Yet he says that he gave to the prize master his ship's log book, his official log book, and his desk, with all the papers therein, being his private papers, and in no way relating to the vessel; and among the papers which he so gave up is found the compara-

tively unimportant letter from Saul Isaac to the British consul at Havana, and the telegrams and official papers of the vessel, which were calculated, on their face, to show a fair and honest voyage from London to Cuba. The two letters which he did withhold, namely, the instructions to himself and the letter to Helm, were the only documents on board which in any way connect Mr. Helm with the vessel and her cargo. This withholding or temporary suppression of these two letters, whose character and contents I have already commented upon, is one of those circumstances which are always regarded with suspicion, particularly where the suppression is made by a master. I shall have occasion to refer to this point hereafter, in connection with the attempted suppression of important papers by Chadwick. That the suppression of these letters by Capt. Dyett was premeditated, is shown by the testimony of Nellman, who says that Capt. Dyett had a letter with him directed to some one, and that he heard him and Chadwick talk about it an hour or so before the capture, just when the capturing vessel was firing her first shot. Chadwick says that he had some private letters from his wife and friends, which he gave to Leisk, the cook, to take care of, and that Leisk gave them up to some of the capturing officers. Leisk says that he had some papers belonging to Chadwick which he (Leisk) put into a teapot, where they were found by the searching officer, and that they were put there by the orders of Chadwick, to keep them out of sight. Nellman says that Chadwick, a few minutes before the capture, gave some papers to Leisk, with directions to put them in a teapot in the galley for the purpose of concealing them, but that they were found by the United States officers. Allen says that he saw a bunch of papers taken out of the teapot by the boarding officer, and that, when they were found, the officer asked Leisk what they were, and Leisk said he thought it was tea. On his re-examination Leisk says that some papers were given to him by Capt. Dyett on the evening of the day they were captured which Capt. Dyett had put at the foot of his berth. Leisk says: "He told me, if he sent for these papers, I should know where to find them. He then went on board the Supply. When he returned, I asked him if he wanted those papers. He said he had already got them. This conversation was between us, there being no other person within hearing. We were in his stateroom at the time, with the door closed." We have no explanation from any witness as to what those papers were. As to the papers which Leisk received from Chadwick and put into the teapot, where they were found by the boarding officer, Leisk says, on his re-examination: "When the first officer handed me those papers he seemed anxious and uneasy, and, when he returned to the schooner to get his clothes, the first thing he said to me was, 'Have you got those papers?' I told him they were found by the officer. He then said, 'Why in hell did you not destroy them?' and likewise, 'By God, I am done.' "

Three of the papers which were concealed in the teapot, and which Chadwick speaks of as private letters, are letters to Chadwick containing some very important matter. One of them is dated at Bristol, England, October 29, 1861, and is addressed to Chadwick by a person who signs himself "R. H. Leonard, ship Alexander, Confederate States." Leonard expresses his pleasure that he is able to furnish Chadwick with "the book required," without price. He refers to it as a book which Chadwick had written for; says that it belongs to him (Leonard), and that, if it were worth £50, he would willingly give it to an enterprise of Chadwick's, and hopes it may be of valuable service to him. This book is the copy of the United States Coast Survey that was found on board of the vessel, containing charts, as has been seen, for entering very many of the blockaded ports of the enemy. In his testimony, given on his re-examination, Chadwick refers particularly to this book of charts as one which he recommended to his employers to purchase, and which they told him to purchase at any price. He says that he obtained one, which was presented to him by "R. H. Leonard, the mate of the ship Alexander, then lying in Bristol." These employers, Chadwick states, in his deposition on re-examination, to have been Mr. Hughes, "the commercial Confederate agent for purchasing arms and ammunition for and shipping the same to the Confederate States," William L. Yancey of the United States, a South Carolina captain named Connor, and Mr. Saul Isaac. In the same letter, Leonard says: "Capt. Johnson will mark out the chart; also the route, with some information; also write a letter which he will wish you to deliver or forward. Mrs. Bain will also have a letter for you to take, and forward to Virginia, if you arrive safe. I hope you may be successful. If so, report the old Alexander laying up at Bristol, with the palmetto tree constantly flying, and that her captain and officers are ready to aid the South in any enterprise. Tommy, I will not ask you to disclose the secret of your voyage. Be whatever it may, I believe it is true to the South. My heart and well wishes are with you, hoping you may be successful, and I may hear of the consequences. If that book prove serviceable to you, it will afford me more pleasure than its weight in gold in return. * * * I shall send the book by express this evening. I wish you to write me two or three mails before you put to sea, as Mrs. Bain will have some other letters to send. If you should fail, destroy." Chadwick, on his re-examination, states that he received a letter from Capt. Johnson, of the ship Naomi, of Charleston, S. C., giving him

a description of the entrance to Charleston, and also received from him letters for his wife, and for other persons residing in the "Confederate States." In confirmation of this, we find that another of the three letters, being one dated at Bristol, England, October 29, 1861, and signed "John Johnson, ship Naomi," and addressed to Benjamin H. Chadwick, schooner Stephen Hart, Surrey Canal, London," says: "Mr. Leonard, chief officer of the ship Alexander, and I had some private conversation this morning concerning some things, which I need not now repeat." Johnson then proceeds to give specific directions as to the mode of entering the harbor of Charleston, and adds: "The chart of Charleston harbor, in the book called the 'United States Coast Survey,' will be your best guide." He also says: "Enclosed is a letter, and I beg that you will, in case you succeed in safely reaching any Southern port, forward the same to its destination. At the same time, do not let its encumbrance in any way interfere with your enterprise. Destroy it, if need be; but, if it could be managed to forward it safe to my wife, I should feel very grateful towards you for your kindness. I hope and trust that you will succeed in your undertaking. Observe secrecy by all means, and I can assure you that no information as regards the Stephen Hart's whereabouts or movements shall be gained from me by any one, here or elsewhere. * * * May the God of Justice guide you in safety to your port of destination is the fervent wish of one who loves the South, its institutions, and its people. The remaining one of the three letters is from Leonard, and is addressed "to Mr. B. H. Chadwick, alias Tommy, first officer Stephen Hart," and is written at Bristol, England, but without date. It says, among other things, "Give me the particulars of your voyage, what your cargo consists of, and if you have got any guns on board."

The suppression by Capt. Dyett, until his examination in preparatorio, of the letter of instructions to him from S. Isaac, Campbell & Co., and of the letter from S. Isaac to Helm, and the attempt by Chadwick to conceal the letters from Leonard and Capt. Johnson, are circumstances of great importance, as tending to show the illicit and fraudulent character of the entire transaction connected with this vessel and her cargo, and that Capt. Dyett and Chadwick were concerned in carrying out the unlawful purpose, and endeavored to promote that end by attempting to conceal the evidence which they had in their possession. The spoliation of papers is a strong circumstance of suspicion. 1 Kent, Comm. 157. It is not, however, either in England or in the United States, held to furnish, of itself, sufficient ground for condemnation, but is a circumstance open to explanation. The Hunter, 1 Dod. 480; The Pizarro, 2 Wheat. [15 U. S.] 227. But if the explanation be not prompt and frank, or be weak or futile, if the cause labors under heavy suspicions, or if there be a vehement presumption of bad faith or gross prevarication, it is ground for the denial of further proof; and the condemnation ensues from defects in the evidence, which the party is not permitted to supply. 1 Kent, Comm. 158; The Pizarro, 2 Wheat. [15 U. S.] 227; Bernardi v. Motteux, Doug. 574, 579, 580. In the case of The Two Brothers, 1 C. Rob. Adm. 131, the master had burned some letters, before capture, which he said were only private letters. Sir William Scott says, in commenting upon that circumstance: "No rule can be better known than that neutral masters are not at liberty to destroy papers, or, if they do, that they will not be permitted to explain away such suppression by saying 'they were only private letters.' In all cases it must be considered as a proof of mala fides; and, where that appears, it is a universal rule to presume the worst against those who are convicted of it. It will always be supposed that such letters relate to the ship or cargo, and that it was of material consequence to some interests that they should be destroyed." In the case of The Rising Sun, 2 C. Rob. Adm. 104, Sir William Scott says: "Spoliation is not, alone, in our courts of admiralty, a cause of condemnation; but if other circumstances occur to raise suspicion, it is not too much to say, of a spoliation of papers, that the person guilty of that act shall not have the aid of the court, or be permitted to give further proof, if further proof is necessary." The withholding by the master of the two letters, in the present case, until his examination, while he gave up to the captors the letter to the British consul at Havana, and as he says, all his own private papers, would have been a complete suppression of the two letters in question, if their production had not been compelled by the stringent character of the standing interrogatories. In the case of The Concordia, 1 C. Rob. Adm. 119, the master withheld his instructions until the time of his examination. Sir William Scott says: "This was certainly incorrect. It is a master's duty to produce all his papers, and, least of all, to withhold his instructions, which are very important papers to be communicated for the interest of both parties." So, also, the concealment by Chadwick of the letters to him, which showed the true character of the enterprise of the Stephen Hart, would have been as effectually a destruction of those papers, for the purposes of this case, if they had not been found upon the search, as if they had been actually thrown into the sea and lost. And the suspicion which the law attaches to a spoliation of papers arises with equal force from an attempted spoliation.

That Capt. Dyett and all his crew knew of the blockade of the enemy's ports is abundantly established by the evidence. Nellman says that "all on board knew that the Southern States, including Florida, were in a state of war with the United States, and the South-

ern ports blockaded by the United States navy. It was a matter of conversation on board during the voyage." Capt. Dyett says: "I knew of the Rebellion in the Southern States, and that some of the Southern ports were blockaded." Capt. Dyett says that the vessel was steering for Cardenas when she was captured, and that her course was not altered upon the appearance of the capturing vessel. Chadwick, on his first examination, says the same thing. Nellman says that, when they first saw the capturing vessel, about 6 o'clock in the morning, the Stephen Hart was standing towards Key West, and continued on that course until about 12 o'clock, when she tacked and steered towards Havana, and was steering towards Havana when captured; that their course, at all times when wind and weather permitted, was towards Cardenas, except in the instance mentioned, and except when obliged to pursue another course on account of head winds; and that the latter was the reason why the vessel was steering towards Havana at the time of her capture. Nellman says that he had the watch when the capturing vessel was first seen, and that Chadwick had the watch from 8 a. m. until noon, and he (Nellman) again from noon to 4 o'clock. Nellman and Allan say that the capture was made about 2 o'clock p. m. Although Capt. Dyett, and Chadwick on his first examination, say that the course of the vessel was, at all times when wind and weather would permit, towards Cardenas, yet it is apparent that she set out from England with the intention of running the blockade if she could, and she was captured in a position consistent with that intention.

The evidence which has been reviewed establishes, beyond reasonable doubt, that the cargo of the Stephen Hart was intended, on its departure from England, to be carried into the enemy's country, for the use of the enemy, by a violation of the blockade of some one of the enemy's ports, either in the Stephen Hart or in another vessel into which the cargo was to be transshipped, for the purpose of being transported by sea to the enemy's country. This is clearly established without the aid of the testimony given by Chadwick on his re-examination. Some portions of that testimony have been incidentally alluded to. The other main facts detailed by Chadwick on his re-examination are entirely consistent with all the rest of the evidence in the case, and are corroborated by that evidence. Some of the points of corroboration have been already alluded to, and I shall refer to others. Chadwick says, on his re-examination: "The vessel was bound to Cardenas, in Cuba, but the destination of her cargo was certainly to one of the Confederate States; and the vessel was, in like manner so destined, if Charles J. Helm, the Confederate agent at Cuba, should so direct. That voyage began in London, and was to have ended at Cardenas or any port in the Confederate States which the aforesaid Confederate agent should direct." He also says: "The vessel was steering for Cardenas, but that port was to be used only as an intermediate port of call, and of transshipment of the cargo, if necessary or ordered by Charles J. Helm." He also says that, after he had gone in the vessel, then called the "Tamaulipas," from New Orleans, by the way of Havana and Matanzas, to Falmouth and Bristol, England, and thence in the same vessel to London, he was requested to go to No. 71 Jermyn street, London. He adds: "I accordingly went, and was there introduced to Mr. Isaac, the head of the firm of Isaac, Campbell & Co., and also to a Mr. Hughes, whose first name I did not learn, and who told me he was commercial Confederate agent for purchasing arms and ammunition for, and shipping the same to, the Confederate States. He asked me how I would like to run the blockade of the Southern states in the Stephen Hart. I answered 'that I would sooner go in a steamer.' There was no definite arrangement made at that time. I was again sent for, and went to the same place, where I met Mr. Isaac, the same Capt. Hughes, and William L. Yancey, of the United States. There was also a South Carolina captain there. I was taken by Capt. Hughes and this South Carolina captain (whose name was Connor), into another room, and there fully examined in regard to my knowledge of the southern coast of the United States. I was then employed by Capt. Hughes as a pilot agent, and to leave the Stephen Hart and go on board a steamer which he had chartered, and which was then taking a cargo of arms and ammunition for the Confederate States. I was to leave the Stephen Hart, go ashore and take lodgings, and observe secrecy until I was called, which I did. About a week afterwards I was told to go on board of the steamer Gladiator, then lying in the Thames, and examine and see if she had proper boats for landing her cargo in the surf on the southern coast, if required, and report to Hughes. I did so, and reported that she had, with the exception of one boat. I was then ordered to take my things on board of that vessel (the Gladiator), and proceed in her to Nassau, and there either obtain a pilot for her, or else pilot her myself into some southern port of the Confederate States between Cape Canaveral, in Florida, and York river, Virginia. I went aboard accordingly. That vessel was loaded with arms, ammunition, and army outfits. After I got aboard, it was found that she could not carry all the cargo which had been bought for her, and, accordingly, what portion thereof could not be taken by the Gladiator was put aboard the Stephen Hart, together with other like cargo to fill her up. I was ordered to proceed from the Gladiator and take charge of the loading and fitting out of the Stephen Hart, which I did. On my recommendation to Capt. Hughes, Capt. Dyett was appointed master of the Stephen Hart, while I was to go in her nominally as mate, but really in charge of the cargo, consisting of arms and munitions

of war. The vessel proceeded down the Thames several miles, and there took aboard a quantity of powder." Nellman testifies to the same effect as to the place where the powder was taken on board. Chadwick proceeds: "Before the Stephen Hart left, I was instructed by Capt. Hughes to proceed to Cuba, that is, to Cardenas, and there to work under the instructions of Charles J. Helm, the agent for the 'Confederate States' at that place. He said the cargo was to be transshipped into a steamer, which could be used with greater facility in running the blockade, or she might be ordered to proceed herself." The connection of Hughes with the transaction, and his being an agent for "the Confederate States," and the lader of the cargo on board of the Stephen Hart, are also testified to by Nellman. The contents of the letter of instructions to Capt. Dyett confirm all that Chadwick says, on his re-examination, as to the connection of Helm with the matter, and as to the certain destination of the cargo and the contingent destination of the vessel being to a port of the enemy. It is stated by Nellman that he heard Chadwick say that the cargo was going to the enemy's country, and that a steamer would receive it at Cuba, very probably, and would carry it thence to a port of the enemy. And it is apparent, from what Nellman says, that it was understood, on board of the Stephen Hart, that the cargo was destined for a port of the enemy, and was to be carried there in that vessel, or to be transshipped to another vessel for the same purpose. Chadwick proceeds: "The agreement was that I should have $45 a month for all the time I was employed, including any time I might be detained or imprisoned, in consequence of any attempt to run the blockade; and if I had gone in the Gladiator I was to have received a bounty of $500; and, in the Stephen Hart, if ordered by Helm to cross the blockade, I was to have a bonus, to be agreed upon with him." The shipping articles confirm this statement of Chadwick's to a certain extent, as they show that his wages were to be £9 per month. They also show that the wages of the mate, whose place he took, were only £6 per month. He then goes on to state, what he had already stated in his affidavit upon which the order for his re-examination was made, that he was induced to state these facts, not by any persons in any way connected with the libellants or captors, but solely by the persuasion of his wife, "who is a loyal woman, and now residing in Boston." The absence from on board of the Stephen Hart of the bills of lading and manifest, to whose existence the master testifies, and of all invoices of the cargo, has been already referred to. The absence of these papers, in time of war, is a suspicious circumstance, as affecting the question of the neutrality of the cargo and the honesty of the trade. 1 Kent, Comm. 157; Halleck, Int. Law, p. 622, c. 25, § 25.

It has been strongly urged upon the court, in the present case, that as Harris, the alleged owner of the vessel, is not shown to have any interest in any of the cargo, the vessel can be visited with no greater penalty of carrying contraband articles, even though they were intended for the enemy, than the loss of freight and expenses. But, even on the assumption that the grounds already set forth in respect to the real ownership of the vessel are not sufficient for her condemnation, the court is of opinion that her condemnation must, under the circumstances, follow the condemnation of the cargo, the latter being contraband of war, and intended, on its departure from England, to be carried into the enemy's country by a violation of the blockade. The contingent destination of the vessel to a blockaded port would be sufficient, under the authority of the case of The Richmond, before cited, to warrant her condemnation. But, even if her destination was only to Cardenas, yet, as her cargo was intended, on its departure from England, to be introduced into the enemy's country, by being transshipped from the vessel at Cardenas, condemnation must equally follow, because of the employment of the vessel in this unlawful enterprise, under the circumstances disclosed in this case. As testified to by Capt. Dyett, there was no charter party for the voyage. He says that he was put in charge of the vessel, not by Harris, her alleged owner, but by S. Isaac, Campbell & Co., the claimants of the cargo. No instructions from Harris to Capt. Dyett are found, but only instructions to him from S. Isaac, Campbell & Co. Harris, therefore, surrendered the entire control of his vessel to that firm, and her master must be regarded as her agent, and the claimant of the vessel must be held responsible for the use to which the master and the claimants of the cargo put the vessel. Jecker v. Montgomery, 18 How. [59 U. S.] 110, 119. That use was the carrying, for a portion of the distance on its way to the enemy's country, of a cargo contraband of war, intended for the use of the enemy, and to enter the enemy's port by a violation of the blockade. This use of the vessel was, under the authorities before cited, unlawful in its inception, and, the entire transportation of the cargo from England to the enemy's country being unlawful, the vessel must be condemned for having been permitted by Harris to be used, at the pleasure of S. Isaac, Campbell & Co., in carrying out a portion of the unlawful purpose. Such use was, under the circumstances, in judgment of law, with the knowledge and assent of Harris. Chadwick, on his re-examination, states that Harris wished him to continue in the Stephen Hart as mate; "that either she would go to, or else he would put me on board of another vessel to go to, the Confederate States."

In the case of The Ringende Jacob, 1 C. Rob. Adm. 89, Sir William Scott says that, under the ancient law of Europe, the carry-

ing of a contraband cargo rendered the vessel liable to condemnation; but that, in the modern practice of the courts of admiralty of England, a milder rule has been adopted, and that the carrying of contraband articles is attended only with the loss of freight and expenses, "except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying a contraband cargo has been connected with other malignant and aggravating circumstances." And he cites, as an exception, a case attended with particular circumstances of falsehood and fraud, both as to the papers and destination of the voyage, and in which there was an attempt, under colorable appearances, to defeat the rights of the belligerent. The same doctrine is laid down in the case of The Jonge Tobias, Id. 329. In the case of The Franklin, 3 C. Rob. Adm. 217, a neutral vessel, ostensibly bound to a neutral port, and whose cargo consisted of several articles which were contraband if going to the enemy, was held, by Sir William Scott, to have been captured while really on her way to a port of the enemy. He says: "I have had frequent occasion to observe that it is very difficult to detect a fraud of this species in the particular instances. Pretences and excuses are always resorted to, the fallacy of which can seldom be completely exposed; and therefore, without undertaking the task of exposing them in the particular case, the court has been induced (and I hope not unwarrantably) to hold generally, in each case, that the certain fact shall prevail over the dubious explanations. I am satisfied, on the facts of this case, that it was the plan of the voyage to carry the ship fraudulently, under a false destination, into a Spanish port. The consequences will be. that this fraudulent conduct, on the part of those who are concerned in the ship, will justly subject her to confiscation. Anciently, the carrying of contraband did, in ordinary cases, affect the ship, and, although a relaxation has taken place, it is a relaxation the benefit of which can only be claimed by fair cases. The aggravation of fraud justifies additional penalties." He then announces it as the settled rule of law "that the carriage of contraband, with a false destination, will work a condemnation of the ship as well as the cargo." In that case the owner of the ship was not the owner of the cargo, but, being himself a neutral, had entered into a charter party for a voyage of the vessel from one neutral port to another neutral port. In a note to the case, these very appropriate remarks are made: "The relaxation of the old rule has been directed, in its practical application, as well as in its origin, only to such cases as afford a presumption that the owner was innocent, or the master deceived. Where the owner is himself privy to the transaction, or where his agent interposes so actively in the fraud as to consent to give additional cover to it by sailing with false papers, all pretence of ignorance or innocence is precluded, and there seems to be no further ground, consistent with equity and good sense, upon which the relaxation in favor of the ship can any longer be supposed to exist." The same principles are laid down in the cases of The Mercurius, 1 C. Rob. Adm. 288; The Edward. 4 C. Rob. Adm. 68; and The Neutralitet, 3 C. Rob. Adm. 295. In the latter case, Sir William Scott says that, where a vessel is carrying contraband articles under a false destination or false papers, those circumstances of aggravation constitute excepted cases out of the modern rule, and continue them in the ancient one. In The Ranger, 6 C. Rob. Adm. 125, which was the case of an American vessel with a cargo which was documented for a neutral port, but was going to the enemy's port, and was condemned as contraband, Sir William Scott says: "I also condemned the vessel, as employed in carrying a cargo of sea stores to a place of naval equipment, under false papers. It is described, I perceive, as an American vessel. But, if the owner will place his property under the absolute management and control of persons who are capable of lending it, in this manner, to be made an instrument of fraud in the hands of the enemy, he must sustain the consequences of such misconduct on the part of his agent." In The Oster Risoer, 4 C. Rob. Adm. 199, Sir William Scott held that a master could not be permitted to aver his ignorance of the contents of contraband packages on board of his vessel; that he was bound, in time of war, to know the contents of his cargo; and that, if a different rule could be sustained, it might be applied to excuse the carrying of all contraband.

One important circumstance, to show that the cargo of the Stephen Hart was intended for the enemy, is the fact that a part of it consisted of 90,000 buttons, marked with the initials "C. S. A.," which, it is well understood, stand for the words "Confederate States of America," or "Confederate States Army," the buttons being such as are used on army clothing for the three services of an army.

This review of the facts in this case leads to the conclusion that the vessel and her cargo must both of them be condemned. No doubt is left upon the mind that the case is one of a manifest attempt to introduce contraband goods into the enemy's territory by a breach of blockade, for which the vessel must be held liable to forfeiture as well as her cargo. Chadwick was evidently employed by reason of his being a citizen of the United States, familiar with the enemy's country, and qualified to conduct the vessel into one of the blockaded ports. The vessel was captured in a position convenient for running the blockade. The cargo consisted of arms, munitions of war, and military equipments, and, among them, a large quantity of

military buttons, stamped in such a manner as to render them capable of no appropriate use save for the infantry, cavalry, and artillery of the enemy's army, thus showing that the enemy's country was their only appropriate destination. The absence of the manifest and bills of lading is not satisfactorily accounted for, and the want of any invoices and of any charter party is a circumstance of great weight against the lawfulness of the commerce. The attempt, by the master, to suppress his letter of instructions, and the letter to Helm, the agent of the enemy in Cuba, and the attempt of the mate to conceal the letters which show that the design was that the Stephen Hart should, under his guidance, enter a blockaded port of the enemy, and which also contain specific directions for entering the harbor of Charleston, justify the conclusion that Charleston, or some other port of the enemy, was the real destination of the vessel and her cargo. The absence of any charter party, and of any instructions from Harris to Capt. Dyett, and the entire surrender by Harris of the control of the vessel to the laders of the cargo, and to the master as their agent, involve the vessel in all the guilt which attaches to the cargo. The object of carrying the flag of the enemy could only have been that it might be used for the purpose of entering the enemy's port,—a conclusion strengthened by the fact that it was thrown overboard at the time of the capture. The charts found on board are charts of such a character as to enable a vessel to enter many of the blockaded ports. The letter concealed by the mate, which contains directions for entering the harbor of Charleston, is one which he had a motive to preserve by concealing, and not to destroy, because, upon the regular papers of the vessel, he must have indulged the hope that she would have been permitted, after a search, to proceed upon the voyage indicated by her papers, and thus that the letter in question would afterwards become useful on a further voyage to the port of the enemy. There is an absence of all papers and circumstances to warrant the conclusion that there was any intent to dispose of the cargo at Cardenas, in the usual way of lawful commerce. The consignee of the entire cargo was the agent of the enemy, and the cargo was laden on board by the agent of the enemy in London. The asserted ignorance of the master as to the contents of his cargo, and as to the fact that arms are contraband of war, and the ambiguous destination set out in the shipping articles, are circumstances which, with many others, go to swell the volume of suspicion attached to the enterprise. In addition to all this, there is the positive evidence which has been referred to, particularly of Chadwick and Nellman, as to the actual destination of the cargo. All the material facts of the case, which lead to a condemnation, are proved without any resort to the re-examination either of Leisk or of Chadwick.

This is not a case for further proof, and no application has been made on the part of the claimants to supply any further proofs as to any point. There must, therefore, be a decree condemning both vessel and cargo.

[An appeal was taken to the supreme court from this decree, and it was there affirmed. 3 Wall. (70 U. S.) 559.]

STEPHEN HART, The (UNITED STATES v.). See Case No. 16,385.

Case No. 13,365.

In re STEPHENS.

[3 Biss. 187;[1] 6 N. B. R. 533.]

District Court, W. D. Wisconsin. Feb., 1872.

SURRENDER OF PREFERENCE — WHEN MUST BE MADE — CHATTEL MORTGAGE — WHEN FRAUDULENT—TRANSFER IN PAYMENT—WHAT DEBTS RETIRING PARTNER MAY PROVE.

1. A full surrender by a creditor of a preference fraudulent under the act restores him to all his rights, and he may prove his claim against the estate.

[Cited in Re Leland, Case No. 8,230; In re Hatje, Id. 6,215.]

2. Whether this may be done after suit is brought, is a matter of discretion with the court. It will not be allowed after a recovery.

3. There is no distinction in this respect between voluntary and involuntary bankruptcy.

4. A chattel mortgage taken by a retiring partner on all the firm goods, including property to be afterwards acquired, and by agreement kept from the records, is fraudulent and void as to subsequent creditors of the continuing partner.

5. A transfer of the property to the retiring partner in payment of his mortgage can be set aside by the assignee, and the mortgagee will not, in such case, be allowed to prove his debt.

6. For such partnership debts, however, as he may have paid or assumed, he will be allowed to prove, he having as partner a right to contribution.

This was a motion on behalf of the assignee in bankruptcy to expunge certain debts proven by Satterlee Warden against the bankrupt's estate, on the ground: First, that he had received a preference by way of payment from the bankrupt which he had not wholly surrendered; second, that the debts were void as arising out of a transaction between the parties entered into to defraud the creditors of the bankrupt. For about five years prior to March 31, 1870, E. R. Stephens and Satterlee Warden were co-partners in mercantile business at Darlington, in this district. On that day the firm dissolved, owing Warden for capital in the business $15,000, and third parties $11,000. They had assets of the value of $19,750, $6,000 of which was real estate, and the balance consisted of the stock of merchandise, notes and accounts. Stephens had no capital in the business, and his individual

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

property, besides his homestead, did not exceed $600. Stephens and Warden settled on that day, Stephens buying Warden's interest in the firm property, except the real estate, giving his notes for $7,000, secured by a chattel mortgage on the stock then on hand and thereafter to be acquired. He also agreed to pay the $11,000 of firm debts, and Warden took the real estate of the firm at $6,000. By agreement between them the chattel mortgage was not filed until March 30, 1871. Stephens continued the business alone until March 21, 1871, when he transferred his stock of merchandise and notes and accounts, valued at $12,000, to Warden, in payment of the $7,000 due him, Warden at the same time agreeing to pay the firm debts, which were then about $5,000. On petition afterwards by his creditors Stephens was adjudicated a bankrupt. The assignee filed a petition against Warden to compel him to surrender the property thus taken by him, as being a preference under the act. On the hearing Warden asked to have proceedings stayed that he might surrender the property, which was granted by the court; and Warden thereupon surrendered the property to the assignee, and then filed claims against the bankrupt's estate for the $7,000, for which he had Stephens' notes and mortgage, and for the $5,000 of firm debts, which Warden had agreed to pay. After March 31, 1871, Stephens contracted other debts in his business to the amount of $7,000, which were still unpaid.

P. A. Orton, Jr., for assignee.
H. S. Orton, for Warden.

HOPKINS, District Judge. At the conclusion of the argument I announced that I regarded the transfer of the property by the bankrupt to Mr. Warden, on the 20th of March, 1871, in payment of these claims, as clearly creating a preference within the meaning of the bankrupt law, and a plain violation of its provisions. I further stated that I thought the testimony showed that he had surrendered all the property he had received of the bankrupt upon said debts before filing the proof of his claims, although he did not do so until after the testimony had been taken on proceedings to recover it.

But upon the question as to the effect of the surrender at that time, as well as several other matters discussed, I took the case under consideration, and after a careful examination of the whole case, I have come to the conclusion that Mr. Warden, by the surrender of the property that he took in payment of these claims of the bankrupt, relieved himself from the penalty prescribed in the 39th section of the act [of 1867 (14 Stat. 536)].

I fail to see any reason for a distinction between sections 35 and 39 in that respect. The attempt to maintain a distinction between voluntary and involuntary proceedings fails to commend itself to my judgment.

A full surrender of a fraudulent preference by a creditor is a complete condonation of that offense, as I understand the provisions of section 23. That section is not limited in its operation to cases of voluntary proceedings.

The preference is what the law denounces, the intent of the act being to secure an equal distribution of the estate of a bankrupt among all his creditors; and if a creditor voluntarily yields a preference he may have acquired or attempted to acquire, and surrenders all the property, so that it does not in any manner interrupt the equal distribution required by the act, the party is restored to his rights as they stood before the preference. If a creditor, having received preference, refuses to surrender, and a suit is prosecuted against him by the assignee for the property or money unlawfully received as a preference, and a recovery is had against him, he cannot then surrender and receive the benefits of that section. He is then by section 39 forbidden the privilege of proving his debt or receiving any dividend; and it may be a matter of discretion with the court whether a party should be allowed to surrender after suit brought, and particularly after the testimony is taken, and the defendant becomes satisfied that it is enough to defeat him.

I do not think the spirit of the act would warrant a practice of that kind. A party should not be allowed to experiment and speculate upon the ability of the assignee to prove a case against him, and when he sees he has succeeded then to plead guilty and surrender, and take the benefit of section 23. Such a practice ought not to be tolerated, and hereafter, except under very peculiar circumstances, I shall not allow a party guilty of a fraudulent preference to surrender after suit brought and prove his debt under section 23; and if, on examination, I should conclude I had the power to prevent it, I shall expect a party to elect, and after having elected, shall hold him to his election. But in this case, he did surrender, and I think he is, therefore, relieved from the penalty imposed by the bankrupt act. In re Scott [Case No. 12,518]; Tonkin v. Trewartha [Id. 14,094]; In re Kipp [Id. 7,836]; In re Montgomery [Id. 9,728]; In re Davidson [Id. 3,599]. So, if the case of the assignee rested wholly upon the bankrupt act, the motion would be denied.

But a question of far more importance and difficulty is presented, that is, whether the transaction between Warden and the bankrupt on the 30th of March, 1870, was not intended to defraud the subsequent creditors of Stephens, and hence void at common law. It is claimed if I should so find, that that fraud is not condoned, but inheres in the transaction, and renders void all the prom-

ises Stephens made with Warden upon such transaction, and that no court should lend its aid to enforce them or either of them; that the case will then fall within the principle of the maxim, "Ex turpi causa, non oritur actio." Nellis v. Clark, 20 Wend. 24, and cases cited.

In order to rightly understand my conclusions on this point, it will be necessary to briefly state some of the facts established by the evidence. Stephens and Warden were partners in the mercantile business, at Darlington, commencing sometime in 1865. Warden was the man of means; Stephens the active man, although both gave some personal attention to the business. The business was not successful, and before March, 1870, Stephens had withdrawn, and used up all his capital, and the company was owing Warden $15,000, and their other liabilities were a little over $10,000. On the 31st of March, 1870, an inventory was completed, which showed that the firm nominally had assets equal to the debts, or nearly so, but they were not equal in actual value to the firm liabilities by several thousand dollars. Stephens had very little except his homestead, The firm was then insolvent, although Mr. Warden was perfectly good, and able to pay all the liabilities. On that day they dissolved, and Warden transferred his interest in the firm assets to Stephens, except the real estate, which Warden took at $6,000, and applied towards the amount the firm owed him; Stephens agreed to pay all the firm debts to third parties, and gave his note for $7,000 to Warden, that being the balance due him, which he secured by chattel mortgage upon the goods then in the store, and upon all such as he might afterwards acquire, until the payment of that debt. It was agreed, however, that the chattel mortgage was not to be filed, for the alleged reason that if it was it would prevent Stephens buying any more goods on credit.

It must have been known to Mr. Warden that Mr. Stephens was insolvent, and that he could not, out of the stock, pay the indebtedness assumed by him; and the case fails to disclose any ground for a belief upon the part of Warden of the ability of Stephens to go on long with the business. It had been unsuccessful with the credit his name had given to it, and in the light of the testimony no court could find that Mr. Warden believed Stephens would be able to continue long, and the taking of the chattel mortgage to secure the debts to him shows that he meant to keep a control of the stock and goods, so that he could at any time secure himself by taking possession. In view of these facts, I am forced to the conclusion that it was a scheme on the part of Warden and Stephens to clothe Stephens with the apparent ownership of the property, and send him out to obtain goods on credit from parties ignorant of the condition of his affairs and of the security to Warden, and thus enable him to obtain the means with which to pay the balance due to Warden, which in any other way he would be unable to do. Warden must have known such would be the probable result of Stephens' undertaking, and when he consented to keep his mortgage off the record he must be held to have done so with a view of enabling Stephens to obtain credit that he ought not to have, and to obtain property that he could not pay for, and which, according to the terms of this mortgage, was incumbered by it as soon as placed in the store.

I must, upon these facts, hold that the design of these parties was to defraud the subsequent creditors of Stephens, and therefore that the notes and chattel mortgage given to Warden were absolutely void as to the subsequent creditors of Stephens, and that the proof of debt filed therefor must be stricken out. This I find was a fraud upon the subsequent creditors, and this case should be treated as if they were the parties contesting it. The assignee is, in reality, acting in their interest.

The parties entered into this arrangement for the real purpose of casting upon the subsequent creditors the hazards of Stephens' success in continuing the business. All the property he could get, they supposed, was covered by this mortgage to Warden, so that Warden would be secured anyway.

Suppose the subsequent creditors, instead of proceeding in bankruptcy, had proceeded by attachment and taken this property, and Warden had commenced his action to recover it back upon his mortgage, can it be possible, upon the facts as proven in this court, that a court or jury would hesitate a moment in finding that this scheme was devised to defraud Stephens' subsequent creditors? The facts constitute fraud—fraud in fact. Case v. Phelps [39 N. Y. 164]; Stilman v. Ashdown, 2 Atk. 481; Reade v. Livingston, 3 Johns. Ch. 481; Parrish v. Murphree, 13 How. [54 U. S.] 99.

[In the latter case, McLean, J., in delivering the opinion of the court, says, "The statute designed to prohibit frauds by protecting the rights of creditors. If the facts and circumstances show a fraudulent intent, the conveyance is void against all creditors past and future."] [3]

The taking of the mortgage which expressly covers the goods Stephens might afterwards acquire, as well as those he then had, and keeping it from the records for the express purpose of enabling him to acquire more upon credit, in view of his pecuniary situation and the known hazardous nature of the business he was engaged in, are sufficient to warrant and authorize any court to find that Mr. Warden was acting in bad faith toward the parties who might, in ignorance of his claim, sell Stephens goods on credit, and I know of no principle of law or

[3] [From 6 N. B. R. 533.]

equity that would allow him to hold such property as against the creditors thus deceived, or to share with them in its distribution.

The subsequent conduct of the parties is in harmony with this construction. When the crisis came we find Warden taking all the property and accounts to pay his debts and the balance of the firm debts, without making any provisions for subsequent creditors. It was insisted by the counsel for the assignee that the claims proven by Warden as company debts, should be excluded upon the same ground, as the contract of dissolution embraced them as well as the payment of his individual debts; but I think they are distinguishable. Mr. Warden's right to prove them does not rest wholly on the agreement made by Stephens at that time; if it did, I think they would be void on the same grounds. But he had no claim until he had paid the debts, and when he paid them he had the right to claim contribution of Stephens, independent of the agreement and the right to prove them and have them allowed to the extent of his right to contribution; and as between the parties in the case, he would be entitled to the whole sum paid, as he had largely overpaid his portion, and the company, and Mr. Stephens as one of the members, were owing him a much larger amount than these claims. He stands on his rights as partner to be reimbursed for his advancements, and can recover independent of the agreement, and if the agreement was void it cannot be said to merge his original claim, nor be set up, if void, by Stephens or those representing him as a defense to such original claim. Meshke v. Van Doren, 16 Wis. 320, 325; Ferrall v. Shaen, 1 Saund. 295; The Queen v. Sewel, 7 Mod. 119; Vilas v. Jones, 1 Comst. [1 N. Y.] 276; Johnson v. Johnson, 11 Mass. 359. Again, there was no contract made to defraud existing creditors; the fraudulent part of the agreement related to the effort of Warden to get his pay at the expense of future creditors, and only that part which was fraudulent should be held void.

[The debt of Doty & Judge, supposed to be one thousand dollars, should be excluded, as the proof is defective in not stating the amount paid therefor by Warden. But as it is probable under the rule above adopted, Mr. Warden may withdraw that proof and perfect it according to the facts. The claim proven at three hundred and four dollars and twenty-five cents, contains items that have accrued since the filing of petition, and for insurance which is not provable. From the testimony I cannot find that there is due but the charge for cash twenty-two dollars, loaned to Stephens to go to Kansas. I do not see that a claim against Stephens is established for the balance of these items; and that claim is disallowed except as to the twenty-two dollars loaned to Stephens to go to Kansas. All the other claims are allowed as proven, except the seven thousand dollar claim upon Stephens' notes to Warden hereinbefore mentioned.] [3]

Warden's claim for the $5,000 of firm debts which he had assumed will be allowed, but not the $7,000 claim upon Stephens' notes to him.

A suggestion was made by me upon the argument, in relation to a mortgage given by Stephens to Warden to secure certain notes indorsed by Warden, to the effect that a release of that portion of the property not embraced in the homestead set-off, might entitle Mr. Warden to prove those claims. On further reflection I am inclined to think that, in order to be allowed to prove these claims, he should discharge the mortgage absolutely. In re Stevens [Case No. 13,392]. I think, in order to be allowed to prove a debt unlawfully preferred, the party must wholly surrender the unlawful preference—wipe out the security entirely.

NOTE. That a creditor who has accepted a chattel mortgage with a view to obtain a preference, not only loses the lien of his mortgage, but will not be allowed to prove his debt. Bingham v. Richmond [Case No. 1,415]. That preferred creditor may surrender and then prove debt. In re Richter's Estate [Id. 11,803]. May be after suit brought, but must be before judgment. Hood v. Karper [Id. 6,664]. Contra, Phelps v. Stearns [Id. 11,080]. Same in involuntary as in voluntary bankruptcy. In re Scott [Id. 12,518]. Contra, In re Princeton [Id. 11,433]; In re Coleman [Id. 2,979]; In re Walton [Id. 17,130].

Case No. 13,366.

STEPHENS et al. v. BALES OF COTTON.

[Bee, 170.] [1]

District Court, D. South Carolina. 1800.

SALVAGE—SERVICES—RISK—AMOUNT OF COMPENSATION—WHO ENTITLED TO SHARE — LOST VESSEL.

1. Vessel wrecked on Charleston bar; her cargo of cotton, &c. cast ashore on the adjoining islands, and there secured by great labour, much risque of health, and some of life, of the salvors. One third of the cotton, and one half of the other articles given as salvage.

[Cited in The Wave, Case No. 17,297; Baker v. The Slobodna, 35 Fed. 541.]

2. A schooner lost in transporting these articles to Charleston, after they had been placed in a state of safety, not entitled to compensation.

In admiralty.

BEE, District Judge. Three suits have been instituted in this court against the articles saved from the ship Argus, lately wrecked on Charleston bar. The goods were cast ashore on several islands contiguous thereto. Restitution is prayed, after such deduction for salvage as this court may think reasonable. It appears that the weather was rather tempestuous, and that great labour and

[3] [From 6 N. B. R. 533.]

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

exertion were necessary, first to place these goods in a state of safety, and then to bring them to Charleston. All this was done by the salvors alone, without any assistance from the ship's crew. It appears also that, without great diligence, much of the cotton would have been washed off from the shore to which it had drifted, and would have been again afloat at sea. The owners of all these islands, and their negroes, were constantly employed for a considerable time, (in some instances for three weeks) in securing, and drying this cotton; after which, it was carted with great labour to distant landing places, from whence it was finally brought to Charleston. During the whole of this time, the crops of those who were employed in rendering this service were neglected; and at this season must have suffered much by grass. The different salvors are upon nearly the same footing. But Mr. Taylor, who lost a schooner, valued at £250 employed in bringing part of this cotton from a landing to Charleston, has libelled for salvage upon that ground. I shall decide upon that point hereafter.

The act of the legislature of this state passed 16th March, 1783, has been produced to shew that goods, circumstanced as these were, shall be restored upon payment of reasonable salvage. This brought forward the question of jurisdiction. The point, indeed, was waived by counsel, but I think it my duty to notice it; for, "consent will not give jurisdiction." This state act was passed previously to the establishment of this court under the federal constitution, and the subsequent act of congress, which gives the district court exclusive cognizance of all civil causes of admiralty and maritime jurisdiction. Such are all matters relative to wreck; and it is settled that incidental circumstances, necessarily flowing from and dependent upon the first cause of action, shall follow the original jurisdiction. In cases of concurrent jurisdiction, either court may decide; so that, in every point of view, I am bound to adjudge this case, without any undue interference with the act of the state, above mentioned. Both this act and the law of nations entitle the salvors to compensation in this case. Marten, Law Nat. 167.

The material consideration regards the quantum of salvage. The service rendered, the risque attending it, and the value of the property saved, are the points by which the decree in this, and every similar case, must be regulated.

Here, the service rendered was considerable. It is proved that the ship's crew abandoned the property; and the captain, who remained for some time on one of the islands, did not assist in any manner. Mr. Mair, by the newspapers and by handbills made known the situation of the vessel, and offered all due encouragement to such as would endeavour to save the cargo; yet no more than 35 bales of cotton, and 15 barrels of tar were saved by these, or any exertions, except those of the salvors, parties to this suit. They, unassisted but by their own negroes, saved 264 bags of cotton, 334 barrels of tar, and a quantity of logwood, fustick, and mahogany, which sold for 600 dollars.

The risque these persons ran was not, I think, so imminent as was contended. They exposed their health, indeed; and Mr. Lawton and his son were actually made ill by their exertions. Several respectable witnesses are of opinion that the salvors ran some risque of their lives in saving the cotton; and declare that they themselves would not have encountered the same, for the whole value of what was saved. The parties, however, seem to have dreaded sickness more than anything else; and they might reasonably do so, for their labour must have been extreme.

As to the third point, the value of what was saved, the sales amount to 12,199 dollars, chiefly arising from the cotton. The tar, &c. produced 1,178 dollars; but these articles of inferior value occasioned much more labour to the salvors, than the cotton.

Upon the whole, I think the libellants are entitled to receive, as a compensation for their very meritorious exertions in this case, one third of the net proceeds arising from the sale of the cotton, and one half the proceeds of the other articles: and I decree accordingly.

With respect to the charge contained in the libel, filed by Mr. Taylor, I cannot, on any principle, admit it. His schooner was not lost while employed in saving the goods; but in conveying them, after they had been placed in safety, to the agent of the owners. He is, therefore, upon a footing with the owners of other coasting, or river vessels, and, like them, entitled to freight, (but to nothing more) on delivery of their lading.

STEPHENS (BRIGGS v.). See Case No. 1,873.

Case No. 13,367.

STEPHENS v. CALDWELL.

PENAL ACTION—AFFIXING WORD "PATENT" TO UNPATENTED ARTICLES—MAKING APPLICATION FOR PATENT—PURPOSE.

1. The penalty specified in section 5 of the act of 1842 [5 Stat. 544] for affixing the word "Patent" to an unpatented article is incurred as to all articles made and having such word affixed with a guilty purpose; and this is not changed by the party making application for a patent during such manufacture, at least as to such as were made or ordered to be made and so stamped before his application.

[Cited in Oliphant v. Salem Flouring Mills, Case No. 10,486.]

2. The penalty mentioned in this section is incurred as to all articles made, and having the word "Patent" affixed, with a guilty purpose.

[Nowhere reported; opinion not now accessible. Cited in Law's Pat. Dig. 585, to points as above stated.]

Case No. 13,368.

STEPHENS v. FELT et al.

[2 Blatchf. 37;[1] 1 Fish. Pat. Rep. 144.]

Circuit Court, S. D. New York. Dec. 2, 1846.

PATENTS—DAMAGES IN INFRINGEMENT SUITS—DEFENDANT'S EVIDENCE.

1. On the trial of an action for the infringement of a patent for a writing fluid, no proof was given of the cost of the manufacture of the fluid, or of the sale price, but it was shown that sales were highly profitable, and that the defendants had made and sold very large quantities. The defendants gave no evidence of the amount of their manufacture and sales, or of the cost or value of the article. The jury found a verdict of $2,000 for the plaintiff. *Held*, that the verdict must stand, it not being one of palpable extravagance.

[Cited in Doyle v. Dixon, 97 Mass. 213.]

[Cited in Adams v. Keystone Manuf'g Co., 41 Fed. 598.]

2. In such a case, a plaintiff is not held to the most exact proof of the amount of his damages, and the jury are warranted in exercising a liberal discretion.

3. If the defendant prefers to leave the damages to general inference and the estimate of the jury, when he might make their amount reasonably certain by evidence on his part, the finding of the jury will not be interfered with, except in a case of palpable extravagance.

This was an action at law, to recover damages for the infringement of letters patent granted to the plaintiff for a writing fluid [granted October 28, 1837, to the plaintiff, reissued April 21, 1838.][2] The plaintiff had a verdict for $2,000, and the defendants now moved for a new trial, on a case, upon the ground that there was no legal evidence authorizing the amount of damages given by the jury.

George Gifford, for plaintiff.
William Emerson, for defendants.

BETTS, District Judge. The actual damages sustained by the patentee, are, according to the fourteenth section of the act of July 4, 1836 (5 Stat. 123), to be the sum fixed by the verdict; and the court is empowered, according to the circumstances of the case, to render judgment for any sum not exceeding three times the amount of the verdict. In this case, there was no proof of the cost of the manufacture of the fluid, or of the sale price. It was in evidence that sales were highly profitable, and that the defendants had manufactured and sold very large quantities, measured not by bottles only, but by hogsheads. It was also proved that they had prepared many thousands of labels, which were affixed to their bottles, and that they were constantly selling these labels and sending them off in large quantities, besides what were sold at retail at their establishment in New-York. On these facts the jury assessed the damages. No proof was offered by the defendants, from their books or clerks, tending to limit or qualify the generality of the evidence given by the plaintiff in respect to the amount of their manufacture and sales; nor did they offer proof of the cost of the article, or of its value in market, to show that their operations were not seriously injurious to the plaintiff. We do not think that a plaintiff ought, in such a case, to be held to the most explicit and exact proof of the amount of damages sustained, and that the jury are warranted in exercising a liberal discretion. A patentee may never be able to prove the extent of his actual damages, but a defendant can almost invariably, if he is disposed to do so, show the character of his own acts, and prevent any excessive valuation of damages against him. If, however, a defendant prefers to leave the matter to general inference and the estimate of a jury, when he might make it reasonably certain, by evidence on his part, we do not think the judgment and valuation of the jury should be weighed over-scrupulously, or that the court should interfere with their finding, except in a case of palpable extravagance. We do not think the verdict in this instance is of that character, and, in our opinion, it ought to stand. The motion for a new trial is accordingly denied.

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

[2] [From 1 Fish. Pat. Rep. 144.]

Case No. 13,368a.

STEPHENS v. FELT et al.

[11 Hunt, Mer. Mag. 266.]

Circuit Court, S. D. New York. May 11, 1844.

PATENTS — VALIDITY AND INFRINGEMENT — DAMAGES.

[1. A claim for more than that of which the patentee was the first and original discoverer will not avoid the patent as to that which was in fact new and original.]

[2. If a combination of ingredients is new, and produces a new and useful result, a patent therefor is valid, even if the inventor's process of preparing the separate ingredients were previously known or used.]

[3. Mere abstract knowledge by others of the preparation of a compound, or of the properties of its ingredients and their effect upon each other, will not defeat a patent, unless there was an actual prior use of the discovery.]

[4. A prior discovery and practical use, however limited, will defeat a patent, unless such use was secret, and confined to the knowledge of the discoverer alone.]

[5. The prior discovery and use of a product will defeat a patent, whether or not it was intended to be applied to the use contemplated by the patentee; and it is immaterial if the prior product was less complete and perfect in all respects than that of the patent.]

[6. In an action for infringement of a patent for a compound, the fact that defendants have used on their preparation labels counterfeiting those of the patentee affords no ground for damages. The damages are limited to the injuries sustained by the manufacture and sale of the patented product.]

This was an action for the violation of the plaintiff's patent for the manufacture of blue writing ink, or a blue liquid for staining

paper, &c. The cause occupied the court from April 21 to May 11, numerous witnesses having been examined on both sides,—on the part of the defendants [D. & W. Felt], to prove a discovery and use of the article prior to the patent; and on the part of the plaintiff, to counteract that evidence, and prove he was the first and original discoverer, and that the defendants had wilfully violated his right, and to a great extent. The discovery consisted in the application of oxalic acid as a solvent to Prussian blue, by which a combination of the two substances is effected, and the blue is held suspended after being dissolved. It was proved that the discovery is highly valuable, and that the article is in extensive use in this country as a writing fluid and a dye; and evidence was given tending to prove that the defendants had simulated the plaintiff's label, and had applied these simulated labels to bottles, or had used bottles before filled and labelled by the plaintiff, and, in vending their manufacture, had represented it to be that of the plaintiff.

BETTS, District Judge (charging jury). 1. The true construction of this patent is, that it secures an improvement in the use in combination of oxalates, or oxalic acid, and Prussian blue, in the manner pointed out in the specification, for the purpose of manufacturing a coloring matter, and rendering the color more applicable to dyeing, staining, and writing.

2. The patent is valid to this end, if the proofs show that the plaintiff is the first and original inventor of the composition claimed, and that it is useful for the purposes described in the patent.

3. A claim in the patent for more than that plaintiff was the first and original discoverer and inventor of, will not avoid it as to that which is new; and if his process in the separate preparation of either of the ingredients named in his patent was before known or used, yet, if his combination of them is new, and the result produced is new and useful, his patent is valid.

4. A mere abstract discovery or knowledge, by others, of the preparation of Prussian blue, as described in the patent, or the properties and effect of oxalic acid, in combination with Prussian blue, unless such knowledge was in actual practical use prior to plaintiff's discovery, will not defeat his patent.

5. Any prior discovery, and practical use of the subject patented, however small and limited such use was, will defeat the patent, unless such use was secret, and confined to the knowledge of the discoverer alone.

6. The patent will be defeated if the proofs show that the coloring fluid claimed thereby has been before produced by the same combination of ingredients, whether the product was intended for or applied to the same purpose and use as that contemplated by plaintiff, or not; or whether or not the product was less complete and perfect, in all respects, than that of the patentee.

7. If the plaintiff's patent is sustained, the use of labels by the defendants, counterfeiting his, affords no ground for damages in this action. The jury must give damages only to cover the injury sustained by the plaintiff by means of the manufacture and sale, by defendants, of coloring matter made in violation of his patent.

The jury found a verdict for plaintiff, $2,000 damages.

STEPHENS (McLAUGHLIN v.). See Case No. 8,874.

Case No. 13,369.

STEPHENS et al. v. SALISBURY.

[1 MacA. Pat. Cas. 379.]

Circuit Court, District of Columbia. May, 1855.

PATENTS—APPLICATIONS—SUFFICIENCY OF SPECIFICATIONS—INTERFERENCE PROCEEDINGS—PRIORITY OF INVENTION—VERBAL DECLARATIONS—REDUCTION TO PRACTICE—LACHES.

[1. The model and drawings filed with the specifications are to be taken together in explanation thereof, and the construction given to the specifications should not be too strict and technical. They will therefore be *held* sufficiently definite if, when thus construed and explained, it appears that the invention has been communicated to the public so that a skillful workman would be able to carry it into execution.]

[2. Mere verbal declarations and explanations of the inventor are competent evidence as part of the res gestæ, and from the necessity of the case, to give date to an invention, and may be sufficient for the purpose without drawings or model, when the invention is of great simplicity, and the time is not so long as to make the recollection improbable. Philadelphia & T. R. Co. v. Stimpson, 14 Pet. (39 U. S.) 462, followed.]

[3. It is not necessary, in order to prevent a subsequent inventor from obtaining a patent, that the invention should have been put in practical use, or even, in all cases, that drawings or a model shall have been made; but, if the first inventor has made it known, even by verbal description, so that a person skilled in the art would be able to apply it, his right will be preserved, if he uses reasonable diligence in applying for a patent.]

[4. When both parties to an interference are mere applicants, neither having obtained a patent, lapse of time is immaterial, except where it is sufficient, with other circumstances, to show an abandonment of the invention.]

[This was an appeal by Robert S. Stephens and Robert S. Van Rensalaer from a decision of the commissioner of patents in an interference proceeding, awarding priority to Elam C. Salisbury in respect to an invention relating to railroad cars.]

The rules of the office referred to in the decision were as follows (rules of 1855):

"What will Prevent the Grant of a Patent.

"(5) Even although the applicant has in good faith actually made an invention, a patent therefor will not be granted him if the whole or any part of what he claims as new had before been patented or described in any

printed publication in this or any foreign country, or even if it had before been invented or discovered in this country (Act 1836, § 7 [5 Stat. 119]), or if he has once abandoned his invention to the public, or if with his consent and allowance it has been for more than two years in public use or on sale. Act 1836, § 6; Act 1839, § 7 [5 Stat. 354].

"(6) The mere fact of prior invention or discovery abroad will not prevent the issue of the patent, unless the invention has been there patented or described in some printed publication. Act 1836, § 7; also Act 1836, § 15.

"(7) Merely conceiving the idea of an improvement or machine in this country is not such an 'invention' or 'discovery' as is above contemplated. The invention must have been reduced to a practical form, either by construction of the machine itself or of a model thereof, or at least by making a full drawing of it, before it will prevent a subsequent inventor from obtaining a patent. See Heath v. Hildreth [Case No. 6,309]; and Perry v. Cornell [Id. 11,001] decided by Judge Cranch on an appeal from the commissioner."

The patent issued to Elam Salisbury, No. 13,364, July 31st, 1855. For diagram, see Pat. Off. Rep. 1855, p. 169.

F. Sheppard, for Stephens and Van Rensalaer.

(1) The case of Salisbury does not conform to rule 7 of the rules of the office, inasmuch as the alleged invention was "never reduced to a practical form, either by the construction of the machine itself or of a model thereof, or at least by making a full drawing of it;" and the reason assigned by the commissioner for dispensing with that rule in this case is insufficient, because the invention in question consists of a material structure or arrangement, the means of which depend upon the connections, adjustments, and fitness of all the parts with reference to each other, and upon other elements, which can no more be determined a priori in this case than in the usual cases of mechanical structure to which the office applies the rule.

(2) Mere suggestions, never depicted in drawings or reduced to form in a model or machine, cannot prejudice the rights of a diligent and independent inventor who has reduced his speculation to practice, developed the experiment into discovery, and perfected that discovery by patient and continued experiments; who has not only "proposed" the thing, but has actually accomplished the result himself, and shows others how to do it. Carpenter v. Smith, Webst. Pat. Cas. 534; Galloway v. Bleaden, Id. 525; Norm. Pat. 28; Reed v. Cutter [Case No. 11,645]; Bedford v. Hunt [Id. 1,217]; Curt. Pat. §§ 43, 47; Goodyear v. Day, 2 Wall. [69 U. S.] 299.

MORSELL, Circuit Judge. In the case as tried before the commissioner there was included in the interference another party, namely, Henry Waterman, but in considering the proofs in the case it was thought that he was improperly brought in, and there is no appeal as to him.

There have been various reasons of appeal filed, the most material of which is to be found under the third general head, which I purpose first to consider. The general proposition is that the commissioner erred in deciding the question of priority in favor of the appellee, Elam C. Salisbury. The substance of the particular reasons under this head is: First. Because his case does not conform to the rules of the office as published (rule 7), inasmuch as the alleged invention was never reduced to a practical form, either by the construction of the machine itself, or of a model therefor, or at least by making a full drawing of it. The second is as to the effect of William Davis' testimony—that it does not disclose a practicable invention or discovery which, under the law and the circumstances of this case, can interfere with the rights of the appellants, who commenced in 1848 or 1849 to develop their invention by actual trials and experiments. Third. That the appellants are original and independent inventors, who have really offered the invention to the public in a material, practicable, and useful embodiment; against such, the prior mental speculations of ingenious men, and their verbal suggestions, which have remained undeveloped for years, and have never taken a determinate form and shape, cannot legally avail, and ought not to, on the ground of public policy; they are not patentable. Fourth. The testimony of Davis is also impeached; also because the specification is insufficient, being vague and indefinite.

This last objection lies, as it were, at the threshold of the controversy, and must be first noticed. It is stated to consist principally in the omission to describe the kind of fixtures by which the shield is to be attached to the cars securely; and that as to the connections of the ends of the cars and the platforms, no way of effecting them is stated. With the specification a drawing containing a particular description of the appellee's plan, and to which he refers, and also a model thereof, were filed. These are to be taken together in explanation of the specification. The construction which ought to be given to the specification should not be too strict and technical. The proper inquiry is, has the specification substantially complied with that which the public has a right to require; has the appellee communicated to the public the manner of carrying his invention into effect, so that a skillful workman can carry into execution the plan of the inventor? The commissioner has thought it was sufficient; and I think it is to be gathered from the evidence in the cause that it was thought so by skillful engineers, and particularly in its application on the Hudson River Railroad in the month of June, 1853.

With respect to the other objections, the

closing argument of the appellee before me has reduced the points to precise and specific limits. The appellant says: "The appellee admits the priority of the appellant in the practical reduction of the invention, but contends that his rights are saved notwithstanding, because he has shown that he was using due diligence in adapting and perfecting his invention. He brings the whole controversy down to this simple issue, and submits his case upon the decision of that issue; and we (say the appellants) are willing to accept the issue thus offered, and let the case be decided according as that shall be determined." The argument thence proceeds to deny in point of fact that the evidence shows that due diligence has been used, or if it does in point of law, it is inapplicable; that the only provision on the subject of due diligence is in the fifteenth section of the act of 1836, which is intended to apply to a case of a patentee's surreptitiously or unjustly obtaining a patent for that which was in fact invented or discovered by another, who was using reasonable diligence in adapting and perfecting the same; that the thing must be reduced to a practical and useful form—and this only constitutes the kind of invention of which the law will take cognizance, and with which it can deal; that it is immaterial what inchoate attempts or intellectual notions Salisbury was using due diligence to perfect. His conversations do not constitute invention or discovery in the legal and statutory sense of the terms, and they do not any the more constitute it because Salisbury was in the meantime using due diligence to bring himself up to that standard. It is further contended that the appellants are bona fide, independent inventors, and not such as the statute was intended to apply to; and that the ultimate object of the patent system is utility and public good. The law will grant the patent to him who first utilizes the conception, embodies it into a practical form, and offers it to the public.

For the purpose of examining the correctness of the positions stated in the aforegoing argument, and on which the event of this decision must depend, a brief view will be taken of the provisions of the act of 1836, before alluded to, and some of the settled principles of patent law. The appellant has referred to the seventh rule of the patent office, requiring the invention to be reduced to practice, as a test by which the inventor's right to receive a patent is to be determined. Without giving any opinion as to the operation or validity of this rule, it is proper to say that the acts of congress on the subject must be always looked to, and that whatever principle is not comprehended in their provisions is not to be depended on. The monopoly thereby given was intended to be for the mutual benefit of the particular inventor and the public. Section 6 of the act of congress of 1836 (chapter 357) declares that before any inventor shall receive a patent for any such new invention or discovery he shall comply with the prerequisites therein declared. He shall file a written specification in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct, compound, and use the same, together with appropriate drawings and models and the oath of the party that he verily believes that he is the original and first inventor or discoverer of the art, machine, &c. The application thus prepared is submitted to the commissioner for his examination as to the novelty and utility of the invention; and on his being satisfied thereof, a prima facie right is established, and the commissioner is directed to issue letters-patent accordingly to the applicant for the invention. Let it be remarked that there is no express requirement that the applicant shall reduce his invention to actual use before he can obtain a patent; nor is there any time limited within which he is to disclose his invention before application for a patent. The inventor is allowed a reasonable time to mature his invention. This must depend upon circumstances; and his right can be affected by no lapse of time short of that which will be sufficient to show an abandonment of his claim, during which time no subsequent inventor, however original or bona fide, can deprive him of his priority. The eighth section provides for the case of interference which the commissioner is authorized to declare, if in his opinion it exists between the applicant's invention and any other patent for which an application may be pending, or with any unexpired patent which shall have been granted. In this proceeding the issue is priority of invention, to be tried before the commissioner, for which purpose he may direct the parties to take their proof as in this case; on which occasion the evidence objected to as insufficient by the appellant was taken and submitted, which objections will be now considered, viz., the propositions as to the conversations of the appellee as proving the actual reduction of the invention to practice or use, and the want of due diligence.

What measure of proof might be requisite to show the date of an invention or an issue of this kind depends upon the nature of the invention, the capacity of the witnesses, the distance of time when the facts occurred, and whether the invention was complicated, of many parts, contrivances and devices. In such cases mere verbal description would be very uncertain, and would need drawings or models at the time, and might be insufficient to establish the priority of invention and its date; but neither of these objections existed in this case; the invention was of great simplicity, and the time not so long as to make the recollection improbable. The commissioner says: "This seems one of those cases in which an idea of the invention

can be communicated by oral description, without a drawing or model. Generally it is held that either a drawing or a model is indispensable to give date to an invention; but in this case the description would be quite as intelligible without a drawing or model as with one, so far as the general plan is concerned. I should therefore suppose that such description was sufficient." The proof of the invention and time, it is true, consisted of the appellee's own verbal declaration; but it was made to several of the witnesses, accompanied with the effort and desire that permission should be given and an opportunity afforded him of having the same tried on railroad cars over which they were supposed to have control, and to persons who thought the description full and clear enough to enable them to make the application, which was actually done in the year 1853. These efforts were constant from the year 1846 up to the time when it was effected. With respect to such verbal declarations being competent for the purpose, I suppose the necessity, from the nature of the subject, and being, as it were, a part of the res gestæ, ought to be considered as making them so. The rule is very fully and clearly laid down in the opinion of the supreme court in the case of Philadelphia & T. R. Co. v. Stimpson, 14 Pet. [39 U. S.] 462. The judge, in stating the opinion of the court, says: "In many cases of inventions it is hardly possible in any other manner (speaking of the verbal declarations of the party inventor) to ascertain the precise time and exact origin of the particular invention. The invention itself is an intellectual process or operation; and, like all other expressions of thought, can in many cases scarcely be made known except by speech." Again: "His conversations and declarations stating that he had made an invention, and describing its details and explaining its operations, are properly to be deemed an assertion of his right at that time as an inventor to the extent of the facts and details which he then makes known, although not of their existence at an antecedent time. In short, such conversations and declarations, coupled with a description of the nature and objects of the invention, are to be deemed a part of the res gestæ, and legitimate evidence that the invention was then known to and claimed by him, and thus its origin may be fixed at least as early as that period." I should suppose, therefore, that it cannot be doubted that such verbal descriptions, without drawing or model, must be considered admissible for the purpose of proving priority of invention. Next, as to the part of the proposition relating to the necessity of reducing the invention to actual practice or use, I consider the doctrine as laid down by Judge Cranch in the case of Heath v. Hildreth [supra], and Perry v. Cornell [supra], as settling and establishing the point—and to that effect I have expressed myself on several occasions before this—in the latter of which cases the judge says: "There is no law requiring the applicant to reduce his invention to actual use before he can obtain a patent. An inventor has reduced his invention to practice when he has so described it on paper with such drawings or models as to enable any person skilled in the art to make and use the same. He must show that it is practicable, and the manner in which it may be used; but it is not necessary that he should do this until he has perfected his invention and is ready to apply for a patent. He may have conceived the idea years ago, but is not obliged to furnish drawings or model until he makes his application. In the present case the specifications and drawings and models have been filed, showing the invention to be practicable and the manner in which it can be used." If, however, the case should occur where such evidence was not satisfactory, as before intimated, it might be necessary to show the same by proof of actual successful experiments.

As to the subject of diligence, provided for by the fifteenth section of the statute, it has application to the case of a prior inventor by way of defense, where a subsequent inventor has obtained a patent for the same invention surreptitiously and directly only in such a case, or where it has appeared that analogous principles are involved, and then by an equitable construction of the rule. But in this case both parties were applicants for a patent. I think the only rule which would be applicable in a case like the present would be from lapse of time, which, with other circumstances, would be sufficient to show an abandonment of the invention. There is no such ground pretended in this case. There are other reasons of appeal, but it is supposed the views I have taken will make it unnecessary particularly to notice them.

The conclusion to which I am brought is that the ground taken in the appeal cannot be supported, and that the decision of the commissioner ought to be affirmed; and I do accordingly hereby affirm the same.

STEPHENS (SHARP v.). See Case No. 12,-710.

Case No. 13,369a.

STEPHENS et al. v. SHERMAN et al.[1]

Circuit Court, S. D. Iowa. 1879.[2]

FRAUDULENT CONVEYANCES—MORTGAGE TO COVER ADVANCES—FALSE REPRESENTATIONS.

[A blanket mortgage given by a banker on all his real estate to a firm of which he was a member, to secure advances made and to be made, *held* void at common law as a fraud upon creditors; it appearing that he was insolvent at the time; that the mortgagees must have

1 [Not previously reported.]

2 [Affirmed in 105 U. S. 100.]

known it; that they refrained from recording the mortgage until he was on the brink of failure; that they sedulously concealed its existence, and, in the meantime, succeeded, by using every effort and resource at their command, including false representations as to his financial condition, in raising large sums of money upon the paper of the mortgagor and the firms of which he was a member.]

[Cited in note to Harris v. Exchange Nat. Bank, Case No. 6,119.]

This is a bill in equity to foreclose a mortgage executed by B. F. Allen to the firm of Allen, Stephens & Co. The members of that firm were B. F. Allen, the mortgagor, William A. Stephens, and Herman Blennerhassett. The mortgage is in these words: "New York, 18 Nov., 1874. I hereby acknowledge the receipt of four hundred and sixty-five thousand four hundred and seventy-six and $^{88}/_{100}$ dollars of advance to the Cook County National Bank of Chicago, for my account, same being made by Allen, Stephens & Co., in money, paper and endorsements. I have arranged with them for additional advances. In consideration thereof, I hereby grant and convey to Allen, Stephens & Co., by way of mortgage and security for such advances, all my real estate, of every kind and description and wherever situated. B. F. Allen." This instrument was on the same day duly acknowledged before a notary public of the city and county of New York. The mortgage was delivered to Stephens and Blennerhassett on the day of its date, but withheld by them from record until the 19th day of January, 1875. On the last-named day it was filed for record in Cook county, Illinois, and on the 20th of the same month recorded in Polk county, Iowa. The original bill was filed by Wm. A. Stephens and Herman Blennerhassett on the 26th day of January, 1875, making B. F. Allen, defendant. On the 8th of February, 1875, the mortgage was assigned by Allen, Stephens & Co., for a valuable consideration, to the Charter Oak Life Insurance Company. On the 22nd day of April, 1875, B. F. Allen was adjudicated a bankrupt, and, in due course of law, Hoyt Sherman was appointed assignee of his estate. It therefore became necessary to make new parties both plaintiff and defendant to the bill. Accordingly, the Charter Oak Insurance Co., having by leave of the court become a party to the suit, filed, with Stephens and Blennerhassett, a consolidated bill making Hoyt Sherman, assignee, and B. F. Allen parties defendant. The latter was retained as a defendant by reason of his claim of homestead to certain property covered by the mortgage. There were other pleadings intervening between the original and consolidated bills which it is unnecessary to state. The defendant Sherman answers the bill, and assails the mortgage on several grounds, among which are the following: That it was intended by the parties to give, and that it did in fact give, to the mortgagees, a fraudulent preference, in violation of the bankrupt law; that it was intended by the parties to hinder delay and defraud creditors; that, to that end, it was withheld from registry and concealed; that whilst the instrument was thus concealed, Stephens and Blennerhassett actively engaged in obtaining for the mortgagor a false and fictitious credit, and in selling and negotiating his commercial paper; and that the mortgage was therefore rendered invalid at common law.

Nourse, Kauffman & Co. and A. P. Hyde, for the Charter Oak Life Ins. Company.

J. S. Polk (with Monroe, Bisbee & Ball), for Hoyt Sherman, assignee.

Wright, Gatch & Wright and Barcroft, Given & Drabelle, for B. F. Allen.

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

LOVE, District Judge. It is not our purpose to decide any question which is not in our view necessary to the determination of the case, and therefore we omit to decide the question of the validity of this mortgage under the bankrupt law. The question which we purpose to consider and decide is whether or not the mortgage in suit can, under the facts and circumstances established by the evidence, be sustained as against creditors at common law. The parties to this mortgage have given much conflicting testimony respecting the material facts connected with it. Indeed, it seems to be a law of nature with them to contradict one another. Whatever Allen affirms Stephens and Blennerhassett deny, and whatever Stephens and Blennerhassett affirm Allen directly controverts. We shall spend no time in the vain effort to sift, weigh and reconcile their testimony. It must be obvious to any one who has given careful attention to the record in this case that no court could safely place its judgment upon the testimony of these witnesses. Their disregard of truth and of moral obligations is so apparent that except where they happen to be corroborated we cannot rely upon their testimony. Fortunately there is, irrespective of their testimony, abundant evidence in the record to guide the judgment of the court. This evidence is found in the correspondence between these parties, and in facts and circumstances which can be neither denied nor coloured.

It is absolutely necessary to a clear and distinct understanding of the reasoning of the court which is to follow that we should state some preliminary facts, having no direct bearing upon the question which is in our view decisive of the case.

This court, in October, 1868, appointed B. F. Allen receiver in the case of Mark Howard v. The City of Davenport and others. The possession and control of the trust fund which the court placed in his hands, con-

sisting principally of 540,000 dollars of the 1st mortgage bonds of the Rock Island Railroad Co., evidently awakened in the mind of Mr. Allen a mania for speculation. He very soon became a great speculator, a great borrower and a great loser. The catalogue of his losses is somewhat startling. He brought himself in a very short time to a condition of hopeless insolvency. When, after a protracted litigation, the court, in the year 1873, called for the trust fund in question, the bonds were not within Mr. Allen's control. He had pledged them for loans in New York, and had lost them. In this emergency he resorted to the expedient of purchasing a controlling interest in the Cook County National Bank of Chicago. The capital of this institution was $500,000; its deposits about $13,000.00. Mr. Allen paid the greater part of the money required to purchase his interest in the bank out of the means of the bank itself, and, having the control and management of the institution, he paid out of its means and assets the sum of about $540,000 to the receiver fund. This was the first sum demanded by the parties controlling that fund. There is no doubt that this transaction reduced the Cook County Bank to insolvency. From this time forward until its final suspension the Cook County Bank, under Allen's management, struggled for existence in a crippled condition.

The banking house of Allen, Stephens & Co. was established in New York in January, 1872. They commenced business without a dollar of actual capital, and in fact paid for the fixtures and furniture of the house out of their depositors' money. Allen was the only person of reputed responsibility in the firm, and he was then, without doubt, in a state of commercial insolvency. The other members of the firm, Stephens and Blennerhassett, were without means or capital. The exclusive management of this New York house was with the junior members of the firm. They soon secured large deposits, and seem to have done a prosperous business until the spring and summer of 1874. At that time, Stephens and Blennerhassett invested the sum of $400,000 in a silver mine in the territory of Utah, every dollar of which was lost. This transaction brought the firm of Allen, Stephens & Co. to insolvency. It is true that Blennerhassett artfully tempted Mr. S. H. White, treasurer of the Charter Oak Insurance Co., into this speculation, by which Mr. White lost of the money of that company one-third of the sum of $400,000; so that the actual loss of Allen, Stephens & Co. was finally, in round numbers, only $266,666. Stephens and B., nevertheless, managed to keep the firm of Allen, Stephens & Co. afloat in a wrecked condition; and in the months of October and November, 1874, that firm, as they claim, advanced to Allen and the Cook County Bank, at his request, the large sums of money which resulted in the debt secured by the mortgage in question. They undoubtedly, though in fact insolvent, had the control of large sums of money belonging to their depositors and other creditors. The necessity of their situation compelled Stephens and Blennerhassett to sustain Allen and the Cook County Bank, because, if either Allen or the bank had suspended, the bankruptcy of the firm of Allen, Stephens & Co. would inevitably have followed, and the Mono-mine transaction would have been exposed. No one doubts or questions the fact at the time of the execution of the mortgage Allen was insolvent. Stephens and Blennerhassett both, however, deny that they knew of Allen's insolvency. Allen testifies that they knew all about his financial condition, but Stephens and Blennerhassett swear that they believed Allen to be perfectly solvent. Whoever attends to the correspondence between these parties from early in October, 1874, when the debt in question commenced accumulating, till the 18th day of November, when it amounted to the sum of $465,476.88, will be astonished at the sworn statement of Stephens and Blennerhassett that they believed Allen to be perfectly solvent.

The correspondence in question clearly and unmistakeably reveals the financial condition of Allen, and Stephens' and Blennerhassett's knowledge of it. But, independent of the conclusive evidence furnished by this correspondence, the very fact that Allen had become indebted to them for advances and overdrafts to the amount of nearly a half a million, which he could not pay or provide for, and which he repeatedly acknowledged, his inability to pay was most cogent evidence to the minds of Stephens and Blennerhassett that Allen was in a state of commercial insolvency. The evidence of Stephens' and Blennerhassett's knowledge of Mr. Allen's insolvency when the mortgage was executed, and during the sixty days when it was withheld from record, is to our minds absolutely conclusive. We have carefully collected and arranged this evidence, and we append it to this opinion in order that, if the supreme court shall see fit to determine the question of the validity of the mortgage under the bankrupt law, the judges of that court may find this evidence in a convenient form, without the necessity of searching for it, as we have done, through the immense record which is before us.

The general conclusions of fact which we deduce from the evidence are the following: 1st. That B. F. Allen was at the time of the execution of the mortgage insolvent, and that Stephens and Blennerhassett had reason to know, and did know, the fact of his insolvency. 2nd. Stephens and Blennerhassett secreted the mortgage, and, as a part of their scheme of concealment, withheld it from record, with intent to give B. F. Allen a false and fictitious credit, and keep him out of bankruptcy until the sixty days should expire within which it was necessary, as they supposed, to commence proceedings in bankruptcy in order to invalidate the instrument. 3d. That, during the 60 days when the mortgage was concealed and withheld from record, Stephens and Blenner-

hassett actively engaged in obtaining credit for Allen and the Cook County Bank, and that, to this end, they made false and fraudulent representations, calculated and intended to deceive creditors, as to the financial condition of B. F. Allen. 4th. That during the same period of 60 days when the false and fraudulent representations were thus made, and when the paper of Allen was negotiated and sold by Stephens and B., they knew that Allen was in a condition of utter and hopeless insolvency. 5th. That the creditors of B. F. Allen and the Cook County Bank were in fact misled and deceived by the concealment of the mortgage, and by said false representations, and that they did in fact, between the date and recording of the mortgage, deposit large sums of money in Allen's private bank and in said Cook County Bank, and did discount the paper of Allen and said bank to a very large amount, at the instance and request of said Stephens and Blennerhassett.

It was argued at the bar that creditors have no right, by the settled law of Iowa, to impeach a conveyance of real estate upon the ground that it has not been recorded. An unrecorded deed is void as to purchasers for value without notice, but it is valid as against the claims of creditors. We do not question this doctrine. It is undoubtedly settled law in this state. The reason is obvious. The mere failure to record a deed is no fraud upon creditors. To make a deed void as to creditors, it must be shown that it was intended by the parties to "hinder, delay, or defraud creditors." Fraud is a matter of intention. The mere omission to record a deed, in the absence of other circumstances of fraud, argues no purpose to defraud creditors. A party might withhold a conveyance from the registry by mere inadvertence, or by negligence, or in consequence of some mistake or accident, without any intention whatever to mislead creditors or prejudice their rights. Nay, a creditor might perhaps intentionally withhold a mortgage from record, without the imputation of fraud as to other creditors. Suppose a creditor should take a mortgage upon some particular part of his debtor's property, believing him to be solvent and possessed of ample means to satisfy all other creditors, and suppose, from an unwillingness to hurt his debtor's credit, the mortgagee in such case should purposely withhold the mortgage from record; no inference would thence necessarily arise of an intention to defraud other creditors. A creditor may secure himself even though some incidental evil may result to others, but he must so exercise his own rights as not to inflict wanton, intentional, and unnecessary loss upon other creditors. He may do what is necessary to his own security, but he may not do intentionally what may enable his debtor to hinder, delay, and defraud other creditors.

Nothing is better settled in our jurisprudence than the doctrine that in order to support a conveyance against creditors, it must be not only for a valuable consideration, but bona fide. If it be made with intent to hinder, delay, and defraud creditors, it is void as against them, although there may be in the strictest sense a valuable or even an adequate consideration. Story, Eq. Jur. § 369, and the cases there cited. Kerr, Fraud & M. p. 200, and the cases cited. A deed not at first fraudulent may become so by being concealed or not pursued if creditors are thereby drawn to give credit to the grantor. Hildreth v. Sands, 2 Johns. Ch. 35; Perine v. Dunn, 3 Johns. Ch. 508. See 1 Burrows, 474; Cowp. 434, per Mansfield and Dallas. Holmes v. Penney, 3 Kay & J. 99. But let us suppose that a creditor, knowing his debtor to be insolvent, should take a mortgage upon all his property, wherever found, and should, with intent to give his debtor a false and fictitious credit, keep his mortgage a profound secret, and withhold it from record as a part of his scheme of concealment; could such a mortgage be supported against injured creditors? Certainly the mortgagee must in such case be held to intend the natural consequences of his own acts, and the inevitable result of such a transaction would be to give the debtor a false and delusive credit, and mislead other creditors in dealing with the debtor. But suppose, further, that the mortgage creditor should, during the concealment of the mortgage, actually aid in obtaining credit for the mortgagor by negotiating and selling his paper, and by false representations as to the state of his property and his financial condition; can there be a doubt that a court of equity, at least, would set aside such a mortgage in favor of creditors misled and injured by the misconduct of the mortgagee? Suppose the mortgagees in the present case had, in express terms, denied the existence of the mortgage to other creditors; would they not have been estopped on the ground of fraud from afterwards setting it up against them? Now, there can surely be no difference in concealment, by express denial, of the existence of the instrument, and concealment by other means intended to produce the same effect.

A fraudulent concealment may be just as effectually accomplished by indirect as by direct expressions, by acts as words, by omissions and suppressions as by positive contrivances of fraud. And although the mere failure of the mortgagee to record his deed would not of itself warrant the conclusion of a fraudulent intention as to other creditors, yet it is a most material fact, in connection with other circumstances, demonstrating such fraudulent intent. Chief Justice Denio, in the case of Thompson v. Van Vechten, 27 N. Y. 568, says upon page 582, in relation to the effect of a secret mortgage: "But it was the apparent and I think the real object of the act to prevent the setting up of secret mortgages against persons who might deal with the mortgagor on the faith that his property was not thus incumbered.

It is true the mortgage cannot be legally questioned until the creditor clothes himself with a judgment and execution or with some legal process against his property, for creditors cannot interfere with the property of their debtor without process; but when they present themselves with their process, they may, I think, go back to the origin of debt, and show, if they can, that when it was contracted, the incumbrance with which they are confronted existed, and was kept secret by being withheld from the proper officer." A deed not at first fraudulent may become so by being concealed, because by the concealment persons may be induced to give credit to the grantor. Bump, Fraud. Conv. 82; Hildreth v. Sands, 2 Johns. Ch. 35; Hildeburn v. Brown, 17 B. Mon. 779; Worseley v. De Mattos, 1 Burrows, 467; Hafner v. Irwin, 1 Ired. 490; Thompson v. Van Vechten, 27 N. Y. 568. In the case of Coates v. Gerlach, 44 Pa. St. 43, Mr. Justice Strong treats the concealment and not recording of a deed as a badge of fraud as against creditors. He says: "There is another aspect of this case not at all favorable to the claims of the wife. It is that she withheld the deed from her husband, which was dated March 23, 1857, from record until December 2, 1857." In asking that a deed void at law (it being from her husband) should be sustained in equity, she is met with the fact that she asserted no right under it, and in fact concealed its existence, until after the husband had contracted the debts against which she now asks to set it up. * * * Even if the deed was delivered on the day of its date the supineness of the wife gave to the husband a false credit, and equity will not aid her at the expense of those who have been misled by her laches." In Bank of U. S. v. Housman, 6 Paige, 537, 538, the chancellor says that, "whatever may have been the intention of the parties to the deed the complainants have actually been deceived and defrauded by the grantor's negligence in putting their deed on record, and suffering the grantor to occupy and use the premises as his own, and as if no such conveyance had in fact been made." In Scrivenor v. Scrivenor, 7 B. Mon. 374, Marshall, C. J., says that the deed (being kept from the record) has thus evidently been the means of defrauding others, and there is some ground to infer that it was originally so intended. At any rate, it has, by being so long (six years) kept secret and finally put upon the records after the grantor had become embarrassed, and without any designation of the real consideration, been made the instrument of fraud, as against the creditors of the grantor." In Hungerford v. Earle, 2 Vern. 261, it is said that "a deed not at first fraudulent may afterwards become so by being concealed or not pursued, by which creditors are drawn to lend their money." Sands v. Hildreth, 14 Johns. 498, was an appeal from the opinion of the chancellor cited 2 Johns. Ch. 53. Spencer, J., after reviewing the facts, to wit, that the deed was concealed, the vendor remaining in possession as the ostensible owner etc., says: "I never met with a more marked case of positive, actual fraud, and if such a deed, so contaminated, is allowed to stand, there would be an end of all upright and honest dealings between man and man, and no creditor would hereafter stand the least chance of coercing any dishonest debtor to pay his debts." The foregoing cases are not relied on as parallel in their facts and circumstances with the case before us. We are aware that most of them are not cases in point. Our quotations from them are intended to exhibit the view taken by eminent judges of the concealment and non-recording of deeds and incumbrances as badges of actual fraud upon creditors, who trust to the grantor in ignorance of the existence of such conveyances.

That Stephens and Blennerhassett knew of the insolvency of Allen and the Cook County Bank is indubitable; that, the personal estate of Allen being exhausted, the mortgage covered all his remaining property, is unquestionable; that the mortgagees concealed the mortgage with intent to induce others to give Allen and the bank a false and delusive credit is clearly proved; and that, whilst the mortgage was concealed, Stephens and Blennerhassett resorted to active means to promote a false and delusive credit to Allen and the bank, is beyond all reasonable doubt. In the first place, Stephens and Blennerhassett had the strongest possible motives to practice this fraud upon other creditors. At the time when the mortgage was executed, on the 18th day of November, 1874, Stephens and Blennerhassett knew they had committed most grievous wrongs upon their depositors and other creditors. They had taken 400,000 dollars of money which they held upon trust for their depositors, and invested it in a speculation upon a worthless silver mine, and they had actually lost all but one-third of this large sum of money. In order to avert the fatal consequences to their own character and credit, which would inevitably have resulted from the exposure of the Mono-mine transaction of Allen, and the Cook County Bank had suspended payment, Stephens and Blennerhassett had advanced to the Cook County Bank, as they say, at Allen's instance and request, nearly a half million more of the money of their creditors and depositors, and this without any security whatever. Thus, they had taken over seven hundred thousand dollars out of a concern without capital! For a part of this sum they obtained security by the mortgage in question. This mortgage was about all they had to show their creditors and depositors. They believed, as they have assumed all along, that the mortgage covered property worth more than a million of dollars. If this mortgage should not be

sustained, what would Stephens and Blennerhassett have to exhibit to their outraged and indignant creditors? But in order to sustain the mortgage, they well knew that it was indispensable that the suspension of Allen and the bank should be averted until it was too late to commence proceedings by which the mortgage might be assailed under the bankrupt law. The mortgage was a clear act of bankruptcy. There was no doubt that it would be held void under that law if it should be assailed in time. But, after the lapse of two months from the execution of the mortgage, it would be too late, as they assumed, to commence proceedings under which the mortgage could be impeached. It was perfectly evident to Stephens and Blennerhassett that the exposure of the mortgage, by placing it upon the record or otherwise, would lead to the suspension of Allen and the Cook County Bank, and to their own suspension; for, with a quarter of a million in the Mono-mine and a half a million in Allen's broken bank, it would have been the veriest folly to think of keeping the firm of Allen, Stephens & Co. afloat. Hence Stéphens and Blennerhassett had the strongest possible motive to conceal the mortgage and withhold it from registry. But this was not all. Stephens and Blennerhassett well knew that Allen and the bank were tottering on the brink of bankruptcy; even, therefore, if the mortgage should be successfully concealed, Allen and the bank might, and probably would, be compelled to suspend within the 60 days prescribed by the bankrupt law, unless extraordinary measures were taken to postpone that catastrophe. Hence Stephens and Blennerhassett had overruling motives impelling them to sustain the credit of the bank and Allen, and prevent a suspension until the 60-days limitation should expire.

Let us now see from the evidence how the conduct of these men responded to the motives by which they were governed. And first as to the concealment of the mortgage. It is noticeable that from first to last the mortgagees as well as the debtor proceeded with the most profound secrecy. They did not in the execution of the instrument pursue the usual and ordinary way of such transactions. They consulted no counsel. They applied to no conveyancer or scrivener to prepare a mortgage which was to cover as they supposed over a million's worth of property, and secure a half million of money. Blennerhassett himself obtained from Judge Morris a form of words which would convey all of a man's real estate wherever situated, without, as he says, mentioning to Judge Morris any particular mortgage. He then wrote the mortgage himself upon a sheet of letter paper. Stephens and Blennerhassett had in their possession a full description of Allen's real estate. Why did they not describe it in the mortgage? Blennerhassett's explanation of this circumstance is that they were in haste to get security, and that they had no time to get abstracts of title; just as if abstracts of title were any more necessary in preparing a deed with a specific than a general description when it was their purpose to take a conveyance of "all" the grantor's "real estate of every kind and description wherever situated." If it had been their purpose to take a conveyance of the real estate to which Allen had a good title, and none other, there would be some sense in Blennerhassett's explanation that they had no time to obtain abstracts of title. The true explanation of these unusual and extraordinary proceedings is to be found in the fact that it was the purpose of all the parties to the mortgage to keep its execution a profound secret, and to that end it was important that they should take neither lawyers, conveyancers, nor clerks to their assistance. If a lawyer or conveyancer had been employed to prepare the mortgage, he would in all probability have required the assistance of clerks in writing a description of so large a quantity of land, and the very magnitude of the conveyance would have attracted curiosity and attention. For the same reason, if Blennerhassett himself had attempted to prepare the instrument with a specific description, he would have been compelled to use the hands of his own clerks. Every additional person whom they let into the secret would have increased the chances of disclosure, and therefore the only certain way to perfect secrecy was to admit no one into their counsels, and call no one to their assistance. The mortgage being thus executed, the security and safety of the mortgagees required that it should be recorded with all reasonable despatch. They were at the mercy of the mortgagor so long as the instrument remained unrecorded. He might have conveyed at any moment to another purchaser. They were under no obligation to withhold the mortgage from record. Allen, indeed, testifies that there was an agreement not to record, but Stephens and Blennerhassett both swear that there was no such agreement or understanding.

Why, then, did Stephens and Blennerhassett, at their own great peril, and contrary to all ordinary usages of business, withhold an instrument of such vast importance from the registry for a period of two whole months? The reason is obvious. They knew that the recording of the mortgage in Chicaco and Des Moines would precipitate the suspension of Allen's bank, and thus render the mortgage security valueless under the bankrupt law. That all these parties were perfectly well aware of the fact that the recording of the mortgage would result in discrediting Allen and the Cook County Bank is apparent from their own evidence:

"Chicago, Ill., Sept. 10, 1874. Friend Blennerhassett—I have been thinking over the idea of having all those assignments of mortgages recorded. I fear very much it will attract attention. You know how quick our friends are to notice and take advantage of everything that is against us. I want to

make the Charter Oak safe, and want it done to hurt my credit as little as possible. With large deposits held at Des Moines and here, all depending on my credit, we can easily do more harm than all the money we could get would do good. Suppose I should borrow $250,000 from the Charter Oak, and in so doing damage personal credit with depositors $500,000, which you are aware is very easy done, our Des Moines banks having on deposit over $1,000,000? Now, if the county records should show a large and unusual transfer of my assets, it would create a distrust that I fear would do great damage. Harry writes me from Des Moines, and suggests the same difficulties. I am willing to make any kind of assignment, but I think to put on the public records in Iowa the amount we propose to do, would do more harm than good. Allen, Stephens & Co. would be as much interested as I. You must bear in mind I never have made a mortgage in Iowa. All my property is clear. That the records are all full of mortgages and deeds in my favor. Now, I want you to see Mr. White. Tell him the situation, and see if you and he can not devise some other way than to have assignments go on record. What do you hear from Mono? Please give this your immediate attention, and much oblige. Yours, truly, B. F. Allen."

Mr. Stephens, in his testimony (plaintiffs' record, p. 689), says: "I knew that if the instrument (mortgage in suit) was recorded it would be very likely to possibly discredit Mr. Allen and the Cook County Bank. In fact he (Allen) stated with reference to other mortgages and other records, both verbally and in correspondence, that such a thing would have that effect," &c.

Defendants' record, 740: "Int. 1615. State where, if you know, the writing set out as Exhibit No. 1 to your deposition was recorded. Ans. The first time it was recorded was on the 19th day of January, 1875. Int. 1616. State why it was not recorded before that time. Ans. The reason why it was not recorded before that time was, it was agreed when I signed it that it should not be recorded unless the Cook County Bank and myself failed, and then not unless I consented to it. The object of such agreement was to conceal the instrument from the public, so as not to injure my credit or the credit of the Cook County Bank. This whole matter was discussed and settled on the 17th of November. The only object of recording it at all, as I understood it, was to help force a settlement with my creditors."

Mr. Stephens testifies on this subject (plaintiffs' record, 684): "Int. 556. Why was it (the mortgage) not placed on record at the time it was made? Ans. Well, that was an affair of ours. We did not choose to place it on record. Int. 557. Why didn't you choose to place it on record? Ans. In the first place we supposed, or I supposed, speaking for myself, that we should really never have to avail ourselves, might never have to avail ourselves, of the mortgage; and, in the second place, to have done so would have been to discredit Mr. Allen. In fact, he had stated that any mortgage put on record against him would discredit him. We had no agreement on the subject. Int. 559. What do you mean by discrediting Mr. Allen? Ans. Mr. Allen was a banker in Des Moines, receiving large deposits from other people. He was supposed to own a very large amount of real estate, and I presume he thought if the mortgage was recorded against him, it might discredit him there and elsewhere. Int. 560. Was anything said about keeping the matter from the public? Ans. Nothing."

Again, on page 689, plaintiffs' record, Mr. Stephens says: "* * * I knew that, if recorded (the mortgage), it would be very likely to possibly discredit Mr. Allen and the Cook County Bank. In fact, he stated, in reference to other mortgages and other records, both verbally and in correspondence, that such a thing would have that effect, and to have recorded it then did seem as if it would risk precipitating the very thing which we had been trying so hard to aid in averting,—that is, the suspension of the Cook County Bank. And again, with the same knowledge of human nature, I thought that if the Cook Co. Bank, should suspend, it might involve the suspension of Mr. Allen's Des Moines house, and that complications might arise, which it would be very desirable to avoid. Int. 651. Did the matter or question of affecting Mr. Allen's credit in any way as a banker in Des Moines, Iowa, have anything to do with keeping the mortgage from the record? Ans. Nothing was said about any such thing, but I knew perfectly, if it were put on record, it would probably affect his credit, and cause deposits to be drawn; but nothing was said. Int. 652. Did Mr. Allen make any request of you to keep that mortgage from the record? Ans. No, sir; he did not."

Further evidence of the profound secrecy observed by mortgagees is found in the fact that they placed the mortgage in a sealed package, which they delivered to their agent, Denman, keeping him in total ignorance of its contents, with instructions to go with the package, unopened, to Chicago, and there await telegraphic orders. It seems that they kept this agent, with his secret package, at Chicago, at considerable expense, from about the 30th day of November till the 19th day of January, 1875, when he was instructed to open his package, and record the mortgage. Thus it appears that they withheld the mortgage from record, and kept it a secret from creditors, just two months and one day,—the precise time necessary, as they assumed, to defeat all proceedings to invalidate it under the bankrupt law. That such a coincidence was purely accidental is in the highest degree improbable.

But this is not all. While the mortgage was thus kept from record and secreted, Stephens and Blennerhassett, in a letter to

Dun, Barlow & Co., mercantile agents of New York (which letter will be more fully set forth hereafter), represented that neither Allen nor themselves had made any losses; that Allen's property was, to the best of their knowledge, undiminished; that they had a copy of his Iowa real estate, and that it was a vast property. These false representations to one of the largest mercantile agencies in the country amounted to as complete a suppression of the truth respecting the existence of the mortgage, as if the mortgagees had, in direct terms, denied its existence, in order to mislead creditors.

But it is said as evidence that the mortgage was not secreted; that it was shown to S. H. White, S. V. White, James Tryon, O. H. Shreiver, Geo. F. Baker, and Geo. E. Coe. Now Geo. E. Coe swears that, to the best of his knowledge, he did not hear of the mortgage until after the failure of the Cook County Bank. It is clear from the testimony of O. H. Shreiver and Geo. F. Baker that they never heard of or saw the mortgage involved in this suit till after the suspension of the Cook County Bank. They both say this in their testimony in chief.

James Tryon was the confidential clerk of Stephens and Blennerhassett. They summoned him from Hartford to do the service which they had committed to Denman. He came after Denman had been despatched on that business, and, in explanation of the fact, Stephens or Blennerhassett, or both of them, told him that Denman had been sent to Chicago, and had received instructions to record a paper from Mr. Allen, which would protect them for advances to the Cook County Bank. Neither Stephens nor Blennerhassett showed him any mortgage, or any copy of a mortgage, nor did he know that the word "mortgage" was used. This took place on the 30th November, 1874. S. V. White was the intimate and confidential friend of Allen and of Stephens and Blennerhassett. He testifies, on his cross-examination, that he never saw the original mortgage, and that no copy was ever shown to him until after the failure of the bank. They told him in December, 1874, that they had a mortgage on Allen's property to secure their advances. Stephens and Blennerhassett might, with reasonable safety, have communicated their secret to these two confidential friends in the month of December, 1874. S. H. White was the only person who had early and definite information from Stephens and Blennerhassett of the existence of the mortgage in question. He testifies that the obligations of the Charter Oak Insurance Company, of which he was treasurer, were out for the benefit of the firm of Allen, Stephens & Co. to a very large amount, and it seemed as though Allen, Stephens & Co. were desiring very large sums of money, and he expressed some anxiety to Blennerhassett concerning their security, whereupon Blennerhassett showed him the blanket mortgage, and told him he should have this security, in addition to all the rest, if necessary. It is perfectly clear that S. H. White had the same interest in keeping the mortgage secret that possessed the minds of Stephens and Blennerhassett. They promised that he should have it as security, but he had reason to know that it would be rendered worthless as a security if, by the fact of its exposure, it should be assailed under the bankrupt law. Moreover, it was apparent to the sagacious Mr. White that the revelation of the existence of this wholesale mortgage would bring about a suspension of Allen and his banks, and of Allen, Stephens & Co., in which event White's abuse of trust in the matter of the Monomine investment and the sale of the Charter Oak paper to prop up his tottering confederates, would be laid open to the gaze of men. This was a consummation not devoutly to be wished by Mr. White. But, assuming that Stephens and Blennerhassett did communicate the fact of the existence of the mortgage to three confidential parties. What of it? Does that prove that the mortgage was not secreted? Of the whole business world of New York, Chicago, and Iowa, not a living soul has been produced who ever heard of the mortgage until after the failure of the mortgagor, except the three individuals above named. What better evidence than this could possibly be adduced of the profound secrecy with which a mortgage of such importance was concealed from the business world? It is evident that, during the 60 days intervening between the execution of the mortgage and the failure of Allen and his banks, Stephens and Blennerhassett had a double game to play. It was necessary to the safety of their security that they should not only conceal the mortgage, but sustain the sinking credit of Allen and his banks. They all stood upon the brink of bankruptcy. The publication of the mortgage would have precipitated their suspension. But, even if the mortgage was concealed, there was imminent danger of a suspension. This would have led to proceedings in bankruptcy, and the consequent invalidation of the mortgage security. Hence, we find Stephens and Blennerhassett, during the 60 days, making active and most strenuous efforts to sustain the credit of Allen and his banks. Their efforts indeed to this end were most extraordinary. To obtain the large sums of money required for that purpose, Stephens and Blennerhassett, while secreting the mortgage, and concealing the impending bankruptcy of Allen and his banks, negotiated and sold the paper of Allen and the Cook County Bank, to a very large amount, to various moneyed men and institutions, whose confidence they seemed to possess. And, in order to accomplish their purpose, they (S. and B.) did not scruple, in some instances, to make false and fraudulent representations concerning Allen's property and

financial condition. It is perhaps impossible to state accurately from the evidence the amount of commercial paper belonging to Allen and the Cook County Bank sold, and hypothecated by Stephens and B. during the 60 days; but it is certain that the amount was very large, running up to hundreds of thousands, of which very considerable sums remain to this day unpaid.

It is impossible to state the evidence of these fraudulent transactions in detail within the limits of this opinion. We have collected and arranged this evidence with reading the testimony of one or two witnesses and referring to the rest. On the 20th of November, 1874, two days after the execution of this mortgage, Allen, Stephens & Co. sold notes made by B. F. Murphy & Co., of which firm Mr. Allen was the only responsible partner, which notes were endorsed by the Cook County National Bank, and are now proved against the Cook County National Bank and B. F. Allen's estate, to the Webster Bank of Boston, for $10,000. And on the 28th of November, 1874, they sold the same bank, or to William F. Weld, a like note for $5,000. And again, on the 28th of November, 1874, a like note for $5,000, and on the same day they sold to W. F. Weld, of Boston, a note endorsed by the Cook County National Bank, made by H. C. Nutt & Co., for $5,000. On the 30th of November, 1874, they sold a like note, made by B. F. Murphy, endorsed by the Cook County National Bank to the First National Bank of Westfield, Mass., for $5,000. On December 1, 1874, they sold a like note, so made and endorsed, to S. P. Burt of Falmouth, Mass., for $5,000. On the 2nd of December, 1874, they sold to the National Webster Bank of Boston, notes made by H. C. Nutt & Co., endorsed by the Cook County National Bank, for $10,000. On the 2d of December, a like note made by B. F. Murphy & Co., so endorsed to the Webster National Bank of Boston, for $10,000. On the 7th of December, 1874, they sold a like note of B. F. Murphy, so endorsed to the First National Bank of Morrisville, New York, for $5,000, and also a note made by Nutt & Co., endorsed by the Cook County National Bank to said First National Bank of Morrisville, for $5,000. On the 24th of December, 1874, they sold a like note made by B. F. Murphy, and so endorsed, for $5,000. Making a total of notes so sold and all unpaid to this day of $70,000.

L. D. Dana says: "Am cashier of the First National Bank of Morrisville, New York. On the 4th of December, 1874, I bought for our bank a note made by B. F. Murphy & Co. for $5,000 on four months' time. I bought it of Allen, Stephens & Co. of New York. We bought it relying upon the rating of B. F. Allen & Co., A+A1, the rating being in the letter sent to us by Allen, Stephens & Co., requesting us to purchase this paper. This paper has never been paid. If we had known of the mortgage in question, we should not have bought the paper. This paper was endorsed by the Cook County National Bank." Dft. 1409: Cutler Laflin says: "I am president of the First National Bank of Westfield, Mass. On the 1st day of December, 1874, our bank purchased of Allen, Stephens & Co. of New York a piece of paper for $5,000, made by B. F. Murphy & Co. and endorsed by the Cook County National Bank. We were induced to purchase this paper by representations made to us in a circular from Allen, Stephens & Co. If I had known of the mortgage in question, or any mortgage for a very large amount made by Mr. Allen, I should not have purchased such paper." Dft. 1417: William Keith says: "I am president of the Franklin County National Bank of Greenfield, Mass. On the 25 of November, 1874, we purchased of Allen, Stephens & Co. a piece of paper of the amount of $5,000, made by B. F. Murphy & Co., and endorsed by the Cook County National Bank of Chicago. We bought it upon the strength of a circular and the commercial report of the makers of the paper, as found in Dun, Barlow & Co.'s Agency. If we had known that Mr. Allen had given any such real estate in any way for any very large amount, we would not have purchased this paper. No. part of it was ever paid." Dft. 1663: William F. Weld says: "I reside in Boston. I purchased $15,000 of paper made by B. F. Murphy & Co., and $5,000 made by H. C. Nutt & Co., about the 1st of December, 1874, of Allen, Stephens & Co. None of it has ever been paid. Before purchasing it, I examined the commercial agencies, and found H. C. Nutt & Co. and B. F. Murphy & Co. set out A+A1. This paper was endorsed by the Cook County National Bank. I should not have bought this paper if I had known of such a mortgage." Dft. 1670: Edward P. Hall, says: "I was cashier of the Webster National Bank of Boston in 1874. Our bank purchased $5,000 of paper made by B. F. Murphy & Co. of Chicago, and endorsed by the Cook County National Bank. We purchased it of Allen, Stephens & Co. on the 27th of November, 1874. We examined the rating of B. F. Murphy & Co. before purchasing it, and found that it stood A+A1. This paper has not been paid. If we had known of such a mortgage as the one in question, we should not have purchased this paper; or if we had known that the Cook County Bank was indebted to other parties for more than its capital stock, we should not have purchased it." Plf. 1252: On the 6th of January, 1875, Stephens and Blennerhassett borrowed of the American Exchange National Bank of New York $100,000, and placed there as security for it $159,000 of Cook County National Bank paper, out of which only about $40,000 has been paid, leaving still due to that bank from Cook County Bank about $60,000. The unpaid paper was mostly made by B. F. Murphy & Co., A. T. Andrews & Co., and H. M. Bush & Co., in all of which concerns B. F. Allen was the

principal partner, and upon whose credit the paper was taken, leaving Mr. Allen still indebted to the American Exchange National Bank, as a maker of said paper, to the amount of over $60,000. On the 30th of December, 1874, Allen, Stephens & Co. borrowed of the Dry Goods Bank in New York $50,000, secured by paper as follows (Plf. 1024, 1025): B. F. Murphy & Co., $25,500, J. & T. B. Schissler, $25,000, H. C. Nutt & Co., $10,000; which paper was all endorsed by the Cook County National Bank, and no portion of the B. F. Murphy and H. C. Nutt paper has been paid, and about 50 per cent. only has been paid upon the J. & T. B. Schissler paper. Here, then, is now a debt against B. F. Allen of over $40,000, and a debt against the Cook County National Bank of the same amount. Plf. 1027: On the 19th of November, 1874, Allen, Stephens & Co. borrowed from the Continental National Bank of New York $125,000, secured by paper, $80,000 only of which has been paid, leaving $45,000 and interest still due said bank. The paper still held by this bank was made by J. & T. B. Schissler, B. F. Murphy & Co., T. S. Dobbins, and H. C. Nutt & Co., all endorsed by the Cook County National Bank, and in about half of which Allen was a partner in the firm of makers of said papers, and his estate is still liable to said Continental National Bank for about $20,000 and the Cook County Bank for about $40,000.

Stephens and Blennerhassett knew of the indebtedness of Mr. Allen and of the Cook County Bank to the New York State Loan and Trust Co., and aided in procuring the discounts and loans, all of which was contracted while this mortgage was being concealed; and there is still due the Trust Co. from the Cook County National Bank about $100,000, at least half of which Mr. Allen is personally liable upon. With relation to this, Mr. Hubbard and Mr. Smythe of that defunct institution testify as follows (Dft. 1575): Henry J. Hubbard says: "I was secretary of the New York State Loan and Trust Co. in 1874 and 1875. At the time the Cook County Bank suspended, the Trust Company had under discount about $95,000 commercial paper endorsed by the Cook County National Bank. It was discounted during November and December, 1874. On the 19th of November the Trust Co. loaned to the Cook County National Bank $25,000, and on the 29th day of December, 1874, it loaned it another $25,000. About $26,000 has been paid upon these two call loans, and about $30,000 of the $95,000 in paper has been paid. The Cook County National Bank also owed the Trust Co. about $5,000 in overdrafts. The present indebtedness of the Cook County National Bank to the New York State Loan is $95,000 and interest. Blennerhassett made the applications to the Trust Co. for these discounts." Dft. 1599: Henry A. Smythe says: "I was president of the New York Loan and Trust Co. in 1874 and 1875. The Cook County National Bank owes the New York Loan and Trust Co. now about $100,000. Mr. Allen had the reputation, in the fall of 1874, of being a large real-estate owner. My opinion of his wealth was strengthened by what Mr. Blennerhassett had said to me. Mr. Blennerhassett urged me to take this paper on account of the necessity of Mr. Allen and the Cook County National Bank. Mr. Allen was personally holden on a large amount of this indebtedness. If I had known that the Cook County National Bank owed the full amount of its capital stock, I should not have loaned it any money, or discounted any paper for it. If I had known in December or November, 1874, that Allen had given a mortgage like the one in suit, I should not have discounted any paper for the Cook County National Bank, or loaned it money, nor should we have loaned Mr. Allen any money, or discounted any money for him. Since the failure of the Cook County National Bank, the Trust Co. has been wound up, and its stock has very much depreciated."

There is also a large amount of money still due the Nassau Bank of New York, and the Tradesman's National Bank, and the Chemical National Bank, and the Central National Bank. These various parties, through their officers, have testified (Dft. 1436): W. A. Wheelock says: "I am president of the Central National Bank of New York, and was in 1874. I am acquainted with W. A. Stephens and H. Blennerhassett. On the 29th day of December, 1874, the Cook County National Bank opened an account with the Central National. On that day we discounted $64,000 for the Cook County National Bank in paper at 7 per cent. per annum." Deft. 1438: "It was understood that, under no circumstances, should their balance be drawn down below $20,000. The notes that we discounted were all endorsed by the Cook County National Bank, by Allen, Stephens & Co., agents. I was informed that B. F. Allen was a partner in the firms of B. F. Murphy & Co., A. T. Andrews & Co., and H. C. Nutt & Co. I discounted paper for these three firms on the strength of Mr. Allen's reputed wealth. The Cook County National Bank drew a draft on us, dated 29th of December, 1874, in favor of Allen, Stephens & Co. for $25,000. Also, one dated December 31, 1874, in favor Allen, Stephens & Co. for $39,000. They were both paid by us on the 2d day of January, 1875. Both of them were endorsed by Allen, Stephens & Co. About 10 or 15 minutes before the intelligence came to us that the Cook County National Bank had failed, a draft for $20,000 was presented to us for payment. It came from the banking house of Allen, Stephens & Co. The draft was payable to S. V. White. Another reason why I did not pay it was because it was nominally drawn in Chicago, dated three or four days back. The ink was scarcely dry on the face of the draft, which I noticed particularly. The

amount now due the Central Bank from the Cook County National Bank is $29,600 on account of these notes discounted by us, which were not good. I had no knowledge at this time that Allen, Stephens & Co. claimed that the Cook County National Bank owed them. Neither had I any knowledge of the mortgage in question. If I had known of such a mortgage, I should not have discounted one dollar of that paper. I consulted Dun, Barlow & Co.'s Agency before discounting this paper, and I learned from them that Allen was a partner of both-named firms. I got the ratings of B. G. Murphy & Co., A. T. Andrews & Co., H. C. Nutt & Co., and B. F. Allen, from Dun, Barlow & Co. before I discounted this paper; found that Allen was rated A+A1." Deft. 1451: Francis M. Harris says: "I am president of the Nassau Bank of New York. At the time the Cook County National Bank failed, we had under discount for it notes amounting to $26,608, and none of that paper has since been paid. There were three notes made by B. F. Murphy of $5,000 each. The Cook County Bank also owed us $33,431.32 for collections made through our bank in the month of January, 1875. On the 7th of January, 1875, we received a draft from the Cook County National Bank for $13,176.19, drawn on the American Exchange National Bank, which was never paid. We are subscribers to the commercial agencies in New York. We knew nothing of any pretended mortgage like the one in question. If we had known of it, we should not have discounted this paper for the Cook County National Bank, nor should we have sent our collections to it. The paper was all endorsed by the Cook County National Bank. If we had known that the Cook County National Bank was indebted for more than its capital stock, we should not have discounted this paper. I should have been suspicious of the Cook County Bank, if I had known it drew its drafts on the American Exchange Bank, where it had no funds, and that the drafts were taken up by Allen, Stephens & Co." Deft. 1464: Anthony Halsey says: "Am cashier of the Tradesmen's National Bank of New York. When the Cook County National Bank suspended, it had about $10,000 of our money, which it had collected for us during the early part of January, 1875. We did not know that Allen, Stephens & Co. claimed the Cook County National Bank owed it four or five thousand dollars; neither did we know of any such mortgage as the one in question. If we had known of such a mortgage, we should not have sent our collections to the Cook County Bank, under any circumstances." Deft. 1514: George H. Williams says: "I am cashier of the Chemical National Bank of New York. The Cook County National Bank kept an account with us some time in October or November, 1874. I became distrustful of the Cook County National Bank, and stopped discounting for them. We were watchful of them, to prevent them overdrawing. They did in October or November, because they were pressing us for discounts, and seemed to be very short, and I heard something to their discredit in relation to their business in Chicago. Their overdrafts were sometimes made good at our bank by Allen, Stephens & Co. They told us to send down to their bank when the Cook County overdrew. We would not permit such a course as that to continue. We did not countenance kiting in that way. We made a discount for the Cook County December 30, 1874, of about $14,000. The paper we discounted was endorsed by the Cook County National Bank. We ceased sending it collections in Chicago about November 1, 1874. The Cook County Bank now owes us $4,330, besides a note endorsed by it to secure $731. Mr. Stephens represented to me that Mr. Allen was a man of large property. I knew nothing about the mortgage or pretended mortgage in question on Mr. Allen's property,—never heard of such a transaction until after the failure. If I had known it in December, 1874, I should not have made discount to them of $14,000, or if I had known that Allen, Stephens & Co. claimed to be creditors of the Cook County National Bank for upward of $500,000, I should not have made the discount. If I had known of such a state of things, I should not have trusted the Cook County National Bank, under any circumstances, with any collections or any funds belonging to our bank. I did not know that the Cook County National Bank drew large amounts of drafts on the American Exchange National Bank, where they had no funds, and that said drafts were taken up by Allen, Stephens & Co. This is not a customary or regular course of banking. Such course, in my opinion, if known, would create suspicion of the credibility of the bank drawing the drafts. Kiting always excites suspicion, and that would look as though they were in a desperate condition. During my experiences as a banker, I have never known of any such course as that continued by any responsible and sound bank during the perod of a couple of months at a time. We would not permit any correspondents in the country or other cities to draw drafts upon us at two months, at the rate of fifty or seventy thousand dollars a day, when they had no funds with which to pay them. We are subscribers of Dun, Barlow & Co.'s Agency, and frequently consult it, when paper is offered for discount. Stephens repeatedly represented to me, on a number of occasions, that Mr. Allen was a very rich man, and that the Cook County National Bank was perfectly good."

It will be seen that these witnesses testify that, if they had known of the existence of the mortgage, they would not have parted with their money upon the paper of Allen and the Cook County Bank, and certainly

this is most reasonable; for the mortgage, if known, would have disclosed the fact, not only that Allen's whole property was incumbered for a vast sum, but that the Cook County Bank was indebted to a single house in a sum larger than its whole capital, and from this it would have been evident to the minds of all financial men that both Allen and the bank were insolvent, since they were not in a condition to pay their commercial paper in the usual and ordinary course of business.

It appears by the evidence that a very general custom exists with banks and moneyed men to consult the mercantile agencies for the financial standing of those with whom they have negotiations for loans and discounts. Stephens and Blennerhassett in January, 1872, caused the rating of B. F. Allen to be made by Dun, Barlow & Co., commercial agents, upon the following statement made by Stephens that Allen, the senior partner, was a banker in Des Moines, Iowa, and was worth about two millions of dollars, and that himself and the junior partner, Blennerhassett, had means, but that it was not considered necessary to state the amount, as their capital would be ample for any requirement of their business. Upon this statement the firm was rated A+A1, meaning that the firm was worth over a million, and had unlimited credit. It was upon this estimate of Allen's wealth that all the firms of which he was a member were rated A+A1. None of the other members of the firms of Allen, Stephens & Co., Murphy & Co., Nutt & Co., and Andrews & Co. were men of any means worth considering. Did Stephens know, or have reason to know, in January, 1872, that Allen was worth two millions and that his credit was unlimited. If he did not know what he thus caused to be held out as truth to the financial world, he was guilty of fraud. But, certain it is, that from and after the taking of the mortgage on the 18th day of November, 1874, Stephens and B. did know that Allen was not worth two millions, and that his credit was not unlimited; yet they not only permitted this statement to stand upon the books of Dun, Barlow & Co., but they made false and fraudulent representations to the same purpose, in order to effect loans and discounts upon Allen's credit.

It will be noticed that Mr. Dana, cashier of 1st National Bank of Morrisville, N.Y., testifies that on the 4th day of December, 1874, he purchased $5,000 of B. F. Murphy & Co.'s paper on four months' time from Allen, Stephens & Co., relying upon the rating of B. F. Murphy & Co. of A+A1, the rating being in the letters sent them by Allen, Stephens & Co., requesting them to purchase the paper. Mr. Weld, of Boston, testifies that he purchased $15,000 of paper made by B. F. Murphy & Co., and five thousand of H. C. Nutt & Co., about the 1st of December, 1874, of Allen, Stephens & Co., none of which has been paid. He further says that he examined the rating of B. F. Murphy & Co. before purchasing, and found it to be A+A1, and that he saw correspondence of Allen, Stephens & Co. about this paper, and they rated Allen as A+A1. This paper was indorsed by the Cook County Bank. Edward P. Hall, cashier of the Webster National Bank of Boston, testified that he purchased $5,000 of the paper of the firm of B. F. Murphy & Co. from Allen, Stephens & Co. on 27th Nov., 1874. This paper was endorsed by the Cook County Bank. Before purchasing this paper, witness examined the rating of B. F. Murphy & Co., and found it A+A1. On the 25th day of Nov., 1874, Mr. Keith, president of the Franklin County National Bank, Greenfield, Mass., purchased from A., S. & Co. $5,000 of Murphy & Co.'s paper, endorsed by the Cook County Bank, upon the strength of a circular and commercial report of Dun, Barlow & Co.'s Mercantile Agency.

Mr. Wheelock, president of the Central National Bank of New York, testifies that, between the 29th day of November and December 31st, 1874, his bank discounted a large amount of the paper of the Cook County Bank, B. F. Murphy & Co., A. T. Andrews & Co., and H. C. Nutt & Co., all through Allen, Stephens & Co. He says: "I was informed that B. F. Allen was a partner in the firms of B. F. Murphy & Co., A. T. Andrews & Co., and H. C. Nutt & Co. I discounted paper of these firms on the strength of B. F. Allen's reputed wealth. I got the ratings of B. F. Murphy & Co., A. T. Andrews & Co., & H. C. Nutt & Co., & B. F. Allen from Dun, Barlow & Co. before I discounted this paper. Found that of Allen to be rated A+A1." But this is not all. In the winter of 1874 & 5, reports injurious to the credit of Allen getting abroad, the following correspondence occurred between Dun, Barlow & Co. and Allen, Stephens & Co., the letter of A., S. & Co. being written by Blennerhassett: "The Mercantile Agency. Dun, Barlow & Co. New York, Jan. 9th, 1875. Messrs. Allen, Stephens & Co., 25 Pine Street—Dear Sirs: Our rating of your house, A+A1, has caused so much criticism, and had been so generally reduced by parties whose opinion we value, that we hardly know how to continue it without some better evidence than we now possess: Our book goes to press on Tuesday morning, and we are loth to let the rating remain, and still more loth to take it down. It might help us to a conclusion if one of your firm would so far favor us as to call upon our Mr. Wiman on Monday morning on his way down town. We are, with much esteem, respectfully yours, Dun, Barlow & Co." In reply to which Mr. Blennerhassett, for the firm of Allen, Stephens & Co., wrote the following letter, to-wit: "11th January, 1875. Messrs. Dun, Barlow & Co.—Dear Sirs: We have to thank you for your very considerate letter of the 9th, and to assure you that whatever you deem best will seem to us to have been done kindly in consequence thereof. Our credit as a house of 'a million or over' responsibility, we know no reason to change in. We have made no losses, neither do we think Mr. Allen has.

We do not speculate. Mr. Allen's property is, to the best of our knowledge, undiminished. We have a copy of his Iowa real estate, and it is a vast property. You know, doubtless, that Mr. Allen lives West, and that he is not here for us to ask him any question. We suppose him to be worth some millions, but have never asked him to state his wealth. We do not ask 'credit' as a rule, and our title to 'unlimited credit' you must judge of. A somewhat malicious effort has been made, we fear, to injure the Cook Co. Nat. B'k of Chicago, of which Mr. Allen is president. We think all reports about us originate from this source. The American Exchange B'k, Geo. S. Coe, Pres., know somewhat of us and our business. We never refer to any one, but we mention the fact. Of course it will be very painful to us to have an appearance of diminished credit. With regards, we are v. truly, Allen, Stephens & Co." On the 12th day of January, 1875, Messrs. Dun, Barlow & Co., in reply to this letter, write: "The Mercantile Agency, Dun, Barlow & Co. N. Y., Jan'y 12, 1875. Messrs. Allen, Stephens & Co.—Dear Sirs: We are much indebted to you for your frank and full favor of the 11th inst., and we deeply regret our inability to have an interview with Mr. Allen. We would feel much obliged if you would advise us when he is likely to be in this city. If you like, you can transmit to him our letter of the 9th, together with this, so that he may understand our difficulties and disposition. It would be very important if an interview could be arranged, so that we might more clearly understand his position than we do now. We are aware that an attempt has been made to injure the Cook Co. Nat. B'k, but the criticism of your ratings, to which we referred, have not come from any source acquainted with that concern, but from independent and important scutinizers of the credit in this city. You will therefore see the importance of placing us early in possession of definite information, to sustain the rating of your house. With much respect, we are truly yours, Dun, Barlow & Co." This letter was sent to B. F. Allen by Mr. Blennerhassett, and on the bottom of the same he wrote to Mr. Allen as follows: "Dr. A— read the above. If you can write anything to satisfy them, do so, and send through us. If you can say you are worth millions, do so. If you can not say anything satisfactory, do not write. Yours, H. B." The letter of January 11th needs no comment. It was under the circumstances most flagitious. Blennerhassett, in this letter, not content himself with uttering such atrocious falsehoods as that Allen, Stephens & Co. knew of no reason to change the statement of their credit as a house of a million or over responsibility; that neither they nor Allen had made any losses; that they did not speculate; and that, to the best of their knowledge, Allen's property was indiminished,—gently tempted his senior partner, Allen, to strengthen and confirm these false and fraudulent representations. "Read the above," says he to Allen, "and, if you can write anything to satisfy them, do so, and send through us. If you can say you are worth millions, do so. If you can say nothing to satisfy them, do not write, but leave them under the false impression made by my letter." Such is Blennerhassett.

On the very day on which the foregoing letter was written to Dun, Barlow & Co., Stephens & Blennerhassett wrote to Allen a despairing letter, which clearly reveals the facts that they then stood, like desperate men, upon the very brink of bankruptcy (Plf. 509):

"(Letter heading of Allen, Stephens & Co.) New York, 12th Jany, 1875. Friend Allen: We have yours 9th inst., about the notes and mtgs. referred to with Charter Oak. Mr. White is here, and says he has found them where he did not expect they were, and will return them when he gets home. He wrote Harry about it to-day. Our telegrams of last evening, and yours and ours of to-day, tell their own sad tales. There is no use writing you a long letter about it. It is simply a case of our not having money enough to take up your drafts, and no prospects of any. Coe and Bowen failed us. We had exhausted all other resources. You have had our all, as we wrote you last Saturday. We have never ceased working. We have had Coe, S. H. White, S. V. White, and Bowen in council, separately, and in groups. All saw the situation. Neither could give us what we needed,—money,—tho' all contributed sympathy and advice, and sorrowed over the situation we are all placed in. Nothing has been unthought of; nothing neglected or overlooked. No accidents have happened. It is simply that our money and our available resources have gone. I could write you an array of figures and an essay on the subject, but you have grief enough. We can give you everything but what you want most,—money. You have had that as long as we had it. We are heartbroken that we have to stop where we are, or seem to be, to-day. We are willing to pitch in, old fellow, if the worst comes, and try and make something, and divide it in thirds, one for you. We are anxiously awaiting further advice from you, while we dread to hear. We have taken up all the small d'fts yesterday and to-day, trying thus to avoid publicity, leaving you as few in number as possible to deal with, and they in such large amounts as would naturally shut their mouths. Your telegrams, saying you had paid Central 30,000 and Milwaukee $30,000, to-day, is very hopeful, for you would not have done so had you not seen your way clear to take up all, as paying any one would be to open his mouth to talk. We are led to hope the Chicago banks —— may have been applied to, and furnished you means (Plf. 510) to go through, rather than themselves stand the —— rather of your failing. There are not many who could stand it. We are drifting. What comes next to us we don't know. Coe and S. H. White remain in council over us. They are our largest creditors. God grant they may see some way for us. We are past the asking. What they do, they

must volunteer. We are not happy to-night. We know you are not.

Cook Co. Dr. balance to-night is....	$819,225
Harry West, Dr..................	8,000
Nat. State, Dr....................	19,000
	$846,225.

"With sorrow we remain, faithfully yours, Stephens & Blenn't."

The purpose of Blennerhassett in writing the letters of January 11th is not to be mistaken. It was to deceive and mislead creditors and moneyed men through the commercial agency which he knew would be consulted. It was to lull depositors and money lenders into a fatal security for a few days more, so that money enough could be obtained from them to carry the Cook County Bank and Allen over the required 60 days without actual bankruptcy. That the creditors of Allen and the Cook County Bank were in fact deceived and misled to their own injury by the concealment of the mortgage and the other fraudulent practices of Stephens and B. requires, we think, little farther explication. This inference would, from the very nature of the case, be unavoidable, even if so many witnesses of the highest respectability had not testified that they would not have made the loans and discounts which they did make if the existence of the mortgage, and all that it discloses, had been made known to them.

It is in evidence that, between the time of the making and recording the mortgage and while it was concealed, the sum of $1,244,294.78 was deposited in Allen's private bank at Des Moines, and that the amount due depositors on the 19th of January, 1875, was $690,657.44. Several witnesses testify that they would not have deposited their money as they did in the Des Moines Bank if they had known of the existence of the mortgage. A very large amount of money was also deposited in the Cook County Bank between the same dates, and many new accounts were opened.

There are eight witnesses, all of whom were cashiers of banks in various parts of the county, giving testimony to the effect that, if they had known of the existence of the mortgage, they would not have opened accounts or deposited their money in the Cook County Bank. The banks represented by these witnesses had balances in the Cook County Bank at the time of the failure ranging from $5 to $40,000 in round numbers.

We append hereto a synopsis of the testimony of these witnesses, with a tabular statement of the new accounts opened between the time of the making and recording of the mortgage. After the execution of this mortgage, and while it was being kept secret, $1,244,294.78 in money was deposited in Mr. Allen's private bank at Des Moines. Dft. 1264: Harry West says: "I was cashier for B. F. Allen at Des Moines. There was deposited in Mr. Allen's private bank in Des Moines, between the 18th day of November, 1874, and the 19th day of January, 1875, $1,244,294.78. The amount due depositors on the 19th of January, 1875, was $690,657.44." Dft. 1220: W. H. Hatch says: "Reside at Des Moines. I had $1,300 on deposit in Allen's bank at the time of the failure. It was deposited in December, 1874. If I had known of the mortgage in question, I should not have deposited any money in his bank." Dft. 1231: Ed. Hewitt says: "Reside at Des Moines. Member of the firm of Hewitt & Bro. At the time Allen failed, we had on deposit in his private bank $7,542.53. If a mortgage like the one in controversy had been placed upon record, or published in the community, the public would have lost confidence in Mr. Allen. I should not have put my money in his bank if I had known of such a thing." Dft. 1244: A. J. Dunkle says: "Reside in Des Moines. Am a merchant. I had deposited $1,500 or $1,600 in Allen's bank when he suspended. I never heard of the mortgage in question to his New York house until after he failed. If I had known of it, I should not have continued to have done business at his bank." Dft. 1245: E. N. Curl says: "Reside at Des Moines. Our firm had on deposit in Allen's bank, when it failed, $3,727.19. Knew of his being a large real-estate owner in Des Moines. Never knew of any incumbrance on his property until after he suspended. If I had known of the mortgage in question, we should not have continued our deposits with his private bank at Des Moines." John B. Cummings says: "Am cashier of the Farmers' National B. of Bushnell, Ill. At the time the Cook County failed, we had on deposit $20,650.04. If we had known of the existence of the mortgage in question, we should have withdrawn our account, and placed no more money there." Dft. 1202: William H. Harper says: "I had on deposit $10,246.43 in the Cook County National Bank at the time of its suspension. I had on deposit $5,000 on the 20th of November (Dft. 1204) 1874. If I had known that Mr. Allen had placed an incumbrance on his real estate $465,000, or for any amount exceeding $200,000, I should not have deposited the $5,000 in said Cook County Bank, nor should I have allowed my money to remain there at all." Dft. 1323: Joseph F. Kelly says: "I was cashier of the De Witt National Bank. We had on deposit in the Cook County Bank at the time it suspended $15,344.43. If we had known, soon after the 18th of November, that Allen had placed such a mortgage on his real estate, we should have withdrawn our account at once." Dft. 1330: James F. Dresser says: "I was formerly cashier of the Geneseo City Bank. Our bank had on deposit in the Cook County National Bank, at the time of its suspension, $39,540.62. If I had known of such a mortgage, we should have withdrawn our account, and deposited no more money there." Dft. 1340: Augustus E. Bundy says: "I was cashier of the First National Bank of Crown Point, Indiana, at the time the Cook

County National Bank suspended. We had on deposit there $3,974.60. If I had known of such a mortgage, I should have deposited no more money there. Neither should we have continued our account at the Cook County." Dft. 1348: Willis H. Ford: "I am cashier of the First National Bank of Lacon, Illinois. We had over $20,000 on deposit in the Cook County National Bank at the time it suspended. If we had known of the mortgage in question, we should have discontinued our acccount, and deposited no more money there." Dft. 1357: John W. Neff says: "I was a partner of the banking house of James Mitchell & Co., at Freeport, Ills. We had on deposit in the Cook County National Bank, at the time of its suspension, $10,479.-91. If we had known of the existence of the mortgage in question, we should have withdrawn our account at the Cook County Bank at once, and placed no more money there." Dft. 1364: D. B. Barnes says: "I am cashier of the National Bank of Delavan, Wis. I opened an account with the Cook County Bank Jary. 5, 1875. Had on deposit $6,300 at the time the bank failed. If I had known of the execution of the mortgage in controversy, should not have opened said account at all."

Dft. 137: The following named persons opened accounts at the Cook County National Bank after November 18th, 1874, and had on deposit there the amounts named when the bank suspended:

	Acc't		
F. M. Chapman	opened	Nov. 28, '74	$ 64 80
W. W. Cole	"	Dec. 14, '74	159 40
Davis & Co	"	Jan'y 11, '75	200 00
Davis & Co., special	"	Dec. 21, '74	227 74
Chas. L. Easton	"	Dec. 9, '74	142 20
W. S. Harbert	"	Dec. 12, '74	122 00
A. W. Hurlburt	"	Nov. 30, '74	653 04
J. Russell Jones	"	Jan'y 3, '75	250 00
F. Lester	"	Dec. 22, '74	129 80
Mason & Co	"	Jan'y 16, '75	6 20
J. H. Melcher	"	Dec. 16, '74	33 84
John Muller	"	Nov. 19, '74	42 77
H. C. Nutt	"	Nov. 30, '74	10,000 00
Frank H. Rood	"	Jan'y 2, '75	1,086 15
Scott Siddons	"	Jan'y 15, '75	1,228 00
Perry Trumbull	"	Jan'y 4, '75	18 25
Turner & Howard	"	Nov. 30, '74	47 25
F. M. Van Pelt	"	Jan'y 5, '75	69 00
Cadwell & Fisk, Logan, Ia	"	Dec. 28, '74	1,434 23
Davis Co. Bk., Bloomfield, Ia	"	Dec. 16, '74	213 66
National Bank of Delavan, Wis	"	Jan'y 5, '75	4,378 25
Blaine & Ely	"	Dec. 22, '74	20 63
Lafayette Natl. Bk., Ind	"	Jan'y 11, '75	235 20
Citizens' State Bk	"	Dec. 10, '74	3,460 19
Joseph Schissler, Des Moines	"	Nov. 28, '74	3,127 95
Sperey & Davis, Fayette, Ia.	"	Jan'y 4, '75	4,626 78
Twogood & Elliott, Marion, Ia.	"	Jan'y 5, '75	445 88
W. H. Harper	"	Nov. 21, '74	10,000 00
Moulding & Harland	"	Nov. 21, '74	1,000 00
L. A. Shoff	"	Nov. 21, '74	1,000 00
A. D. Wood	"	Dec. 10, '74	1,500 00
O. R. Shearman	"	Dec. 11, '74	110 00
W. W. Cole	"	Dec. 12, '74	210 00
Philip Carey	"	Dec. 17, '74	200 00
Mrs. G. H. Lawton	"	Dec. 21, '74	2,893 58
C. H. Hill	"	Jan'y 7, '75	200 00
William Neville	"	Jan'y 8, '75	550 00
A. D. Wood	"	Jan'y 8, '75	4,600 00
Mr. Homer Hopkins	"	Jan'y 11, '75	445 00
Joseph Parker	"	Jan'y 13, '75	450 00
L. E. McCord	"	Jan'y 14, '75	90 00
			$55,671 79

It is simply impossible to suppose or believe that Blennerhassett did not, during his stay in Chicago, from the 11th to the 30th of December, 1874, know of the broken and rotten condition of the Cook County Bank. He was a most expert bookkeeper and skillful banker. He had had long experience in the business of banking. His purpose in visiting the bank was to aid, with his superior skill, in its better management, in order to tide it, if possible, over its manifold difficulties. The enormous advances which Allen, Stephens & Co. had made before he left New York, and the correspondence between that firm and Allen, had clearly revealed to Blennerhassett the true condition of the bank. For a time, Allen, while on a visit to Des Moines, left B. in control of the bank. Blennerhassett knew that the bank was keeping itself afloat by the very practices which clearly indicate insolvency in such an institution. What could be clearer evidence, to a sharp-sighted man like Blennerhassett, of the desperate condition of a bank, than the practice of "kiting," in which he knew the Cook County Bank was engaged? That he knew this is beyond doubt, because he speaks of it in several of his letters. Indeed, in his letters to Stephens of Dec. 26, 1874, he gives an account of a "pitched battle," as he calls it, with Allen about kiting. Allen, it seems, was unwilling to kite enough to suit Blennerhassett. Allen said "it would only do harm, and might hurt the bank's credit," and it ended in his saying "he would rather telegraph $30,000 on Saturday," and their "kite $30,000, than kite both days." It appears that this timidity of Allen about kiting disgusted Blennerhassett deeply. Again Blennerhassett, in a letter to Stephens of Dec. 28, 1874, says: "Saturday I urged Allen. I urged Bowen. I did not fail to present the necessity early, and with all the strength (though despairingly) I could, and they kited just $10,000 Saturday. They started to do $30,000. I begged them not to stop at $30,000, but to do more." "Allen," he says, "is not humbled enough by the fear of disaster to give up his own way yet." Again, B. F. Allen, on the 23d November, 1874, upon his return to Chicago after the execution of the mortgage, caused entries to be made upon the books of the Cook County Bank, charging Allen, Stephens & Co. with the round sum of $600,000, and crediting the same to Allen's bank and himself. This was intended by Allen to balance the large sum which appeared by the books to be due from him to the Cook County Bank. Allen claims that these entries were made in accordance with an understanding with Stephens and B. before he left New York. This Stephens and B. deny, and they swear that the entry was entirely fraudulent as to them. Blennerhassett swears that he did not see this entry, and did not know of its existence, during his stay at Chicago, nor until after the suspension of the bank, but it is simply impossible to credit such a statement as this. Cleve-

land, the discount clerk, testifies that Blennerhassett examined the books of the bank frequently, and particularly the account of Allen, Stephens & Co.; that he (Cleveland) pointed out to B. the $600,000 entry, and that B. did in fact see the entry. Barrett, the bookkeeper, testifies that Blennerhassett examined frequently the books of the bank, and especially the account of Allen, Stephens & Co., and it is not questioned by any that he saw the general balances as shown by the books of the bank. It must, therefore, have attracted Blennerhassett's attention that, on the 21st day of November, 1874, his firm was credited with a balance of $542,402.10, and that on the 24th, the day after the $600,000 entry, the firm A., S. & Co. stood charged with a debt balance of $75,063.37; and further, that the daily balances against Allen, Stephens & Co., from the 11th day of December to the 30th day of the same month, ranged from $31,107.10 to $228,391.18. Now Blennerhassett, according to the account of Allen, Stephens & Co., and their present claims, knew, when he left New York, that the Cook County Bank was indebted to Allen, S. & Co. several hundred thousand dollars. Is it conceivable that, when he saw this result reversed on the books of the bank, he did not inquire into it, and examine the books, which were before him, to see how so unexpected and extraordinary a result was brought about? And if he did open his eyes, and look at all, could he have failed to discover the $600,000 entry? The truth is that we must reject his testimony that he did not know of this entry until after the suspension as a flagrant attempt to impose upon the court. We cannot doubt that Cleveland testified to the truth respecting this matter.

Assuming, then, that Blennerhassett knew of the $600,000 entry, and believed it to be fraudulent, what revelation must it have presented to his mind? Must he not have concluded that Allen was indebted to the Cook County Bank in an enormous sum of money, which he had no means of paying, and that, in order to meet his dreaded responsibility to the bank law, as one of its officers, Allen was driven to the desperate expedient of making a false and fraudulent entry, to the amount of $600,000, upon the books of the bank? And who can doubt that, with this fact and all the other evidence present to B.'s mind, he must have known that the bank, as well as Allen himself, was utterly insolvent and unworthy of credit? Nevertheless, Blennerhassett, while in the Cook County Bank, aiding Allen in its management, wrote a number of cunningly worded letters to various Eastern capitalists, intended to recommend and promote the credit of the Cook County Bank. These letters bear date December 12th, 15th, and 24th. Though written by Blennerhassett, they were signed by Allen, as president, and West, as cashier, of the Cook County Bank.

On the 24th of December, 1874, he wrote Mr. Coe, president of the American Exchange National Bank, the following letter, and had Mr. Allen sign it (Plf. 178): "George S. Coe, Esq., President, New York City—Dear Sir: We are doing our best to reduce our discount lines, but cannot cease entirely to do something for our customers, as your knowledge of banking will assure you. This bank has obtained no rediscount for a long time, except the $17,000 you did, and the $100,000 aid you gave through Allen, Stephens & Co. It is impossible for us to get along without some now. We have been compelled this week to overdraw on A., S. & Co. $100,000, which we can make good only by a discount, and I doubt if they can spare the money. In January this bank will be much better off. You can see we have done well so far, when I say that our rediscounts in New York have been reduced net by over $400,000, and we have not been able to reduce here to correspond, but we shall as quickly as we can. I am sorry I cannot do it in a moment, but it shall be done. There seems to be no certainty of my getting a discount, unless I can get it from you. I shall have to ask Mr. Stephens to call on you, and offer $100,000 of paper for our account; for, until January is fairly in, we are not likely to gain much now. I regret to trouble you again, as you have been so very friendly. Yours, very truly, [Signed] B. F. Allen, President." Mr. Blennerhassett, not content with duping a dozen banks, sought to get "alongside of" the Tenth National Bank of New York, and when in Chicago, on December 12, 1874 (as he acknowledges on page 836, plaintiffs' record), he wrote George Ackerman the following letter, and had it signed by Mr. West, cashier (Plf. 836): "12 Dec., 1874. Geo. Ackerman, Esq., Cash'r Tenth National Bank, New York—Dear Sir: Your letter of 10th came this morning. We have been for some weeks contemplating a change in New York. We will direct either Mr. Stephens or Mr. Bowen to call on you in our behalf, and, if they can arrange with you, we will try a part of our business with you. We do not want to start with you without a fair understanding. We are at this season in the habit of getting discounts in New York, and we should ask of you, if we opened. If you deal with us liberally, we should try to run a balance averaging between 50 and $100,000. Our Chicago banks all borrow in the winter. One thing more: If we like your dealings, and you like ours, we should be glad in time to run all our business to you, and keep all our balance with you. Yours, truly, A. West, Cashier." And again, on the same day, Mr. Blennerhassett wrote to Mr. S. M. Clement, of the Marine Bank of Buffalo, as follows (Plf. 837): "12 Dec'r, 1874. S. M. Clement, Esq., Cash'r Marine Bank, Buffalo, New York—Dear Sir. We have yours of 11th. We should be glad to supply you with a line of our paper. We could use to advantage $50,000, or more, now. Would take it at a fair rate if decided imme-

diately. Some of the paper, Allen, Stephens & Co. have. They alone could supply you with, as we have parted with it to them. We cannot well send you a list, but the paper you should have would be such as we take ourselves, and consider good, and which we would indorse. It is impossible for us to do any more. We would not promise you any of the list of Allen, Stephens & Co. have sent you, but we should direct them to supply you from our lot, at any rate you and we agree on. So, if, on receipt of this, you telegraph us an offer for a lot, and we like your bid, we will answer at once. We should like to have your decision Monday. Yours, truly, A. West, Cash." And again, Mr. Blennerhassett on the same day, December 12, 1874, wrote H. A. Smythe, of the New York State Loan and Trust Co., the following letter (Plf. 837): "12 Dec'r, 1874. H. A. Smythe, Esq., Pres. New York State Loan and Trust Co., New York—Dear Sir: I inclose herewith my stock notes $37,500 @ 6 mos. and $37,000 @ 7 mos., each calling for $50,000 of the stock of your company as collateral. When I purchased this stock, it was with the understanding that your company would carry it for me at 75c. It has cost me much more, and I have paid interest to carry it, and have been without dividends. I bought $100,000 stock under this agreement. The part of the stock I now ask you to carry is out on a call loan. The lenders call for the return of the money, and I am fearful that at any time they may insist on sending the stock to auction. So large an amount pressed upon the market at one time would depress the value of the stock, and reflect on you. Let me, therefore, beg you to give the matter attention. Allen, Stephens & Co. will supply you with the stock for the notes, or send you to the party who holds the loan. Very truly, B. F. Allen." On the 15th of December, 1874, Mr. Blennerhassett wrote Edward A. Presbrey the following letter (Plf. 839): "15th December, 1874. Edward A. Presbrey, Esq., Cashier National Bank of Redemption, Boston—Dear Sir: Mr. Edwards, of your bank, was here a few days since, and solicited our account, asking us if we ever got rediscounts, intimating, if we would change, we would find your bank very accommodating. We rather led him to think we would be favorably inclined to make a change, as we never had any discounts on our Boston acc't, and that would be an inducement in the winter season. We don't know how much it is worth your while to have us. We do a good deal of business in your city, and have to have an account there. When we wanted anything, we have always gone to New York, and consequently kept our large balances there. We should be glad to have you write us. Very truly yours, B. F. Allen, President."

Blennerhassett, also, on the 16th December, 1874, wrote from Chicago, in his own name, to Geo. S. Coe, president of the American Exchange Bank of New York, a letter, in which, among other ingeniously worded statements intended to recommend the Cook County Bank to credit, he says: "My own impression to-day is that there are few better banks in this city than the Cook County National Bank." "It is one of the largest to-day, and bids fair to rival the most prominent. Allen suits the West, and will be popular always." Again: "For 30 days longer, I hope you will hold up the amount you have under discount. I can form only a judgment of the matter, but I think by the middle of January this bank's deposits will be largely returned, and the inflow reliable. The $26,000 that the bank paid on the 9th, and the $30,000 paid yesterday, pray do not refuse to take new paper for," &c. Again, pleading with Mr. Coe for discounts, Blennerhassett, in a letter to him of December 22nd, says: "Its (the Cook County's) old discount with you is all paid, and the old overdraft, all but $7,000. If it had money, it would open an account elsewhere. Keep a balance for a reasonable time, and then get a discount. It is worthy of a discount anywhere. Its paper is as good as any here." In a letter of 12th December to Mr. Coe, B. says: "This bank is sound and good. Mr. Allen had an official examination of his bank by the clearing house committee, composed of Sol Smith and De Koven. Since that they are decided in pronouncing the bank perfectly sound." Allen swears that no examination of the bank was made by Smith and De Koven, and that B.'s statement is untrue. At all events, it is certain that B. knew his statement in this letter to be untrue. About the same time that these letters were written to Coe, Blennerhassett wrote letters to Stephens, disclosing the fact that the Cook County Bank men were using the most discreditable means, by "shinning," "kiting," &c., to keep the bank afloat. Indeed these letters to Stephens are, of themselves, sufficient to show that the Cook County Bank was on the verge of bankruptcy. Thus December 22, 1874, B. writes: "We got beat to-day, but will hold back until late mail more than enough to cover deficit. It really could not be helped, and we are doing our best. Coe must discount some. The bank can't shut up entirely, and must have some rediscount." Again, on the 24th, he writes to the same correspondent: "I am glad this does not reach you before Saturday, as it is gloomy. Up to last night this bank has overdrawn on you this week $99,000." Again, on the 24th, B. says: "I could have kited here, and prevented the overdrafts of Monday and Tuesday from appearing to you. I have had two pitched battles with Allen," &c. (already quoted). "This bank is doing better, but its load of loans cannot be reduced fast enough, whilst its rediscounts are running down to almost nothing. Just think of my position here, and believe me it is not possible to do differently. I have been heartsick many, many days since I came here, and

really intended to leave here Tuesday in despair, and then thought better of it. I have lost all heart, and only have hope. I stay here simply because I can do a little (only a little, however), and to have it appear in New York that I am helping Allen. I am trusting to luck, and going it blind," &c. On the 26th he writes: "Allen will send you every dollar of paper he can to-day. The Trust Co. has $50,000 paper with the call loan. Then, after using them, discount that. It is a poor lot, what you have. I know no other way than to borrow paper of Coe, and to take up that $100,000 lot in part with the proceeds." It may here be added that on the 6th day of January, 1875, only a few days after Blennerhassett's letters to Mr. Coe, Stephens and Blennerhassett borrowed of the American Exchange Bank of New York $100,000, and placed as security $150,000 of Cook County paper, out of which only about $40,000 have been paid, leaving still due to that bank from the Cook County about $60,000. The unpaid paper was mostly made by B. F. Murphy & Co., A. T. Andrews & Co., and H. M. Rush & Co., in all of which concerns B. F. Allen was the principal partner, and the only one on whose credit the paper was taken. Allen is still indebted to that bank on this $100,000 loan $60,000.

It was argued at the bar that the creditors of Allen have no good ground of complaint, because the advances made under the mortgage resulted to their benefit. The original debt secured by the mortgage was all paid, and the amount now claimed, of about $800,000, consists entirely of advances made subsequent to the execution of the mortgage. The advances were made to the Cook County Bank, but it is argued that through the Cook County Bank Allen's private bank received the sum of $72,396.57 between the 18th day of November, 1874, and the 19th day of January, 1875, and the sum of $258,424.12, before the date of the mortgage, on the 18th day of November, 1874, out of the money advanced by Allen, Stephens & Co. In the same connection, it is further said that the total deposits in Allen's bank Nov. 18, 1874, were $726,783.16, while the total Jan. 9, 1875, was $690,657.44, making a gain to depositors of $36,125.72.

If we understand this argument, it seems to us wholly untenable. It is no answer to one set of creditors, who have been misled, deceived, and defrauded of their money, to show that other creditors of the same debtor may have been benefited to an equal or greater amount by advances made by the party committing the fraud. If the New York bankers were induced by the fraudulent acts of Allen, Stephens & Co. to advance money for the Cook County Bank upon the paper of Allen and his partners, and if their advances remain unpaid, it is certainly no answer to their claims to show that the money furnished by Allen, Stephens & Co. was, by the Cook County Bank, in its turn advanced to Allen's private bank, so as to benefit his individual creditors. If one depositor was defrauded and lost his money, it avails nothing to show that another depositor received payment out of funds furnished by the defrauding party.

For these reasons, it is our judgment that the mortgage in question was fraudulent and void as to creditors at common law, and that the plaintiff's bill must be dismissed.

[On appeal to the supreme court, the above judgment was affirmed. 105 U. S. 100.]

STEPHENSON'S EXECUTORS (UNITED STATES v.). See Case No. 16,386.

Case No. 13,370.

STEPHENS & C. TRANSP. CO. v. WESTERN UNION TEL. CO.

[Nowhere reported; opinion not now accessible.]

Case No. 13,371.

STEPHENS & C. TRANSP. CO. v. WESTERN UNION TEL. CO.

WESTERN UNION TEL. CO. v. STEPHENS & C. TRANSP. CO.

[8 Ben. 502.] [1]

District Court, E. D. New York. July, 1876. [2]

SHIPPING—SUBMARINE CABLE—DAMAGE TO PASSING BOAT—REFUSAL OF ASSISTANCE—NEGLIGENCE.

1. Where a telegraph cable, laid across the Passaic river at Newark, N. J., under water, was caught up by the screw of a propeller that backed up over the crossing-place, and was wound around the shaft, so that the cable was broken and damaged, and the propeller had to go on the dock to get off the cable and repair damage to her machinery: *Held*, that the telegraph company was bound not only to lay, but also to maintain its cable, in such a way as not to interfere with the movements of boats engaged in proper manœuvres at that place;

2. The boat was not in fault in endeavoring to free herself from the cable by such devices and skill as were at her command; nor for refusing an offer of assistance from the employees of the telegraph company, made at a time when it was thought the screw was cleared from the cable:

3. The telegraph company was liable for the injury to the boat, and the owners of the boat were not liable for the injury to the cable.

[Cited in The City of Richmond, 43 Fed. 87.]

The Western Union Telegraph Company had laid, some years previously, submarine cables across the Passaic river, at the draw of a railroad bridge at Newark, N. J. In October, 1872, a propeller the Cement Rock, backed up

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

[2] [Affirmed by circuit court. Case unreported.]

to the side of the bridge, near a bulk head where she was accustomed to go, to adjust her course, and one of her twin-screws caught up one of the cables. The officers of the boat, finding that one of the screws had caught on the cable and stopped the engine, undertook to free the screw by working the engine the other way, but only succeeded in catching the cable on the other screw. They continued working their engine back and forth for several hours, pulled the cable out from the shore, and finally broke it off. While they were so engaged, the telegraph company sent word to the boat that they would have men there next morning to free the cable. And about six o'clock the next morning the agent of the company came and from the bridge asked the captain of the boat if he desired help to free the cable. The captain answered that he knew his own business, and at once started his boat to go down the river. The cable proved to be still entangled on the screw, and was at once wound upon the shaft so as to injure the machinery and to make it necessary to take the steamboat to a dock and have the cable cut off. The owners of the steamboat filed a libel against the telegraph company to recover the damage to the boat; and the telegraph company filed a libel against the owners of the boat to recover for the injury to the cable.

T. E. Stillman, for transportation company.
R. D. Benedict and G. W. Soren, for telegraph company.

BENEDICT, District Judge. The first of these actions is brought by the owners of the propeller Cement Rock, to recover for injuries caused to that vessel, by reason of her screw becoming entangled in a cluster of telegraph cables, belonging to the Western Union Telegraph Company and laid across the Passaic river at Newark, N. J.

The second action is brought by the owners of the cable against the owners of the Cement Rock, to recover for the injuries caused to the cable by the same occurrence.

The right of the telegraph company to lay the cable across the river, at the place where it was laid, is conferred by statute and is not disputed. The obligations dependent thereupon I conceive to be these: on the part of the telegraph company, not only to lay the cable in such a manner that it would not catch the bottoms of vessels navigating that water in the ordinary method, but also to maintain it in that condition: on the part of vessels, so to navigate the water as to avoid coming in contact with or disturbing a cable so laid. Here the contention on the part of the telegraph company, in answer to the action of the owners of the propeller, is that the evidence adduced by the propeller does not show how the cable was laid nor how it came to be caught by the screw; whence it is argued that negligence on their part is not proved. But the evidence shows that the propeller, at the time she caught the cable, was light; that she did not get aground, nor so far as known strike bottom; that, in the performance of an ordinary and necessary manœuvre, which she had the right to suppose could be performed without touching the cable, and in which the cable, if laid upon the bottom, would not have been touched, the cable became wound about the screw. From these facts it is the natural and proper inference that the accident arose from the fact that the cable was out of its proper place, and in some places was raised above the bottom of the river. The conclusion to which these facts point is strengthened by the fact proved, that a loop does sometimes form in a cable and that a loop was afterwards found in one of the cables laid at this point. Upon these facts, and in the absence of evidence as to any facts calculated to lead those in charge of the propeller to suppose that there was danger of catching the cable by putting the screw in motion at this place, I conclude that the accident must be held to be the result of negligence on the part of the telegraph company, in not maintaining the cable in its proper place at the bottom of the river. But it is further contended on the part of the telegraph company, that all the damage that ensued, not only to the propeller but to the cable, was caused by gross negligence on the part of the propeller in the means she adopted to free herself, and that she refused an offer made by the telegraph company to get the cable off, which, if it had been accepted, would have avoided all loss.

It is certainly true that the result shows that the means resorted to for the purpose of freeing the propeller's screw from the cables were not well adapted to that purpose; for in the end the cables became so tightly wound around the screw that it was necessary to dock the vessel and cut the cables off. But what is clear in view of the result was not necessarily so clear without the light of experience. The incident was not of common occurrence. The persons in charge of the propeller were persons of skill and judgment, who had no other desire than to get the cable free from the screw with as little loss as possible. Unquestionably they acted according to the best judgment they were able to form, and there is no evidence which will justify the determination that the course pursued was so plainly wrong as to cast the liability upon the propeller. The language of Dr. Phillimore in the case of The Clara Killam, 3 Asp. 463, that "it was the duty of the ship, if possible, to disentangle her anchor from the cable without injuring it; she was bound to apply ordinary skill, and to take the time necessary for this purpose, unless she thereby exposed herself to present imminent peril," I fully agree with. Here the vessel took the time, and endeavored to free the cable without injuring it. It was in an endeavor to free the cable from the screw, that it became hopelessly wound about the screw. The cable was broken only after the effort to unwind it had been made and failed, and then there was no other way than to break or cut

it. The result of their effort was not foreseen when the effort was made to unwind the cable; and in the face of action taken by intelligent men, who were upon the spot doing what seemed best, I am unable upon my own judgment, passed after the event, to say that the result was so clearly to be foreseen as to entail a liability upon the ground of negligence.

In regard to the refusal of the offer of the telegraph company to free the cable—as I understand the facts, a protracted effort was first made, on the part of the propeller, to free the cable; which resulted in an entanglement of the other screw so that no other way was open but to break or cut the cable. It was therefore, as was supposed, broken, and the vessel, considered to be all clear, started off on the next morning. At that time the employees of the telegraph company appeared, and offered their services in regard to the cable. These were then unnecessary, as was supposed, and the vessel moved off. It was afterwards disclosed that the boat was still fast, another of the cables having caught the screw. This cable parted when the strain came upon it.

A refusal of the services of the telegraph company under such circumstances does not, in my opinion, cast upon the propeller the responsibility for all that occurred. On the contrary, the subsequent events must be held to be the result of the original negligence, which entangled the propeller in the cable.

There must be a decree in the first named action in favor of the libellant with an order of reference, and the libel of the Western Union Telegraph Company must be dismissed with costs.

[On appeal to the circuit court, the above decree was affirmed. Case unreported.]

Case No. 13,372.

STEPHENSON v. GIBERSON.

[1 Cranch, C. C. 319.][1]

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

ATTACHMENT—CONDEMNATION—PROOF OF DEBT.

1. Upon an attachment under Act 1795, c. 56, the plaintiff must prove his debt before he can obtain judgment of condemnation.

2. Quære, whether attachment lies for unliquidated damages.

Attachment under Act Md. 1795, c. 56. The plaintiff made affidavit and annexed articles of agreement by which the defendant had agreed to do bricklaying work for the plaintiff.

THE COURT refused to condemn the attached effects without proof of the debt, and doubted whether a claim of unliquidated damages can be the ground of an attachment under the act of 1795.

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

Case No. 13,373.

STEPHENSON v. HOYT.

[1 MacA. Pat. Cas. 292.]

Circuit Court, District of Columbia. March, 1854.

PATENTS—INTERFERENCES—TEST OF INTERFERENCE—PRIORITY OF INVENTION—REDUCTION TO PRACTICE—OMNIBUS STEPS.

[1. On the question whether an interference exists between an application and an existing patent, the nature and extent of the patentee's invention is not necessarily to be ascertained from his specification and claim alone, but the same may be shown by parol evidence; for under the sixth and eighth sections of the act of 1836, which must be construed together, the applicant is not entitled to a patent if it appears that any part of that which he claims as new had before been invented, discovered, or patented, etc.]

[2. Proof that at a particular time the inventor made drawings of his invention is sufficient evidence of reduction to practice.]

[3. Where the end proposed by two inventors is the same, namely, to secure the step of an omnibus from unauthorized use by boys, and also to keep mud from dashing upon it, and both accomplish the result by combining a shield with the coach door so as to cover the step when the door is closed, the inventions must be considered as substantially the same, so as to constitute an interference, although one inventor so constructs the step that it forms part of the body of the omnibus, while the other makes it separate from the body, and afterwards attaches it thereto.]

[This was an appeal by John Stephenson from a decision of the commissioner of patents, in an interference proceeding, awarding to William H. Hoyt priority of invention in respect to an improved step for omnibuses.]

MORSELL, Circuit Judge. On the 25th October, 1852, the appellant, John Stephenson, presented his petition to the commissioner for a patent for his invention of a new and improved step for omnibuses. In his accompanying specification he states that "the nature of his invention is to make a more safe, comfortable, cleanly, and elegant step than those now in use, and, in combination with the shield, secure the step from improper use; that the independent boxed and shielded step is in two parts." He proceeds to give a particular description of said parts according to his drawings and model, and then says: "These parts united form the boxed step A, which is usually attached by the legs N N to the tail-block of the carriage parts, but may be fastened to the body at or near the door-sill." Then he particularly describes the shield, which is attached to the lower part of the door in such manner as to form the outer covering to the boxed step, thus shielding the steps from use when the door is closed. Again he says: "What I claim, and desire to secure by letters-patent, is the independent boxed omnibus step, in combination with the shield, in form and construction substantially as described."

A similiar application in some respects was made by Thomas Coles, who was one of the parties in this controversy before the com-

missioner; but as he has since abandoned his claim, he will be considered as no party to this appeal, and as out of the case.

As to William H. Hoyt, the appellee, right is derived to him under a patent issued the 27th May, 1851, (No. 8,119,) for his invention of a new and useful improvement in omnibus steps. In his specification he particularly describes the construction of it, and refers to the accompanying drawings as part thereof. He states that the nature of his improvement consists in having a rear portion of the body of an omnibus project downwards sufficiently to form a step, said step being covered by the door when closed, by which arrangement the accidents daily occurring in consequence of persons standing upon the steps of omnibuses as at present constructed are entirely prevented. He further says: "What I claim as new, and desire to secure by letters-patent, is the manner of constructing the step as described, viz., by having a portion, B, of the body of the omnibus projecting downwards a suitable distance, the bottom of said projection B forming the step C, and so arranged as to be perfectly covered and protected by the door D, when closed, substantially as described."

The commissioner being of opinion that the patent thus applied for by the appellant would interfere with the said unexpired patent of said William H. Hoyt, refused to grant the same. And for the purpose of trying the issues between the parties a day was appointed, and the parties allowed to take testimony accordingly; and which being duly taken and laid before the commissioner, together with the arguments of the parties by their counsel, on the 26th of September, 1853, the commissioner says: "This cause came up for hearing on the 12th instant; and on careful consideration of the testimony duly taken and transmitted by the three parties aforesaid, I do decide, in accordance with the reasons given in my opinion filed this day, that W. H. Hoyt is the prior inventor of the covered omnibus step." From this decision and consequent refusal Mr. Stephenson hath appealed and filed his reasons, with a petition that it may be heard and determined.

The first and fifth reasons may be considered in substance as embracing the same matter—that the commissioner erred in deciding that it appeared from the testimony that the independent boxed and shielded omnibus step was not a new and useful invention, so essentially differing from that conveyed by the patent of Hoyt as to entitle Stephenson to letters-patent for the same. The second, because he decided that Hoyt was legally to be regarded as the original inventor of the covered or protected omnibus step. Third, because he decided that Hoyt's delay in applying for a patent until 1851 did not operate as an abandonment of his alleged invention. Fourth, because he decided that the invention of Hoyt and Stephenson sought to effect the same result by the same means. The sixth and last is a general reason as to the facts proved, and his conclusions of law from these facts. The grounds of the commissioner's decision, which he is required by the eleventh section of the act of March 3, 1839 [5 Stat. 354], fully to set forth in writing, touching all the points involved by the reasons of appeal, (and to which the revision must be confined,) the commissioner states are to be found in the opinion and reasons before alluded to filed on the said 26th of September, 1853, in which he says: "The main object sought to be accomplished in all these cases is the construction of a covered omnibus step so arranged that the opening of the door removes the covering. This object is attained in each case by means almost identical in their general character. If Hoyt was the prior inventor, he must be so declared, and his patent will still cover just what he invented, and no more. The evidence shows that Hoyt conceived the idea in 1846; that he marked it out with chalk on a board and drew a plan on paper; and the witnesses state that the plan was sufficiently described to enable a workman to construct what was there represented. This date is long prior to that fixed for the inventions of Cole or Stephenson. * * * It is not necessary to have actually constructed a machine in order to give a date to the time of invention. A drawing that sufficiently embodies the entire idea is enough for this purpose."

The commissioner says his only doubt is as to the presumption of abandonment arising from the lapse of time between the date of his invention and his application for the patent; but is satisfied from the circumstances proved that such a conclusion would not be warranted in this case. The circumstances are that Hoyt was a workman for Kipp & Brown; that when he made his invention he proposed to them to try it on their omnibuses, which they promised to do as soon as they should have any new ones constructed; that before this event occurred their establishment was burned down, and that as soon as they were in a condition to construct a new omnibus they made them with this device, and Hoyt about the same time applied for a patent. The conclusion to which he comes is that these circumstances are sufficient to rebut the conclusion of any abandonment on the part of Hoyt of the design to apply his invention to use; and he therefore was of the opinion that Hoyt must be regarded as the prior inventor of the covered omnibus step.

Notice of the time and place of hearing having been given, the commissioner, according to law, laid before me all the original papers and evidence in the case, together with the grounds of his decision, set forth in writing, touching the points involved by the reasons of appeal; and the case has been submitted to me upon written arguments. The order of the argument in reply to the report of the commissioner has been much the same with

that of the reasons. With respect to the construction of the patent and specification, and the rule of law by which the interference in this case is to be tested, the commissioner has said: "If Hoyt was the prior inventor he must be so declared, and his patent will still cover just what he invented, and no more." The position of the appellant's counsel is that the nature and extent of invention of Hoyt is to be determined from the specification and claim upon which his patent is founded—"not what Hoyt's idea was when he made his first drawing, or what kind of step and cover he now makes and uses, but what his patent actually secures to him." This rule, I think, is too broadly laid down as applicable to this case. The sixth and eighth sections of the act of congress of 1836, c. 357 [5 Stat. 119, 120], must be taken together in construction, by which the applicant for a patent to entitle himself (and before the commissioner can be authorized to issue the patent) must appear to be the original and first inventor or discoverer, and it must appear that no part of that which is claimed as new had before been invented, discovered or patented, &c.; and upon appeal by an applicant it may be determined whether he is or is not entitled to a patent; and of course this becomes the duty of the appellate tribunal.

It is true under particular circumstances a subsequent inventor may be entitled to a patent, and perhaps for any part not clearly described in the patent and specification of the first and original inventor; but it can only be so where the subsequent inventor believes himself to have been the first and original inventor, and where he had no knowledge of the original invention—where no such public use was made of it that such knowledge was attainable, or where such part had not been perfected and was abandoned. To support his position the appellant refers to Le Roy v. Tatham, 14 How. [55 U. S.] 176. In this case the court say: "But we must look to the claim of the invention stated in their application by the patentees." And again: "The patentees have founded their claim on this specification, and they can neither modify nor abandon it, in whole or in part. The combination of the machinery is claimed, through which the new property of lead was developed, as a part of the process in the structure of the pipes. But the jury were instructed 'that the originality of the invention did not consist in the novelty of the machinery, but in bringing a newly-discovered principle into practical application.'" This was the case for an infringement of a patent. In such a case the plaintiff could only recover for a violation of that which he had an exclusive right to, and that could be nothing more than his patent and specification covered in plain, clear terms. But I have endeavored to show that the question in this case is entirely different, and, therefore, the decision is inapplicable.

What, then, are the circumstances as to this point? Brown, one of the witnesses, proves that Hoyt explained his plan of a protecting omnibus step to him, in the presence of Runyon and Kipp, in November or December, 1846, and at the same time made a drawing of it both on board and on paper. The original drawing or paper was shown and recollected and sworn to by the witness, but it has since been lost by the commissioner. The protected step described by Hoyt in 1846 was like the one described in Hoyt's patent, subsequently attached to witness' omnibus by direction of Hoyt. He well understood it, and could have made one from the drawing. He intended to have put them on his new omnibuses, but was burnt out; and the first of the Hoyt steps which were applied to their omnibuses was in 1850. He used twenty-five or thirty. Kipp, another witness, proves the same facts, and that in the year 1846-'47 Hoyt urged that his step should be put on the omnibus of Kipp & Brown, and that it would have been so done, but that they were burnt out. Descamp, another witness, says that Glandat, of Philadelphia, had Hoyt's step on forty-four or forty-five omnibuses. Mr. Stephenson and Hoyt were residents of the same place. Under such circumstances, it will not, I think, be too much to say that a sufficient opportunity was afforded to Mr. Stephenson to attain a knowledge of the claim of Hoyt for his plan of a protected omnibus step. The first witness proves, also, that at the same time—that is, in December, 1846—said Hoyt made a drawing of it both on a board and on paper. This, on well-settled principles of patent law, must be considered as sufficiently reducing the invention to practice. On a comparison between the two inventions as described in the respective specifications, and unaided by the testimony of the witnesses, there certainly appears in the forms of the contrivances considerable differences and improvements, the structure of the one being a component part of the body of the omnibus and the consequent arrangement for the step, and the other a separate and independent step, until connected with the omnibus by being attached to it. That this latter is a better and improved mode of accomplishing the object in many respects, I strongly incline to think; but this may be the case, and still it may be a substantial interference with the principle of Hoyt's invention, though much more imperfect in its embodiment. Whatever that principle is, he has certainly a right to be protected in the enjoyment of it after it has become secured to him by patent. And as has been before seen, it is important in the decision of the questions involved that the appellant, to entitle himself to a patent, should appear to be the first original inventor, according to the principles of patent law as to the proper tests.

The object and end to be attained appear to have been the same, i. e., to secure the step, in combination with the shield when the door was shut, from improper use by the intrusion of boys standing upon it and the preservation of passengers from mud. This was to be effected, though in a somewhat different way, yet by substantially the same kind of operation, i. e., a shield arranged with the lower part of the door, to operate, when shut, to form a covering for the step, which forms a component part of the rear body of the omnibus or is connected to it by being attached to the same part. To effect this result appears to me to have been the great and principal aim of both. What, therefore, according to authorities on the subject of patent law, was the principle? Judge Washington, in the case of Gray v. James [Case No. 5,718], stating what he considers to be the test of the principle of a machine, says: "What constitutes a difference in principle between two machines is frequently a question of difficulty, more especially if the difference in form is considerable and the machinery complicated. But we think it may be safely laid down as a general rule that when the machines are substantially the same, and operate in the same manner to produce the same result, they must be in principle the same. I say substantially, in order to exclude all formal difference. And when I speak of the same result, I must be understood as meaning the same kind of result, though it may differ in extent; so that the result is the same, according to this definition, whether the one produces more nails, for instance, in a given space of time than the other, if the operation is to make nails." So, also, Bovill v. Moore, Davies' Pat. Cas. 361–405: "It will be the same in substance if the principle be the same in effect, though the form of the machine be different." Many more authorities to the same point might be stated. I shall think one more enough. Curtis (section 224) says: "If the change introduced by the defendant constitutes a mechanical equivalent in reference to the means used by the patentee, and, besides being such an equivalent, accomplishes some other advantage beyond the effect or purpose accomplished by the patentee, it will still be an infringement as it respects what is covered by the patent, although the further advantage be a patentable subject as an improvement upon the former invention." [Curt. Pat.]

With respect to the extent of the protection in his exclusive property, Alderson (Baron) said (Webst. Pat. Cas. 144–146): "The difficulty that will press on you (the jury), and to which your attention will be called in the present case, is this: You can take out a patent for a principle, coupled with the mode of carrying the principle into effect, provided you have not only discovered the principle, but invented some mode of carrying it into effect. But then you must start with having invented some mode of carrying the principle into effect. If you have done that, you are entitled to protect yourself from all other modes of carrying the same principle into effect," &c. The rule of law is perhaps more accurately stated by Judge Washington in the nail manufacturing case just before referred to, in which he says: "The patent is for an improvement in the art of making nails by means of a machine which cuts and heads the nails at one operation. It is therefore not the grant of an abstract principle," &c. With these principles and tests, I will proceed to consider the two inventions in connection with the testimony.

The amount of the testimony, as stated by the witnesses on the part of the appellant, must, I think, be considered as proving that the box step and protector of the Stephenson invention is separate and independent of the omnibus body, and may be put on or taken off at pleasure, as stated in the specification; and when put on, it is done by attaching it thereto; that it possesses superior advantages over the Hoyt step; that the Hoyt step itself is a component part of the body of the omnibus, and not an independent thing; that they were found in practical use to be very imperfect (they weakened the back of the body and required the rear carriage part to be carried ahead); that omnibuses which had been used with these steps required much more time and expense to repair them and to apply them to the ordinary omnibuses. There was evidence, also, tending to prove that alterations had been made by Hoyt himself and others in his steps in some measure to resemble the Stephenson step, on account of the imperfections found in the practical use of the Hoyt step, according to the original plan; that by Hoyt's mode a good deal of room was taken away by cutting the piece out of the bottom side to make a step. As to the testimony on the part of the appellee, Brown—a witness before alluded to—a builder and repairer of coaches for twenty-seven years—in addition to what has already been stated of his testimony, says the protected step described by Hoyt in 1846 was like the one described in Hoyt's patent; he says it is the best in use; that the cutting out for the step does not weaken the body of the omnibus nor require a new door to apply it to old omnibuses; the Hoyt step and the so-called Stephenson step can both be applied to the same omnibus; Hoyt's form is best; the drawing of Hoyt's letters-patent represents accurately the step and protection which Hoyt explained and drew out in 1846; he considers all the different forms in use as Hoyt's or bordering on Hoyt's step. John M. Runyon, a coachmaker, whose testimony has also been partly stated, corroborates Brown. He says that he has often made the step since it was shown to him in 1846, and as early as 1849

or 1850; Hoyt's is the best form of protected steps now in use; they have worn well; both the Hoyt step and the Stephenson form of it can be applied to the same omnibuses; the Stephenson form would be the most expensive; the principle is the same in all the covered steps; they all agree in the essential parts; Hoyt's can be applied to old omnibuses without making new doors, and does not weaken the body. Kipp, a coach-maker, as far as he goes, is substantially the same with the other two. James Foster, a coach-maker, has applied the Hoyt step; says that it does not weaken the body, is most convenient, and wears just as well; it is about three days' work to make and apply steps like Hoyt's. Francis Descamp: The testimony also of this witness has been partly stated. In addition he says: "Hoyt's form is better than Stephenson's; his step is very strong; they have been well tried on the forty-four or forty-five omnibuses of Glandat; those that were put on first well are there still." The testimony of one of the appellant's witnesses, George Fielding, who is stated to be a coach-maker and machinist, in some respects corroborates what is said by the aforenamed witnesses of the appellee, as it respects the nature of the differences between the two machines, partaking of form in the embodiment rather than substance as to their principle.

On a very careful examination and comparison of the testimony on the different sides of the controversy in this case, which I have endeavored to make, I find it is true that there are considerable differences in the statements of the witnesses, but they are chiefly as to the Stephenson step being the most perfect form in which the idea or original principle has been clothed, consisting in the various advantages stated by them, rather than in the principle itself in the more imperfect form in which it has been presented by Hoyt, the appellee. His witnesses, if they are to be believed, prove that even as to this point the facts are not so, and that the Hoyt step is to be preferred. Beyond this they say, expressly and positively, that the principle in both inventions is the same; that there is no essential difference. These witnesses are stated to be experienced machinists and coach-makers, skilled in this very branch of business. Their opinions and judgment, therefore, must be allowed due weight, and I think gives the preponderance in favor of Hoyt.

As before noticed, the evidence very clearly shows that Hoyt's said invention was several years prior to that of Stephenson. Upon full consideration, therefore, of the whole case, I am of opinion that the said William H. Hoyt was the prior inventor of the said improved omnibus step and cover as in his specification is described, and that the said invention of the independent boxed and shielded step, for which the said Stephenson asks a patent, does interfere with said Hoyt's invention, and that the said decision of the commissioner of patents be, and the same is hereby, affirmed.

Case No. 13,374.

STEPHENSON v. JACKSON.

[2 Hughes, 204; [1] 9 N. B. R. (1874) 255.]

Circuit Court, D. West Virginia.

BANKRUPTCY—PARTNERSHIP—JOINT AND SEPARATE ASSETS.

Where a creditor holds the note of a copartnership indorsed by one of its members, he may prove in bankruptcy against the copartnership fund and also against the separate estate of the copartner indorsing, and he may elect out of which fund he may be paid. Arguendo, he may collect dividends from both funds.

[In review of the action of the district court of the United States for the district of West Virginia.]

In bankruptcy.

BOND, Circuit Judge. This is an appeal from the district court in bankruptcy to the supervisory jurisdiction of the circuit court, under the second section of the bankrupt act [of 1867 (14 Stat. 518)]. George A. Wells & Co., merchants, of which firm James Cook was a member, were adjudged bankrupts, upon the petition of creditors, in August, 1869, and an assignee was appointed, who has collected and has in hand the assets of the said firm. On the 7th day of April, 1870, James A. Stephenson filed his petition in the bankrupt court, alleging that on the 28th day of August, 1868, the said George A. Wells & Co. made their promissory note to James Cook for the sum of six thousand nine hundred and six dollars and thirty-five cents, payable six months after date, and that the said James Cook, before said note became due, for a valuable consideration indorsed the said note to him, Stephenson, "Protest waived, James Cook," which said note was not paid at maturity; that he has proved his said debt against the said firm of George A. Wells & Co., and also against the individual estate of James Cook; that having two funds to elect from out of which the said debt shall be paid, he elected to take the individual estate of James Cook. He alleged, moreover, that there were conflicting claims of other creditors of said firm, and the individual members thereof, claims conflicting not only as to priority, but also as to what fund was applicable for their payment. He asked, therefore, that the court refer the matter to a commissioner to report the debts and their priorities, and the funds applicable to the payment of each. This was done, and the commissioner reported that the claim of Stephenson was a valid one, and that he was entitled to be paid as he had elected to be, out of the separate es-

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

tate of James Cook. To this report certain of the creditors excepted, alleging "that the debt due Stephenson was a firm debt, and was so received by Stephenson, and no engagement on the part of Cook to see it paid will alter his liability, except as attaches to his as an indorser of the paper of the firm." The proof chiefly in argument relied on, that Stephenson took his note, intending to charge the firm of George A. Wells & Co. only, is that that firm were the makers of the note, and that he knew that James Cook was a member of that firm.

These facts are not sufficient to sustain the inference drawn from them, and even were the inference not repelled by direct proof to the contrary, they do not even tend to show that Stephenson trusted the firm alone. It is a daily occurrence that individual members of partnerships indorse the notes of their firm to give the individual security of their individual property to the holders of the firm paper, and that was the fact in this case. I am at a loss to know, and have not been able to learn from the argument, why an indorsee is not entitled to prove his debt against the estate of any prior indorser of an unpaid promissory note, even if that indorser be a member of the firm which made the note. That a person is a member of a firm does not preclude him from acting in his individual capacity even in behalf of the firm to which he belongs, and if he indorses the note of his firm he stands in the same relation to all subsequent holders and to the makers also as if he were a stranger. Now, if the makers of this note were not in bankruptcy, unquestionably Stephenson could sue and recover from the indorser, Cook, and levy execution upon and make his debt out of the separate estate of Cook, and leave him to recover from the maker. How does the fact of bankruptcy of the parties alter the liability of either the indorser or the makers to the holder? The bankrupt law undertakes to make distribution of the assets of the bankrupt according to the rights and priorities of creditors existing at the time of bankruptcy. It does not alter or change those rights and priorities, and Stephenson, if he could sue and recover his debt out of the separate estate of Cook prior to this bankruptcy, can do so now out of his separate estate in the hands of the assignee. It is contended here, though the point was not raised below, that the liability of Cook as indorser never became fixed, because there is no proof offered of demand upon and non-payment by the makers. It would not be permitted to raise this question here for the first time without giving the petitioner an opportunity to offer proof of the fact. The exception to the commissioner's report states no such objection, and even if it did, I see no force in it. Cook waived protest, and must be held therefor. Now, to admit that a protest would prove, and by the statute law of this state a protest is prima facie evidence of demand and non-payment by the makers, it is not necessary to decide how far Stephenson was bound to elect out of which fund he would take his debt. He asks so to do, and cannot complain if he be permitted to do as he asks. I think the district court erred in its order sustaining the exception to the report of the commissioner, and will sign an order confirming that report in this respect, and directing the assignee to allow Stephenson to take his debt out of the individual assets of Cook.

STERLAND (UNITED STATES v.). See Case No. 16,387.

STERLING (HUMPHREYVILLE COPPER CO. v.). See Case No. 6,872.

Case No. 13,375.

STERLING et al. v. The JENNIE CUSHMAN.

[2 Cliff. 636.] [1]

Circuit Court, D. Maine. Sept. Term, 1866.

COLLISION—VESSEL AT ANCHOR—HARBOR REGULATIONS—INEVITABLE ACCIDENT.

1. The general rule is, that where a vessel is at anchor in a proper place, with no sails set, and another under sail collides with her and occasions injury to her, the vessel in motion is liable.

2. The harbor regulations of the harbor of Bangor require that no vessel shall come to anchor in the channel within certain limits; in this case it was found that the libellant's vessel was anchored in a proper place, had the proper light, and that her owners were entitled to recover of the respondents, in accordance with the decree of the district court which was affirmed.

3. Inevitable accident in collision cases is never admitted as a defence, except when it is shown that neither vessel was in fault.

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

Admiralty appeal in a cause of collision. [William Sterling and others] the owners of the brig William Nickels exhibited their libel in the court below, against the brig Jennie Cushman [William H. Lewis, claimant], in a cause of collision, civil and maritime. The place of the collision was in the Penobscot river between Bangor bridge and the north line of the town of Hampden. The libellants' brig arrived at Bangor during the night of September 7, 1865, with a load of white-oak timber, and anchored on the eastern side of the river, nearly opposite Tewksbury's Shipyard. The next day, at the request of the stevedore, she weighed anchor and dropped down the river about one hundred and fifty feet, where she again came to anchor for the purpose of discharging cargo. The stevedore stated that in changing her place of anchorage she was put in shore on

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

the eastern side of the channel. The cargo was consigned to John T. Tewksbury, the owner of the wharf of that name on the Brewer side of the river; and he confirmed the statement of the stevedore that the vessel did not lie more than one third the way across the river from the Brewer shore. She drew, when loaded, twelve feet of water, and at low tide there was not more than seven feet of water where she lay. Unloading was continued through two days, during which the brig did not change her position. The Jennie Cushman came up the river on the night of the second day during which the brig was unloading. When three miles below Bangor a steam-tug was employed to tow her into the harbor, and in coming in she struck the vessel of the libellants and caused the damage complained of. None of the ship's company of the respondents' vessel were on board at the time of the collision except the master and two seamen, and they were below. At about nine o'clock in the evening, they set a light in the starboard rigging, ten or twelve feet above the deck, and the light burned brightly. The collision occurred between eleven and twelve o'clock at night; but it was a bright night, and the vessels had been in plain view of each other for a half-hour before it took place.

James S. Rowe, for libellants.

Charles P. Stetson and Shepley & Strout, for respondents.

CLIFFORD, Circuit Justice. Taken as a whole, the circumstances show to a demonstration that this was a case of fault and not of inevitable accident. Inevitable accident is never admitted as a good defence except when it appears that neither vessel was in fault, because if the vessel of the respondent was in fault, the libellant is entitled to recover, and if the vessel of the libellant is in fault then the libel should be dismissed; but if both were in fault, then the damages should be divided. The Pennsylvania, 24 How. [65 U. S.] 313; The James Gray, 21 How. [62 U. S.] 194. The general rule is, that when a ship is at anchor in a proper place or anchoring, and with no sails set, if another ship under sail collides with her and does her damage, the vessel in motion is liable. The Batavier, 2 W. Rob. Adm. 407; The Scioto [Case No. 12,508]; Strout v. Foster, 1 How. [42 U. S.] 89.

The appellants do not controvert that general rule, but insist that the evidence in the record shows that the case falls within the qualifications which are included in the rule. The harbor regulations of the port of Bangor provide that no vessel, steamboat, or raft shall be allowed to anchor or lie in the main channel of the river between the Bangor bridge and the north line of Hampden, so as to obstruct the free passage of vessels, boats, or rafts up or down the river. The duty of the harbor-master is to board vessels as soon as practicable after their arrival, and to exhibit to the proper officer the regulations of the port, and, if necessary, to direct them where they shall lie. The argument of the appellants is that the vessel of the libellants was not anchored in a place allowed by the harbor regulations, but in a place where she obstructed the free passage of vessels up and down the river. But the harbor-master, and the owner of the wharf to whom the cargo was consigned, testified otherwise, and so do the master and all others on board the damaged vessel. They testify that she was on the Brewer side of the main channel, where at low tide the water was not more than seven feet deep. The witnesses examined by the appellants strongly support their theory, but after a careful examination of the whole evidence I concur with the district judge that their testimony is not sufficient to overcome the facts and circumstances adduced by the libellants. Several other defences were set up by the respondents, but it is sufficient to say that no one of them is sustained by the evidence. Decree affirmed with costs.

STERLING (UNITED STATES v.). See Case No. 16,388.

STERLING FURNITURE CO. (McCULLOUGH v.). See Case No. 8,741.

Case No. 13,376.

Case of STERN.

[6 Int. Rev. Rec. 87.]

Circuit Court, S. D. New York. Sept. 12, 1867.

BANKRUPTCY—PETITION TO ANNUL—ASSIGNMENT OF CLAIMS.

In bankruptcy.

BLATCHFORD, District Judge. A petition was duly verified by oath, having been presented to, and filed in this court by said bankrupt, setting forth that on the 11th of July, 1867, he filed a petition in bankruptcy in this court; that on the 16th of July, 1867, he was duly adjudicated a bankrupt under the bankruptcy act of March 2, 1867 [14 Stat. 517]; that on the 2d day of September, 1867, Mr. John Sedgwick was duly appointed assignee of his estate; that all the creditors named in Schedule A, filed in his petition, have made assignments of their claims against him to one Morriz Stern; that all such creditors have been paid and satisfied by said Morriz Stern; that said Morriz Stern having thus become sole creditor of said bankrupt, has released him from all claims, demands and liabilities by a deed of release executed by him to said bankrupt, and dated the 9th day of September, 1867, a copy of which deed is annexed to said petition,—and praying that the said adjudication in bankruptcy against him may be annulled upon

his giving such notice to the creditors set forth in said schedule, as this court may direct, or upon such other terms and conditions as this court may deem reasonable and just.

Now, on motion of Edwin James, Esquire, attorney for said petitioner, it is hereby ordered that the said creditors, and all other creditors of said bankrupt, and the said assignee, and all other persons interested, show cause before this court in bankruptcy, on the 1st day of October, 1867, at 11 a. m., in the court-room of this court in the city of New York, why the prayer of said petition shall not be granted; and it is further ordered that a copy of this order be served personally or through the post-office, postage prepaid, upon each of the said creditors whose debts are set forth in said schedule, and also a copy thereof personally upon said assignee at least ten days before the return day aforesaid; and that a copy of this order be published once in each week for two successive weeks in the New York Daily Times and the New York Commercial Advertiser, the last publication to be at least five days before said return day.

STERN v. CLINTON. See Case No. 8,688.

Case No. 13,377.

STERN v. SCHONFIELD.

[3 Cin. Law Bul. (1878) 500.]

Circuit Court, S. D. Ohio.

BANKRUPTCY—CONFESSION OF JUDGMENT AS PREFERENCE OF CREDITORS.

[This was an action by L. Stern against Alexander Schonfield.]

Wright & Simon, for petitioner.

W. M. Bateman and F. W. Wood, for defendant.

Before SWING, District Judge.

In this case, Stern and others, as creditors of defendant, filed their petition in bankruptcy against him, and, as the act of bankruptcy, alleged that about the 1st of November, 1877, he confessed judgments in favor of Schonfield Bros. & Co. and Steinfield, with intent to prefer. They also filed a petition in the same case against those judgment creditors for an injunction to restrain them from enforcing a levy upon Schonfield's goods. In January, 1875, Steinfield loaned Schonfield a sum of money, and took a judgment note for it. In July, 1877, Schonfield Bros. & Co., having a large claim against Schonfield, loaned him $1,800, and took two judgment notes for the whole indebtedness. In November, 1877, a few days before the filing of the petition in bankruptcy, Schonfield Bros. & Co. and Steinfield took judgment upon their notes, and levied execution upon Schonfield's store. Petitioners moved for leave to amend their petition in bankruptcy so as to charge as a further act that Schonfield had given power of attorney to confess judgment with intent to prefer creditors.

THE COURT held: First. That within the meaning of the bankrupt act [of 1867 (14 Stat. 517)] the defendant, Schonfield, did not confess judgments as alleged; the taking of a judgment upon a power of attorney not being a confession of judgment within the meaning of the law.

Second. That petitioning creditors are not entitled to amend so as to allege a new act of bankruptcy.

Third. That in this case, if the notes and powers of attorney were given without intent to prefer, and without knowledge of the bankruptcy of the maker, the creditors are entitled to pursue their legal remedies thereon by judgment and levy, although the debtor may be bankrupt, and the creditors have knowledge of that fact the time of such judgment and levy.

Fourth. That as a matter of fact the powers of attorney were not given with intent to prefer in violation of the bankrupt law.

Both petitions were dismissed at the cost of the petitioning creditors.

STERN (UNITED STATES v.). See Case No. 16,389.

Case No. 13.378.

STERN v. WISCONSIN CENT. R. CO. et al.

[11 Chi. Leg. News, 384; 8 Reporter, 488; [1] 27 Pittsb. Leg. J. 40.]

Circuit Court, E. D. Wisconsin. April, 1879.

RAILROAD COMPANY—MORTGAGE—FORECLOSURE BY BONDHOLDER.

A mortgage of a railroad was given to secure the holders of bonds. Default having been made in payment of the interest, a bill was filed by the trustees of the mortgage, asking that they be put into possession. A funding system was adopted by which payment of interest on the bonds was postponed, and the money used in completing the road. The proceeds of sale of certain lands were also used in construction of the road, to which the trustees, under the mortgage, assented. On a bill filed by a bondholder who had not assented to the funding arrangement, *held*, that although there had been a diversion of the funds of the road, yet there having been no demand by the bondholders upon the trustees to foreclose and sell, the plaintiff, as one of the bondholders, could not by original bill proceed and ask for a foreclosure and sale; he should ask to be made a party, for the protection of his interest, to the litigation already pending in court.

[This was a bill in equity by Theodore Stern against the Wisconsin Central Railroad Company and others. Heard on motion for decree of foreclosure.]

Mr. Mariner, for plaintiff.

Mr. Finch, Jr., for defendants.

[1] [8 Reporter, 488, contains only a partial report.]

DRUMMOND, Circuit Judge. This is a bill filed by the owner of bonds secured by a mortgage, given to trustees by the railroad company. By various acts of the legislature of this state, certain companies were authorized to construct a railroad from Menasha, by way of Stevens' Point, to Lake Superior, and from Stevens' Point south to Portage City. The companies became consolidated into what is known as the Wisconsin Central Railroad Company. After this consolidation a mortgage was made on the whole railroad to secure certain bonds which were issued, and upon which money was raised, and the road partially constructed. The interest was paid on the bonds for a few years, but default having been made in the payment of interest, a bill was filed in this court by the trustees of the mortgage, in December, 1875, asking that the property should be put in their possession. There was a subsequent mortgage made in conformity with the authority contained in the original mortgage for further assurance. A supplemental bill was then filed, stating various facts which it is important that we should consider. With the funds obtained on the bonds issued under the original mortgage the company was unable to finish the road, and a funding system was proposed, by which the payment of certain interest coupons was to be postponed for a series of years, and some advances were to be made by the bondholders for the completion of the road. Under this funding arrangement a large number of bondholders surrendered their coupons, and made advances of money with which the road was finally finished throughout its entire length from Portage City and Menasha via Stevens' Point to Lake Superior. The supplemental bill stated that it was of the greatest importance that the road should be completed, because congress had made grants of lands which could only be available on condition that the road was finished within a certain time, and because the proceeds of the land constituted one of the principal funds relied on for its construction. These facts were the main inducement which caused a majority of the bondholders to make the advances mentioned, and the trustees to acquiesce, they believing it to be for the best interests of all the bondholders. But some of the bondholders did not accede to this proposition, and took no part in the funding arrangement. It appears that in consequence of the want of funds, the proceeds of the sale of certain lands that had been made by the company were used in the construction and completion of the road. By the terms of the mortgage this could only be done with the consent of the trustees, as the title of the railroad property, including the lands, was vested in them. They assented, as they say in their supplemental bill, to this appropriation of the money arising from the sale of lands because they thought it for the best interests of all concerned. It appears by the pleadings in this case that the company had become insolvent, and even with the assistance obtained from the proceeds of the sale of lands, it was unable to meet the interest on its bonds, to which purpose in a certain contingency these proceeds were to be appropriated. For the advances made by the bondholders in the manner stated, under the funding arrangement, additional bonds were issued, and one of the questions in the case grows out of this fact, which, however, may be settled when the court shall consider the manner in which the distribution shall be made of any fund which there may be in court arising from the sale of the property, or from the income of the road. The plaintiff in the bill now before the court, which was filed on the ——day of ——, 1878, and who is a bondholder who did not become a party to the funding scheme, complains that the trustees had violated their trust, and asks that the property be sold, under a decree of foreclosure. This, it will be observed, is an independent bill, distinct from the original and supplemental bills filed by the trustees, both of which simply ask for a strict foreclosure, and the possession of the property, and not for its sale. The gravamen of this bill is, that as by the mortgage executed by the company it was provided that the funds arising from the sale of any lands granted to it should be used in a particular way, and as the trustees have diverted those funds from the use authorized by the mortgage, they should not be permitted to remain as trustees of the interest of all the bondholders, and to control the litigation.

In considering the question now before the court we have to treat this allegation as true, and must consequently concede that this was an unauthorized diversion by the trustees of the fund arising in that way; that they had no right by the terms of the mortgage to assent to or even acquiesce in such diversion; but we must bear in mind the circumstances under which this took place, and consider whether the security of the complainant has been seriously impaired. It is reasonably certain that his security is more valuable in consequence of this funding arrangement, and the use of the funds acquiesced in by the trustees, and which resulted in the completion of the road. Who shall be entitled to priority out of any proceeds arising from the operation of the road, or from the sale of the property, if it shall be sold under a decree of the court, may be a question that will arise hereafter. There is but one other fact stated in the bill which can be regarded as very material. That is, what is said as to the condition, or position of the trustees in relation to the bonds. There is an allegation that one of the trustees is a stockholder in the company, and owner of a large number of bonds, and that the real controversy in the case is be-

tween the conflicting claims of the various bondholders. If we concede the authority of the case cited and relied on by the plaintiffs' counsel,—Alexander v. Iowa Cent. R. R. [Case No. 166],—that one bondholder has a right to have a mortgage foreclosed on a railroad where there has been default in the payment of interest, and where the mortgage itself provides that the trustees can proceed to foreclose, or to take other legal steps, only upon the contingency that a certain number of bondholders should ask for their action, the question is, whether this can be done in such a case as this. It is claimed it cannot be done unless the bondholders should ask the trustees to make the foreclosure, or to take such other steps as should be necessary in order that the bondholders should realize the amount due to them. In the Case of Alexander, the court considered the right of the trustees to foreclose, as stated in the mortgage, as cumulative merely, and that the bondholder was not deprived of his right, on that account, to bring a foreclosure suit. But the mortgage in that case, as in this, provided that the principal should become due only on a certain contingency, and in that case, as in this, the principal was not due at the time the bill for foreclosure was filed. In that case the mortgage provided that the principal should become due upon default in the payment of interest, whenever a majority of the bondholders should exercise the option which the mortgage gave them. In this it is given only to the trustees, so it is not competent for any one of the bondholders to declare that in consequence of a default in the payment of interest the whole is due. In this case, unlike that, no demand has been made on the trustees to foreclose this mortgage by any bondholder. There has been no demand for the sale of the property in consequence of the default in the payment of interest, under the terms of the mortgage. So that the question in this case is whether, because there has been a diversion, in the manner stated, of a portion of the funds belonging to the company from their proper direction as prescribed in the mortgage, one of the bondholders can come into a court of equity and ask for a foreclosure without a demand made on the trustees in any form. We have very great doubts whether that can be done. It is not within the case of Alexander v. Iowa Cent. R. R. [supra]; but under the circumstances in this case, and the allegations made in the bill, we think the plaintiff has a right to come into court and ask to be made a party for the protection of his interest to the litigation which is already pending in this court.

There is an allegation contained in the bill to which, perhaps, we ought to refer, as some reliance has been placed on it. It is, that because of the failure of some of the bondholders to enter into the funding arrangement, the railroad company induced the trustees, under the mortgage to file the original bill on the 31st of December, 1875, in this court, with the object of directing the suit commenced by themselves, in such a way that it could not be pressed to a decree, thereby protecting the stockholders of the railroad company and the Colby Construction Company. The instruction which was given to the trustees by certain bondholders to commence the proceedings already mentioned was as stated therein, "upon a stipulation that the same shall not be prosecuted to final judgment or decree except under the direction of a majority of said bondholders by requisition in writing as provided in said mortgage, and in no event, to the harm of said company, or to a judicial sale of the mortgaged premises at an earlier day than the provisions of the mortgage would enable it to be done in and by proceedings instituted adversely to, and without the consent of, said company." Admitting the full force of this allegation, there is nothing contained in it to affect prejudicially the rights of this plaintiff, or of the holders of bonds in the same circumstances as himself. There is no distinct and explicit allegation which the defendants can traverse. It is not stated how the company induced the trustees to institute the proceedings, neither is it said that there was any agreement made upon the subject. The whole allegation lacks precision and distinctness. There is no fraud or collusion so clearly stated as to require a traverse from the defendants.

In view of all these various considerations, and of the doubt whether an original bill of this kind can, in this case, be maintained, we feel inclined to hold that the complainant ought not to proceed with the bill as an independent measure, but that he shall come into the suit already pending in this court and ask to be admitted, for the protection of any equities which may exist in his favor. We have no doubt that this railroad property must be sooner or later sold in order to meet, as far as it can do so, the claims that are against it. We can see no particular benefit to be derived in any way by postponing the sale. We understand, although the bill states the railroad company has possession of the property, and not the Phillips & Colby Construction Co., about which a good deal is said in the pleadings, and in relation to whose rights there is no controversy here, it is conceded the trustees are now in possession, so that the object which they sought in their original and supplemental bills, has been accomplished. If the plaintiff should come in as a party to the original suit, it may be that he would have the right to ask the court to direct the trustees to amend their bill so that there may be a sale of the property, but in becoming a party to the original litigation, we think that the plaintiff should eliminate

from his petition all except what has been now stated to constitute the material allegations. When this is done, it will be for the court to consider what his equities are, and how far those equities have been prejudiced or impaired, if at all, by any wrongful act of the trustees.

We have given generally our views upon the case as stated in the bill, and in the exhibits annexed thereto. We think it unnecessary to refer to the various exceptions in detail which have been taken to the bill, and are referred to in the report of the master, to which exceptions have been made.

[NOTE. The plaintiff subsequently filed an amended bill, to which the defendant company demurred, and the defendant trustees filed a bill setting up the pendency of their own suit, and denying all the frauds which were alleged in the bill. The case then came on to be heard upon the demurrer and plea. 1 Fed. 555.]

STERNS (PHELPS v.). See Case No. 11,-080.

Case No. 13,379.

STERRICK v. PUGSLEY et al.

[1 Flip. 350;[1] 1 Cent. Law J. 106.]

Circuit Court, E. D. Michigan. Jan. 26, 1874.

PRACTICE IN EQUITY—MODE OF ENTITLING BILLS AND AFFIDAVITS—SERVICE OF COPIES.

1. A bill addressed to the "circuit court, etc., in chancery sitting," is a sufficient address.

2. A bill should not be entitled in a cause until it is filed. And if so entitled before filing, such part may be rejected as surplusage.

3. The venue should, when the affidavits are taken before a United States commissioner, be thus given: "United States of America, District of ——" and not "State of ——, county of ——;" and if made to be used in a suit not yet commenced it should not be entitled, as that would be cause for rejecting them.

4. How copies of affidavits should be served on opposing counsel.

On motion of complainant [Charles V. Sterrick] for a preliminary injunction to restrain defendants [James W. Pugsley and others] from using a deed of assignment of a patent by complainant to defendant Pugsley, and from claiming or exercising any rights thereunder.

Mr. Breese, for complainant.
H. B. Brown, for defendants.

LONGYEAR, District Judge. Some preliminary objections will be first noticed. The defendants' counsel objected to the bill of complaint being read on the grounds: 1st—That the entitling of the court is not "in equity," but of the "circuit court," etc., merely. 2d—That it is entitled in the cause.

The address of the bill is to the "circuit court," etc., "in chancery sitting." This is sufficient, and if the entitling of the court were of any consequence the court would direct it to be amended by adding the words "in equity." The bill is entitled in the cause. This is irregular, because until the bill is filed there is no cause pending. The bill, however, is complete without it, and the entitling as to the parties is rejected as surplusage. The objections to the bill are, therefore, overruled.

Counsel for defendants also objected to the reception and reading of the affidavits annexed to the bill of complaint in support of the motion for injunction on the grounds: 1st—That they have no proper venue. 2d—That they are not entitled in any cause "in equity."

The affidavits are sworn to before United States circuit court commissioners, some of them before a commissioner for the Eastern district, and some before a commissioner for the Western district of Michigan. The venue of each is: "State of Michigan, County of Calhoun," or, "County of Kalamazoo," according, I suppose, to the county in which the oath happened to be administered. This was irregular. The proper venue of an affidavit taken before a United States commissioner is: "United States of America, District of ——," naming the district and state for which the commissioner is such. In this case it should have been "Eastern District of Michigan," or "Western District of Michigan," as the case was. In the view taken by the court, however, upon the merits of the motion, admitting all the affidavits, it is unnecessary for the purposes of this case to decide what is the effect of the irregularity in the venue.

The objection to the entitling of the court is not tenable upon the ground stated. The affidavits were all made before the suit was commenced. Such affidavits should in no case be entitled in any court or cause. When they are so entitled it is a good cause for their rejection. Reg. v. Jones, 1 Strange, 704; Rex v. Pierson, Andrews, 313; Rex v. Harrison, 6 Term R. 60; King v. Cole, Id. 640; 1 Daniell, Ch. Prac. 891; Humphrey v. Cande, 2 Cow. 509; Haight v. Turner, 2 Johns. 371; In re Bronson, 12 Johns. 460; Milliken v. Selye, 3 Denio, 54; Hawley v. Donnelly, 8 Paige, 415; 1 Barb. Ch. Prac. 600. See, also, the decision of this court made in the present term in Blake Crusher Co. v. Ward [Case No. 1,505]. But it was said at the argument, if there is no entitling how can it be known for what purpose the affidavit was made? This objection, if it be one, can be very easily obviated by stating the purpose for which it is intended in the affidavit itself.

The bill and affidavits having been read, defendants' counsel offered to read a sworn answer and accompanying affidavits in opposition to the motion. To this the complainant's counsel objected, on the ground that he had not been served with copies. Affidavits to be used in support of, or in opposition to, special motions, ought always to be served on the opposite counsel a reasonable time before the

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

motion is brought on. Where this is not done the court may reject the affidavits, or, in its discretion, allow the same to be read, giving the opposite party the option to proceed with the hearing or to take time for the perusal and examination of the affidavits, and production of affidavits in reply, where that is competent. The latter course was pursued in the present case.

STERRY (HARRISON v.). See Case No. 6,-144.

Case No. 13,380.

STETLER'S CASE.

[9 Leg. Int. 38; 1 Phila. 302; 1 Whart. Am. Cr. Law, 407.]

Circuit Court, E. D. Pennsylvania. Feb. 27, 1852.

CRIMINAL LAW—PARDON.

1. [The president of the United States has authority to pardon an offense, so long as any of its legal consequences remain, though the term of imprisonment to which the offender was sentenced has expired.]

2. [A pardon, which recites in a preamble the conviction of the offender of an offense against the United States, and thereupon grants to him "a full and unconditional pardon," without again specifying the offense, is not a general pardon, and is valid.]

3. [A pardon, granted to one S., recited his conviction, at the "June term, 1850," of the offense, "counterfeiting the coin of the United States," and his sentence to "imprisonment for the term of one year." It appeared that S. was convicted, at the May term, 1850, upon one indictment charging both counterfeiting and uttering counterfeit coin, and was sentenced to both fine and imprisonment. *Held*, that such pardon, if not void because of failing to show that the executive was fully apprised of the crime of the party and the action of the court upon it, could have no application to the felony of uttering counterfeit coin, of which G. had been convicted.]

William Stetler was tried at the last sessions of the district court of the United States for counterfeiting the coin of the United States. On the trial one Lewis George was offered as a witness for the United States. He was objected to by the prisoner's counsel on the ground that he was convicted for the same offence in 1850, and sentenced. A pardon was then produced for the witness. To this pardon Mr. Tyler excepted, because it pardoned George after he had served out the term of imprisonment to which he was sentenced; and by Mr. Vaux, because his pardon did not recite the offence of which he was convicted, and it did not pardon any offence, but simply granted to the said George "a full and unconditional pardon." The court (Judge Kane) admitted the witness. Stetler was convicted. On a rule to show cause why a new trial should not be granted on the reason filed sec. reg.

On the argument, the following points were taken by the counsel for the prisoner:

Lewis George was improperly admitted as a witness, because: (1) The pardon of the president was void, having been granted to one who had served out his time of imprisonment, and the president has no authority, under the constitution, to pardon disabilities of a felony. (2) The pardon was void because it did not recite if the pardoned person had been indicted and convicted; and hence no "offence against the United States" was recited in the pardon. (3) That the president could not grant a pardon to an individual, in whatever form of words, without reciting the specific offence, and pardoning the offence, as the constitution gives power only "to pardon offences against the United States." (4) That the pardon was void for misdescription of the offence, the time of holding the court, and in failing to describe the offence pardoned (as said George was found guilty on one bill charging in two counts separate and distinct offences).

Mr. Tyler argued the first point as a question of law governed by the constitution of the United States, and the English statutes, and the prerogative of the king and power of parliament. Russ. Crimes.

Mr. Vaux, in support of the second, third, and fourth points, considered the pardon void and of no effect, because by the constitution of the United States a positive and limited power was vested in the president to "pardon offences against the United States," and the grant of the president must show that it was within the power vested in him and the constitution; that a full and unconditional pardon was not a pardon of "an offence against the United States" unless it recited the crime as one contrary to the laws of the United States, and, having thus brought it within the pardoning power granted in the constitution, pardon such specific and defined offence; that misdescription, mistake, misrepresentation are fatal defects in a pardon; and, that as the pardon in this case shows patent defects, and as two offences exist in the bill of indictment, and the pardon does not recite them, a pardon that does not relate back to the offence, and cover it, is void. 3 Bac. Abr. tit. "Evidence," note f, p. 583; 5 Bac. Abr. tit. "Pardon," p. 258, note D, p. *291; 2 Trials per paix, 377, &c.; Hawk. P. C.; Hargrave (Index); Macn. Ev. *207; McKal. Justice, 235, 243; 2 Russ. Crimes, 592; 9 Cow. 707; 17 Mass. 515; 8 Watts & S. 197; 12 Pick.; [U. S. v. Wilson] 7 Pet. [32 U. S.] 153; 1 Phil. & A. (N. S.) Ev. *19; 1 Ashe, 84; 2 Pa. Law J. 37; Duncan, J., Whart. Dig. 393; 4 City H. Rec. 119; 5 City H. Rec. 194; 3 Johns. Cas.; Gordon, Dig. § 5; Acts 638–640; 4 Law Rep. (N. S.) 437, Dec. No. 51.

KANE, District Judge. When this indictment was on trial at the last session of the court, one George Lewis was offered as a witness for the prosecution, and was objected to as incompetent, because convicted of felony; but on the production of a pardon he was allowed to be sworn, and thereupon testified to a fact material in the cause. The prisoner was found guilty, and a new trial

having been moved for, it is now contended that George was improperly admitted as a witness.

The facts, as developed by the record, are these: George was tried, at the May sessions of 1850, in this court, on an indictment containing two counts,—the first for unlawfully, feloniously and falsely making, forging, and counterfeiting ten pieces of coin in the resemblance and similitude of the silver coin which has been coined at the mint of the United States, called a half dollar; the second, for unlawfully and feloniously passing, uttering, and publishing ten false, forged, and counterfeit pieces of coin such as were described in the first count. The verdict was a general one of guilty, and on the nineteenth of August, 1850, he was sentenced to pay a fine of —— dollars, and to suffer an imprisonment of one year, to be computed from the second day of June preceding.

The pardon was in these words: "Millard Fillmore, President of the United States of America, to all whom these presents shall come, greeting: Whereas, it appears that at the June term, 1850, of the United States district court for the Eastern district of Pennsylvania, Lewis George was convicted of counterfeiting the silver coin of the United States, and sentenced to be imprisoned for the term of one year; and whereas, it has been made satisfactorily to appear to me that the said George is a fit subject for the exercise of the executive clemency: Now, therefore, be it known that I, Millard Fillmore, president of the United States of North America, in consideration of the premises, divers other good and sufficient reasons me therefore moving, have granted, and do hereby grant, unto him, the said Lewis George, a full and unconditional pardon, to take effect from and after the first day of July next. [Seal.] In witness, etc. Done at Washington, this fourth day of June, A. D. 1851, etc."

The exceptions, as they have been expanded in argument, embrace the following points: (1) That it is not competent in the president to grant a pardon after the expiration of the term of sentence. (2) That the pardon contemplated by the constitution is of offences, not of the offender; and that this pardon is inoperative, because it does not set forth the offence pardoned. (3) That if the pardoning words of the instrument are to be referred by implication to the offence recited in the preamble, the recital is itself indefinite, and variant from the record of conviction.

1. I intimated my opinion on the first point, before the argument closed. I cannot doubt the constitutional authority of the president to pardon an offence, so long as any of its legal consequences remain. I do not enter upon the question, whether it is in the power of congress to attach consequences to a conviction which a pardon cannot remove. There are constitutional views of that question, which are not met in the reasonings of Mr. Hargrave (2 Jur. Arg. 221), nor in any of the cases which recognize the English doctrine. But here the disability was only consequential, not statutory; and I can see no reason for restricting the president's power of pardoning to the time during which the convict is undergoing sentence. In very many cases, the consequential disability is the most painful incident on the conviction. In some, the offence, though a grave one in its legal aspect, is morally venial, perhaps involving no turpitude whatever, and calling for a merely nominal sentence. It would be strange if such a sentence were to disqualify forever because it did not allow time to invoke the president's clemency. For clearly congress could not relieve. Were such the law, a nominal sentence, to be effectively merciful, must bear a relation to the distance between the court and the capitol; and a Californian, to ransom his civil rights, must invoke some months of imprisonment beyond the rightful penance of his crime. But I need not pursue the argument. There is nothing before the court, to show that the sentence of George was complied with, by the payment of the fine, which formed part of it; and, besides the question of law has, I apprehend, been determined by the late Mr. Justice Thompson in U. S. v. Jones [Case No. 15,493].

2. The second point of exception involves in its terms the question of a general pardon, the power to grant such a pardon, and its effect, if granted, on the legal competency of the convict. This power is one which can hardly be regarded as established in England, notwithstanding the numerous dicta in the ancient books (see the remarks of Sargeant Hawkins on the several cases, P. C. bk. 2, c. 37, § 9); and which, in our country, might admit of a less embarrassed dissention under the terms of the federal constitution. It is certain that such pardons have not been granted by the crown for some centuries past, and I am not aware that they have ever been known in the United States. But, at any rate, no question regarding them can arise upon the facts before the court. The pardon here is full and unconditional, but not general. Whatever may be the effect of the preamble reciting as it does a single offence, it must be held to limit, in some degree the general words of the grant.

3. The third exception is better taken. A comparison of the instrument of pardon with the conviction on which it is supposed to operate shows as, it seems to me, a fatal diversity. The pardon speaks of a conviction at "June term" of the offence of "counterfeiting the silver coin" and a "sentence" thereon of "imprisonment." The record is of a conviction at the "May sessions" of two felonies,—one "forging and counterfeiting ten pieces of coin," etc.; the other "uttering and passing" them,—on which there is a sentence of "fine" as well as imprisonment. Neither the time of conviction, nor the offences, nor the judgments correspond.

The cases which are digested in Hawkins (ubi supra, § 8, etc.) and in Chitty (chapter 19, p. 770,* 771*), and the concurrent opinion of the commentators on this title of the law, all go to this: That whenever it may be reasonably intended that the king, when he granted the pardon, was not fully apprised both of the heinousness of the crime and also how far the party stands convicted thereof upon record, the pardon is "void." And this being so, what are we to say, where the pardon misrecites the time of conviction, or recites rather an impossible time—for we have no June term—and the conviction was in this court; and referring to one felony as its implied subject, and omits another, of which the party was equally convicted, and omits, besides, a portion of his sentence? Is this a case in which it can reasonably be intended that the executive was fully apprised of the crime of the party, or the action of the court upon it?

There is nothing of which we can take hold, to connect the pardon with the conviction, and thus to make them commensurate. We must begin by assuming that "June term" means "May sessions"; next, that the offence of counterfeiting includes the independent felony of uttering, and then that a sentence to fine and imprisonment is sufficiently described as a sentence of imprisonment; and, if either of these assumptions is too broad, there is nothing left for us but an interpretation of the instrument ex visceribus suis, without reference to anything beyond. We cannot, by judicial construction, expand the pardon of one felony into a pardon of two; and, unless we do this, the pardon, though it be not void, has no application to the felony of which George was convicted under the second count of the indictment against him. I must therefore hold that the witness, notwithstanding the pardon, was incompetent, propter delictum, and that the prisoner is entitled to a new trial.

STETSON, Ex parte. See Case No. 13,390.

Case No. 13,381.

In re STETSON.

[4 Ben. 147;[1] 3 N. B. R. 726 (Quarto, 179).]

District Court, S. D. New York. May, 1870.

BANKRUPTCY—APPLICATION TO VACATE DISCHARGE—NOTICE—OMISSION OF PROPERTY FROM SCHEDULES.

1. A bankrupt obtained his discharge on February 3d, 1868. On March 28th, 1868, a petition was filed by a creditor to vacate the discharge, on the ground that the creditor had no notice of the filing of the petition, or of the adjudication, till February 3d, 1868, and was not served with notice of the issuing of the warrant, and of the meeting of creditors to prove debts and choose an assignee, and on various grounds of fraudulent omission of property from his schedules. The papers showed that notice of the issuing of the warrant and of the first meeting of creditors was published, and that a like notice was mailed to the creditor; and it appeared that he attended that meeting and afterwards, before the discharge, deposed to a proof of his debt before a register, which proof was, after the discharge, filed in court, but it did not appear whether it was presented to the register in charge of the case: *Held*, that, the notice being duly published and served by mail, if the creditor failed to receive the notice, the regularity of the proceeding would not be thereby affected.

[Cited in brief in Pattison v. Wilbur, 10 R. I. 449.]

2. On the merits, the property in question was not shown to have belonged to the bankrupt, and the petition must be dismissed, with costs.

[In the matter of Charles A. Stetson, a bankrupt.]

W. Watson, for creditor.

T. Burwell, for bankrupt.

BLATCHFORD, District Judge. In this case the bankrupt received his discharge on the 3d of February, 1868. On the 28th of March, 1868, a petition was filed by Calixte Harvier, a creditor of the bankrupt's, praying the court to vacate and annul such discharge. The petition set forth, as grounds for the relief asked: (1) That the creditor had no notice of the filing of the bankrupt's petition, or of his adjudication, until the 3d of February, 1868, and was not served with a notice that a warrant had been issued, and that a meeting of creditors would be held to prove their debts and choose an assignee, as required by section 11 of the act [of 1867 (14 Stat. 521)]; (2) that the bankrupt, in his petition and schedules, wilfully omitted to mention the profits of the Astor House, since 1860, in the hands of John E. Develin, but held by him in trust for the bankrupt, and a house at Lynn, Massachusetts, the title of which was in the wife of the bankrupt, but which belonged to him and was purchased with his money; (3) that the bankrupt was guilty of fraud and negligence, in that he did not deliver to his assignee property which belonged to him at the time he presented his petition and inventory, namely the said profits and the said house; (4) that, with intent to defraud his creditors, he admitted, in the proceedings in bankruptcy, three false and fictitious debts in favor of the said Develin, against his, the bankrupt's estate, and, knowing that such debts had been proved, and that the same were false and fictitious, did not declare the same to his assignee within one month after such knowledge; (5) that, after the passage of the bankruptcy act, he made to the said Develin a fraudulent transfer of the profits arising out of the Astor House, contrary to the provisions of the bankruptcy act. The petition alleges, that the creditor had no knowledge of these things, until after the discharge, and no opportunity, if they had come to his knowledge, of availing himself thereof, in opposing the

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

discharge, by reason of such want of notice. The creditor contends, that the bankrupt was, at all times after the year 1860, the proprietor of the Astor House and really a partner with the said Develin, and was the head and principal of the establishment, and it was carried on by his ability, experience, and skill, and he was the owner of, and entitled to a large share of, the profits thereof; that the said Develin, who was the ostensible proprietor, had no agency in the keeping of the hotel, except that he held in his own name a lease of the same, running until 1870; that Develin had not kept the hotel or performed any of the duties of a hotel keeper, but the hotel had been, since 1860, kept by the bankrupt, who was entitled, in consideration of his ability in the art and mystery of hotel keeping, to the profits thereof, Develin being entitled to only such ratable compensation as the taking of the lease was worth; that a portion of the profits of the establishment had been invested in a house at Lynn, Massachusetts, which in fact belonged to the bankrupt, although he gave out that it was given by Develin to his, the bankrupt's, wife; and that the profits of the Astor House, since 1860, were the property of the bankrupt, and were not mentioned in his schedules.

In regard to notice to the creditor, the papers show, that notices of the issuing of the warrant and of the first meeting of creditors were duly published, and that a like notice, containing the name of Mr. Harvier, as a creditor, and a statement of his residence and of the amount of his debt, and the other matter required, was duly served by mail on Mr. Harvier. If he did not receive it, that fact cannot affect the regularity of the proceeding. But it is quite clear, on the evidence of Mr. Harvier, that he attended the first meeting of the creditors of the bankrupt. That meeting was held on the 13th of November, 1867, and was adjourned until the next day, when an assignee was appointed. The petition for discharge was filed on the 24th of December, 1867. The order to show cause against the discharge was returnable on the 21st of January, 1868. On that day Macy & Jenkins, creditors, appeared, and gave notice of opposition to the discharge. On the 27th of January, a summons to the bankrupt to attend and be examined on the 28th, was issued by the register, on the application of Macy & Jenkins. On the 28th, the bankrupt was examined by the attorney for Macy & Jenkins, and his deposition shows, that he was enquired of respecting the matters now raised in regard to his connection with the Astor House since 1860, and in regard to the house at Lynn, and that he testified regarding those matters. As the result, no specifications were filed by Macy & Jenkins. Mr. Harvier, on the 28th, obtained from the office of the clerk of the supreme court of the state of New York, in the city of New York, a certified transcript of the docket of a judgment recovered by him in 1860 against the bankrupt and another person, and, on the 29th, deposed before a register, not the one to whom this case was referred, to a proof of his debt, to which such certified transcript was annexed. Whether such proof was presented to the register in charge of this case, does not appear. It was filed with the clerk of this court on the 17th of February, 1868. The papers show, that thirteen creditors had proved their debts, and that they were served with notices of the hearing on the application for discharge. The register's final certificate was made on the 1st of February, and the discharge was granted on the 3d. These facts are alluded to as indicating that the matter of the relations of the bankrupt to the Astor House, subsequently to 1860, and of the status of the house at Lynn, were made a subject of inquiry by creditors, with reference to a discharge, and that none of those who had proved their debts deemed the facts to be such as to warrant the filing of specifications in opposition to a discharge.

On the merits, I think that the creditor fails altogether, on the proofs now taken, in establishing that the bankrupt had, after 1860, any interest in the profits of the Astor House, or that any part of the same was held in trust for him by Mr. Develin, or that the house at Lynn belonged to him, or was purchased with his money. It is quite clear, on the evidence, that the bankrupt was not, at any time after 1860, the proprietor of the Astor House, or a partner with Mr. Develin, or the proprietor of the establishment, or entitled to any share of its profits. Mr. Develin was the real as well as the ostensible proprietor and keeper of the hotel. He paid to the bankrupt a salary, for certain services rendered at the hotel, and allowed him to reside there. Being the son-in-law of the bankrupt, and residing himself with his family at the hotel, during a part of each year, he permitted the bankrupt's wife, and three unmarried daughters of her and of the bankrupt, to reside at the hotel, and also furnished them with money, out of his own means, towards their support. This, he testifies, was regarded as part of the bankrupt's compensation. Whatever sum it amounted to was expended and used. In addition, Mr. Develin, as was not unnatural from his relationship to the bankrupt's wife and daughters, invested some money for the benefit of the bankrupt's wife and her daughters, the income to go to the wife during her life, and the principal to the daughters at her decease, the whole being put in trust. This money was his own, and was a free gift by him. So, also, the money invested in the house at Lynn, which is held in trust for the bankrupt's wife and her daughters, is not shown to have been the money of the bankrupt.

Instead of three debts in favor of Mr. Develin, but two were proved, and they are shown to have been valid and subsisting debts, and not at all fictitious.

The objections to the discharge fail, and it must stand, and the petition of the creditor be dismissed, with costs.

STETSON (DUNLAP v.). See Case No. 4,-164.

Case No. 13,382.

STETSON et al. v. The PEPITA.

[3 Hughes, 483.] [1]

District Court, E. D. Virginia. May 30, 1878.

COLLISION—SHIP TO WINDWARD—RIGHT OF WAY.

Example of collision happening by violation of rule 17 of the rules of navigation.

[These were cross-libels by Stetson, Garry & Co. against the bark Pepita and Von Lind & Co. against the schooner William Slater.]

HUGHES, District Judge. Since hearing the evidence and arguments in these cases at bar I have given several days to the study of them, not so much because they seemed difficult of decision in themselves, but because of the glaring conflict which displayed itself in the voluminous evidence which was taken, and the necessity I was under to discard as false a good deal of testimony on one side or the other. By sifting the evidence carefully, and planting myself upon facts which do not admit of doubt or dispute, I have made up what I believe to be a true statement of the facts of this controversy, as follows: The collision which is the subject of controversy took place between the German bark Pepita and the American schooner William Slater, at 10 a. m., on the 6th of October last, at a point about three and a half miles N. N. W. from Cape Henry, near the intersection of what is called the Bay Channel, coming out from Chesapeake Bay, with what is called the Cape Channel, coming out from Hampton Roads. Both vessels were on the port tack, moving under a stiff breeze; the bark heading E. by S. from Old Point Comfort, and the schooner heading S. S. E. from the bay. The wind was from the N., but was baffling between N. by E. and N. by W. The bark was to the leeward, with about three points of the wind free. The schooner was to the windward, with the wind nearly aft. Both vessels were full laden, bound to sea; the bark with resin and flour, the schooner with soft coal. The measured tonnage of the two vessels was nearly the same; that of the bark 231$^{70}/_{100}$ tons, that of the schooner 221 tons. They were both dull sailers, the bark being rather the faster of the two with equally favorable winds. The tide at the time of the collision was in ebb, and had been so for two or more hours. The schooner was moving with a fairer wind at a speed of five to six miles an hour. The bark, with less favorable wind, was moving at about the same speed, certainly not much greater, except for a few minutes just preceding the collision, when a slight change of her course to the leeward gave her a better wind. The vessels came together on intersecting courses, which made an angle with each other of twenty-eight to thirty degrees. The crew of each vessel, therefore, naturally supposed the other was overtaking her, whereas they were moving at nearly equal speed to a converging point. The vessels came together at an angle of about forty degrees. The schooner struck the bark's stem and port bow a side blow from the rearward, bending over and splitting her cutwater and wrenching it from the stem, but not bruising it on its starboard side or rubbing the paint on that side. The concussion upon the schooner was upon its starboard quarter, not severe enough to awaken a child sleeping in the cabin, but causing an indentation on the vessel of some six inches in surface and one inch deep. The damage to the bark was such as to require that she should be unloaded for repairs at Norfolk. This was not necessary with the schooner, the damage to which was chiefly in her rigging from fouling with the bow of the bark. As before said, the collision was from the starboard quarter of the schooner striking the port bow and the side of the stem of the bark by a glancing blow in a forward direction. All hands were on deck on the bark at the time of and for an hour or more before the collision, and there was a regular lookout on her forecastle deck. There was no lookout on the schooner. The man considered as the lookout was in the rigging at work with the sails. Except the helmsman, there was no one on the deck of the schooner but the master and a young woman passenger with whom he was conversing, and to whom he was pointing out objects of interest in sight until within a moment or two of the collision. A few minutes before the collision the bark fell off to the leeward from her E. by S. course, to get out of the way of the schooner, although she was near a lee shore. Her helm was aport at the time of the collision. Until a moment or two of the collision the schooner's helm also was aport. Then the master seized it from the helmsman and put it down hard a starboard, but too late to avoid a collision, which happened in consequence of the schooner, with helm aport, running across the bow of the bark. Except this futile and too tardy action of her master, the schooner did nothing to avoid the collision. The case falls within rule 17 of the American rules of navigation, which requires that, "when two sailing ships are crossing so as to involve risk of collision, then . . . . . if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward." This rule means by "crossing"

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

the coming of two ships towards a point on lines at right angles or on smaller angles with each other. Here one vessel was moving on a S. S. E. course, and the other on an E. by S. course. In consequence of the bark's porting her helm and falling off to the leeward a few minutes before the collision, she may at that moment have been heading E. by S. ½ S., or E. S. E. The duty of the schooner, under the rule 17, was, therefore, to have starboarded her helm some minutes before the collision; but she did nothing until her master, when it had become too late, seized her helm and put it hard down with his knee, just before the moment of collision. The schooner being to windward, rule 17 placed the onus of starboarding her helm and getting out of the way upon her, and required nothing of the bark. The schooner was in fault in not having starboarded her helm in sufficient time before the collision to get out of the way, much more, in having ported it at all, and I will decree accordingly.

It is not inappropriate, before dismissing the subject, to examine somewhat particularly the theory on which the owners of the schooner based their case. They hold that the case falls under rule 22, which requires that "every vessel overtaking any other vessel, shall keep out of the way of the last-mentioned vessel." They accordingly claim, that the bark was behind the schooner; that she was the faster sailer of the two; that she was therefore overtaking the schooner; and that consequently it was the bark's duty to keep out of the way of the schooner. They also insist that the wind was at N. N. W.; that the bark, on coming out from Old Point Comfort to Thimble light, did not take the Cape Channel out to sea, but kept straight on, on a N. E. by E. course, across the Tail of the Horseshoe, into the Bay Channel; and that she thence came down the Bay Channel to the point of collision, and not down the Cape Channel; and that she was, therefore, to windward of the schooner, and was following and overtaking her some time before the collision, and at the time of collision. But it is clear, to my judgment, that this theory cannot be reconciled with the indisputable facts of the case. The official report says, that the wind at Old Point at about 8 a. m. was N. It also shows that at 12 m. the wind was N. W. The schooner's testimony is, that the wind was baffling on the bay. It is fair to infer, therefore, that the wind did not get any further than N. N. W. at any time before 10 a. m., the time of the collision; and that its average point up to 10 o'clock was not west of N. by W. The tide, by the official report, was high at 7.20 a. m., and must have been in ebb from 8 to 10 a. m. Now the bark passed Old Point at 8.05 a. m., and got as far as Thimble light at 8.40. If it continued on in that same course of N. E. by E. across the Tail of the Horseshoe into the Bay Channel, which is a distance of nine miles from Old Point, or six miles from Thimble light, it had while on that course no point of the wind free, was close-hauled, and could not have moved faster between Thimble light and the Bay Channel than it had moved between Old Point and Thimble light. As it had sailed three miles in thirty-five minutes between Old Point and Thimble light, it would have consumed an hour to seventy minutes in reaching the Bay Channel from Thimble light, and therefore would not have reached Bay Channel, at a point beyond the Tail of the Horseshoe, about N. E. by E. from Old Point, until 9.45 or 9.40. But this point is five miles from that where the collision happened at 10 o'clock; and the bark could not have gone that distance in the fifteen to twenty minutes which were left to it between 9.40 and 10 a. m. It also seems to me to be simply preposterous to suppose that the master of the bark, who was making his fifteenth voyage from Hampton Roads to Brazil, should, on a beautiful morning in broad day, on a good tide, with a favorable wind, have done so unseamanlike a thing as to leave the direct route of the Cape Channel, to cross over the shallows of the Tail of the Horseshoe, and to get into the Bay Channel, which was out of his course, and several miles farther than the direct route to the Capes. A theory which requires the court to believe either that the master of the bark would have chosen such a route, or that he could have accomplished it, and made the collision by 10 o'clock, requires it to abandon the probable and to adopt the improbable and impossible. I cannot do otherwise than discard it; and the failure of this discarded theory is a breakdown of the schooner's case.

STETSON (SANBORN v.). See Case No. 12,-291.

STETSON (STURGES v.). See Cases Nos. 13,568 and 13,569.

STETSON (UNITED STATES v.). See Case No. 16,390.

STETSON, The D. S. See Case No. 4,104.

STETSON, The M. B. See Case No. 9,363.

Case No. 13,383.

The STETTIN.

[Blatchf. Pr. Cas. 272.] [1]

District Court, S. D. New York. Dec. 13, 1862.[2]

PRIZE—VIOLATION OF BLOCKADE—LOG BOOK—FALSE DESTINATION.

1. Vessel and cargo condemned for an attempt to violate the blockade.

2. Imperfection and mutilation of the log book. False destination stated in vessel's papers.

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

[2] [Affirmed in Case No. 13,384.]

In admiralty.

BETTS, District Judge. This vessel was English-built and documented, and was dispatched by neutral charterers from England with a large miscellaneous cargo, in May, 1862, on a round voyage to Tampico, thence to any port in the West Indies, the American States, or British North America, and back to the continent of Europe, the voyage to finally determine in the United Kingdom. The charter party was executed in London, March 4, 1862, between J. G. Pearson & Co., owners of the vessel, and Leach, Harrison & Forward, merchants of that place, shippers of the cargo. The crew list, the manifests of the cargo, and the bills of lading were all signed at Hull, in the latter part of March. The cargo was to be delivered at Tampico, to order. A letter on board, dated at Nassau, N. P., May 21, 1862, addressed to "S. Simpson, Esq., Supercargo Steamer Stettin," and signed "Henry Adderly & Co.," directed the cargo to be taken directly to St. John, N. B., as being a better market for it than Nassau. The vessel and cargo were captured by the United States steamer Bienville, at sea, near the coast of South Carolina, and about 30 miles distant from the port of Charleston, on the 24th of May, 1862, she having been cleared at Nassau for St. John, N. B., four days previously. No claim is interposed in the suit as to the cargo arrested, but the underwriters on the vessel intervene, by claim, for their interest under the policy.

The case was submitted to the court without argument upon the pleadings and proofs. The testimony of the master, the mate, the chief and the third engineer, and one seaman on the vessel was taken on preparatory examination. The witnesses state that the capture was made May 24, at 6 a. m., from 10 to 20 miles from the coast, and 35 miles outside of Charleston bar. The voyage was changed at Nassau, from Tampico to St. John. The master says that he had no knowledge that it was intended to run the vessel a different course from the one declared on the papers. The first mate and the third engineer state that they believed that the vessel was destined, when she left Nassau, for a blockaded port in the Southern States, from the proximity she made to such port; and the seaman testifies that that was the intention, because pilots were taken on board at Nassau, hired for the purpose of carrying her into a blockaded port. The master denies all knowledge of the owners or consignees of the cargo, or to whom it would belong if it reached the port of apparent destination. The first mate says that he supposed it was to go to some Southern port, and that its apparent destination was changed at Nassau, by order of Adderly & Co., of that place. The third engineer also supposed, after leaving Nassau, that the cargo was to be delivered in some port of the Southern States; and the seaman declared that it was to be carried to any Southern port they could get into, and he supposed it was to be Charleston. All the ship's company knew of the blockade of the Southern coast, and of the port of Charleston. The owners had the same knowledge. The master asserts that he does not know or believe that the vessel ever attempted to enter any blockaded port. He cannot say he ever heard anything which made him suspect or believe that the vessel was going into any port on the coast of North or South Carolina, or into any blockaded port. The first engineer declared a like ignorance on that subject. He cannot say whether or not he believes she intended to enter Charleston or any blockaded port. The third engineer says that he does not know, of his own knowledge, but he believes, from his personal observation and general information, that she was attempting to enter covertly the port of Charleston when she was captured; and the seaman says that he believes that the vessel designed and attempted to break the blockade at that time, because, about an hour and a half previous to the capture, he heard the captain say they were going to enter that port; that he, the witness, knew it before that time, from the actions of the master, who disguised the ship in her rigging and by paint, and that the intention was generally known on board a day or two previous to nearing the port. Other suspicious facts accompany the case. No log is furnished from the ship, or found with her, containing any entry after she started from the port of Nassau, May 21, 1862, and steamed out of the harbor, stopping at its entrance for passengers. That entry concludes the log, leaving space for another paragraph to fill up the page, and all the succeeding leaves of the book are blank. There are strong indications, in the interstices between the two leaves, that a full sheet has been abstracted from between the last page written on and the succeeding one left blank. The suspicion that further statements of the proceedings of the vessel were originally made, following that narrative of the voyage so commenced, arises from the fact that the official log taken from the vessel is without any entry, so that the vessel is left destitute of all record of her proceedings. Such mutilation of the log might have been effected by an adroit and careful operation, and the case does not stand before the court entitled to intendments favoring an interpretation supporting the fairness and innocency of the transactions on the voyage. The representations of the voyage in the shipping articles, manifests, and charter were palpably fictitious, as there is no reasonable support to the assertion that the vessel was expected to perform the tortuous and protracted navigation so ostentatiously set forth at her outset; and the fact that Adderly & Co., of Nassau, ap-

pear, at her first stopping place, as the umpires of her destiny, although in no way named as consignees, shippers, charterers, or agents, augments the impression that a house so long and so openly occupied in the line of trade which this vessel seems to have been actively pursuing, became actors in the enterprise, on the understanding that it should result in a formulent infraction of our belligerent rights.

I am clear that the evidence convicts the vessel and cargo of the offence charged, and that the intention and attempt of the voyage were to enter the port of Charleston, in violation of the blockade there subsisting.

[This decree was affirmed, on appeal, by the circuit court, November 14, 1863. [Case No. 13,384.]

Case No. 13,384.

The STETTIN.

[Blatchf. Pr. Cas. 665.] [1]

Circuit Court, S. D. New York. Nov. 14, 1863.[2]

PRIZE—VIOLATION OF BLOCKADE.

Decree of the district court, condemning vessel and cargo for an attempt to violate the blockade, affirmed.

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

In admiralty.

NELSON, Circuit Justice. This steamer, with a cargo consisting of tea, coffee, brandies, lead, shoes, etc., was captured on the 24th of May, 1862, while attempting to break the blockade of the port of Charleston, South Carolina, by the United States steamer Bienville.

The proofs are full that the vessel was not only near the mouth of the harbor of Charleston at the time of her capture, but that she was intending to enter it, with full knowledge of the blockade. The vessel has been appraised and delivered to the government, and most of the cargo has been sold. The court below decrees a condemnation of the vessel and cargo. The decree of the court below is affirmed. [Case No. 13,383.]

Case No. 13,385.

STETTINIUS v. MYER.

[4 Cranch, C. C. 349.] [3]

Circuit Court, District of Columbia. Nov. Term, 1833.

ASSUMPSIT—TRIAL—INDORSEMENTS—SET-OFF.

1. The plaintiff may, at the trial, after the jury is sworn, strike out the second and third blank indorsements of the note, and fill up the first blank indorsement to himself.

2. In an action for goods sold at auction, for cash, the defendant may set off the plaintiff's note.

Assumpsit [by Samuel Stettinius against B. F. Myer's administrator] for goods sold at auction. Terms cash. The defendant pleaded in offset a promissory note of the plaintiff to Davidson, and indorsed by him and two others, all in blank.

Mr. Morfit, for plaintiff, objected that the defendant's title to the note was not complete, and cited Day v. Lyon, 6 Har. & J. 140.

Mr. Marbury, for defendant, contended that he had now a right, after the jury was sworn, to strike out the blank indorsements of the subsequent indorsers and their names, and to fill up the blank indorsement of Davidson, the first indorser, so as to make the note payable to Myer. And of that opinion was the whole court.

Mr. Morfit then contended that, as the sale of the goods by the plaintiff to Myer was at auction, and the terms of sale cash, the defendant could not set off the note of the plaintiff. And of that opinion was THRUSTON, Circuit Judge.

But THE COURT (THRUSTON, Circuit Judge, contra) overruled the objection. THRUSTON, Circuit Judge, afterwards agreed with the court, upon seeing the case of Eland v. Karr, 1 East, 375.

Case No. 13,386.

STETTINIUS v. ORME.

[4 Cranch, C. C. 342.] [1]

Circuit Court, District of Columbia. Nov. Term, 1833.

BAIL IN CIVIL CASE—AFFIDAVIT—SLANDER.

It is not a valid objection, to an affidavit to hold to bail in slander, that the plaintiff therein states that he is credibly informed and verily believes that the defendant spoke the words; the affidavit being positive that the plaintiff had sustained damage thereby to the amount of $5,000.

[This was an action for slander, by Samuel Stettinius against W. C. Orme.] Affidavit filed with the declaration before the writ was issued.

Mr. Wallach moved for leave to appear without bail, because the affidavit was not positive that the defendant spoke the words charged.

But the affidavit was deemed sufficient by THE COURT (THRUSTON, Circuit Judge, absent), although it only stated that the plaintiff was credibly informed and verily believed that the defendant spoke the words; the affidavit being positive that the plaintiff had sustained damage by the speaking of the words to the amount of $5,000.

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

[2] [Affirming Case No. 13,383.]

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

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

Case No. 13,387.

STETTINIUS v. UNITED STATES.

[5 Cranch, C. C. 573; 2 Liv. Law Mag. 538.] [1]

Circuit Court, District of Columbia. Nov. Term, 1839.

INDICTMENT — CURRENCY ACT — JUSTIFICATION — BANK BILL—JURY.

1. An indictment upon the first section of the act of congress of the 7th of July, 1838, c. 212 [5 Stat. 297], "To restrain the circulation of small notes as a currency, in the District of Columbia, and for other purposes," should aver that the note passed, or offered to be passed, was "paper currency."

2. And an indictment upon the second section of the act should aver that the note issued was "paper medium, evidently intended for common circulation."

3. The passing of a note of less denomination than five dollars is not an offence against the statute, unless it be "paper currency," or "paper medium, evidently intended for common circulation."

4. The offence, under the statute, does not consist in circulating paper as currency, but in passing paper currency,—that which is already currency, or evidently intended for common circulation.

5. It is no justification, for passing such paper as the act prohibits, that it was passed in payment of a bona fide debt, nor that it was passed with intent that it should be carried out of the District, nor that the defendant was agent of the railroad company.

6. The term "bank bill," as used in the act, does not, of itself, purport to be paper currency, without a special averment to that effect.

7. The jurors are not judges of the law, even in a criminal case. They have the power to give a general verdict upon the general issue, which includes the question of law, as well as of fact; but when, by pleading, or by special verdict, or demurrer to evidence, the law is separated from the fact, they have no right to decide the law. It must be decided by the judge.

[Cited in U. S. v. Taylor, 11 Fed. 473; Sparf v. U. S., 156 U. S. 79, 15 Sup. Ct. 284.]

[Cited in Com. v. Van Tuyl, 1 Metc. (Ky.) 2; State v. Burpee (Vt.) 25 Atl. 972.]

8. The right and the power of the jury, whatever they may be, are exactly alike in civil and criminal cases.

9. The argument of counsel on the law should be addressed to the judge: and whenever the question of law is judicially presented to him unmixed with the fact, either by demurrer to the evidence, a special verdict, or by motion for an instruction to the jury upon a hypothetical state of facts, it is not only the right, but the duty of the judge, to decide the question. The right of the judge to instruct the jury as to the law of the case, is not confined to the giving of such instructions as may be asked. After the argument of counsel has been closed on both sides, he may, if he will, instruct the jury as to the law upon the whole evidence, leaving the question of fact entirely with the jury.

10. The process of attaint is obsolete in England, and never was in practice in this country.

11. In practice, both in this country and in England, the counsel for the defendants in criminal cases, have been allowed to argue the law to the jury upon the general issue.

12. The jury have the power to take upon themselves the responsibility of judging for themselves of the meaning of the law; and they may, if they will, but not of right, find a verdict against law; and such a verdict, if in favor of the defendant, will be as conclusive and effectual as if it were according to law.

13. According to the general practice of the courts in this country, the defendant seems to have a right to be heard before the jury, upon his construction of the law, if the court has not already, after hearing the argument of the defendant's counsel, instructed the jury upon the law in the same case; but there are few, if any, courts of criminal jurisdiction, who will suffer counsel to appeal from the court to the jury, upon a question of law which the court has decided against the defendant after he has orally joined issue upon the question and argued it before the court.

14. If the defendant's counsel does not join in the argument to the court, but insists upon arguing it to the jury, the court will require him to proceed with his argument to the jury, and will, after argument, give or refuse such instruction as the court shall think proper.

15. It is the duty of the jury to follow the law as laid down by the court.

Error to the criminal court of the District of Columbia, Hon. James Dunlop, sole judge, upon two indictments, both exactly in the same form.

The first (No. 106) charges that the defendant, on the 15th of October, 1839, at Washington county, with force and arms, "did pass, and offer to pass, to George McCawley, within the District of Columbia, to wit, at the city of Washington, in the county of Washington, in the District aforesaid, a certain note, and bank bill for the payment of one dollar, being of a less denomination than five dollars, against the form of the statute in such case made and provided, and against the peace and government of the United States." In the other indictment (No. 107) the name of Electius Semmes was substituted for that of George McCawley. Upon this indictment (No. 107) the jury returned the following verdict: "We, the jurors in the case of United States v. Samuel Stettinius, are of opinion that he is guilty of passing to the witness in the case, notes of a less denomination than five dollars, in the manner and at the time and place stated in the evidence; but, from the said evidence, not guilty of circulating them in the District of Columbia. November 22, 1839." The parties agreed to receive this "as a special verdict, as if formally made out as such, and to be taken in connection with, and considered as referring to, the evidence as stated." Upon the indictment No. 106, there was a general verdict, "Guilty."

The evidence stated, as given by the United States in support of the indictment No. 106, for passing the note to George McCawley, was, that the United States offered "a competent witness," who proved that the day after the present suspension by the banks of this District, of specie payments, which was on the 11th of October, 1839, "he was going to Baltimore in the railroad cars, and gave the traverser, at the railroad office in Washington city, in order to pay for his passage, a five-dollar note, who gave him in change, just as the

[1] [Reported by Hon. William Cranch, Chief Judge. 2 Liv. Law Mag. 538, contains only a partial report.]

cars were about to start, two notes of one dollar each, of Cohen's Bank in Maryland; that the said traverser was then acting as agent of the Baltimore & Ohio Railroad Company, which is admitted to be a company incorporated by an act of congress; that the traverser knew that he (the witness) was going to Baltimore in the cars, at the time; that he took the notes with him to Baltimore, and brought them back again to Washington, where he resides." In support of the indictment No. 107, for passing a one-dollar note and bank-bill to Electius Semmes, a bill of exceptions states, that "a competent witness was sworn on the part of the United States, who proved, that on the 15th of the last month (October, 1839) he was going to Baltimore in the railroad cars, and offered to the traverser in the city of Washington a five-dollar bank note to pay his passage in the cars; the traverser was acting as agent of the Baltimore and Ohio Railroad Company in said city. The traverser took the note, and gave, in change, to the witness, an half dollar in silver and two one dollar notes. He asked the traverser if he was passing dollar notes, to which he replied, 'Why, Mr Semmes, what can I do?' The witness went to Baltimore in the cars, and when there passed the notes away, without difficulty, at par. He did not remember of what institution the notes were, but thought it likely they were Maryland notes. It was admitted that the railroad company was chartered by congress."

At the trial, several bills of exceptions founded upon the evidence, as stated in the testimony of the two witnesses, were taken to the instructions given or refused by the judge.

Upon the trial of the general issue in the criminal court, District of Columbia, upon the indictment No. 106, four bills of exceptions were taken by the defendant. (1) The first was to the following instruction to the jury, given by the judge at the motion of the district attorney, namely: "That if they believe the evidence as above stated" (in support of this indictment No. 106) "to be true, then the passing of the note as above stated, if believed to be true, was a violation of the act of congress, entitled 'An act to restrain the circulation of small notes as a currency in the District of Columbia; and for other purposes,' approved July 7, 1838; and that the said act of congress is a valid and constitutional law in force in this district." (2) The second bill of exceptions, in the case No. 106, is to the refusal of the judge, at the motion of the defendant's counsel, to instruct the jury, that "if they believe from the evidence that the note in question, if passed at all as stated by the witness, was passed by the traverser in payment of a bona fide debt due by him to the witness, then the act does not come within the prohibition of the law of congress, and the traverser is entitled to a verdict of acquittal." (3) The third bill of exceptions, upon the trial of this issue, is to the refusal to instruct the jury at the motion of the defendant's counsel, "that, should they be of opinion from the evidence, that the defendant did pass the note named in the indictment, but with the intent that the same should be carried into the state of Maryland, and not to be circulated within the District of Columbia, then the defendant is entitled to an acquittal." (4) The fourth bill of exceptions, upon this issue, was as follows: "Upon the trial of this cause, and after the argument of counsel had closed, and before the jury had retired, the court, in a charge given to the jury, after stating that the jury might decide upon the law and the evidence, and, in rendering a general verdict, had a constitutional right so to do, stated that the jury would take upon itself a very great responsibility, which they ought not to do, in deciding upon the law of the case, in opposition to the opinion of the court; and that they ought not to take upon themselves to render a verdict calculated to revoke the legislation of congress. composed of many constitutional lawyers; and that it increased the responsibility of the jury so to decide, in this case, in favor of the defendant, upon the law, because the United States could not appeal; whereas if they found the defendant guilty, he might; and might have the law interpreted, and reverse the judgment, if erroneous; and further said, that if the fact was proved, of passing the note once, the case was brought within the act of congress. To this charge of the court, the defendant by his counsel excepts, because the court ought not to have given said charge, which was calculated to intimidate the jury, and to destroy their free and independent exercise of opinion in the case; and because the said charge was calculated to induce the jury to render a verdict against the defendant for reasons which ought not to operate on their minds; and that the court erred in stating that if the facts were proved to the satisfaction of the jury, the case was brought within the act of congress; and it is prayed that this bill of exceptions may be signed and sealed, this 21st November, 1839."

Upon the trial of the issue upon the indictment, No. 107, the defendant's counsel took three bills of exceptions. (1) The first states that the United States district attorney prayed the court to instruct the jury, that if they believed the evidence aforesaid (namely, the evidence contained in the testimony of the witness, as before stated, who was examined in support of this indictment No. 107), "then the passage of the note charged in the indictment was a violation of the act of congress, entitled," &c. "and that the jury are bound by the said act (if they believe the facts proved by the witness), to find the traverser guilty: And thereupon the counsel for the traverser objected to the court's giving the said instruction, or giving any instruction as to the law, to the jury; and declined arguing the law to the court, on the ground that they had a right to argue to the jury, both on the law and the evidence. And the court decided,

on this objection being made, that the traverser's counsel would be allowed to argue the law to the jury, and that after such argument the court would instruct the jury as to the law; and thereupon the law was argued to the jury by the counsel for the traverser, and by the United States attorney; and the court, after the said argument, was asked by the United States attorney to give the instruction before prayed; which instruction the court gave. To this instruction, so given, the traverser by his counsel excepts," &c. (2) The second bill of exceptions taken upon the trial of this issue, is to the refusal of the court to instruct the jury, that "if they should be of opinion that the defendant did not pass the note for and in lieu of gold and silver, and that he did not intend to put the same into circulation in the District of Columbia, then the defendant is entitled to an acquittal." (3) The third bill of exceptions, upon the trial of this issue, is to the refusal of the court to instruct the jury, upon the evidence aforesaid, that if they "believe that the note passed by the defendant, was passed to a person who, as the defendant knew, was going immediately to Maryland, as a passenger in the railroad cars, without any opportunity of circulating said note in the District of Columbia, before leaving said district, and that said note was issued and redeemable in Maryland, and that said person did immediately after receiving the said note, leave the said District, without circulating it here, and did pass it off in the state of Maryland, then the jury may infer that the note was not passed by the defendant as paper currency, to circulate in said District and that the case is not within the spirit and intention of the act of congress."

The act of congress of the 7th of July, 1838 (5 Stat. 297), entitled "An act to restrain the circulation of small notes as currency in the District of Columbia, and for other purposes," upon which this prosecution is supposed to be founded, provides in the first section, "that after the 10th day of April" (then) "next, it shall not be lawful for any individual, company, or corporation to issue, pass, or offer to pass, within the District of Columbia, any note, check, draft, bank bill, or any other paper currency, of a less denomination than five dollars; and if any person or corporation shall violate the provisions of this section, the person so offending, or, in case of a corporation so offending, the officers of any such corporation for the time being, shall be liable to indictment by the grand jury of the county, within the District where the offence shall have been committed, and the person so offending, or the officers of the corporation so offending, shall, on conviction thereof, be fined in a sum not exceeding $50, at the discretion of the court, for every offence; one half of the said fine shall be paid to the prosecutor; the other half shall be for the use of the county where the offence shall have been committed." "And the person so offending, and the officers of any corporation, shall also be liable to pay the amount of any note, bill, check, draft, or other paper, constituting part of such currency, to any holder thereof, with all costs incident to the protest and legal collection thereof, with fifty per cent. damages for nonpayment on demand, to be recovered by action of debt; and in case of judgment for the plaintiff, execution thereon shall be had forthwith; and it shall be the duty of the district attorney of the District of Columbia, to commence prosecutions against all persons, and every corporation offending against this section, of which he shall have knowledge or probable information. And in case of corporations, the prosecution shall be against the president, or any director or cashier thereof for the time being; and it shall be the duty of the grand jurors to present all such offences of which they have knowledge or probable information; and that no member of a grand jury shall be ignorant of his duty in this particular, it shall be the duty of the court having cognizance of all offences against this section to give the same in charge to the grand juries at the commencement of the term next after the passage of this act. And in the second section it is "further enacted, that from and after the passage of this act, it shall be unlawful for any individual, company, or corporation, to issue de novo, or knowingly to pass, or procure to be issued, passed, or circulated within the District aforesaid, any note, check, bank bill, or other paper medium of the denomination aforesaid, evidently intended for common circulation, as for and in lieu of small change in gold or silver, or for any other pretence whatever, and which shall be issued and circulated for the first time after the period above limited in this section, under the penalties provided in the foregoing section."

C. Cox and R. J. Brent, for plaintiff in error.

Mr. Key, for the United States.

CRANCH, Chief Judge, delivered the opinion of the court; THRUSTON, Circuit Judge, dissenting.

The judgment below was against the defendant upon both indictments, although it is understood that a motion had been made in arrest of judgment. The record had not been made up at full length, and there is no formal assignment of errors; but in argument the counsel for the traverser contend,

1. That there is error in overruling the motion in arrest of judgment, because the indictment does not substantially set forth any offence against the statute. The gist of the offence intended to be forbidden by the statute, and punished, is the issuing of paper currency of a less denomination than five dollars. Unless, therefore, the notes passed by the defendant were such notes as were "paper currency," and which, in the second section, is called "paper medium of the denomi-

nation aforesaid, evidently intended for common circulation, as for and in lieu of small change in gold or silver, or any other pretence whatever," he has committed no offence against the statute. Its title (which may be resorted to, to ascertain the evil which was in the contemplation of the legislature, although it will not restrict the enacting clauses, if they clearly go beyond it) is, "to restrain the circulation of small notes as a currency;" and the enacting clauses forbid the issuing or passing of "any note, check, draft, bank bill, or any other paper currency of a less denomination than five dollars;" and "any note, check, bank bill, or other paper medium of the denomination aforesaid, evidently intended for common circulation, as for and in lieu of small change in gold or silver, or for any other pretence whatever." It is clear that negotiable notes, checks, and drafts for a less sum than five dollars, may be issued or passed from debtor to creditor in bonâ fide payment of a debt, or for the purchase of goods, in the common course of mercantile transactions, without incurring the penalty of the statute. The passing of a note, check, or draft is primâ facie a lawful act; and every man is presumed innocent until the contrary appears.

All the facts charged in the indictment may be true, and yet the traverser not guilty. If the indictment had simply charged the passing of a note, check, or draft for the payment of one dollar, it would not have charged any offence, unless the note had been averred to be, "paper currency," or "paper medium," &c. But it charges the traverser with passing a note and bank bill. If the jury had found the traverser guilty of passing the note only, he must have been acquitted, because the passing of the note was no offence unless it was "paper currency," or "paper medium evidently intended for common circulation." Is the word bank bill better than note? Does the name, per se, import paper currency without an averment that it was paper currency? It might have been a bank bill, and yet be what the brokers call an uncurrent bank bill, or a bank bill not payable to order, or bearer. It might have been the bill of a bank long since broken, and whose notes are no longer current. If the names, "note," "draft," and "check," are insufficient, per se, we do not perceive why the name "bank bill" should not be insufficient also. In the cases of U. S. v. Ringgold [Case No. 16,167] and of U. S. v. Milburn [Id. 15,768], this court decided, that under the statute which prohibited the keeping of "a faro bank or other common gaming table," an indictment for keeping a faro bank was not sufficient without also averring it to be a common gaming table, or a common faro bank. Although I did not concur in those decisions, yet they are binding upon this court, in like cases. I dissented, in those cases, because I thought that the term "faro bank" did, per se, import a common gaming table; and that it would be tautology to say a common faro bank. In the present case I do not think that the names, "note," "check," and "draft," or even bank bill, do of themselves import a paper currency, so as to dispense with an averment, in the indictment under the first section of the act, that they were paper currency; without such an averment and without setting forth the note or bill, so that the court may judge whether it was such a note or bill as is meant to be prohibited by the statute, we think the indictment does not charge an offence against that section; and that the judge erred in not arresting the judgment. See State v. Scribner, 2 Gill & J. 251, and The Mary Anne, 8 Wheat. [21 U. S.] 386, 389.

Another reason suggested in arrest of judgment is, that the act of congress is unconstitutional, because congress cannot regulate the currency unless by some uniform rule operating equally upon all the states and territories. The answer, to this is, that congress, in legislating for this district, has the same power which a state has in legislating for the state, superadded to the power of legislating over all the states and territories as to the matters within its constitutional jurisdiction.

2. The second error, suggested in argument, is, that the special verdict (in the case No. 107,) did not justify the judgment against the traverser; but is, in effect a verdict of acquittal, inasmuch as it finds him not guilty of circulating the notes in the District of Columbia. This special verdict, if extended according to the agreement of the counsel, would state: That Electius Semmes, the person named in the indictment, on the 15th of October, 1839, was about to go to Baltimore in the state of Maryland, in the railroad cars of the Baltimore and Ohio Railroad Company; the same company then and there being a company chartered by congress, and in the city of Washington, in the county of Washington, in the District of Columbia, offered to the traverser, who was then and there acting as the agent of the said company, a five-dollar bank note to pay for his passage in the said cars in the city of Washington. That the traverser took the said note and gave in change to the said Electius Semmes, a half dollar in silver and two one-dollar notes, the same being notes issued and payable in the state of Maryland. That the said Electius Semmes went to Baltimore aforesaid, on the said day, in the said cars, and when in Baltimore passed away the said two notes without difficulty at par, and did not circulate them in the District of Columbia as a currency.

Being of opinion that the passing of a note of a less denomination than five dollars is not an offence against the statute, unless it be "paper currency," or "paper medium of the denomination aforesaid, evidently intended for common circulation, as for and in lieu of small change," or for some other pretence, we think the special verdict, if not a verdict for

the traverser, is an imperfect verdict, in not finding that the notes passed by the traverser were "paper currency," or "paper medium evidently intended for common circulation," &c., and that it does not support the judgment against the traverser. It does not say any thing of the bank bill charged in the indictment. But, as the evil to be remedied was "the circulation of small notes as a currency, in the District of Columbia," and as the jury have expressly found that the traverser did not circulate the notes in the District of Columbia, as a currency; and inasmuch as circulating is passing away in change or otherwise, it would seem, at first view, that the verdict amounts to an acquittal, as it denies the commission of the act which the legislature intended to guard against. But they have not made the offence to consist in circulating paper as currency, but in passing paper currency. It must be paper currency before, or at the time of passing it; that is, as explained by the second section of the act, "paper constituting part of such currency;" or as further explained in the same second section, "paper medium of the denomination aforesaid, evidently intended for common circulation," &c. A denial that the traverser passed the paper as currency, is not a denial that he passed paper currency; so that we think the verdict is not a verdict of acquittal.

3. The next error suggested is that the judge erred in instructing the jury (at the prayer of the United States attorney, in the trial of the issue upon the indictment No. 106, as stated in the traverser's first bill of exceptions upon the trial of that issue) that if they believed the evidence, as above stated in support of that indictment to be true, the passing of the note as therein stated, was a violation of the act approved 7th July, 1838, entitled, "An act to restrain," &c. According to the interpretation of the act which we have before given, it is evident that the offence was not committed, unless the note was paper currency, or paper medium evidently intended for common circulation, &c.; a fact not stated in the evidence, and not found by the jury. We are, therefore, of opinion, that the judge erred in giving that instruction.

4. The next error suggested, consists in the refusal of the judge to instruct the jury (as prayed by the traverser in his second bill of exceptions upon the trial of the issue upon the indictment, No. 106) as follows: "That if they believe, from the evidence, that the traverser passed the note in payment of a bonâ fide debt due by him to the witness, the act does not come within the prohibition of the law of congress." This instruction seems to have been very properly refused, and the exception does not appear to be insisted upon in argument.

5. The fifth error suggested is, the refusal of the judge to instruct the jury, at the prayer of the traverser (as stated in his third bill of exceptions upon this issue), "that should they be of opinion from the evidence, that the traverser passed the note with intent that the same should be carried into the state of Maryland, and not be circulated within the District of Columbia, then the traverser is entitled to an acquittal." This instruction, also, we think was correctly refused, as the act does not make the intent to circulate an ingredient in the offence. The offence is the passing of "paper currency of a less denomination than five dollars," and the penalty for doing this, was the means by which the legislature intended to restrain the circulation of small notes as a currency within the District of Columbia.

6. It was also suggested in argument, that the judgment ought not to have been rendered against the traverser on the special verdict, because it finds that the traverser, in passing the notes, was then acting as agent of the Baltimore and Ohio Railroad Company; the same then being a company incorporated by an act of congress; that it was, therefore, an act of the company; and that, according to the provisions of the statute, the indictment should have been against the president, or a director, or the cashier of the company, and not against the traverser. But the jury have not found that the passing of the notes was the act of the company; nor that they were passed by the order or consent of the company, without which the company cannot be charged criminally. The jury have found a fact, from which they might have inferred and found that the notes were passed by the company, but not having found that fact expressly, the court cannot infer it and make it the foundation of a judgment of acquittal in favor of the traverser. He might well have been acting as the agent of the company, and yet have no authority from them to pass the notes; and such authority to do an illegal act (if it were such) cannot be presumed. We think, therefore, that the judge did not err in refusing to arrest the judgment on that ground.

7. The seventh error suggested, is stated in the traverser's first bill of exceptions upon the trial of the issue upon the indictment No. 107, and consists in the judge's overruling the objection of the traverser's counsel, to the judge's giving any instruction to the jury as to the law; the traverser's counsel having declined arguing the law to the court, on the ground that they had a right to argue to the jury both on the law and the evidence; to the overruling of which objection, and to the instruction which the judge, at the prayer of the United States attorney, gave to the jury, which was similar to that given at his prayer upon the trial of the issue on the indictment No. 106, the traverser's counsel excepted. As to the question whether the instruction thus given to the jury, in point of law, was correct, we have already said, in considering the instruction given upon the trial of the issue on the other indictment, that the offence was

not committed, unless the note was paper currency, or paper medium evidently intended for common circulation; a fact not found by the jury, nor stated in the prayer for the instruction; and therefore we are of opinion that the judge erred in giving that instruction. The objection to the judge's giving any instruction to the jury as to the law, when the defendant's counsel declines arguing the law to the court, and insists upon arguing it to the jury, seems to be founded upon the idea that the jurors are the sole judges of the law, and are under no obligation to respect the decisions of the judge upon the questions of law arising in a criminal cause. The right of the jury to find a general verdict upon the general issue in a criminal cause, is not disputed nor doubted; and as guilt consists of law and fact, and cannot be ascertained but by coupling them together, and comparing them, and applying the facts to the law, they must, in finding such a general verdict, decide the law thus coupled with the facts in that cause. But when the jurors thus took upon themselves to decide the law by a general verdict of not guilty, they subjected themselves, under the old English statutes, to very severe punishment, upon a writ of attaint, if the grand inquest should convict them of finding a false verdict. To avoid this risk, it was formerly common for the jurors to render special verdicts, stating all the facts of the case, and referring the question of law to the court; but the practice of setting aside verdicts, upon motion, and granting new trials, has so superseded the use of attaints, that there are few instances of an attaint in the books later than the sixteenth century. 3 Bl. Comm. 406. Yet as late as Sir Matthew Hale's time, according to his opinion, the king might have attaint upon a verdict of acquittal, although the prisoner, if convicted, could not; because his guilt is confirmed by two inquests; the grand and the petit jury. The right and the power of the jury to decide the law and the fact together, by a general verdict upon the general issue, is not greater in criminal causes than in civil. The effect only is different. In civil causes, the court will set aside the verdict, if against its opinion of the law, whether the verdict is against the defendant or the plaintiff; but in criminal causes, if the verdict be in favor of the defendant, inasmuch as the king might have a writ of attaint and reverse the judgment; and as the prisoner is not to be put twice in jeopardy, nor to be twice vexed for the same offence, and as he could not have attaint if the verdict should be against him, the courts have uniformly, for more than two centuries, refused to award a new trial when the prisoner has been acquitted upon a general verdict of not guilty. This conclusive effect of a verdict of acquittal does not arise from the right of the jury to decide the law definitively in the case, because if the verdict of the jury had been against the defendant, contrary to law, or to the court's exposition of the law, the court unquestionably had the right and the power to set aside the verdict as being contrary to law, and to award a new trial. This could not be the case if the jury had the exclusive right to decide the law. If they had, the verdict would be as conclusive in the one case, as in the other.

It is admitted by all who have advocated the right of the jury to decide the law in criminal cases, that that right extends only to the finding of a general verdict upon the general issue. When the issue is on some collateral point, it involves no question of law, but is confined exclusively to facts. When the verdict was upon such a collateral issue, there was no attaint. That process lay only in cases where the jury undertook to decide the law by a general verdict on the general issue. Whenever, by the pleadings, the law was separated from the fact, so that each could be seen and considered by itself, no pretence that the jury had a right to decide the pure unmixed question of law, has ever been set up by the wildest advocate of the rights of juries. In the trial of the impeachment of Judge Chase, Mr. Randolph, one of the managers of the prosecution, in speaking of this right of juries to decide the law, calls it "their undeniable right of deciding upon the law as well as the fact necessarily involved in a general verdict." He said, also, "There is, in my mind, a material difference between a naked definition of law, the application of which is left to the jury, and the application, by the court, of such definition to the particular case upon which the jury are called upon to find a general verdict. Surely, there is a wide and evident distinction between an abstract opinion upon a point of law, and an opinion applied to the facts admitted by the party accused, or proven against him." Speaking of the prior decisions of the same points of law in some former cases by other judges, Mr. Randolph said, "They exercised the acknowledged privilege of the bench in giving an opinion to the jury on the question of law after it had been fully argued by counsel on both sides." Again, he said, "I do not deny the right of the court to explain their sense of the law to the jury, after counsel have been heard, but I do deny that the jury are bound by such exposition." Mr. Early, another of the managers of that impeachment, said, "It is no part of my intention to deny the right of judges to expound the law in charging juries; but it may be safely affirmed, that such right is the most delicate they possess, and the exercise of which is to be guarded by the utmost caution and humanity." Mr. Edward Tilghman, who was examined as a witness in the trial of that impeachment, testified, that in Pennsylvania, the judges, "in their charge to the jury, state the law and the evidence, and apply the law

to the evidence. The court generally hear the counsel at large on the law; and they are permitted to address the jury on the law and the fact; after which the counsel for the state concludes. The court then states the evidence to the jury, and their opinion of the law, but leaves the decision of both law and fact to the jury." In Croswell's Case, 3 Johns. Cas. 346, the counsel for the defendant admitted it "to be the duty of the court to direct the jury as to the law; and it is advisable for the jury, in most cases, to receive the law from the court, and in all cases they ought to pay respectful attention to the opinion of the court; but it is also their duty to exercise their judgments upon the law as well as the fact; and if they have a clear conviction that the law is different from what it is stated to be by the court, the jury are bound, in such cases, by the superior obligations of conscience, to follow their own convictions." The same counsel said further, that "in civil cases, the power of the court to decide the law, is absolute and conclusive, and may be rightfully so exerted. That in criminal cases, the law and the fact being always blended, the jury, for reasons of a political and peculiar nature, for the security of life and liberty, are intrusted with the power of deciding both law and fact." Judge Chase, in his answer to one of the articles of impeachment, says, "He well knows that it is the right of juries in criminal cases, to give a general verdict of acquittal, which cannot be set aside on account of its being contrary to law; and that hence results the power of juries to decide on the law as well as on the facts in criminal cases." "But he also knows, that in the exercise of this power, it is the duty of the jury to govern themselves by the laws of the land, over which they have no dispensing power; and their right to expect and receive from the court all the assistance which it can give for rightly understanding the law. To withhold this assistance in any manner whatever; to forbear to give it in that way which may be most effectual for preserving the jury from error and mistake; would be an abandonment, or a forgetfulness of duty, which no judge could justify to his conscience, or the laws." And in the opinion which the court had prepared in the Case of John Fries [Case No. 5,126], they said: "It is the duty of the court, in all criminal cases, to state to the jury their opinion of the law arising on the facts; but the jury are to decide in this, and in all criminal cases, both the law and the facts, on their consideration of the whole case."

Mr. Hargrave, in his note 7 to Co. Litt. 155b, has given a very able opinion upon this question of the right of the jury to decide the law in criminal cases. Lord Coke, in folio 155b, had said: "The most usual trial of matters of fact is by twelve such men; for 'ad quæstionem facti non respondent judices'; and matters in law the judges ought to decide and discuss; for 'ad quæstionem juris non respondent juratores.'" In his note to this passage, Mr. Hargrave says: "This decantatum (as Lord Chief Justice Vaughan calls it, on account of its frequency in the books) about the respective provinces of judge and jury, hath, since Lord Coke's time, become the subject of very heated controversy, especially in prosecutions for state libels; some aiming to render juries wholly dependent on the judge for matters of law, and others contending for nearly a complete and unqualified independence." After stating several of the old cases, he says: "In respect to my own ideas on this subject, they are at present to this effect: 'On the one hand, as the jury may, as often as they think fit, find a general verdict, I, therefore, think it unquestionable, that they may so far decide upon the law as well as the fact; such a verdict necessarily involving both. In this, I have the authority of Littleton himself, who hereafter writes, that if the inquest will take upon them the knowledge of the law upon the matter, they may give their verdict generally. Ante, § 368, and post, folio 228.' But, on the other hand, I think it seems clear that questions of law generally, and, more properly, belong to the judges; and that, exclusively of the fitness of having the law explained by those who are trained to the knowledge of it by long study and practice, this appears from various considerations: (1) If the parties litigating agree in their facts, the cause can never go to a jury; but is tried on a demurrer, it being a rule, and I believe without exception, that issues in law are determined by the judges, and only issues of fact are tried by a jury (ante, 71b). (2) Even when an issue in fact is joined, and comes before a jury for trial, either party, by demurring to the evidence, which includes an admission of the fact to which the evidence applies, may, so far, draw the cause from the cognizance of the jury, for, in that case the law is reserved for the decision of the court from which the issue of fact comes; and the jury is either discharged, or, at the utmost, only ascertains the damages. Ante, 72a; Doug. 127, 213; Bull. N. P. (2d Ed.) 313. (3) The jury is supposed to be so inadequate in finding out the law, that it is incumbent upon the judge who presides at the trial to inform them what the law is; and as a check to the judge, in the discharge of his duty, either party may, under the statute of Westminster II. c. 31, make his exception in writing to the judge's direction, and enforce its being made part of the record, so as afterwards to found error upon it. See post, 2 Inst. 426; Trials per Pais (8th Ed.) 222, 466; Fabrigas v. Mostyn [2 W. Bl. 929] in 11 State Trials; Money v. Leach, 3 Burrows, 1742; Bull. N. P. (2d Ed.) 315. (4) The jury is ever at liberty to give a special verdict, the nature of which is to find the facts at large, and leave the conclusion of law to the judges of the court from which the issue comes. Formerly, indeed, it

was doubted whether in certain cases in which the issue was of a very limited and restrained kind, the jury was not bound to find a general verdict. But the contrary was settled in Dowman's Case, 9 Coke, 11b; and the rule now holds both in civil and criminal cases, without exception. See post, 227b; Staund. P. C. 165a; Oneby's Case, 2 Ld. Raym. 1494. (5) While attaints, which still subsist at law, were in use, it was hazardous in a jury to find a general verdict, where the case was doubtful, and they were apprised of it by the judges, because, if they mistook the law they were in danger of an attaint. Post, 228a; Hob. 227; Vaughn, 144; 2 Hale, P. C. 310; Gilb. C. P. (2d Ed.) 128. (6) If the jury find the facts specially, and add their conclusion as to the law, it is not binding on the judges, but they have a right to control the verdict and declare the law as they conceive it to be; at least, this is the language of some most respectable authorities. Staund. P. C. 165a; Plowd. 114, a, b; 4 Coke, 42b; 1 Hale, P. C. 471, 476, 477; 2 Hale, P. C. 302. (7) The courts have long exercised the power of granting new trials in civil cases where the jury find against that which the judge trying the cause, or the court at large, holds to be law; or where the jury find a general verdict, and the court conceives that, on account of difficulty of law, there ought to be a special one. King v. Poole, Cas. t. Hardw. 26. Though, too, in criminal cases the judges do not claim such a discretion against persons acquitted, the reason, I presume, is, in respect of the rule, that 'Nemo bis punitur, aut vexatur pro eodem delicto'; or the hardship which would arise from allowing a person to be twice put in jeopardy for one offence; and if this be so, it only shows that on that account, an exception is made to a general rule. 4 Bl. Comm. (8th Ed.) 361; 2 Ld. Raym. 1585; 2 Strange, 899; 4 Coke, 40a; Wing. Max. 695. Upon the whole, as my mind is affected with this interesting subject, the result is, that the immediate and direct right of deciding upon questions of law, is intrusted to the judges; that in a jury, it is only incidental; that, in the exercise of this incidental right, the latter are not only placed under the superintendence of the former, but are, in some decree, controllable by them; and therefore that in all points of law, arising on a trial, the jury ought to show the most respectful deference to the advice and recommendation of judges. In favor of this conclusion, the conduct of juries bears ample testimony; for, to their honor be it remembered, that the examples of their resisting the advice of a judge, in points of law, are rare, except where they have been provoked into such an opposition by the grossness of his own misconduct, or betrayed into an unjust suspicion of his integrity by the misrepresentation and ill-practice of others. In civil cases, particularly, where the title of real property is in question, juries almost universally find a special verdict as often as the judge recommends their so doing; and though in criminal cases special verdicts are not frequent, it is not from any averseness to them in juries, but from the nature of criminal causes, which depend more upon the evidence of facts, than any difficulty of law. Nor is it any small merit in this arrangement, that in consequence of it, every person accused of a crime, is enabled by the general plea of not guilty, to have the benefit of a trial, in which the judge and the jury are a check upon each other; and that this benefit may always be enjoyed, except in such small offences as are left to the summary jurisdiction of a justice of the peace; which exception, from the necessity of the times is continually increasing; but which, however, cannot be too cautiously extended to new objects. Thus considered, the distinction between the office of judge and jury, seems to claim our utmost respect. May this wise distribution of power, between the two, long continue to flourish, unspoiled, either by the proud encroachment of ill-designing judges, or the wild presumption of licentious juries."

The calm manner in which the subject is considered in the above opinion, adds as much to its weight as it derives from the high character of its author as a jurist. Blackstone, in his Commentary (volume 4, p. 361), speaking of the right of juries, says, "They have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths; and if their verdict be notoriously wrong, they may be punished, and the verdict set aside by attaint at the suit of the king, but not at the suit of the prisoner. But the practice, heretofore in use, of fining, imprisoning, or otherwise punishing jurors, merely at the discretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional and illegal." And Lord Chief Justice Hale (Hale, P. C. 313), in speaking of the fine imposed upon the jurors, in Bushell's Case [Vaughan, 153], for not finding William Penn and others guilty, according to the direction of the court, says, "But it was agreed by all the judges of England (one only dissenting) that this fine was not legally set upon the jury, for they are judges of matters of fact; and although it was inserted in the fine that it was 'contra directionem curiæ in materiâ legis,' this mended not the matter, for it was impossible any matter of law could come in question till the matter of fact were settled and stated, and agreed by the jury; and of such matter of fact they were the only competent judges. And although the witnesses might per chance, swear the fact, to the satisfaction of the court, yet the jury are judges, as well of the credibility of the witnesses, as of the truth of the fact, for possibly they might know somewhat, of their own knowledge, that what was sworn was untrue: and possibly they might know the witnesses to be such as they could not be-

lieve; and it is the conscience of the jury that must pronounce the prisoner guilty, or not guilty. And to say the truth, it were the most unhappy case, that could be, to the judge, if he, at his peril, must take upon him the guilt or innocence of the prisoner: and if the judge's opinion must rule the matter of fact, the trial by jury would be useless." Blackstone, in citing this passage from Hale, has materially altered the language of the last clause of the last sentence. He says, "For as Sir Matthew Hale well observes, it would be a most unhappy case for the judge himself if the prisoner's fate depended upon his directions. Unhappy also for the prisoner; for if the judge's opinion must rule the verdict, the trial by jury would be useless." Hale says, "rule the matter of fact." Blackstone says, "rule the verdict." Hale speaks of the judge's controlling the jury as to the fact only. Blackstone makes him speak of the judge's controlling the jury generally as to their verdict, which may be in matter of law, or matter of fact. This makes so great a difference in the case that Hale's language as cited by Blackstone, has been used in support of the supposed exclusive right of the jury to decide the law in criminal cases (1 Ersk. 160); whereas the language of Lord Hale, in his own book, affords no such support, but evidently tends to support the contrary doctrine.

To the authorities already cited we might add that of Mr. Dane, one of the most able and learned jurists of New England, who has given to the profession a most valuable Abridgement and Digest of American Law in eight volumes, and founded a professorship of law in the Harvard University, and who from these circumstances may well be called the American Viner; but we shall only refer to his able argument in his seventh volume, c. 222, arts. 18 and 19, p. 382. Upon this point we will cite only one more authority. It is that of Mr. Justice Story, of the supreme court of the United States, in his opinion in the case of U. S. v. Battiste [Case No. 14,545], in the circuit court of the United States for the Massachusetts district, at October term, 1835. Mr. Justice Story, in summing up to the jury said: "Before I proceed to the merits of this case, I wish to say a few words upon a point suggested by the argument of the learned counsel of the prisoner, upon which I have had a decided opinion during my whole professional life; it is, that in criminal cases, the jury are the judges of the law as well as of the fact. My opinion is that the jury are no more judges of the law, in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case tried upon the general issue. In each of these cases their verdict, when general, is necessarily compounded of law and of fact, and includes both. In each they must necessarily determine the law as well as the fact. In each they have the physical power to disregard the law as laid down to them by the court. But I deny that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure. On the contrary I hold it the most sacred, constitutional right of every party accused of a crime, that the jury should respond as to the facts and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law as laid down by the court. This is the right of every citizen; and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views which different juries might take of it; but in case of error there would be no remedy or redress by the injured party; for the court would have no right to review the law as it had been settled by the jury. Indeed it would be almost impracticable to ascertain what the law, as settled by the jury, actually was. On the contrary, if the court should err in laying down the law to the jury, there is an adequate remedy for the injured party, by a motion for a new trial, or a writ of error, as the nature of the jurisdiction of the particular court may require. Every person accused as a criminal has a right to be tried, according to the law of the land; the fixed law of the land, and not by the law as a jury may understand it, or choose, from wantonness, or by ignorance, or accidental mistake, to interpret it. If I thought that the jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial But believing, as I do, that every citizen has a right to be tried by the law, and according to the law; that it is his privilege, and truest shield against oppression and wrong, I feel it my duty to state my views fully and openly on the present occasion."

From these authorities we think we may draw the following conclusions:

1. That the judges are to decide every question of law, when the facts, upon which the question arises, are found, or stated; and in all cases where, by the pleadings, or the proceedings, the law and the facts are separated. It has never been pretended that the jury are to decide a pure question of law unmingled with the facts. The law and facts are separated by a demurrer to the evidence; by a special verdict; by a special plea, and by the hypothetical statement of facts, when, in the trial of a cause before the jury, the court is moved by the counsel on either side to instruct the jury as to the law arising from such supposed facts, if they should be found by the jury. This latter proceeding is in the nature of an anticipated special verdict, and, as far as it goes, separates the law and the facts as completely as could be done by a special verdict actually finding the same facts. This is a proceeding which either party has a right to adopt, if, in the opinion of the court, sufficient evidence has been given in the cause to justify the party in assuming the legal possibility that the jury

may find the facts to be as he has stated them in his motion for the instruction. This statement and motion to direct the jury upon the point of law, withdraw it from the jury and submit it to the judges, as in a special verdict; the only difference is that in the latter case the law is decided by the court upon an actual finding, and in the former upon an assumed, or supposed finding; and the court is as much bound to decide the question of law upon such a motion, as upon a demurrer to evidence, or a special verdict. This proceeding is applicable to criminal cases as to civil, and shows that the court is the proper and exclusive tribunal to decide the law in both classes of cases, whenever it can be decided without deciding the fact at the same time.

2. That the power of the jury to find a general verdict upon the general issue in a criminal case does not imply a right to decide the law of the case. The power is the same in a civil case, and yet it has never been supposed that the power of the jury, in a civil case, to render a general verdict on the general issue, was a right, or implied a right, to decide the law of the case. The right and the power of the jury, whatever they may be, as to deciding the law of the case, are exactly alike in both classes of cases; in both, the right and the power of the court are the same to set aside the verdict, if against the defendant, on the ground that it was a verdict against law; thereby clearly showing that the jury has no right to decide the law in either case; but that the court has. The most that can be said, is, that the jury has the power of rendering a general verdict upon the general issue, either according to law, or against law; but no one can suppose that they have a right to render a verdict against law. If in a criminal case they render a general verdict against the defendant, upon the general issue, against law, the court will at once set it aside, because it is against law; but if the verdict be for the defendant, the court, in favorem vitæ, will not set it aside, although against law; and this practice, or maxim, is probably grounded on the reasons before mentioned, and not upon the admission that the jury is the exclusive judge of the law, as well as of the fact, in criminal cases. If the jury, as some have contended, "are the sole judges of the law in criminal cases," the prisoner, however erroneously the law may be laid down by the prosecutor to the jury, would have no more right to ask the court to expound the law to them, than to ask the court to ascertain the facts; and, if the verdict should be against him, would have no right to ask the court to grant a new trial on the ground that the jury had either mistaken or disregarded the law. If juries are the exclusive judges of the law, in criminal cases, there can be no appeal, no writ of error, no new trial, even if the prisoner be convicted. The act establishing the criminal court of this District provides for a writ of error to bring the cause into this court. If the jury is to decide all the law, in criminal cases, their decisions of the law can never be reversed; for there are no means of ascertaining their decision upon a question of law, so as to bring it into review before this court; but when the judge decides the law, a bill of exceptions may be taken, and his judgment, if against the defendant, may be either affirmed or reversed upon a writ of error. In this very case, the defendant's counsel, by asking the court to instruct the jury as to the law, had admitted the right of the judge to decide the law. Again, the same act establishing the criminal court, provides that that court may, in any case, with the consent of the person accused, adjourn any question of law to this court, where it may be argued and decided. It is the court, and not the jury, who adjourn the question of law. It is to the court, therefore, that the question of law is to be made. These provisions of the act establishing the criminal court, are totally inconsistent with the doctrine, that, in criminal cases, the jury are the sole judges of the law. They show, that when a question of law arises, either party may require the judge to decide it, or to adjourn it to this court to be decided here.

3. If, then, it is the province of the judge to decide conclusively every question of law arising in the case, which may be judicially presented to him, unmixed with the facts; and if every question of law, arising in the trial of a cause, may be thus separated and presented to the judge, either by a demurrer to the evidence or a special verdict, or by motion to the court to instruct the jury as to the law arising upon an hypothetical statement of such facts as the party supposes the jury may find from the evidence, it follows that it is not only the right but the duty of the judge to decide every question which may be thus presented to him; and, upon the motion of either party, to give to the jury, during the trial, such instruction and opinion upon the law arising upon such hypothetical statement of facts, as such supposed facts would justify him in giving, if found in a special verdict. But the right of the judge to instruct the jury as to the law of the case, is not confined to the giving of such instruction as he may be asked to give. After the argument of counsel has been closed on both sides, he may, if he will, instruct the jury as to the law arising upon the whole evidence; leaving the question of fact entirely with the jury. This is the practice in the courts of England, and in those of many of the states of this Union. Again: If it is the right and the duty of the judge thus to decide all questions of law which can be separated from the facts, the argument of counsel, upon such questions, should naturally and properly be addressed to the judge.

But it has been contended, that in a crim-

inal case, upon the trial of the general issue, the counsel for the defendant has a right to argue the whole law of the case to the jury: and this is said to be a constitutional right. The sixth article of the amendments to the constitution of the United States declares "that in all criminal prosecutions, the accused shall enjoy the right" "to have the assistance of counsel for his defence." This is the whole constitutional provision upon the subject. This amendment was, no doubt, adopted because, in England it was a settled rule of the common law, that no counsel should be allowed a prisoner upon his trial upon the general issue, in any capital crime, unless some point of law should arise, proper to be debated. But the constitution does not give the counsel a right to address the jury upon the questions of law, which may arise in the trial of the general issue in a criminal case. It only gives him that assistance of counsel which was denied by the common law. The claim is, no doubt, founded upon the idea, that in criminal cases the jury are the sole judges of the law as well as of the facts, because, upon the general issue, they have the power, if they will, to find a conclusive verdict in favor of the defendant, contrary to law; and the judges are forbidden, by the humane maxim of the law, to set it aside. But in finding a verdict against the prisoner, upon the same issue, the jury are not the sole judges of the law; for if such verdict is contrary to law, in the opinion of the judges, they will set it aside and grant a new trial; so that the jury, at the same time, are, and are not, upon the trial of the same issue, in the same cause, the sole judges of the law and the facts; that is, if they are in any manner judges of the law, they are so only when they find a verdict for the defendant, on the general issue, but they are not so when they find a verdict against him. It is true that the court cannot control the jury in giving their verdict, nor compel them to find a special verdict. The only remedy for a verdict contrary to law, is a new trial; for no appeal or writ of error lies from the verdict of a jury; but for a general verdict of not guilty, upon the general issue, in a criminal case, there is no remedy; for the process of attaint is now obsolete in England, and, we believe, never has been resorted to in this country; certainly not in Maryland, whose common law remains the common law of this county, and who never adopted the English statutes on that subject. The only control exercised by the courts over juries is, to keep them together until they find such a verdict as will enable the court to render a judgment in the cause. But either party has a right to require the opinion of the court upon every question of law arising in the trial of the cause, especially where a writ of error will lie to another tribunal. If the judge should expound the law correctly and the jury should find a general verdict contrary to such exposition, a writ of error would be of no avail. If the defendant, upon the trial, does not choose to ask the judge for an instruction to the jury upon the law of the case, and refuses to argue the question of law to the court upon an instruction asked by the attorney of the United States, but insists upon arguing the whole law of the case to the jury, and the verdict should be against him, and contrary to the law as he understands it; upon what ground can he ask the court for a new trial? Will he then contend that the jury had no right to decide the law? If so, he would be condemned out of his own mouth. He must say that the jury is not the proper tribunal to expound the law. Is it right, therefore, in the court, to suffer the defendant's counsel to argue the law to the jury who, confessedly, have no right to decide the law against him? In theory and in principal we should say no. The good old maxim is still in force: "Ad quæstionem facti non respondent judices; ad quæstionem juris non respondent juratores." But, in practice, it is allowed in the courts of England, and of some of these states; and it is upon this ground, namely, that as the jury may find a conclusive general verdict in favor of the defendant, upon the general issue, which involves both law and fact, they have a right to hear from the defendant, or his counsel, the defendant's construction of the law, and his reasons for such construction. Before the jury can apply the facts to the law which it is their peculiar province to do, they must know what the law is. They may ask the opinion of the court, but they are not bound to do so. They have the power to take upon themselves the responsibility of judging for themselves as to the meaning of the law; or they may, if they will, but not of right, find a verdict against law; and sucl a verdict against law, if in favor of the defendant, will be as conclusive and effectual as if it were according to law. But the jury have no more right to find a general verdict against law, in a criminal case than in a civil.

According to the general practice of the courts in this country, the defendant seems to have a right to be heard before the jury, upon his construction of the law, if the court has not already, after hearing the arguments of the defendant's counsel instructed the jury upon the law in the same case. But there are few, if any, courts of criminal jurisdiction, who will suffer counsel to appeal from the judge to the jury, upon a question of law which the court has decided against him after he has orally joined issue upon the question, and argued it before the court. This would be an indignity to which no court ought to submit. If the court has erred the defendant has a right to his writ of error, or to a motion for a new trial. But when the counsel for the defendant declines to

join in the issue of law to the court, tendered to him by the counsel for the prosecution, by his motion to the court to instruct the jury, this court has permitted the defendant's counsel to argue the question of law to the jury upon the general issue. This was done in the case of U. S. v. Fenwick [Case No. 15,086], indicted at March term, 1836, for a riot. The court, in that case, after argument by the counsel of some of the defendants, had decided a question of law against them. The counsel for some of the other defendants offered to argue the same question of law to the jury, in opposition to the instruction which the court had given. The court said, that after a point of law had been argued by the counsel of the parties, and the court had, at the request of either party, instructed the jury upon the point so argued, they could not permit the question of law to be reargued to the jury, in opposition to the instruction given by the court. But, it appearing in that case, that the counsel who had argued the question of law to the court, were not counsel for all the defendants, the counsel for other defendants, who had not joined in the argument to the court, and who said they had objected to the court's giving any instruction to the jury on that point, until they had argued it to the jury (although the court had not understood them as so objecting), were permitted to argue it to the jury,—Morsell, J., observing "that the court never denied the power of the jury to decide the law as well as the fact, in criminal cases, by finding a general verdict; but when either party has asked an instruction, and the other party has proceeded to argue the question before the court, and the court has given an instruction upon that question, the counsel has no right to argue the same question of law before the jury. If the party does not join in the argument to the court, but insists upon arguing it to the jury, the court will require him to proceed with his argument, and will, after the argument, give or refuse, such instruction, as the court shall think proper." The counsel for those defendants then proceeded to argue the law to the jury upon the whole case; the counsel for the United States replied, and concluded by requesting the court to instruct the jury upon the whole law of the case, which the court did in their charge to the jury. In the case of U. S. v. Columbus [Id. 14,841], at March term, 1837, after the court had given an instruction to the jury upon a question of law, the counsel for the defendant being about to argue to the jury against the instruction then just given, was stopped by the court, and informed that he could not be permitted to argue the point of law to the jury, against the instruction which the court had given them. The counsel contended that as he had not asked the opinion of the court upon that point he was not precluded from arguing it to the jury; that in criminal cases the jury are judges of the law as well as of the fact, and therefore the law ought to be argued to them. The court observed, "that this court had always refused to permit counsel to argue the question of law, after it had been decided by the court in the cause. That the jury has a right to find a general verdict, which includes the question of law as well as of fact; but the jury has no right to decide the question of law disconnected from the fact; that this point had been decided early in the existence of this court, upon full argument, and that such had been the uniform decision and practice of the court, from its commencement more than thirty years ago." See the cases of Commonwealth of Virginia v. Zimmerman [Id. 16,968], in Alexandria, at January term, 1802, and Cotton's Case at the same term [unreported].

4. That when the court, after hearing the arguments of the parties, whether addressed to the court or to the jury, has instructed the jury upon the point of law, thus argued, the jury ought to respect such instruction, and not lightly substitute their own often crude expositions, or the sometimes wild or interested suggestions of counsel, for the deliberate, calm, and impartial opinion of judges, who ought to be, and generally are, selected for their knowledge of the law and their judicial integrity. We say, in the language of Mr. Justice Story, already cited: "It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law as laid down by the court. This is the right of every citizen, and it is his only protection." And we say, also, in the language of Mr. Justice Baldwin, of the supreme court of the United States, in the case of U. S. v. Wilson [Case No. 16,730]: "Their judgment is final, not because they settle the law, but because they either think it not applicable, or do not choose to apply it to the case." No person has more fully admitted, or rather insisted upon the right and the duty of the judge to instruct the jury in criminal causes, upon trial of the general issue, than Mr. Erskine, the great advocate of the rights of juries; and we refer to his printed speeches (volume 1, p. 113, 114, 163, &c.) and his whole argument upon the motion for a new trial in the Case of Dean of St. Asaph, indicted for a libel. The act of parliament, 32 Geo. III. c. 60, respecting the trial of prosecutions for libels, merely places such prosecutions on the same ground as other criminal trials, by authorizing the jury to find a general verdict on the general issue; but it expressly requires the judge who tries the cause, to give his opinion or directions to the jury on the matter in issue, "in like manner as in all other criminal cases."

Lord Mansfield, in delivering the opinion of the court of king's bench, in the Case of Dean of St. Asaph, 1 Ersk. 211, said: "Whether the fact alleged, supposing it to be true, be a legal excuse, is a question of

law; whether the allegation be true, is a question of fact; and according to this distinction, the judge ought to direct, and the jury ought to follow the direction; though, by means of a general verdict, they are entrusted with a power of blending law and fact, and following the prejudices of their affections or passions." And on page 217, he says: "The fundamental definition of trial by jury, depends upon a universal maxim that is without exception: 'Ad quæstionem juris non respondent juratores; ad quæstionem facti, non respondent judices.' Where a question can be severed by the form of pleading, the distinction is preserved upon the face of the record, and the jury cannot encroach upon the jurisdiction of the court. Where by the form of pleading, the two questions are blended together, and cannot be separated upon the face of the record, the distinction is preserved by the honesty of the jury. The constitution trusts, that under the direction of a judge, they will not usurp a jurisdiction which is not in their province. They do not know, and are not presumed to know, the law. They are not sworn to decide the law; they are not required to decide the law. If it appears upon the record, they ought to leave it there; or they may find the facts subject to the opinion of the court upon the law. But further, upon the reason of the thing, and the eternal principles of justice, the jury ought not to assume the jurisdiction of the law. As I said before, they do not know, and are not presumed to know any thing of the matter; they do not understand the language in which it is conceived, or the meaning of the terms. They have no rule to go by, but their affections and wishes. It is said that if a man gives a right sentence upon hearing one side only, he is a wicked judge, because he is right by chance only, and has neglected to take the proper method to be informed; so the jury who usurp the judicature of the law, though they happen to be right, are themselves wrong, because they are right by chance only; and have not taken the constitutional way of deciding the question. "It is the duty of the judge, in all cases of general justice, to tell the jury how to do right, though they have it in their power to do wrong; which is a matter entirely between God and their own consciences."

Upon consideration, then, of the whole case as presented to us upon this writ of error, we are of opinion:

1. That the indictments are insufficient, because they do not charge any offence against the true construction of the statute, inasmuch as they do not aver the bank bills, therein mentioned, to be "paper currency," or "paper medium evidently intended for common circulation," &c. As the term "bank bill" in the act is coupled with the words, "note," "check," and "draft," which, certainly, do not of themselves purport to be "paper currency;" and as, if the indictment had been for passing a note, check, or draft, only, it would, in our opinion, have been necessary to aver such note, check, or draft to be "paper currency," to bring the case within the prohibition of the statute, we think it is equally necessary to make the averment in regard to the term "bank bill;" especially as the indictment does not set forth the bank bill, nor describe it in any manner, so that the court may judge whether it be paper currency, or not. There may be bills commonly called bank bills, which are not the bills of any bank; as may, perhaps, be the case with the notes called, by the witness (in No. 106), "notes of Cohen's Bank."

2. That the special verdict (in No. 107) is not sufficient to justify a judgment against the defendant, because it does not find that the defendant passed the bank bill mentioned in the indictment. It only finds that the defendant gave, in change to the witness, a half dollar in silver, and two one-dollar notes, which the witness "thought it likely were Maryland notes," and that these notes were passed by the defendant to the witness, "in the manner, and at the time and place stated in the evidence." We also think it insufficient, because it does not find that the notes were paper currency, which we think was necessary, for the reasons stated when considering the question of the sufficiency of the indictment.

3. That the judge erred, in the matter of his instruction, given at the motion of the attorney of the United States in No. 107, for the reasons before stated; but that he did not err by instructing the jury, as to the matter of law, after it had been argued to the jury by the counsel on both sides; it being his right and duty so to do.

4. That the fact found by the jury in the special verdict upon the indictment No. 107, that the treasurer was acting as the agent of the Baltimore and Ohio Railroad Company, chartered by congress, is no bar to the prosecution, as they have not found that the company ordered or authorized him to pass the notes. This observation will also apply to the instruction given in the other case, No. 106.

5. That there was no error in the refusal of the instruction in No. 106, that if the note "was passed by the traverser in payment of a bonâ fide debt due him to the witness, the act does not come within the prohibition of the law of congress, and the traverser is entitled to a verdict of acquittal;" there being no such exception, express or implied.

6. That there was no error in the refusal to instruct the jury, that if the defendant passed the note "with intent that the same should be carried into Maryland, and not be circulated in the District of Columbia, the defendant is entitled to a verdict of acquittal." The offence against the act of congress of the 7th of July, 1838 (5 Stat. 297), does not consist in passing the notes, &c., with intent to circulate them; but in passing such notes,

&c., of a less denomination than five dollars, as are paper currency at the time of passing them.

7. That the judge had a right, after the arguments of counsel had been heard, whether addressed to the judge or to the jury, to instruct the jury upon the whole law of the case; and this, either ex mero motu, or upon the motion of either of the parties. And if either of the parties or their counsel should pray the judge to give any particular instruction to the jury, it would be his duty either to give or refuse it; and if the defendant or his counsel should think the judge erred, either in the matter of his charge, or in giving or refusing the instruction prayed, he may have his bill of exceptions, and if the verdict should be against him, he may move for a new trial, or take his writ of error.

But the defendant's counsel have excepted also to the matter of the charge; the judge having therein stated "that the jury would take upon themselves a very great responsibility, which they ought not to do, in deciding upon the law of the case in opposition to the opinion of the judge." In this part of the charge we think there is no error, for the reasons which we have already stated. But the charge proceeds: "And that they ought not to take upon themselves to render a verdict calculated to revoke the legislation of congress, composed of many distinguished constitutional lawyers." We think that the meaning of the judge, in this sentence, was, that the jury ought not to take upon themselves, in opposition to the opinion of the court, to decide an act of congress to be unauthorized by the constitution, and therefore not law. If this is the true construction of this sentence of the charge, we think there is no error in it. The charge proceeds: "And it increases the responsibility of the jury so to decide, in this case, in favor of the defendant, upon the law, because the United States could not appeal, whereas, if they found the defendant guilty, he might appeal, and might have the law interpreted, and reverse the judgment if erroneous." We see no error in this sentiment. The judge, in his charge, further said "that if the fact was proved, of passing the notes once, the case was brought within the act of congress." The bill of exceptions does not profess to set out the whole charge of the judge. It is reasonable to suppose that this part of it was given in reference to the question whether it was not necessary for the United States to prove that the defendant circulated the notes, or whether the offence might be committed by simply passing the notes by the defendant to the witness. In this view, the instruction was correct.

It is also suggested that the judge erred in stating in his charge, "that if the facts were proved to the satisfaction of the jury, the case was brought within the act of congress." It does not appear what those facts were. But as this appears to be only an iteration of the opinion expressed in the first bill of exceptions, in the case No. 106, it is presumed that the judge alluded to the facts stated in that bill of exceptions. If so, we have already decided that those facts do not bring the case within the statute. We think, therefore, there was error in this part of the charge.

We have thus endeavored to consider and decide all the questions suggested as arising upon this record; and the result of the whole is, that the judgments must be reversed, with directions to the judge to arrest the judgment upon each of the verdicts, on account of the insufficiency of the indictments.

THRUSTON, Circuit Judge, dissented, having previously delivered his opinion orally.

STETTINIUS (VIOLETT v.). See Case No. 16,953.

Case No. 13,388.

STEUBENVILLE & I. R. CO. v. TUSCARAWAS COUNTY.

[6 Pittsb. Leg. J. 68.]

District Court, N. D. Ohio. Sept. 11, 1858.

TAXATION — ENJOINING COLLECTION — LEVY ON RAILROAD ROLLING STOCK—RIGHTS OF MORTGAGEES.

[1. If the manner of assessing and collecting taxes prescribed by the legislature is not unconstitutional, and the officers charged with those duties conform to the law, no court can interfere with or enjoin them.]

[2. The lien of the state for taxes is paramount to all private rights, and individual liens cannot come in competition with it.]

[3. The lien of the state for taxes attaches to personal property upon the seizure thereof by the collecting officers, as in cases of levy by marshals or sheriffs. When so seized, the property is in the custody of the law.]

[4. The mortgagees and trustees of a railroad company cannot enjoin the state officers from seizing its rolling stock to enforce collection of taxes, even if the company cannot pay the interest on its mortgage bonds, and would be unable to replace the rolling stock if the same should be sold.]

This decision has been made in the case of mortgagees and trustees of the Steubenville & Indiana Railroad Company against the treasurer of Tuscarawas county, who seized the rolling stock for taxes. The mortgagees asked for a perpetual injunction against the taxgatherer on the ground that "the company was unable to pay the interest or principal of said bonds, or replace said locomotive and cars in case the same should be sold, that the use and possession of the same were absolutely necessary to the operation of the road by the company, and that a sale of the property by the treasurer would be

of irreparable injury to the holders of said bonds."

McLEAN, Circuit Justice, held:

1. That the power of taxation is a sovereign political power, and a branch of the power of eminent domain. That if the manner of assessing and collecting taxes prescribed by the legislature be not in conflict with the constitution, and the officers charged with that duty conform, in their action, to the law, no court can restrain or interfere with these officers in the discharge of their duties.

2. That the lien of the state for taxes is paramount to all private rights vested under the government. Individual liens cannot come into competition with the lien of the state for taxes.

3. That the lien of the state for taxes attaches to personal property upon the seizure of the same, as in cases of levy by marshals or sheriffs; and when such property is seized for taxes due the state, it is in the custody of the law under a paramount lien, which cannot be displaced by the liens of individuals upon the same property.

4. That the relation of the complainants to the Steubenville & Indiana Railroad Company is defined by the terms of the mortgage conveyances to them. That default in the payment of the interest or principal of the bonds secured by the mortgages did not vest the road and its equipment in the complainants as mortgagees, but authorized them to take possession of the road and run it as the agents of the company, or to sell the road at public sale. That the ownership of the property could only be changed by a sale of it, and that, no sale having taken place, the company, and not the complainants, were the owners of the property.

Temporary injunction dissolved and bill dismissed, at the cost of the complainants.

Case No. 13,389.

STEVELIE v. READ.

[2 Wash. C. C. 274.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

JUDGMENT—EFFECT OF MISNOMER—PARTIES.

1. A record of a judgment obtained by the plaintiff in North Carolina, against James Reed, administrator de bonis non of Bartow, was properly given in evidence to the jury; parol evidence having proved that the defendant, Joseph Read, had attended the taking of depositions in the case while depending in the court of North Carolina, and that notice of this suit was given to him.

[Cited in Pond v. Ennis, 69 Ill. 347.]

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

2. The rule of law is, that a judgment is inadmissible in evidence, except between the same parties, or those in privity with them, and for the same cause of action.

3. A mere misnomer, is not sufficient to exclude the record of such a judgment from being given in evidence, if, in point of fact, the party appeared by a wrong name, and instead of pleading the misnomer, went to issue on other points, and judgment was given against him.

[Cited in Wood v. Le Baron, 8 Cush. 474.]

4. An averment, in the action on the judgment that he is the same person, if made out by proof, will fix the liability of the defendant for the judgment.

[5. Cited in Allen v. Blunt, Case No. 217, to the general rule that the admission of new testimony is ground for new trial.]

Action for money had and received. The case was as follows. An action was instituted in the state court of North Carolina, in the name of Thomas Bartow, against J. Goodman in September 1793, for the recovery of a sum of money due, in which suit the plaintiff was bail for Goodman. In March 1794, judgment was rendered for —— dollars. In September 1798, scire facias, reciting the death of Bartow, and the appointment of executors, issued in the names of the executors, for reviving the said judgment, and the same was revived. Bartow died in January 1793, before the action was brought, which Stevelie, the bail, pleaded to a scire facias brought by the executors, in order to charge him with the debt. This scire facias issued in September 1799; the plea was overruled on demurrer, and in December 1800, judgment was given against the bail. Execution issued in March 1801, against Stevelie, which was returned, levied and satisfied. The executors named by Bartow, resigned the execution of his will, and Joseph Read, the defendant, was, on the 4th of January 1798, appointed administrator de bonis non, with the will annexed. In September 1801, Stevelie sued out a writ of error, as administrator of Goodman, who was then dead, to reverse the original judgment against Goodman, assigning for error the death of Bartow before judgment was rendered. The executors of Bartow pleaded in nullo est erratum. The jury found the death of Bartow in February 1793, and in September 1802, the original judgment was reversed, and a writ of restitution awarded. The writ was served on G. Hawser, the former agent of Bartow, who stated, that his powers ceased with the death of Bartow, and that he had received nothing on the execution, and had nothing to restore. The writ was dismissed. On the motion to amerce the sheriff for the above return, it appeared, that on the 22d of February 1798, Joseph Read, administrator with the will annexed of Bartow, appointed G. Shober, his attorney, to sue for, demand, and recover all sums due to him as administrator, &c., by J. Goodman; and a receipt was produced, given by Joseph Read, for six

hundred and thirty-six dollars, received from said Shober, which, with one hundred dollars wrongfully detained by Williams, the attorney, and thirty-four dollars, Shober's commission, was in full of the debt due by Goodman to Bartow's estate. This was dated in May 1803; also a letter from G. Haga, one of Bartow's executors, dated the 12th of February 1798, to G. Shober, mentioning the resignation of the executor, and the appointment of Read, as administrator, from whom he, Shober, was to receive orders in future. On the 3d of July 1804, a notice was given by the plaintiff to the defendant, Joseph Read, that, on such a day, he should move the superior court in North Carolina, for a writ of error, to reverse the judgment obtained in the name of the executor of Bartow against him, the said Stevelie, as bail for Goodman; the service of which notice was proved. Agreeably to notice, the writ of error was moved for in September 1804, and granted against James Reed, administrator de bonis non of Thomas Bartow, to reverse the judgment against said Stevelie, as bail of Goodman. The death of Bartow was assigned as the principal error. James Reed, administrator de bonis non of Bartow, appeared by E. Williams, his attorney, and pleaded in nullo est erratum. The fact assigned, being found for the plaintiff in error, judgment against the plaintiff as bail, was reversed in March 1806.

The jury, upon the above evidence given in this cause, found a verdict for the plaintiff, subject to the opinion of the court on the following point reserved, viz., whether the record of Stevelie v. Read, administrator, was properly admitted in evidence to the jury, parol evidence having been given, that the defendant, Joseph Read, attended the taking of depositions, and the examination of witnesses in the suit, to reverse the original judgment against Goodman, on notice given to him, prout the notice, and that notice was given to him, (prout notice and affidavit,) that a writ of error would be brought to reverse the judgment against the plaintiff, as special bail; and if the said record was not properly admitted, then whether this action can be supported upon the above parol proof, and the other written evidence in the cause. If the opinion of the court is in the affirmative, on both or either of these points, judgment to be entered for the plaintiff; if in the negative on both points, judgment to be entered as in case of a nonsuit.

WASHINGTON, Circuit Justice. The first question to be considered is, whether the record in the suit of Stevelie against James Reed, was properly admitted in evidence in this suit, against Joseph Read, administrator of Thomas Bartow? The rule of law is clear, that a judgment is inadmissible in evidence, except between the same parties, or those in privity with them, and for the same cause of action; and unless it appear, that the parties to the record offered in evidence, be in fact the same as those to the suit in which that record is offered, it may be laid down, as a general rule, that such evidence is inadmissible. We say, as a general rule, in order to avoid giving a decided opinion, whether if a judgment be reversed and made void, though a wrong person be made party to the writ of error, such reversal may or may not be given in evidence, in an action against the person who actually received the money, in virtue of the judgment which was reversed. It is not necessary now to decide that question; but we shall inquire whether, in point of fact, Joseph Read, the present defendant, was or was not a party to the proceedings, in which the judgment against the plaintiff was reversed. It was admitted, in argument, that the mere misnomer is not sufficient to prevent the evidence from being admitted, if, in point of fact, the party appeared by a wrong name, and instead of taking advantage of the misnomer, by a plea in abatement, went to issue upon other points, and judgment was given for or against him. The averment in the second action, that he is the same person, if made out in proof, will fix his liability to satisfy the first judgment. Now, what are the facts in this case? In January 1798, the defendant was appointed administrator of Bartow; the next month he appointed G. Shober, of North Carolina, his attorney, to demand and sue for this identical debt due from Goodman. In 1801, he was apprized of the writ of error brought by Stevelie, to reverse the original judgment obtained against Goodman, and attended (nominally, it is true, as attorney, but in fact in his proper person, as representing Bartow,) the taking of depositions in that suit. It is worthy of observation, that the same person who is mentioned in the defendant's receipt, as the attorney who had retained too much for his fee, of the money recovered and received from the plaintiff on the execution against him, appeared to this writ of error, and pleaded in nullo est erratum. This judgment being reversed, the plaintiff, in July, 1801, gave notice to the defendant, that a writ of error would be moved for, to reverse the judgment against him as bail. The writ was granted, and we find an appearance entered for the administrator de bonis non of Thomas Bartow, but misnamed James, instead of Joseph, and a regular plea put in. Now, can there remain a doubt, but that this evidence fully supports the averment that Joseph Read, the defendant in this suit, and James Reed, the defendant in the writ of error, are one and the same? The surname is the same, the description of character is the same, but the Christian name is mistaken. Is it conceivable, that with full notice to the defendant of both writs of error, and with an attorney in fact in North Carolina, an appearance would have been entered, ex-

cept by his orders, or those of his attorney? That without such orders, any person unauthorized, would have appeared; or that knowing of the proceedings, the defendant would so far neglect his duty, as not to attend to and defend that suit, particularly as he had previously received the money? It is impossible, that against such a mass of proof we can doubt as to the fact. If so, the record was properly admitted, and judgment must be rendered for the sum found by the jury.

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